



Neutral Citation Number: [2022] EWHC 624 (Admin)

Case No: CO-1867-2021

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)**  
**ON APPEAL FROM THE SOLICITORS DISCIPLINARY TRIBUNAL**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/03/2022

**Before:**

**THE HONOURABLE MR JUSTICE LINDEN**

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**Between:**

**PETER MATTHEW JAMES GRAY**

**Appellant**

**- and -**

**SOLICITORS REGULATION AUTHORITY  
LIMITED**

**Respondent**

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**Simon Davenport QC, Lewis MacDonald and Emily Moore (instructed by Howard  
Kennedy LLP) for the Appellant**  
**Rory Dunlop QC (instructed by Capsticks LLP) for the Respondent**

Hearing dates: 1 and 2 February 2022

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is 2.00pm on 18 March 2022

**MR JUSTICE LINDEN:****Introduction**

1. The Appellant was admitted as a solicitor in November 2002 and was a salaried partner at Gibson, Dunn & Crutcher LLP (“the Firm”) from April 2012 to April 2015. At all material times he practised principally from the Firm’s office in Dubai. This is an appeal from an order of the Solicitors Disciplinary Tribunal (“the SDT”) that he be struck off the Roll of Solicitors.
2. The disciplinary proceedings against the Appellant related to his actions in the context of a dispute between a Mr Abdourahman Boreh and the Republic of Djibouti and two Djibouti port authorities, in which the Appellant was acting for the Djibouti authorities (“Djibouti”). One of the steps taken by Djibouti in this dispute was to bring an action against Mr Boreh in the Commercial Court in October 2012 (2012 Folio 1333), claiming at least US \$77 million which he had allegedly misappropriated whilst in public office. In the course of this litigation, Flaux J (as he then was) held, on 13 November 2014 ([2014] EWHC 3817 (Comm)), that he had been misled in granting an application for a freezing order against Mr Boreh at a hearing on 10 and 11 September 2013 (“the September 2013 Hearing”). After a 5 day hearing in March 2015 at which the Appellant gave evidence and was cross-examined (“the March 2015 Hearing”), on 23 March 2015 Flaux J then handed down a judgment ([2015] EWHC 769 (Comm)) in which he held that the Appellant had deliberately and dishonestly misled the Court at the September 2013 Hearing (“the March 2015 Judgment”). He therefore discharged the freezing injunction part of the order which he had made, although he left the proprietary aspects in place.
3. The hearing before the SDT took place from 8-16 March 2021. By a decision dated 5 May 2021, the SDT upheld the following four Allegations against the Appellant:

*“While in practice as a solicitor and a Partner in Gibson Dunn & Crutcher LLP (“the Firm”) and in the course of acting in litigation before the High Court on behalf of Client A:*

*1.1 On or about 4 September 2013, swore an affidavit in support of Client A’s application to the High Court for a freezing injunction and other orders (“the Application”) which was misleading as to matters of fact known to the [Appellant], and known by him to be material to the Application, and in doing so allowed the court to be misled....,*

*1.2 On or about 10 and/or 11 September 2013, during the hearing before the High Court of the Application, allowed submissions to be made to the Court by Leading Counsel acting for Client A which were known by the [Appellant] to be misleading, .....*

*1.3 On or about 7 November 2014, sent, or caused or allowed to be sent, written correspondence to Byrne and Partners that he knew to be misleading.....;*

*1.5 On or about 11 November 2014, swore an affidavit in litigation before the High Court which was known by the [Appellant] to be misleading;”*

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4. With slight variations according to the specific charge, the SDT broadly found that in acting as he did, the Appellant breached Principles 1, 2 and 6 of the SRA Principles 2011 and Outcomes 5.1 and 5.2 of the SRA Code of Conduct 2011. These Principles identify, respectively, duties on a solicitor to uphold the law and the proper administration of justice, to act with integrity and to behave in a way that maintains the trust of the public in the solicitor and in the provision of legal services. Outcome 5.1 requires the solicitor not to “*attempt to deceive or knowingly or recklessly mislead the court*” and Outcome 5.2 requires them to ensure that they “*are not complicit in another person deceiving or misleading the court*”.
5. The SDT went on to find that the Appellant had acted dishonestly in relation to each of the Allegations which it had upheld. It dismissed a further charge against the Appellant, which was Allegation 1.4.

**The appeal**

6. By the end of the hearing before me the Appellant had, sensibly, abandoned a number of the 16 grounds of appeal which had been developed in his 60-page skeleton argument. A handful of grounds which raised points of detail remained, but the principal challenge to the SDT’s decision was based on two connected grounds. There was also a challenge to the SDT’s award in respect of costs.
7. The principal basis, or “*crux*” of the appeal as Mr Davenport QC put it, was, firstly, a contention that the SDT’s decision was wrong in that it “*placed significant weight on the [23 March 2015] judgment of Flaux J*” (Ground 1.1). The thrust of this Ground was that there was evidence before the SDT which was not before Flaux J, and which went to the question of the Appellant’s honesty and integrity. It was contended that Flaux J’s findings of fact were interrelated and cumulative, whereas some of his most substantial factual findings were no longer supportable before the SDT and/or were not relied on by the SRA. Indeed, it was said to be doubtful that Flaux J would have reached the same decision in the light of this evidence. His judgment therefore could not carry significant weight.
8. Mr Davenport’s initial oral submission was that Flaux J’s findings were “*irrelevant*”, although he retreated to a more nuanced position in the face of questions from the court. He went on to argue that the SDT had failed to grapple with the fact Flaux J’s findings were of little if any relevance and/or were incorrect and had “*simply followed the findings of a High Court Judge, without coming to its own independent view and without considering the significant weight of the evidence pointing the other way, much of which was not before Flaux J*” ([114] of the Appellant’s Skeleton Argument). He referred to the SDT as being “*poisoned*” and “*blinded*” by Flaux J’s findings.
9. The “new” evidence relied on by Mr Davenport fell into four categories, namely: (a) evidence in relation to the Appellant’s argument that Leading Counsel, instructed by him for Djibouti, Mr Qureshi QC, had been consulted throughout and had agreed with or, at least, had not questioned the positions taken by the Appellant which were impugned by Flaux J and were the subject of the charges before the SDT; (b) evidence that none of the wider team representing or assisting Djibouti (“the Djibouti team”) had considered that the Appellant’s approach was problematic; (c) character evidence about the Appellant from 23 referees; and (d) evidence about the under resourcing of the Djibouti team at the material times. There had been evidence and argument before Flaux

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J on these issues but there was now more evidence to support the Appellant's case in relation to them.

10. By far the greatest emphasis was given by Mr Davenport to the evidence about the involvement of Leading Counsel in the decisions which were taken and the conduct of the Appellant which was impugned. He sought to contrast this evidence with Flaux J's repeated findings that, in effect, at the material times Leading Counsel could not have appreciated the full implications of the Appellant's approach. These findings were not relied on before the SDT by the SRA - the SRA's position was that whatever the involvement of Leading Counsel the issue was as to the conduct of the Appellant and he should be held responsible for his own actions – and it was said that this fatally or very significantly undermined the authority of Flaux J's conclusions about the Defendant so far as the proceedings before the SDT were concerned.
11. Secondly, and linked to this point, it was contended by Mr Davenport that the SDT "*disregarded [his] extensive consultation and reliance on Leading Counsel on issues relating to dealings with the Court*" (Ground 1.2). Here the argument was that the Tribunal had to make findings as to the Appellant's involvement of Leading Counsel and what he thought Leading Counsel knew and agreed with in relation to the conduct which was the subject of the Allegations, yet it failed to do so. If it had taken account of the Appellant's involvement of Leading Counsel in his decisions, the SDT could not have come to the conclusion that the Appellant acted dishonestly.
12. Given the obvious sensitivity of these arguments I make clear at the outset that at the March 2015 Hearing it was stated in open court by Leading Counsel for Mr Boreh (Mr Kendrick QC) that no allegation of professional misconduct or impropriety was made against Leading or junior counsel for Djibouti, nor against any other lawyer at the Firm. Indeed, it was the position of Leading Counsel for the Appellant (Mr Simpson QC) that although there was an honest difference of recollection between the Appellant and Mr Qureshi as to what had happened, there was no suggestion of professional misconduct on Mr Qureshi's part. Flaux J also emphatically found that there was no suggestion that Mr Qureshi had deliberately misled him, nor any other evidence of misconduct or impropriety on his part, and Mr Qureshi was also cleared of any misconduct or impropriety by the Bar Standards Board, which made a public apology to him for its handling of his case.
13. Nor did Mr Davenport make any allegations of impropriety against Mr Qureshi. His case was that the SDT should have found that Leading Counsel was made aware of the issues which had arisen in the litigation and proposed approach of the Appellant in relation to them. The Appellant was open with him, and he did not disagree with the Appellant's approach, and this was evidence that the Appellant was acting honestly. They were both acting honestly. If the Appellant had been acting dishonestly, he would not have involved Leading Counsel and/or Leading Counsel would have disagreed with him.
14. Importantly, in answer to questions from the court, Mr Davenport stated that although he considered that it would have been open to the SDT to go further, he did not challenge the SDT's position at [45.31] of its Reasons as being "wrong" for the purposes of this appeal. This was that:

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*“The Tribunal proceedings were concerned with the [Appellant’s] conduct and knowledge at the material time. It was not required to, and quite properly did not, make findings as to [Leading Counsel’s] knowledge....”*

15. I agree. As Mr Davenport accepted, the issue before the SDT was as to *the Appellant’s* probity and honesty. What the Appellant told Leading Counsel, what he believed Leading Counsel was aware of, and what Leading Counsel said to the Appellant would be potentially relevant to the Appellant’s knowledge or beliefs as to the facts for the purposes of the first, subjective, limb of the test in **Ivey v Genting Casinos (UK) Ltd** [2018] AC 391. Having regard to what the SDT found to be his knowledge and beliefs, it would then go on to decide whether *his* actions were objectively honest. But the question what *Leading Counsel* actually knew, understood or believed would not be directly relevant as *his* honesty was not in issue before the SDT. The SDT did not make findings about this and nor do I. Indeed, it would be quite wrong to do so given that Leading Counsel was present at the March 2015 Hearing, and had set out his position in writing, but no application was ultimately made by the Appellant to cross-examine him and it was not suggested that he had acted improperly. He was not called as a witness or even present at the hearings before the SDT or me.

**Background**The conviction of Mr Boreh for a grenade attack on 4 March 2009

16. Mr Boreh was a businessman, a Djibouti national and a citizen of France, who had held senior roles in the Djibouti ports authority. In 2008 he left Djibouti after a dispute with the tax authorities over claims against him and his companies.
17. On 23 June 2010, Mr Boreh was convicted of terrorism in his absence by the Court of Appeal in Djibouti and sentenced to 15 years’ imprisonment. The offence which he was found to have committed was involvement in a grenade attack on the Nougaprix supermarket in Djibouti at 7.30pm on 4 March 2009. The judgment of the Djibouti Court of Appeal showed that the evidence on which the conviction was based included:
- i) Firstly, intercepted telephone calls between Mr Boreh in Dubai and two brothers, Mohamed and Mahdi Abdillahi, in Djibouti. The calls were said to have taken place on 5 March 2009 i.e. the day after the grenade attack.
  - ii) Secondly, an alleged confession by Mohammed Abdillahi when he was questioned by the national gendarmerie on 24/25 March 2009.
18. As far as the intercepted calls are concerned, the decision to tap the telephones of the Abdillahi brothers was part of a judicial investigation into the distribution of opposition leaflets around Djibouti. However, what was said in the calls was regarded by the Djibouti Court as highly incriminating and was the principal basis for the conviction. The transcripts of the calls showed Mohammed saying to Boreh *“Last night the act was completed in the first district.... the people heard it and it had great resonance”* (emphasis added). It was agreed that Mahdi would call Mr Boreh back two minutes later and the following exchange occurred during the second call:

*“Mahdi: Last night we bought the scrap metal.*

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*Boreh: OK*

*Mahdi: The event took place at Harbi Square and the first precinct/police station*

*Boreh: OK*

*Mahdi: Everything went well.*

*Boreh: OK*

*Mahdi: Tonight, we will be there too.*

*Boreh: OK. Have people heard about it?*

*Mahdi: Yes, they have, they have. There is even an investigation in progress.'*  
(emphasis added)

19. On the basis that the calls had taken place on 5 March 2009, it was feasible that the participants were discussing a grenade attack in the evening of the previous day, rather than buying scrap metal.
20. When Mahdi Abdillahi's property was searched the Djibouti, authorities found multiple political leaflets. He consistently denied being involved in any grenade attack.
21. When Mohammed was questioned, the calls were played to him on the basis that they had taken place on 5 March 2009. In a part of the record of his interview which he signed, he claimed that in the calls they were referring to the distribution of leaflets on behalf of an anti-government organisation known as Arche. But he was accused of lying about this. The record of the interview then purported to show that, in the small hours of 25 March 2009, Mohammed Abdillahi withdrew his previous depositions and admitted that in the calls he was reporting back to Mr Boreh on the successful accomplishment of the grenade attack on the Nougaprix supermarket in Djibouti. However, Mr Abdillahi refused to sign this part of the record and thereafter he maintained that he did not know about the grenade attack at the time of the calls and was telling Mr Boreh about the distribution of leaflets.
22. Djibouti subsequently sought Mr Boreh's extradition from Dubai to Spain. On 27 June 2011 the Spanish High Court refused the request on the basis that there was '*more than a reasonable doubt*' whether there were political or ideological reasons for it.

The application for freezing order relief

23. On 22 April 2013, Djibouti made an application for a freezing order relief against Mr Boreh in the context of the Commercial Court proceedings to which I have referred at paragraph [2], above. In support of that application the Appellant swore an affidavit which made no mention of Mr Boreh's conviction for terrorism.
24. On 21 May 2013 Mr Boreh's solicitor, Ms Nicola Boulton of Byrne & Partners, swore an affidavit setting out Mr Boreh's position, which included an allegation that the proceedings against him were politically motivated because he was seen as a rival to the then President of Djibouti. Amongst other things, she relied on the terrorism

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proceedings against Mr Boreh and she drew attention to the fact that no reference to these proceedings had been made in the Appellant's affidavit. She said that this was because the decision of the Court of Appeal, including its reference to the transcripts of the telephone calls as removing any shadow of a doubt about Mr Boreh's guilt, was '*an obvious travesty of justice*'. She alleged that the Appellant's failure to refer to the conviction was a material failure to comply with the duty to give full and frank disclosure. She also relied on the decision of the Spanish Court in June 2011 as supporting the view that the action against Mr Boreh was politically motivated.

25. On 28 May 2013, the Appellant swore a second affidavit in which, amongst other things, he said that in his view the conviction of Mr Boreh for terrorism was not relevant to the application for a freezing order. However, he also said that the refusal of the Spanish Court to extradite Mr Boreh did not mean that the conviction was unsound, and he said that Mr Boreh was convicted '*on the strength of the evidence, including recorded phone conversations.*'
26. Mr Boreh was then arrested in Dubai. In an email to the Appellant dated 1 August 2013 Jennifer Haywood, junior counsel for Djibouti, observed that this '*clearly moves the terrorism allegation further to the front of the stage*'. The Appellant replied that the Firm had been working on the terrorism issue as parallel matter but '*it did not have the urgency it now has*'.
27. In August 2013, the Appellant and Leading Counsel were both involved in the drafting of a request to the UAE authorities in Dubai for the extradition of Mr Boreh to Djibouti. At this stage, the request was for him to be extradited to serve his sentence for the conviction for terrorism. At a meeting on 18 August 2013 with Al-Tamimi, the Dubai based lawyers who were instructed to request the extradition of Mr Boreh, the Appellant noted that the terrorism case was '*now a key point in the case*' and '*if the extradition proceedings were to succeed then that would increase the odds of reaching settlement*'.
28. On 21 August 2013, Mr Boreh's first affidavit was served. Amongst other things, he said that the Abdillahi brothers were related to him and they spoke from time to time. He could not recall what the recorded conversation referred to but it was not grenades.

The flaw in the evidence on which Mr Boreh's conviction was based

29. On 23 August 2013, Ms Deborah Ngo Yogo II, an associate working for the Firm, then realised from the phone logs that the telephone conversations between Mr Boreh and the Abdillahi brothers had taken place on 4 March 2009, rather than 5 March 2009. If this was right, the callers could not have been discussing the Nougaprix grenade attack given that they were discussing something which they had done the night before, whereas the grenade attack had taken place *after* the call. Mohammed Abdillahi's confession that they were discussing the Nougaprix grenade attack in this call was also obviously unreliable and the two evidential planks on which the conviction of Mr Boreh for involvement in that attack rested did not support the case against him.
30. Ms Ngo Yogo therefore emailed her fellow associates, Ms Kahn and Ms Merchant, attaching the call logs. She pointed out that '*the problem is that the call log shows that the conversations occurred on March 4 2009 at 2.23pm and 2.35pm i.e. before the grenade attacks took place*', and she described this as a '*critical discrepancy that must be cleared.*'

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31. Ms Merchant established that neither the Appellant, nor Leading Counsel had been told about this. She therefore forwarded Ms Ngo Yogo's email to the Appellant saying:

*'It appears that the conversations... took place before the grenade attacks. Unless I am missing something, this would be a very large discrepancy?' and 'unless I am missing something, this is very surprising no? If the phone conversations took place on 4th March before the grenade [sic] attacks which took place on the evening of the 4th then the conversations don't swing in our favour.'*

32. Appreciating the significance of this point, the Appellant also drew the issue to the attention of his lay client, and they forwarded the email chain on to other key figures in Djibouti who said that they would make inquiries. The Appellant then emailed Ms Merchant, Ms Kahn and Ms Yogo to say:

*'Obviously we need to iron out. If right, we have no case, but then if that were the case, the conversations would make no sense and one would think the issue would have been raised before'* (emphasis added).

33. He also emailed Ms Merchant to say: *'If it was so obvious the point would have been raised before. Stop panicking and have another look at them.'*

34. Two days later, on 25 August 2013, the Appellant congratulated Ms Ngo Yogo by email on noticing the discrepancy and said that if she had not checked *'disaster would most certainly have followed'*. In cross-examination before Flaux J at the March 2015 Hearing, the Appellant admitted that the *'disaster'* would have been that a misleading document would have been submitted to the courts in England and Wales and in Dubai (in the context of the extradition proceedings) which put everything on a wrong factual basis.

35. The Appellant also admitted, before Flaux J, that in the light of the error as to the date of the calls, the conviction of Mr Boreh in the Djibouti Court of Appeal was obviously unsafe and the evidence on which it was based was unreliable. He accepted that there was now a big issue as to what to do about the discrepancy in the dates. Indeed, in September 2014 he described it as *"a massive issue"* in an email to Ms Kahn.

Steps taken to address the error as to the date of the calls

36. The Appellant then explored ways in which the transcripts of the calls might be salvaged as evidence against Mr Boreh. He asked about the creation date of the recordings and whether there might have been a similar terrorist event on 3 March 2009. Ms Ngo Yogo confirmed that, after searching online, she could not find any reports of a similar event on 3 March 2009. However, she later reported that 'Hassan', had told her that on 3 March 2009 grenades were found near the People's Palace, a public building where functions were held, but this had not been reported in the press. She offered an alternative interpretation of the phone call in which Mohammed Abdillahi was referring to the grenades found near the People's palace on 3 March 2009 and a proposed attack on the Nougaprix supermarket on the night of the call, and she said that Hassan would provide photographs. But she pointed out that if this alternative explanation were correct *'the problem we now have is that Mohammed Abdillahi has made a false confession'* that they were talking about the Nougaprix attack.



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37. The Appellant did not forward these discussions to Leading Counsel or summarise them in writing. Instead, on 26 August 2013 he emailed Leading Counsel and said, ‘*something has come up*’ and asked to speak on the phone. No notes were taken of the conversation between them which then took place, and they later gave differing accounts of the conversation for the purposes of the March 2015 Hearing. Leading Counsel’s account was that that he was told by the Appellant that there was a typographical/date error in one document referred to in the extradition request, but it was said not to be material. Mr Davenport showed me evidence which, he suggested, showed that Leading Counsel had been a good deal more involved in the issue, and must have had a better understanding of it than this.
38. Later on, 26 August 2013, the Appellant sent an email to associates in which he stated that, having spoken to Leading Counsel:
- “we agree that having reviewed the evidence, we can get away with the error. It is only in the judgment, which is awful anyway, and not in the evidence...”* (emphasis added)
39. The Appellant then reviewed and amended the extradition request and emailed it to Leading Counsel saying:
- “...The extradition request did not labour point, so changing the date by one day was all I needed to do...”*
40. Leading Counsel replied:
- “...On the assumption that all other documents are consistent then the change of date hopefully will not stir matters up too much -- however this is highly likely....”*
41. On 27 August 2013, the Appellant attended a meeting in Dubai with Kroll, a risk management consultancy which had been engaged in connection with the work being undertaken for Djibouti. The minutes recorded that the Appellant had opened the meeting by stating: *“Aim is to finalise the extradition request – use today’s [sic] meeting to finalise the outstanding issues and factual questions ... Basically we want the extradition submitted before the High Court hearing...”*
42. He went on to say:
- “Going to fudge the error of the date, it doesn’t affect the underlying evidence...*
- ..... Avoid at all costs for Boreh to be released and passport given back. [the Appellant] has been discussing backups with QC i.e. tax case and potential retrial as a backup in the event that the first request goes wrong”* (emphasis added)
43. In the March 2015 Judgment, Flaux J found that it was clear from the minutes of the meeting that:
- “the imperative was getting the extradition request dealt with before the freezing order hearing and fudging the error about the date in the request, as well as ensuring that Mr Boreh was not able to leave Dubai”* [58].

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44. One of the other attendees said that there would have to be a retrial and the Appellant was recorded as saying:
- “... What we can do is amend our extradition request to say that the judgment is good, but we are seeking his return for a retrial. That then will get rid of any issues with fairness over his trial...”* (emphasis added)
45. Flaux J noted that the Appellant accepted in cross-examination that when he said this, he knew that the judgment was not, in fact, good [59].
46. Later that day the Appellant had a meeting with Al Tamimi. The minutes of the meeting recorded that the Appellant stated:
- “... Had a meeting to deal with the outstanding factual issues. The most important of these is that we think we need to change it to a retrial rather than enforcement of the sentence...”*
47. The Appellant said:
- “We had the wrong date for the phone conversation as it took (sic) a date earlier. It is correct in the underlying evidence but not in the conviction. The conversation took place on the 4th of March and not the 5th...”*
48. The Appellant then quoted the transcript of the calls at this meeting. He explained the conversation by saying that grenades were left at the President’s palace on the 3rd but never set off. He said that they were ‘*trying to get to the bottom of the issue*’.
49. The minutes said that the Appellant was told that he needed to be ‘*careful to avoid implying the first judgment was incorrect*’. It was reiterated that Mr Boreh would be sent for retrial but the ‘*wording needs to be made very carefully*’. In the March 2015 Judgment, Flaux J found that:
- “the reasons why they were anxious not to imply that the judgment was incorrect were (i) that this might have an adverse effect on whether extradition was successfully achieved; (ii) disclosure of any problem with the judgment would provide Mr Boreh with ammunition for his case that all the actions against him were politically motivated and (iii) anything which suggested the conviction was unsafe would be likely to lead to his being able to leave Dubai.”* [61]
50. At the meeting with Al Tamimi the Appellant also noted that there was an intention to put the extradition request and related documents in evidence in the English proceedings.
51. At [63] Flaux J found that it was at the meetings with Kroll and Al Tamimi that the strategy of not disclosing that the conviction was unsafe and based on unreliable evidence was formed. He found that it was the need to avoid implying that the Djibouti judgment was incorrect which led to the Appellant’s failure to inform the English court or Interpol that this was the case. I note that neither Leading nor junior counsel for Djibouti were present at either of these meetings.

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52. Also, on 27 August 2013, a statement of a police officer was produced by Djibouti which purported to give evidence about a grenade found within the walls of the People's Palace on 3 March 2009. Photographs of the grenade were also produced.
53. On 28 August 2013 the Appellant asked Ms Kahn and the client a series of questions about a Wikileaks cable, which made no reference to any incident on 3 March 2009 and said that the unexploded grenade at the People's Palace was found on 12 April 2009. Ms Kahn informed the Appellant that, contrary to their instructions, the metadata from the photographs which had been provided showed that the People's Palace attack was on 12 April 2009, not 3 March. She also said that at least one police officer accepted that it was found on that date. Flaux J found that at this point '*any hope that this was viable evidence was shattered*': by 28 August 2013 the Appellant must have known that there was no evidence of a grenade attack on 3 March 2009.
54. On 3 September 2013 the extradition request in respect of Mr Boreh was finalised. This set out the transcript of the calls between the Abdillahis and Mr Boreh with the correct time and date but stated that '*It is Djibouti's case that these conversations refer to the successful attack on 4 March 2009*' and, that '*in a pre-trial interview on 25 March 2009 Mohamed Abdillahi admitted that during their telephone conversation he was reporting on the grenade attack at the Nougaprix supermarket*'.

**The Appellant's 4 September 2013 affidavit (SDT Allegation 1.1)**

55. On 4 September 2013, the Appellant swore the Third Affidavit in support of the application for a freezing order. It responded to the affidavits filed by and on behalf of Mr Boreh, including the allegation that he was being subjected to political persecution by Djibouti and his reliance on the refusal of the Spanish Court to extradite him. The Third Affidavit attested to the accuracy of the first two, rather than correcting them, and it did not disclose that the Appellant now appreciated that the conviction of Mr Boreh was unreliable. Rather, it included the following passages:

*"... [163.4] ... Mr Boreh was convicted on 23 June 2010 and sentenced to 15 years imprisonment. It is plain that Mr Boreh misrepresented the severity of his crimes and failed to inform the Spanish court of his prison sentence...*

*[163.6] Extradition would prevent Mr Boreh from campaigning as an opposition Presidential Candidate in elections in Djibouti. This is irrelevant, a further point made again and again, that the request is politically motivated is unsustainable - not least in the face of the evidence which led to Mr Boreh's conviction in Djibouti...*

*[164] Mindful of the serious nature of these matters, I have provided an English language version of the extradition request submitted by the Djibouti Authorities to the LAP at [PMJG7]. This evidence in support is at the very least reflective of a case to be answered by Mr Boreh..." (emphasis added)*

56. Plainly, these passages maintained that the conviction of Mr Boreh by the Djibouti Court of Appeal was safe. As Flaux J said in the March 2015 Judgment: "*There would have been no reason for a judge reading the affidavit to know that there was any problem with the conviction or the evidence.*" [71]

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57. The Third Affidavit exhibited the extradition request, the Djibouti criminal conviction, the deposition of Mohammed Abdillahi and a transcript of the recorded conversation with Mr Boreh. The transcript still bore the wrong date – 5 March 2009 instead of 4 March 2009 – although it was not disputed that the Appellant had not reviewed the exhibits personally before signing the statement. It appears that Ms Merchant, the associate responsible for putting together the exhibits, was not aware that there was a new, correctly dated transcript, which it was intended would be exhibited.
58. Mr Davenport took me through evidence which was before the SDT and which, he said, showed that most of the drafting of the Third Affidavit had been done by associates in the Djibouti team, that it had been sent to Leading Counsel in draft for comment, that Leading Counsel had commented on the final draft but had not questioned the parts of it which were subsequently criticised by Flaux J, and that the Appellant was travelling on the day on which the affidavit was sworn and was not able to review the exhibit to the Third Affidavit. But this begged various questions – which it would not be appropriate for me to attempt to answer, and I do not need to answer for the purposes of the appeal - as to the knowledge and understanding of the others, including Leading Counsel, who were involved in the drafting and production of the Third Affidavit. It is clear, however, that the Appellant did review the text of the affidavit and, of course, he signed it and it was his evidence to the court.

**The hearing of the application before Flaux J on 10/11 September 2013 (Allegation 1.2)**

59. The skeleton argument on behalf of Djibouti prior to the hearing of its application for a freezing order did not rely on the Djibouti conviction as a ground for concluding that there was a risk of dissipation. But it did include a passage which stated in response to Mr Boreh’s claim that the proceedings were politically motivated that:
- “The charges against [Mr Boreh] are not trumped up. [Mr Boreh] was convicted in absentia because he refused to attend court. The attempt to extradite [Mr Boreh] was not misconceived and [Mr Boreh's] Spanish lawyers seriously misled the court, as explained in paras 163 of Peter Gray's Third Affidavit.”* (emphasis added)
60. The skeleton argument submitted on behalf of Mr Boreh by Mr Christopher Butcher QC (as he then was) argued that his conviction was unreliable and was an obvious injustice. Mr Boreh and his legal representatives were not aware of the dating error and therefore did not rely on this point in putting forward this argument.
61. Flaux J gives a detailed account of what happened at the September 2013 Hearing itself at [79]-[98] of the March 2015 Judgment. The Appellant was present throughout the September 2013 Hearing, although he claimed that he was not paying attention throughout as he was distracted by other work which he was doing on his laptop during the hearing and had relied on Counsel to put Djibouti’s case. This was why he had not sought to correct Leading Counsel or the misapprehension under which the court was labouring as to the cogency of the evidence which was said to support Mr Boreh’s conviction for terrorism.
62. In the course of the September 2013 Hearing, Flaux J raised the point that it was being alleged on behalf of Mr Boreh that the conviction was trumped up, and Leading Counsel for Djibouti made submissions that it was not. Consistently with his skeleton argument, he argued that Mr Boreh's point about the refusal of the Spanish Court to accede to the

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extradition request did not carry any weight because his Spanish lawyer's submissions had been misleading.

63. There were various exchanges between the Court and Leading Counsel for both parties in which reference was made to the extradition documents, including the transcripts of the telephone calls and the judgment of the Djibouti Court of Appeal, and detailed submissions were made as to the reliability or otherwise of the conviction of Mr Boreh. Leading Counsel for Djibouti took the court to the wrongly dated transcript of the calls and made detailed submissions that they showed that there was reliable evidence to support the conviction for terrorism, and he was scornful about any suggestion to the contrary. These submissions, the submissions of Leading Counsel for Mr Boreh and the observations of Flaux J during the exchanges which took place all clearly proceeded on the basis that the transcripts were correctly dated and the calls took place on 5 March 2009 and therefore after the Nougaprix attack.
64. In his March 2015 Judgment, Flaux J said at [85] that:
- “this issue of the terrorism conviction allegedly being trumped up was not being refuted by Mr Qureshi QC as part of some irrelevant side-show. He was relying upon it to demolish comprehensively Mr Boreh's case that the actions against him, including the Commercial Court proceedings, were politically motivated.”*
65. And he illustrated this point by citing, amongst other passages from the transcript of the September 2013 Hearing, the following exchange:
- “MR JUSTICE FLAUX: I don't have to decide today whether Mr Boreh has participated in terrorist acts. All you're saying is that you at least have an arguable case that part of your case against Mr Boreh is that he has participated in terrorist acts.”*
- MR QURESHI: My Lord, I go further than that. I say it's simply outrageous for the defendant to maintain a position which of course suits him, and he articulates this through those he has instructed, that somehow the Djiboutian government is pursuing a vendetta against him which is reflected in trumped up charges.”*  
(emphasis added)
66. Flaux J went on to find at [86] of the March 2015 Judgment, that:
- “It is difficult to see how this position of righteous indignation could have been maintained, at least as regards the terrorism conviction, if that conviction was unsafe and the evidence on which it had been based was unreliable, which Mr Gray knew, even though Mr Qureshi QC did not...”*
67. He also found that anyone listening to the submissions who had the knowledge which the Appellant had must have appreciated that the telephone conversations were being referred to on the basis that they took place on 5 March 2009, after the grenade attack on the Nougaprix supermarket. He illustrated his point by reference to numerous passages from the transcript of the March 2015 Hearing which showed the exchanges between both Leading Counsel and the Judge on the subject of the evidence about the telephone calls.

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68. In his ex tempore judgment on the application for a freezing order, Flaux J found the arguable case that Mr Boreh was involved in terrorist acts was one of four matters which demonstrated a real risk of dissipation of assets. He said the following in relation to this point:
- “Fourth, it seems to me that there is, on the basis of the telephone transcript of conversations between Mr Boreh and the Abdillahi brothers, an arguable case that the defendant was involved in and directing terrorist acts in Djibouti. Whilst it is undoubtedly right that somebody who has acted as a terrorist would not necessarily be somebody who would dissipate his assets, in view of all the other evidence, it does seem to me the court is entitled to take a common sense view, and to take the view that somebody who is at least arguably engaged in terrorism is well able and likely to divert his assets to make himself judgment-proof. So, it does seem to me that there is a real risk of dissipation here.”* (emphasis added)
69. The Appellant produced a handwritten note of Flaux J’s ex tempore judgment as it was delivered orally. This included a note that in the light of the telephone transcripts there was a basis for concluding that Mr Boreh was involved in directing terrorism.
70. In the March 2015 Judgment Flaux J found that, immediately after the September 2013 Hearing, the Appellant instructed Ms Kahn to include in a draft letter to Interpol, requesting that a Red Notice be issued, quotations from where the Judge had said that there was a good arguable case that Mr Boreh was involved in terrorism. He then asked Ms Ngo Yogo to highlight all of the relevant passages from the transcript of the hearing. The passages which she highlighted included a number of the exchanges between Counsel and Flaux J about whether the charges were trumped up and which proceeded on the basis that the transcript of the calls was correctly dated.
71. After further discussion between the Appellant and Ms Kahn, the letter to Interpol went out. It quoted what Flaux J had said about the arguability of the terrorism case and stated that he had concluded that there was a good arguable case that Mr Boreh had been involved in terrorism. No mention was made of the fact that the conviction, and the evidence on which it was based, were known by the Appellant to be unreliable.
72. At [117] of the March 2015 Judgment, Flaux J found as a fact that:
- “117. Having considered all the evidence I am unable to accept Mr Gray's explanation that he was not aware at the hearing that both the court and counsel were labouring under a complete misapprehension about the date of the telephone transcripts. In my judgment, Mr Gray was well aware at the hearing of the implications of the discussions taking place between the court and both leading counsel and that those discussions were proceeding on the false basis that calls took place on 5 March 2009, after the grenade attack on the Nougaprix supermarket the previous evening. In the circumstances, I have concluded that Mr Gray did deliberately mislead the court at the 10–11 September 2013 hearing and that there is cogent evidence to that effect.”*
73. At [118] Flaux J went on to give a summary of the reasons why he had come to this conclusion. He made nine points at [118(1)-(9)]:

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- i) The issue of the misdating of the transcripts had arisen less than three weeks before the September 2013 Hearing and the Appellant had immediately recognised that it was, as he later said, “*a massive issue*”. It was inconceivable that he would not have been acutely aware if both Counsel and the Judge were proceeding on an interpretation of the evidence which did not appreciate that the transcripts were dated incorrectly.
  - ii) Despite the Appellant’s knowledge that the conviction was unsafe and the evidence on which it was based was unreliable, from 26 August 2013 onwards he adopted a strategy of not revealing this to any court or outside agency such as Interpol, rather than being open and frank. “*Fudging the error of the date*” was the language of concealment and not the approach of a solicitor of integrity.
  - iii) That approach could not be justified by the claim that the Appellant thought that, even when the transcripts were given the correct date, Mr Boreh had a case to answer. By 28 August 2013, and therefore two weeks before the September 2013 Hearing, he knew that he had no evidence of any grenade attack on 3 March 2009.
  - iv) Even if the Appellant had convinced himself that Mr Boreh still had a case to answer on the basis of the telephone transcripts with the correct date, the proper and honest course to have taken would have been to ensure that the Dubai court dealing with extradition and, in due course, the English court, were made aware that the original conviction was unsafe. However, the problem with doing so might well have been that Mr Boreh’s passport would be returned to him and he would be able to leave Dubai before the revised extradition request was presented and considered. This was something which Djibouti wished to avoid at all costs.
74. The fifth reason relied on by Flaux J was as follows. I quote it in full because of Mr Davenport’s emphasis on the fact that the SRA did not place reliance on it.
- “(5) Contrary to Mr Gray's purported recollection in his evidence, I do not consider that he explained the full implication of the dating error to Mr Qureshi QC either in their telephone call on 26 August 2013 or at any time thereafter. In particular, I do not consider that he ever told Mr Qureshi QC that the conviction was unsafe or that the evidence on which it had been obtained was unreliable. I consider that Mr Gray only told him that there was an error in one document referred to in the extradition request. Not only is this consistent with the contemporaneous documentation.... but .... since Mr Simpson QC on behalf of Mr Gray expressly disavowed any allegation of professional misconduct against Mr Qureshi QC, Mr Gray simply cannot have explained the full extent of the problem to him. If Mr Qureshi QC had been aware that the conviction was unsafe and the evidence on which it was based .. was unreliable...Mr Qureshi QC simply could not and would not have made the submissions he made to the court on 10 and 11 September 2013 which I have quoted....”*
75. The further reasons which Flaux J gave for his conclusion that he had been deliberately misled by the Appellant can be summarised as follows:

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- i) The Third Affidavit was part of the strategy of not revealing to any court or outside agency that the conviction and the evidence on which it was based were unreliable. Paragraphs 163.4, 163.6 and 164 of the Appellant's Third Affidavit *"involved equivocation, on any view conduct which fell a long way short of the standard of professional integrity and candour which the court is entitled to expect of an English solicitor"*.
- ii) Whilst the Appellant did not deliberately include the wrong transcripts in the exhibit to the Third Affidavit, so that when the hearing started he would not have known that the wrong transcripts had been exhibited, once Leading Counsel started making the submissions he did on the morning of the first day of the hearing the Appellant must have appreciated that the discussion with the court was proceeding on the false basis that the phone calls had taken place after the Nougaprix attack. Flaux J did not accept the Appellant's evidence that because he was tired or doing his emails or leaving the submissions to Leading Counsel he was not listening or concentrating and had not appreciated that the exchanges were proceeding on a false basis.

*"On the contrary, the fact that immediately after the hearing had finished on 11 September 2013, the Appellant asked Ms Khan to include in the draft Interpol letter references to the transcript where the court had said there was an arguable case that Mr Boreh was involved in terrorism, demonstrated that he was listening and concentrating as one would expect of the partner in charge of a case of this seriousness, sitting behind counsel in court."*

- iii) Furthermore, at the Appellant's request, Ms Ngo Yogo highlighted in yellow extensive sections of the transcripts of the hearing which Flaux J was sure he did go through and discuss with the associates in connection with the draft letter to Interpol. The excerpts which went into the draft which Ms Kahn sent him on the evening of 13 September 2013 included passages from the transcript from which it was obvious that the basis for Flaux J saying that there was an arguable case that Mr Boreh was implicated in terrorism was that the telephone calls took place after the Nougaprix attack. Even if the Appellant was not aware at the hearing that the Court and Counsel were proceeding on a false basis, he was aware of it when he read this and it was incumbent upon him to come back to court straightaway to correct the error.
- iv) Finally, Flaux J relied on the Appellant's behaviour and reaction when Byrne & Partners challenged the Firm on the issue of misdating a year later, pointing out that the court had been misled: *"he treated their perfectly reasonable letter and subsequent correspondence with disdain and then engaged in a course of thoroughly evasive and positively misleading conduct, up to and including at the hearing on 13 November 2014"*.

**The correspondence with Byrne & Partners from September 2014 (Allegation 1.3)**

- 76. At [142]-[178], Flaux J then went on to analyse in detail the written exchanges with Byrne & Partners and between the Appellant and members of the Djibouti team, including Leading Counsel, at each stage as well as the Appellant's evidence about these documents.



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77. In summary, on 4 September 2014, Byrne & Partners wrote a detailed letter to the Appellant having discovered the problem with the dating of the transcripts. They said:
- “...In the first instance, a number of questions arise to which we consider it is vital that your clients should give full and prompt responses:*
- 1. Do your clients accept that the telephone calls between Mr Boreh and the Abdillahi brothers took place on 4 March 2009, as opposed to 5 March 2009?*
- 2. If so, then:*
- a. Given that this fundamentally underpins the reasoning of the Court which convicted Mr Boreh of involvement in terrorism, what steps (if any) do your clients intend to take in relation to that conviction, and particularly, will they seek to have the conviction quashed?*
- b. Given that this also calls into question the confessions of the Abdillahi brothers that they were reporting to Mr Boreh on the Nougaprix grenade attack, what steps (if any) do your clients intend to take to investigate the circumstances of their interrogation?*
- 3. What steps do you propose to take to inform the Court that it was misled by the submission advanced before Mr Justice Flaux?”*
78. The Appellant asked Ms Kahn to investigate. She said she was certain the conversation was on 4 March 2009. The Appellant queried how Djibouti could have got the date wrong. Ms Kahn said that she did not think ‘*we ever developed on the date discrepancy*’ or tried to explain it as ‘*it somehow would have been shooting ourselves in the foot*’. The Appellant said “*We did all discuss it. It was a massive issue*”. Ms Kahn reminded the Appellant of his own emails on the subject.
79. On 14 September 2014, the Appellant emailed a draft response to the Bryne & Partners letter to Leading Counsel. Leading Counsel’s reply included the question ‘*what we can say about the dates apart from ‘yes, they are significant*’.
80. On 18 September 2014 the Firm emailed a letter to Bryne & Partners which accepted that the recorded conversation took place on 4 March 2009 but asserted that the court was not misled.
81. On 30 September 2014 Byrne & Partners replied to the Firm. They questioned how it could be said that the court had not been misled, when clearly it had been. They required the Firm:
- “to confirm, as a matter of urgency and in clear terms, whether you, your clients or your counsel were aware of the dating error (i) at the time when the extradition request was drafted, or (ii) at the time of the [September] hearing before Mr Justice Flaux...”*
82. They also urged the Firm and Djibouti to consider taking appropriate steps to set the record straight in the English proceedings and proposed a joint letter to Flaux J which invited him to retract the part of his judgment where he said that there was an arguable case that Mr Boreh had been involved in terrorism.

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83. On 1 October 2014, Leading Counsel emailed a suggested response to the Appellant and suggested that they were not aware of the dating issue. The Appellant replied that they did know about the date issue but that he took the view that it was an error, but not one relied on.
84. In a letter dated 14 October 2014, the Firm responded to Byrne & Partners arguing that the judgment of the Djibouti court did not proceed on a *'false basis'*, alleging that there had been *'significant disturbances in Harbi Square on 3 March'* and asserting that with the correct date of 4 March the narrative makes *'more sense'*.
85. In a letter to the Firm dated 3 November 2014, Byrne & Partners said that the judgment of the Djibouti court plainly did proceed on a false basis and explained why. Regardless of any alternative explanation for the transcripts, the case actually brought against Mr Boreh, that he had been involved in a grenade attack on the Nougaprix supermarket in 4 March 2009 was false. Byrne & Partners went on:
- "...It is clear that Mr Justice Flaux did not appreciate that that was so, and that the submissions made on behalf of your clients did nothing to disabuse him of that mistake. In circumstances where a major part of Mr Boreh's case at the September hearing was that he was being unfairly persecuted by the Republic of Djibouti, that is a serious matter. We note your denial that the Court was deliberately misled as to the date of the conversation, but you still have not answered our question as to whether you, your clients or your counsel were aware of that error and its significance (i) at the time when the extradition request was drafted, or (ii) at the time of the hearing before Mr Justice Flaux. Please now do so.'*
86. On 4 November 2014, Byrne & Partners issued an application for an Order that affidavits be sworn, stating when the dating error was discovered by the Firm and its client.
87. In a response dated 5 November 2014, the Appellant claimed that the queries of Byrne & Partners *"have been fully and properly addressed"*.
88. On 6 November 2014, the Appellant emailed Leading Counsel to say that there was *'nothing to correct'* in his affidavit and the only question was how to address the fact that Leading Counsel did not correct Flaux J's *'obvious misunderstanding'*. He said, *'I can't remember it happening but obviously it did, and I guess we say that you were unaware of the error and we did not notice it at the time....We can't concede this one even if we wanted to.'*
89. In his reply to the Appellant, Leading Counsel said that he had no recollection of the date issue. He said that the way forward was to send a letter which made clear that it was an error but that it was not material as the evidence implicated Mr Boreh. There was no attempt to mislead.
90. In a separate email exchange on 6 November 2014, Leading Counsel said to junior counsel that the terrorism issue was becoming much bigger because the Firm were *'ducking'* it [4935], that the Appellant had repeated that he mentioned the date issue before the hearing, that unfortunately he could not recall, so it was possible that the Appellant did tell him, but that he would hope he would have appreciated its potential for problems immediately.

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91. On 7 November 2014, Leading Counsel sent the Appellant a suggested draft response to Byrne & Partners which stated that it was only from Byrne & Partner's letters that the Appellant and Leading Counsel became aware of, and understood, the nature of the dating issue. The Appellant then amended the wording of the draft so that it did not answer the question whether there was any awareness of the dating issue before the September 2013 Hearing and it said the following in relation to the second question: *'Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March dates at the September 2013 hearing.'*
92. In a covering email the Appellant said to Leading Counsel that they would be *'on thin ice'* if they said they didn't know about the dating issue until the Byrne & Partners' letter of 4 September 2014: *"Remember, they know we've been to see Interpol lots of times"*. He said he thought it was *'better we say we were not alive to the distinction at the hearing, which is true'*. At [174] of the March 2015 Judgement, Flaux J found that the reference to *"thin ice"* and Interpol showed that the Appellant was concerned about getting caught out in a lie because the date had been corrected in correspondence with Interpol before the challenge from Byrne & Partners in September 2014.
93. Leading Counsel agreed that the amended draft was OK to be sent. Flaux J found that it was true as far as Leading Counsel was concerned but misleading in the case of the Appellant.
94. As a result, the Firm emailed a letter dated 7 November 2014 to Byrne & Partners which said:
- "...Neither Leading Counsel nor Mr Peter Gray were alive to the issue of the 4/5 March date discrepancy at the September 2013 hearing..."*
95. Mr Davenport emphasised that Leading Counsel had approved the 7 November 2014 letter. However, as Mr Dunlop QC pointed out, only the Appellant could say what he was or was not alive to at the September 2013 Hearing, and that was an issue of fact. Having considered the evidence, both Flaux J and the SDT did not accept that what he said in this letter about his own awareness was true and they took the view that he knew it was not true.
96. In evidence before Flaux J, the Appellant denied that this letter was *"straight dishonest"* but he accepted that it was *"a very evasive letter"*, albeit he thought it was *"acceptably evasive"* [176]. Flaux J found this claim to be *"breath-taking"* and that the letter *"was clearly dishonest and it was designed to deceive Byrne & Partners into thinking that [the Appellant] had not been aware of the dating error at the September 2013 hearing."* [177].
97. In a letter to the Firm dated 9 November 2014, Byrne & Partners stated:
- "...You have now told us that Mr Gray and Leading Counsel were not aware of the misdating, and we accept that. Please provide the same confirmation respect of the other lawyers within your firm instructed on this matter"*
98. I note that the Appellant did not correct this point or write to Byrne & Partners drawing a distinction between being aware of an issue and being alive to it. The Byrne & Partners letter also said that the authors inferred that the Firm's client was aware of the

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false date on the transcripts and made clear that Byrne & Partners were not going to abandon their application for an explanation by way of affidavits.

99. On 10 November 2014, Mark Handley (a Senior Associate at the London Office of the Firm) convened a conference call with Leading Counsel and members of the Djibouti team. The Appellant did not attend. Leading Counsel advised that they would have to admit that they knew of the date error in late August 2013 and that the inconsistency was not drawn out in the affidavit evidence.

100. After the conference Mr Handley reported back to the Appellant as follows:

*“...SM and AK have been asked to complete what they can with the affidavit and asked to go back through their emails and see if there is an explanation for how we got the right dates in the extradition request but mischaracterised the dates for the freezer...”*

101. The Appellant replied:

*“... This is a waste of time. Please do not do that.*

*All you are likely to find is that on date X we realised the error, addressed it and moved on. Is that something you think is appropriate to admit to the court? Would you like me to publicly apportion blame on other lawyers? All you are doing is falling into their trap. And it would not end there.*

*The fact is we were not alive to it at the [September] hearing, we did not mean to mislead the court and we are addressing it that way...”*

102. Mr Handley replied to say:

*“... We just need to know what happened. So far, we have not answered Byrne’s two fundamental questions: 1) when did we know, and 2) how is it that we got the dates right for the extradition, but used other dates for the Freezer? If the realization occurred before evidence was served for the freezer or before the Freezer hearing, or before Byrne’s letter of September 2014, then yes I do think that this is something we have to admit to the Court... Obviously no one meant to mislead the court, but it has turned out that we have. We can either find out what happened now, or we can leave it a few weeks after they’ve applied to lift the Freezer. They are clearly signalling that they are considering that option...”*

103. These exchanges were the subject of Allegation 1.4 which the SDT rejected despite Flaux J describing the Appellant’s email as ‘disgraceful’ and an attempt to deceive Mr Handley into thinking that the Appellant had not known of the issue [187].

**The Appellant’s Fourth Affidavit (Allegation 1.5)**

104. It was against this background, and in anticipation of the hearing before Flaux J which took place on 13 November 2014, that the Appellant’s Fourth Affidavit was prepared.

105. The Appellant swore this affidavit on 11 November 2014. At [4] he said that he made the affidavit ‘to clarify certain matters raised by [Byrne & Partners] in an exchange of correspondence dating from 4 September 2014’. At [6] he said that, without prejudice

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to his argument that the application was ‘*unnecessary and diversionary*’ he set out the matters below to ensure that the Court is ‘*fully apprised of all facts and matters underpinning the serious allegations*’ made in the application by Byrne & Partners.

106. The Fourth Affidavit went on to say:

*“38. Although they [Byrne & Partners] no longer suggest that leading counsel or I intended to mislead the court, the defendants contend, without any evidence, that our clients must have done. As I set out below, there was no intention to mislead the court by our clients or this firm. If this court was misled, I apologise.”*  
(emphasis added)

*“39. Byrne have asked who knew of the dating error within the firm and when. Without any way waiving privilege, it is correct we provided advice regarding the extradition request. This was one of a number of parallel work streams. The internal work of the firm is, of course, privileged. Given the enormous volume of internal email traffic and the number of lawyers involved in the overall matter, it would be a significant task to work out who exactly knew what and when. If that exercise was undertaken, I do not believe the information would have any utility in this matter. I am confident in the event no lawyer in the team intended to mislead either this court or the Dubai courts.*

*40. In short, the error was in my affidavit and I take responsibility for its contents. I repeat that the error was inadvertent, and I sincerely apologise to the Court is that error caused it to be misled...”*

107. In the March 2015 Judgment, Flaux J found that these paragraphs were “*evasive and misleading and deliberately so*” [197]. He described [38] as “*banking [the] earlier misleading*” given that Byrne & Partners were only not suggesting that there had been deliberate misleading at the September 2013 Hearing because they had been misled by the Appellant’s letter of 7 November 2014. [39] gave the impression that the Appellant had not personally been aware of the dating error and that it would require a great deal of work to find out who was, and [40] was untrue in suggesting that the error had been inadvertent given that, as Flaux J found, the strategy had been to avoid disclosing the unreliability of Mr Boreh’s conviction and the evidence on which it was based.
108. At [209] Flaux J concluded that in the period September to November 2014 the Appellant was ‘engaged in a strategy of evasion and equivocation which was not one which any reputable and honest solicitor could ever have adopted and the concept of ‘*acceptable evasion*’ is clearly anathema to the standards of professional conduct to be expected of an officer of the court’. This strategy was designed to prevent his earlier misconduct from coming out.
109. Mr Davenport showed me evidence which, he said, demonstrated that Leading Counsel had commented on the Fourth Affidavit and had approved it. But, again, this begged various questions, which I do not need to answer for the purposes of deciding this the appeal, as to the knowledge and understanding of Leading Counsel at the material time. Again, this was the Appellant’s affidavit and he was giving evidence about the knowledge of individuals within the Firm, including himself. He was the person who was best qualified to say who knew what, and the circumstances also called for particular care on his part.

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110. On 13 November 2014 there was an interlocutory hearing before Flaux J. The Appellant did not attend but Leading Counsel appeared on behalf of Djibouti. He submitted that the Appellant was not aware of the dating error at the time of the September Hearing, otherwise [39] of his Fourth Affidavit would have been worded differently. Flaux J found that Leading Counsel was not aware of the true position when he made these submissions and would not have made them if he had been.
111. Flaux J held that:
- i) The court was misled on granting the freezing injunction in September 2013.
  - ii) There was no suggestion that Leading Counsel or the Appellant were aware of the error. In the March 2015 Judgment Flaux J said: *“So far as [the Appellant] is concerned, that demonstrates that the strategy of equivocation and evasion adopted in his fourth affidavit had succeeded at least for the moment.”* [202]
  - iii) The terrorist conviction against Mr Boreh was unsafe and should not be relied upon to external agencies pending the final hearing.
  - iv) There was an arguable case and a legitimate suspicion that someone in the Firm may have known more than the Appellant and appreciated that an error had been committed.
112. Flaux J therefore ordered the internal investigation sought by Byrne & Partners into who knew what and when within the Firm and the client.

Subsequent events

113. On 9 January 2015, Mr Boreh applied for the freezing injunction, proprietary injunction and other relief granted in favour of Djibouti at the September 2013 Hearing to be set aside. The application was on the basis that the Appellant had deliberately misled the court at the September 2013 Hearing. I have dealt with the March 2015 Hearing and its outcome at paragraph 2 above.
114. On 2 March 2016, Flaux J dismissed Djibouti’s claims against Mr Boreh and found that they were part of a campaign of politically motivated persecution against Mr Boreh and those associated with him (see **Republic of Djibouti & Ors v Boreh & Ors** [2016] EWHC 405 (Comm)).
115. The Appellant sought permission to appeal against the decision that he had acted dishonestly. On 9 February 2017, after a hearing which was attended by Leading Counsel for the Appellant and for Mr Boreh, the Court of Appeal refused permission to appeal: see **Gray v Boreh & Ors** [2017] EWCA Civ 56. Although the Appellant was a non-party to the Commercial Court proceedings and no relief against him personally had been ordered, the Court was prepared to assume that in principle it had jurisdiction to entertain an appeal by the Appellant on procedural grounds which engaged his rights under Article 8 ECHR and that, consequently, there might be jurisdiction to entertain his substantive arguments. But it held that there was no realistic prospect of a complaint about the procedure adopted by Flaux J succeeding.

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116. I note that at [44] Gloster LJ said:

*“Mr Gray's principal complaint as to the substance of the judge's findings presented on the appeal before us was that, by parity of reasoning, in circumstances where the judge had not been prepared to find that the claimants' leading counsel, Mr Qureshi QC, was dishonest, there was no basis for finding Mr Gray dishonest. Again, I reject that argument. The judge was perfectly entitled to reach the conclusion that Mr Gray had behaved dishonestly, and that, as a result, the freezing order should be set aside, irrespective of any need to make any findings to similar, or different, effect in relation to Mr Qureshi, whose knowledge and state in mind had not been investigated. The judge was entitled to conclude that the latter's state of mind had not necessarily been the same as the formers.”* (emphasis added)

117. As I have pointed out, this was also the approach of the SDT, and Mr Davenport does not suggest that it was wrong.

118. As Mr Davenport also points out, Gloster LJ went on to say that even if there had been merit in the challenge to Flaux J's decision, as a matter of discretion it would not have been appropriate for the Appellant to be given a right of appeal to the full court given that he was not a party to the Commercial Court proceedings and those proceedings had now come to an end. The disciplinary proceedings in the SDT, which had been adjourned pending the appeal, were the appropriate forum for him to deal with the implications for his career of what had happened.

The hearing before the Solicitors Disciplinary Tribunal.

119. The hearing before the SDT lasted 7 days. The Appellant was represented by Mr Lewis MacDonald of Counsel who put in a detailed skeleton argument in advance and then detailed written closing submissions. If I may say so, these documents were detailed, and they were of a high standard. They said all that could be said in the Appellant's favour.

120. The SRA was represented by Ms Grace Hansen of Counsel. She opened the hearing on the basis of the SRA's pleaded case as set out in its Rule 5 statement and took the SDT through the documentary evidence. I note that she said this in the course of her submissions:

*“Sir, you'll have realised that by and large the SRA's analysis of the case follows that of Mr. Justice Flaux. There is perhaps only one point on that which I would set out that we don't necessarily follow, uh, which is a... point that is raised by Mr. Gray. And that's that Mr. Justice Flaux accepted that Khawar Qureshi, Queen's Counsel, who was instructed by Mr. Gray in these proceedings, cannot have known about what is called the dating error. Mr. Gray says that Mr. Qureshi did know about it. The SRA say, sir, very simply, that it doesn't matter whether Mr. Qureshi knew or not. A solicitor's obligation to not mislead the court remains regardless of whether or not leading counsel knew about a solicitor's conduct. You may, sir, think as you go through the case you need to make some findings about what Mr. Qureshi knew or not. We don't invite you to and obviously invite caution in relation to that, given that Mr. Qureshi isn't appearing before you.”*

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121. This was a departure from the SRA's position in its Rule 5 statement, which relied on the whole of [188(1)-(9)] of the March 2015 Judgment. Mr Davenport submitted that the change of approach was highly significant, and it was forced on the SRA because of the additional evidence about the involvement of Leading Counsel which was now available. For reasons which will become apparent, I do not think that it matters why the SRA took this course. What matters for the purposes of the appeal is whether the SDT's treatment of the issue of the involvement of Leading Counsel, and the evidence about this, was wrong.

Legal frameworkThe SDT

122. The SDT is an independent tribunal established under section 46 of the Solicitors Act 1974. Its members are appointed by the Master of the Rolls and they include practising solicitors of not less than ten years' standing: see section 46(3).

The burden and standard of proof in the proceedings before the SDT

123. The burden of proof in misconduct proceedings before the SDT is on the SRA. The standard of proof is the criminal standard: **Campbell v Hamlet** [2005] UKPC 19 [16]. This is one of the reasons why caution should be exercised by the SDT in placing reliance on the factual findings of a court in civil proceedings.

The function of the SDT where a court has made findings of fact in civil proceedings

124. Rule 15(4) of the Solicitors (Disciplinary Proceedings) Rules 2007, which was applicable at the time, provided as follows:

*“(4) The judgment of any civil court in any jurisdiction may be proved by producing a certified copy of the judgment and the findings of fact upon which that judgment was based shall be admissible as proof but not conclusive proof of those facts.”*

125. On the basis of the decision of the Divisional Court in, **In re A Solicitor** [1993] QB 69, 80G-H it was common ground before me that:
- i) The SDT must reach its own conclusion on whether the solicitor is guilty of the misconduct alleged and cannot, therefore, treat the findings of the earlier court as being binding or conclusive. It can, however, treat the findings as admissible evidence.
  - ii) In deciding how much weight should be attached to a given finding of an earlier court on the allegations of misconduct which the SDT has to determine, the SDT should bear in mind, at least:
    - a) the evidence adduced before the court;
    - b) the apparent fairness or otherwise of the proceedings before the court;
    - c) the standard of proof adopted by the court;



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- d) the availability of any appeal from the court's findings.
126. These considerations reflect the duty of the SDT to act fairly, and the fact that there may be a number of considerations which affect the probative value of the findings of an earlier court. If, for example, a solicitor has been found guilty by an English jury of precisely the same charge and on the basis of the same evidence, this finding may carry substantial weight. If, on the other hand, there is significant exculpatory evidence available which was not before the earlier court, that will potentially diminish the weight of the earlier finding. Similarly, the lack of an ability to challenge the incriminating evidence at the earlier hearing, or to appeal against an adverse finding, may diminish the weight of that finding and/or the fairness of reliance upon it by the subsequent tribunal.
127. A change in the party which has the burden of proof is likely to be relevant to the weight which can be given to the decision of the earlier court. Similarly, if the earlier court was applying a lower standard of proof in relation to a factual issue, that may also diminish the weight of the finding. But the extent to which these considerations do so may depend on the nature of the evidence which established the fact. If there was contemporaneous documentary evidence which proved a binary issue of primary fact, the burden and standard of proof may have played little or no part in the court's finding on the point. In general, the position would be essentially the same in relation to admissions which were made in the earlier proceedings, although there may be reasons in a given case which render it unfair to hold a party to those admissions.
128. At the other end of the spectrum, if the court has had to resolve a disputed issue of fact by deciding which of two diametrically opposed oral accounts it prefers, the burden and standard of proof may well have played a more significant role. Similarly, it may be that, overall, the evidence adduced by the losing party in relation to an issue was less weighty compared to the evidence which was preferred, and that the court really has gone no further than to hold that the party with the burden of proof has not proved its case, or that its finding represents the likely or probable position. Even where the burden or the standard of proof have are different, then, the task of the SDT in deciding how much weight to give to a finding or conclusion of an earlier court therefore requires careful consideration of the reasons given by the court, the nature of the issue and the nature of the evidence on which the finding was based.
129. Finally, I note that **In re A Solicitor** was concerned with the earlier disciplinary body's findings on the actual allegations of misconduct against the solicitor, which had been upheld in her absence. There may be cases where the factual issue in the earlier proceedings was not central and/or was not explored in detail in the earlier proceedings. Obviously, this will diminish the weight which it can or should be given for reasons of reliability and fairness.
130. I was also referred by Mr Davenport to **Afolabi v Solicitors Regulation Authority** [2011] EWHC 2122 (Admin) and **Constantinides v Law Society** [2006] EWHC 725 (Admin) but, with respect, they are essentially illustrations of the application of the principles set out above to the facts of those cases.

The jurisdiction and approach of the High Court in this type of case

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131. Section 49(1) of the Solicitors Act 1974 provides a right of appeal to the High Court against an order of the SDT. CPR 52.21 applies to such an appeal, which will therefore normally be by way of a review. As is well known, Rule 52.21(3) states that:

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

*(a) wrong; or*

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

*(4) The appeal court may draw any inference of fact which it considers justified on the evidence.”*

132. Mr Davenport relied on the commentary in the White Book at 52.21.5 to submit that “wrong” means that there must be an error of law or fact or in the exercise of discretion. He also drew attention to the decision of the Supreme Court in **Henderson v Foxworth Investments Limited** [2014] 1 WLR 2600 at [67] where Lord Reed said:

*“67. 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.”*

133. As far as findings of primary fact are concerned, at [62] Lord Reed also said in relation to the phrase “plainly wrong” that:

*“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.”*

134. In relation to cases such as the present, where the credibility of a witness (i.e. the Appellant) is in issue, it is worth noting **Cook v Thomas** [2010] EWCA Civ 227 at [48] where Lloyd LJ said:

*“an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue”.*

135. In relation to evaluative judgments, I was referred to the following passage from the judgment of the Court of Appeal in **Prescott v Potamianous** [2019] EWCA Civ 932 at [76]

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*“... on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge’s treatment of the question to be decided, ‘such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion’”.*

136. Mr Davenport also referred to the well-known principle that an appellate court will accord due deference to evaluative judgements which are made by a specialist body about matters which are within its field of expertise. In **Solicitors Regulatory Authority v Day** [2018] EWHC 2726 (Admin) this principle was expressed as follows by the Divisional Court in relation to a decision of the SDT:

*“71. The first consideration is that this is a decision of a specialist Tribunal, particularly equipped to appraise what is to be required, in the particular circumstances, of a solicitor by way of professional conduct. The appellate (judicial) court will be cautious in interfering with such an appraisal. The principle is well established on the authorities....”*

137. He submitted that this principle does not apply in the present case as the issue was one of dishonesty. Ultimately, nothing turns on whether it does. But in my view this is a case where the views of the SDT as to the standards which were required of the Appellant in the circumstances which arose carry some weight, albeit a court is similarly well placed to form a view about what those standards were and whether the Appellant met them.
138. In the light of Mr Davenport’s submission that the SDT may have stated that it was applying the correct approach but was merely paying “lip service” to the principles which it stated, Mr Dunlop emphasised the well-known passages in the speech of Lord Hoffmann in **Piglowska v Pilowski** [1999] 1 WLR 1360, at 1372B-H and particularly the following passage:

*“The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes.... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions, and which matters he should take into account..... An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.” (emphasis added)*

139. Mr Dunlop submits that where, as here, the SDT made clear statements which, on their face, demonstrate that it carried out its task correctly, it is a strong thing to argue that it did not undertake its task in the way which it said it did. This submission is obviously correct, and in this connection, I am reminded of the following dictum of Popplewell LJ in **DPP Law v Greenberg** [2021] EWCA Civ 672 [58]:

*“..where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the*

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*language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision... ”.*

140. Although this was stated in the context of an appeal from a decision of an employment tribunal, it seems to me to be equally applicable in the present context.

Dishonesty

141. It was agreed before the SDT that the test in relation to dishonesty which the SDT was required to apply is set out at [74] of the decision of the Supreme Court in **Ivey v Genting Casinos (UK) Ltd** (supra) where Lord Hughes JSC said:

*“... When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-under by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”*

142. Mr Dunlop accepted that, in principle, evidence which went to the Appellant’s subjective understanding or perception of the views or understanding of Leading Counsel in relation to affidavits which the Appellant proposed to put before the court, or correspondence which he proposed to send, or in relation to submissions which Leading Counsel made to the court, was potentially relevant to limb 1 of the test in **Ivey**. He also accepted that there may be cases where it is difficult for a solicitor to judge where the line should be drawn as to what is or is not a permissible step to take in a given situation - the question is finally balanced - and the solicitor consults senior counsel or a senior colleague before making their mind up. Depending on the precise circumstances, the fact that the solicitor genuinely relied on a more authoritative person’s view in coming to a decision in a borderline case, believing that view to be honest, considered, and well informed, may help the solicitor in relation to the question whether their decision was honest by the standards of ordinary decent people, and therefore satisfied the second limb of the **Ivey** test.

143. I agree. This much is consistent with the following passage from the decision of the Divisional Court in **Brett v Solicitors Regulation Authority** [2014] EWHC 2974, on which Mr Davenport relied. Albeit he was not directly addressing the point at issue here, at [110] Lord Thomas CJ said:

*“Every lawyer must be alive to the fact that circumstances can arise during the course of any lawyer’s professional practice when matters come to his knowledge (or are obvious to him) which may have the effect of making his duty to the court*

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*his paramount duty and to act in the interests of justice. In many cases it will be clear what course the lawyer must take, either through the way in which the case is presented or by withdrawing from acting for the client. In others it may be more difficult. The lawyer may not be absolutely sure that his actions will discharge his duty to the court. In such a case, for reasons which I shall explain, a lawyer would be ill-advised if he did not put the matters before a person more senior within his firm or before independent counsel, making full and complete disclosure to such a person of all the relevant circumstances.” (emphasis added)*

144. However, this does not detract from the point, which the SDT made in the present case, that the question is always as to the honesty of the solicitor who made the decision to act in the way that they did. The fact that senior counsel or a senior colleague may have approved a given step is not an all-purpose insurance policy: it is merely a potentially relevant factor. As I have said, the weight which it should or will be given will depend on the circumstances, including how well informed the second opinion was. It may be a weighty factor in a borderline case, but it will not be in a case where the decision of the solicitor was clearly wrong. Mr Davenport appeared to suggest that the solicitors’ profession would be deeply concerned if this were the position but I very much doubt that this is so. Indeed, with respect, such a suggestion would do the profession a disservice given that, I anticipate, all solicitors would accept that they are personally responsible for the probity of their own conduct.

The importance of not misleading the court

145. I also note that, in **Brett**, Lord Thomas cited the following passage from the speech of Lord Hoffmann in **Arthur JS Hall v Simons** [2002] 1 AC 615 at 686 E:

*“Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour.”*

146. Lord Thomas went on to say at [111]:

*“... misleading the court is regarded by the court and must be regarded by any disciplinary tribunal as one of the most serious offences that an advocate or litigator can commit. It is not simply a breach of a rule of a game, but a fundamental affront to a rule designed to safeguard the fairness and justice of proceedings. Such conduct will normally attract an exemplary and deterrent sentence. That is in part because our system for the administration of justice relies so heavily upon the integrity of the profession and the full discharge of the profession’s duties and in part because the privilege of conducting litigation or appearing in court is granted on terms that the rules are observed not merely in their letter but in their spirit. Indeed, the reputation of the system of the administration of justice in England and Wales and the standing of the profession depends particularly upon the discharge of the duties owed to the court.”*

147. These passages are germane to the present case. They also deserve particular attention from lawyers who may feel from time to time that they are under pressure, from colleagues or clients, to get the result which the client wants; or who may fear a loss of face if they admit that a mistake has been made.

The Appellant's arguments on his principal grounds of appeal

148. I have outlined Mr Davenport's central argument at paragraphs [6]-[15] above. He submitted that there was a number of key reasons why the March 2015 Judgment should be treated with caution:
- i) As a general point, Flaux J was applying a different standard of proof.
  - ii) He repeatedly found that Leading Counsel could not have been aware, or fully aware, of the true position when he failed to challenge, or agreed with, the Appellant's approach in relation to the Third and Fourth Affidavits and in the correspondence with Byrne & Partner, and when he made the submissions which he made at the hearings in September 2013 and November 2014. These findings were clearly regarded as relevant by Flaux J as the point was repeatedly adverted to by him and was one of the 9 points which supported his conclusion that the court had been misled at the September 2013 Hearing. They also formed part of the picture viewed as a whole, i.e. cumulatively, so that removal of this consideration would materially undermine Flaux J's finding of dishonesty. And yet these aspects of Flaux J's decision were not relied on before the SDT and, indeed, there was a good deal of additional evidence before the SDT as to the extent of Leading Counsel's involvement in the decisions which were taken.
  - iii) There was also other evidence which had not been before the SDT to support an argument that the Appellant could not have been acting dishonestly given that the other members of the Djibouti team had no issue with the approach which the Appellant had taken. He would not have been as open with them or Leading Counsel as he was if he was engaged in a strategy which he knew to be dishonest. There was also evidence from numerous sources as to his good character and he had taken the relevant decisions in the context of being overworked and under resourced.
  - iv) The Appellant also had a limited right of appeal against Flaux J's findings given that he was not a party to the proceedings in the Commercial Court.
149. Here the SDT had said that it had attached significant weight to Flaux J's decision and it was argued by Mr Davenport that it did so in relation to his findings about the behaviour and motivation for the Appellant, rather than limiting its use to establishing the factual context. Indeed, examination of its Reasons showed that it had effectively adopted Flaux J's findings. It was wrong to do so. Indeed, insofar as it merely attached significant weight to those findings it was also wrong to do so.
150. Mr Davenport also submitted that the SDT's approach wrongly disregarded the Appellant's extensive consultation and reliance on Leading Counsel in relation to dealings with the court. He took me through this evidence by reference to a very helpful chronology and he identified which of the documents had been before Flaux J and which had not been, and what they showed. As I have noted, though, he accepted that the SDT was right to assess the knowledge or beliefs and the honesty of the Appellant and that the evidence as to the involvement of Leading Counsel was only relevant insofar as it went to that question.

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151. Ultimately, however, in his written and oral submissions Mr Davenport spent a good deal of time on the evidence before the SDT and on submissions about the facts. Perhaps revealingly, he appeared reluctant to analyse the SDT's judgment with a view to proving that it had, in fact, made the errors of approach which he asserted.

**Discussion and conclusion on the Appellant's central arguments**The significance of the judgment of Flaux J

152. I accept that Flaux J's March 2015 Judgment did not bind the SDT and, indeed, that it would have been wrong for the SDT simply to adopt it. As I will come on to explain, however, the answer to the appeal is that the SDT did not do this. But, before I do so, it is worth noting that, quite apart from the clarity, cogency and thoroughness of his judgment, and the identity of its author, Flaux J's analysis was clearly of significance for a number of reasons.
153. First, although Flaux J was applying a different standard of proof to that which is applicable in the SDT it is of note that at [7] he said that he would apply the well known principle that: *"the standard of proof remains the civil standard of the balance of probabilities, but where an allegation is made of deliberate misconduct or dishonesty, the court will only conclude that the allegation is made out if there is cogent evidence to that effect"*.
154. Second, on a number of points Flaux J expressed himself (unsurprisingly given the evidence) in forthright terms and did not appear to be relying on the balance of probabilities to reach his findings.
155. Third, in relation to the question of dishonesty, Flaux J was applying the two-stage test indicated by the Divisional Court in **Bryant v Law Society** [2007] EWHC 3043 (Admin); [2009] 1 WLR 163 which said that:
- "155. Accordingly, the tribunal in the present case should, in our judgment, have asked itself two questions when deciding the issue of dishonesty: first, whether Mr Bryant acted dishonestly by the ordinary standards of reasonable and honest people; and, secondly, whether he was aware that by those standards he was acting dishonestly."*
156. Arguably this test was more generous to the Appellant than the test in **Ivey** as it permitted an argument that, even if he acted dishonestly by objective standards, he was not aware that he was doing so because he believed that Leading Counsel was honest and that Leading Counsel was well informed and agreed with each of the impugned steps which the Appellant took. The effect of Flaux J's findings in relation to Leading Counsel was that this argument failed but, even on the **Bryant** test, the issue was as to the Appellant's knowledge and beliefs, so the role of Leading Counsel was not decisive. Under the **Ivey** test the Appellant could be found to be dishonest even if he had not appreciated that he was acting dishonestly and the issue of the involvement of Leading Counsel was arguably of less importance.
157. Fourth, there could be no more authoritative source than Flaux J for the underlying narrative. He was also uniquely well placed to say whether the Third Affidavit, the submissions at the September 2013 Hearing and the Fourth Affidavit were in fact

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misleading. And he was also in a good position to say whether any misleading was intended or unintended, given that misconduct alleged related to hearings at which he presided in the context of proceedings with which he was particularly familiar.

158. Fifth, as my account of the facts demonstrates, a substantial part of the evidence before Flaux J was in the form of undisputed facts, contemporaneous documents and admissions by the Appellant which showed the state of his knowledge, at the material times, as to the discrepancy in the dates and its significance. It was also a reasonable working assumption that the explanations which the Appellant offered to Flaux J for his actions would be broadly the same as those which he offered to the SDT. A number of the findings which Flaux J made were therefore based on an analysis of essentially the same materials as were before the SDT.
159. Sixth, the foundation for the analysis of this case was and still is the point that a short time before the Third Affidavit was sworn, and the September 2013 Hearing took place, there had been a “*massive issue*” as a result of the discovery of the incorrect dating of the transcripts of the phone calls, and it was appreciated by the Appellant that the conviction of Mr Boreh by the Djibouti Court had been on a false basis. The documents also showed the strategy which was adopted at the meetings with Kroll and Al-Tamimi. More importantly, the Third and Fourth affidavits and the correspondence with Byrne & Partners were a matter of record. What was said by the Appellant could readily be compared with what he knew to be the position when it was said. As far as Allegation 1.2 was concerned, this turned on whether the Appellant failed to notice that the exchanges between the court and Counsel were proceeding on a mistaken basis. There was ample evidence, given that the Appellant took a note of the *ex tempore* judgment and subsequently made use of the transcripts of the hearing, that he must have. This analysis is not materially affected by the issues as to the involvement or otherwise of Leading Counsel or other lawyers in the Djibouti team.
160. Seventh, more generally it is important to note that the arguments that the Appellant could not have been dishonest because his approach was not questioned by other members of the Djibouti team, and his reliance on being overworked and under resourced, were considered by Flaux J. In my view, given that the issue was as to the Appellant’s honesty and not the honesty of anyone else, the key findings of Flaux J were not materially affected by the additional evidence which was before the SDT, including the additional evidence as to the understanding of Leading Counsel. Indeed, it seemed to me to be highly unlikely that Flaux J would have taken a different view of the Appellant’s conduct had he seen the additional materials which were placed before the SDT or been applying the criminal standard of proof.
161. Finally, it is true that availability of an appeal was problematic for the Appellant as he was not a party to the Commercial Court proceedings. But the decision of the Court of Appeal on his application for permission shows that such an appeal would not have succeeded on the merits in any event. With respect, there did not appear to me to be any arguable reason for the SDT to take the view that it would be unjust to place any reliance on the March 2015 Judgment because no appeal was available to the Appellant for procedural reasons.
162. For all of these reasons, the SDT cannot be said to have been wrong to take the judgment of Flaux J into account and to attach significance to it. No doubt it is for this reason that the focus of Mr Davenport’s submissions was on the argument that it went further than



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this, and failed to make its own decision on the Allegations against the Appellant and/or to treat the judgment of Flaux J with appropriate caution.

The SDT did not simply adopt the judgment of Flaux J in any event

163. As I have indicated, however, the key point is that the SDT did not commit any of the errors of which it stands accused by Mr Davenport. It did reach its own decision on the basis of the evidence and arguments which it received, and it was well aware of the different standard of proof which it was required to apply.
164. The SDT's Reasons ran to 84 pages of single-spaced print. They were carefully and clearly structured in a logical sequence and under a series of headings. That structure was applied in the same way for each of the issues which the SDT had to decide.
165. Having set out the charges against the Appellant, the SDT dealt with various preliminary matters. I note, as one of many indications that the SDT genuinely considered the evidence and reached its own decision, that the SDT granted an application for the Appellant to take the unusual course of being taken through his evidence orally as opposed to his 88 page witness statement being taken as read and standing as his evidence in chief. The Tribunal also granted an application for 4 of the Appellant's witnesses, including 3-character witnesses, to give oral evidence although the SRA did not have any questions to put to them.
166. The SDT made its own detailed findings as to the chronology of events under the heading "*Factual Background*". These findings were the SDT's own drafting rather than lifted from the judgment of Flaux J. They referred to and quoted relevant parts of the underlying documents including emails, letters, minutes of meetings, the transcript of the September 2013 Hearing, the passages from the Third and Fourth Affidavits and the correspondence with Byrne & Partners which was said to be misleading. The final item in the chronology was the March 2015 Judgment of which the SDT said this:

*"34 Flaux J considered the application and received evidence from the Respondent. He found that the Respondent had allowed the Court to be misled at the September Hearing and that he had done so dishonestly. Consequently, Flaux J ordered that the freezing injunction (but not the proprietary injunction) be discharged on the basis that the Respondent had deliberately misled the Court.*

*35. The particulars of the relevant findings made by Flaux J are set out below under each allegation"*

167. There was then a section headed "*Live Witnesses*" which summarised the evidence of each of these witnesses under a heading for each witness. I note that in relation to the Appellant that, at this stage in its Reasons, the SDT outlined aspects of his evidence before stating, at [38.12], that the particulars of his evidence were set out below under each Allegation. The summary included the SDT noting at [38.2] that the Appellant:

*".... confirmed that a vast amount of material was not before Flaux J at the March Hearing as the Djibouti Client and the Firm wanted to keep disclosure to a minimum on the grounds of legal professional privilege..."*

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168. So, the SDT was clearly alive to this point. Indeed, the SDT was provided with a Table which showed what evidence was and was not before Flaux J.
169. Also contrary to Mr Davenport's argument, the SDT noted, at [38.4], the Appellant's evidence that:
- “The Djibouti Team's workload was extremely busy, they were undermanned, he was the only partner on the case and he never had the benefit of more than one Senior Associate. The Respondent stated that despite repeated requests to the Firm, he was never given additional resources let alone partner support and the Djibouti Team was “brutally overworked”.”*
170. The SDT then dealt with the burden and standard of proof and expressly directed itself that the SRA *“was required to prove the allegations beyond reasonable doubt”* [43]. This was one of a number of occasions on which SDT expressly referred to or applied the criminal standard of proof.
171. The SDT then addressed each of the five Allegations against the Appellant in turn and in separate sections, before turning to consider whether he had acted dishonestly in relation to the Allegations which it upheld. In each of these sections, the findings were the SDT's drafting rather than lifted from the judgment of Flaux J. For each Allegation, under a series of headings the SDT first summarised the SRA's submissions in relation to that Allegation, then summarised the Appellant's evidence on the point, then set out the submissions made on his behalf and then reached its conclusion in relation to that Allegation under the heading *“The Tribunal's Findings”*.
172. I note that as part of each of its summaries of the SRA's submissions the SDT said words to the effect *“Ms Hansen relied upon Flaux J's findings at the March Hearing to support her submissions which included...”*. It then set out relevant passages from his judgment and said words to the effect that *“Ms Hansen averred that significant weight could and should be attributed to Flaux J's findings...”*. It was common ground before me that more material from the March 2015 Judgment than was expressly relied on by the SRA in its statement of case (the Rule 5 statement) or Ms Hansen's oral submissions was included by the SDT. But Mr Davenport confirmed that, with the one exception which I have identified at paragraphs [120]-[121] above, these passages were not disavowed by Ms Hansen. The nature of the Appellant's complaint was that whilst she had relied on the findings of Flaux J she had highlighted some passages but had not highlighted others which the Tribunal set out. Nor had these passages been put to the Appellant in evidence.
173. It is also true that in relation to Allegation 1.3 in particular – the complaint about the 7 November 2014 letter to Byrne & Partners - the whole of paragraphs [142]-[177] of Flaux J's judgment were set out whereas only paragraph [174] had been specifically referred to by Ms Hansen. But the vast majority of the information in these passages comprised a detailed chronological account and analysis of the documented exchanges between the Appellant, his colleagues, Leading Counsel and Byrne and Partners as well as the Appellant's admissions in relation to them under cross examination. They also included Flaux J's views about what the documents and the Appellant's admissions showed. There was barely any reference to Flaux J's view that Leading Counsel could not have been fully informed and it is plain that he was judging the Appellant in relation

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to this passage at arms on the basis of the documentary evidence and the Appellant's own admissions in oral evidence.

174. It is also true that, in relation to Allegation 1.2, the SDT set out [118] of Flaux J's judgment in full, rather than omitting [118(5)] on which Ms Hansen had effectively said she did not rely. But the SDT's subsequent discussion of this issue shows that this does not indicate that it relied on this sub-paragraph in coming to its decision i.e. that it proceeded on the basis that Leading Counsel could not have been aware of the implications of the dating error at the material times. On the contrary, as I have noted, the SDT said that its task was to assess the honesty of the Appellant on the basis of what he knew and believed, rather than to assess the knowledge, beliefs or honesty of Leading Counsel.
175. As far as Mr MacDonald's submissions are concerned, these were set out in detail by the SDT for each allegation in turn. Indeed, Mr Davenport accepted that the SDT's Reasons were "*notable for the length and accuracy with which*" they set out the Appellant's argument. He attributed this to the fact that Mr MacDonald had put in written submissions, but this did not detract from the point that therefore the SDT had his arguments, including his arguments as to the relevance of Flaux J's judgment, the effect of the different standard of proof and the "new" evidence etc well in mind.
176. It is also important to note that in each of the sections headed "*The Tribunal's Findings*" the SDT made its own findings of fact before reaching a conclusion. In relation to Allegation 1.1, for example, it began as follows at [44.29]:

*"In order to determine whether the Applicant had proved Allegation 1.1 beyond reasonable doubt, the Tribunal firstly considered the facts known by the Respondent prior to him swearing the Third Affidavit. The Tribunal found the following facts in that regard..."*

177. It then went on to make its own findings about what the Appellant knew prior the drafting of the Third Affidavit before considering the relevant paragraphs of that Affidavit and finding that, in the light of what the Appellant knew, they were misleading. At [44.33] the SDT considered each of the offending paragraphs of the Third Affidavit in turn. By way of illustration of its approach, in relation to [163.4] it said:

*"• [163.4] laboured the severity of the fact that Mr Boreh had been convicted of terrorism offences and sentenced to 15 years imprisonment by the Djibouti Court. It failed to mention or address the fact that the conviction was predicated on the erroneously dated transcripts and the erroneous confession of Mr Abdillahi both of which attributed the telephone conversations to the Nougaprix attack which had not taken place at that time. The Tribunal found that the Respondent's failure in that regard rendered [163.4] misleading."*

178. I also note that, contrary to the Appellant's arguments, this section included the following passages:

*"44.31 The Tribunal noted and accepted that the drafting of the Third Affidavit was a team effort and that it went back and forth in various iterations between the associates and the Respondent as well as consultation with Mr Qureshi QC."*

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*However, the Tribunal found that did not vitiate the Respondent's ultimate responsibility for its content as it was his affidavit which bore his name and signature against the statement of truth.*

*44.32 The Tribunal was cognisant of and accepted that the Respondent was working long hours, travelling extensively at the material time as well as working in a different time zone to the Djibouti Team on occasion. However, that did not detract from or militate against the Respondent's ultimate responsibility for the content of the Third Affidavit."*

179. These passages are amongst a number of others which show that the SDT *did* consider the features of the case in respect of which it was said that there was new or additional evidence but found that this evidence did not alter the point that ultimately the Appellant was responsible for the contents of the Third Affidavit. Its approach was the same in relation to the other Allegations which it considered.
180. By way of further example of findings of fact which the SDT itself made which were fatal to the Appellant's case, in relation to Allegation 1.2 – misleading submissions at the September 2013 Hearing - it found at [45.30] that it was inconceivable that the Appellant would not have had the error fresh in his mind at the time of the Hearing. It then considered a number of matters which were relevant to the Appellant's claim that he had not appreciated that the court had been misled. These included accepting that the Appellant was working long hours and travelling extensively at the time [45.12], that other members of the Djibouti team were in court during the hearing [45.33], that the Appellant was sending and receiving emails during the hearing and may have been distracted [45.34] and that he did not have his own bundle of the documents so as to help him to follow the submissions [45.35].
181. But the SDT noted that the Appellant made a note of the judgment of Flaux J as he delivered it [45.36]. This was no doubt a reference to the powerful point that the Judge's misapprehension was confirmed by what he said in his *ex tempore* judgment. It must have been apparent to the Appellant at this point at the latest and yet he did nothing to correct it. On the contrary, he placed reliance on Flaux J's statement that it was arguable that Mr Boreh had committed terrorist offences. The Tribunal then said:

*"45.37 The terrorism issue was addressed at length by Mr Butcher QC on behalf of Mr Boreh and responded to at length by Mr Qureshi QC. It was not an issue that was raised briefly then moved on from. Flaux J interposed Mr Qureshi QC's submissions to seek confirmation that he was not being asked to make findings as to whether Mr Boreh had participated in terrorist acts. Mr Qureshi QC's response went much further than confirmation. He repeatedly stated that Mr Boreh's position was "outrageous". Such emotive language could not, in the Tribunal's view, have passed the [Appellant] by as (a) evidence upon which the terrorism conviction had been undermined by the dating error which the [Appellant] was well aware of shortly before the September Hearing and (b) the significance of the dating error was profound in that it required amendment to the litigation strategy adopted by the Respondent in respect of the extradition request (namely re-trial as opposed to enforcement of sentence). (emphasis added)*

*45.38 The Tribunal therefore rejected the [Appellant's] evidence that he was not aware that the Court was being misled during the September Hearing. The*

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*Tribunal found that the [Appellant] was aware and made a conscious decision not to correct Mr Qureshi QC or otherwise bring to the Court's attention that it was proceeding on a mistaken basis."*

182. At the end of each section headed "*The Tribunal's Findings*" in relation to each of Allegations 1.1-1.3 and 1.5 the SDT expressed its conclusion in the same format, of which the following is a representative example:

***"44.34 Having reached its own decision on the factual matrix of Allegation 1.1, the Tribunal considered and concurred with Flaux J's findings in that regard and in so doing determined that the [Appellant]:***

- Failed to uphold the rule of law and proper administration of justice contrary to Principle 1 as the High Court was misled.*
- Failed to act with integrity contrary to Principle 2 as no solicitor acting with integrity would have misled the High Court.*
- Undermined public trust in him and in the provision of legal services contrary to Principle 6. The public was entitled to expect solicitors not to mislead the Court by filing misleading sworn statements in support of an application.*
- Failed to achieve Outcome 5.1 which required him not to mislead the Court.*

*44.35 The Tribunal therefore found Allegation 1.1, breach of Principle 1, 2, 6 and failure to achieve Outcome 5.1 proved beyond reasonable doubt.*

*44.36 Outcome 5.2 provides that solicitors should not be complicit in another person deceiving or misleading the court. Having found that the content of the Third Affidavit was ultimately the Respondent's responsibility and did not impinge on the conduct of others, the Tribunal determined that the alleged breach of Outcome 5.2 was not proved beyond reasonable doubt." (emboldening added but the underlining is in the original text)*

183. The SDT therefore stated in terms, in relation to each of the Allegations which it upheld, that it had reached its own decision and then found that it agreed with the relevant findings of Flaux J. It also stated that in coming to its conclusion it had applied the criminal standard of proof. Although Mr Davenport's case was that it paid "*lip service*" to what it was required to do and/or had not really done what it claimed to have done, I found this submission impossible to accept looking at the decision as a whole and noting the points which I have noted above and below. There is, in my view, no reason at all to doubt that the SDT approached its task correctly.
184. Further evidence of the care which the SDT took, and the fact that it did reach its own decision, can be found in the fact that the SDT rejected aspects of the SRA's case. This is apparent from the passages which I have cited above but a more powerful example is Allegation 1.4, which related to an the email which the Appellant sent to Mr Handley on 10 November 2014, to which I have referred at [101] above. The Allegation was that:

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*“on or about 10 November 2014 he had sent correspondence to a more junior colleague at the Firm in which he sought to induce his colleague to make, or cause to be made, statements to third parties in relation to litigation which, if made, would be misleading...”*. (emphasis added)

185. Adopting the same approach as it did in relation to the other Allegations, the SDT set out [185]-[187] of Flaux J’s judgment in its summary of Ms Hansen’s submission, noting that she relied on his findings *“in that regard which included...”* these passages although in fact she had not referred to them specifically. At [187] Flaux J had said:

*“Mr Gray really had no proper explanation for this disgraceful email in cross-examination. He was forced to accept that Mr Handley was obviously right when he said later that the court should be informed. However, the attempt to suggest that other lawyers were to blame, when he knew that he was the only English solicitor who had sat through the September 2013 hearing knowing the full implications of the misdating issue, was wholly wrong. This email, as Mr Kendrick QC put to Mr Gray, albeit he would not accept the point, was deceiving Mr Handley into thinking that he, Mr Gray, had not known: “we were not alive to it at the hearing” again the words of equivocation, whereas others in the firm had...”* (emphasis added)

186. And yet the SDT dismissed the charge in relation to this email. It said:

*“Mr Handley’s evidence did not touch upon and he did not speak to whether the Respondent’s email sought to induce him to make or cause to be made statements to third parties which would have been misleading as alleged. There was no other evidence advanced by the Applicant to support or substantiate that Mr Handley had been so induced.*

*47.18 The Tribunal therefore found Allegation 1.4 not proved in its entirety.”*

187. This is testimony to the fact that the SDT applied its mind to the evidence which it received and to the question whether that evidence proved the specific charges which were before it. Here, Flaux J had been heavily critical of the Appellant’s email on the basis that it was attempting to deceive Mr Handley, but that was not the charge before the SDT. The SRA had not adduced evidence to prove that the Appellant was attempting to induce Mr Handley to make misleading statements to third parties and the charge was therefore rejected. Contrary to Mr Davenport’s argument, it plainly was not the case that the mind of the SDT was *“poisoned”* by the judgment of Flaux J or that it simply adopted his views without thinking or that they were *“blinded”* by his March 2015 Judgment.
188. Having reached conclusions on each of Allegations 1.1-1.5 the SDT turned to Allegation 2.1, which was that the Appellant’s conduct under each of these Allegations was dishonest. It first summarised the SRA’s submissions on this issue and then it summarised Mr MacDonald’s submissions at length. These included submissions on each of [188(1)-(9)] of the March 2015 Judgment, of which the submissions on [188(5)] were the lengthiest. In relation to [118(5)] Mr MacDonald argued that it was telling that the SRA did not rely on this finding because the evidence before the SDT suggested that Leading Counsel *“was aware of the full implications of the dating error in both 2013 and 2014, because he was told that by”* the Appellant. The evidence and argument

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which were said to support this contention were then summarised by the SDT. This is further evidence that the SDT had this issue well in mind in coming to its conclusion.

189. The SDT then noted a submission by Mr MacDonald of 22 reasons why the Appellant's actions were neither deliberate, nor dishonest. The 22 reasons were set out by the SDT as bullet points and they included the following which are relevant to this appeal:

*“• The considerable character evidence before the Tribunal, which demonstrated how out of character, and how unlikely, the conduct alleged would be ....*

*• The overwhelming weight of the evidence that the Respondent did consult counsel at each stage. His position appeared to have been entirely consistent with counsels.*

*• The fact that other lawyers made the same mistakes, in as far as the Tribunal may determine that they were mistakes: in drafting the extradition request; in drafting the Third Affidavit; in failing to notice any misleading during the September Hearing; in failing to recognise that the court had been misled when it was raised in 2014. Junior lawyers were perfectly capable of raising ethical concerns and were often closer to the facts on the ground than a partner. The fact that no one – either junior or senior to the Respondent – raised concerns during the material time suggested that it was entirely plausible that the Respondent was not acting deliberately. It was inconceivable that he could have brought so many people along with him in pursuing a dishonest course of conduct.....*

*• The Respondent's workload and travel schedule. It was no coincidence that those problems peaked during the dates covering the allegations.*

*• The fact that the Djibouti Team was spread over many different jurisdictions, and there was no London partner, in litigation in the High Court in London.”*

190. The SDT said that it had given careful considerations to the 22 reasons but set out 21 bullet points in answer to them. These included, in response to the points which I have noted:

*“• It would be perverse to disregard the contemporaneous documentary evidence in favour of the character evidence adduced on the Respondent's behalf...*

*• The extensive consultations with and reliance on Mr Qureshi QC and Ms Hayward of counsel did not abdicate the Respondent's responsibility to Byrne and the Court so as not to mislead.*

*• The fact that other lawyers made the same mistakes did not abdicate the Respondent's responsibility to Byrne and the Court so as not to mislead*

*• The Respondent's workload and travel schedule did not abdicate his responsibility to Byrne and the Court so as not to mislead.*

*• The fact that the Djibouti Team was spread over many different jurisdictions, and there was no London partner, in litigation in the High Court in London did not abdicate the Respondent's responsibility to Byrne and the Court so as not to mislead.”*

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191. I note that the SDT therefore clearly had well in mind the points to which the additional evidence went, and it addressed those points. Moreover, in doing so it did not reject the additional evidence. Its position was that the additional evidence and the arguments of the Appellant did not detract from his personal responsibility for the decisions which he made.
192. I also note that amongst its reasons, the SDT said that:
- “• The Tribunal found it difficult to follow the Respondent’s oral evidence and found that he could not provide a direct answer to a direct question.”*
193. Self-evidently, this was the SDT’s view based on what it saw of the Appellant when he gave evidence. Moreover, it was a damaging finding in the context of a case about his honesty, and one which the SDT was fully entitled to make on the basis of its own assessment of him.
194. The particular answer to the 22 bullet points on which Mr Davenport relies heavily as supporting his first ground of appeal is the following:
- “• The Tribunal accepted that the Respondent’s position in respect of the allegations was consistent throughout the Tribunal proceedings. However, that did not detract from the significant weight the Tribunal attributed to the contemporaneous documentary evidence and the findings of Flaux J.”* (emphasis added)
195. However, I note that on a literal reading the SDT was saying no more than that that it had attributed significant weight to the combination of the contemporaneous documentary evidence and the findings of Flaux J. Even if this is a statement that significant weight was attached to each separately, in the context of the SDT’s Reasons as a whole it is hardly evidence that the SDT failed to reach its own decision or simply adopted the findings of Flaux J. Provided it made its own decision, the SDT was also perfectly entitled to attach significant weight to the judgment of Flaux J for the reasons which I have given. Indeed, it would be surprising if it had done otherwise.
196. Having responded to the 22 bullet points, the SDT continued, at [49.11]:
- “Against that backdrop the Tribunal made the following findings in respect of the allegations of dishonesty...”*
197. It then went on to address each of Allegations 1.1, 1.2, 1.3 and 1.5 in turn, with a section for each, and gave brief reasons in each section which focussed on what the Appellant knew at the relevant time, and what he had done or failed to do, before concluding as follows at the end of each section:
- “The Tribunal found that given those facts the ordinary decent man would find the Respondent’s conduct was dishonest.”*
198. I will illustrate the SDT’s approach to the issue of honesty in relation to each Allegation by reference to Allegation 1.2 given that this is the only one where there was reference to the conclusions of Flaux J in the section of its judgment where the SDT stated its conclusions on Allegation 2.1:



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*“49.11.2a Having determined that the [Appellant] was aware of the dating error shortly before the September Hearing and having rejected the [Appellant’s] evidence that he did not notice that the Court was proceeding on the erroneously dated transcripts the same, the Tribunal concurred with the findings of Flaux J that:*

- *The [Appellant] knew the Djibouti conviction was predicated on unreliable evidence but made a decision not to disclose that fact to the Court or any other outside agency.*
- *That decision of non-disclosure perpetuated into his Third Affidavit and the misleading language deployed in the “offending” paragraphs.*
- *The [Appellant] reviewed the transcripts of the September Hearing and discussed the same with Ms Ngo Yogo II as well as Ms Kahn. Having done so it was patently clear that the Court had been misled yet he did nothing to correct the Court’s error in relying upon the conviction as a ground for granting the freezing injunction against Mr Boreh.*

*49.11.2b The Tribunal found that given those facts the ordinary decent man would find the [Appellant’s] conduct was dishonest.” (emphasis added)*

199. Plainly, this was an expression of the SDT’s own assessment albeit this was that it agreed with the views of Flaux J for the reasons which it identified. Moreover, its reasons were not affected by the question whether Leading Counsel had been briefed and/or consulted or Flaux J’s views on this question.

**Ground 1.2**

200. As for the complaint that the SDT “*disregarded the Appellant’s extensive consultation and reliance on Leading Counsel on issue relating to dealings with the Court*”, this is simply not the case. The SDT’s Judgment is replete with references to the Appellant’s evidence and arguments as to the role of Leading Counsel at each stage of the narrative. At no point did it reject the Appellant’s evidence on this issue. On the contrary, that evidence was not questioned by the SDT, although on some points it took the view that lengthy discussion with Leading Counsel was likely to indicate that the Appellant had regarded the issue as an important one and was unlikely to have forgotten about it, or failed to notice that what was said at the relevant times was misleading.
201. Similarly, when it came to the SDT’s findings and conclusions about the case it proceeded on the assumption that matters had been discussed with Leading Counsel and had been discussed at length. But, as is apparent from the passages which I have quoted above, its position was that ultimately the issue was as to the Appellant’s honesty rather than that of Leading Counsel. Whatever Leading Counsel may or may not have known, understood, said or approved this did not absolve the Appellant of his personal responsibility not to mislead the court or to allow it to be misled. He was to be judged according to what he knew and what he said and did, and, by that measure, it was clear that he acted dishonestly and in breach of the relevant Principles and Outcomes.

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202. As I have pointed out, the SDT's view that it was required to focus on the honesty of the Appellant and not obliged to make findings about the knowledge or beliefs of Leading Counsel was consistent with the view of the Court of Appeal when he sought permission to appeal. It was also accepted to be permissible by Mr Davenport, and I agree with it. Given that the SDT clearly took the Appellant's evidence on this topic into account and was prepared to assume that it was reliable, I cannot see any error in this regard.

**Further grounds of appeal which were pursued by the Appellant**

203. The additional grounds which Mr Davenport left open but did not develop orally were as follows:

- i) That the SDT cited and placed weight on points in the judgment of Flaux J which had not been cited in argument or put to Mr Gray (Ground 2.1). I have dealt with this issue above. The position was that the SRA's case reflected Flaux J's analysis and approach, with one exception – the findings on the issue of Leading Counsel's knowledge and beliefs - which issue, the SRA said, did not arise. The SRA highlighted certain key passages in its submissions but that did not mean that the passages which it did not specifically highlight were irrelevant and/or did not form part of the evidence before the SDT. I do not consider that any unfairness was caused to the Appellant by the SDT's approach in this regard. The findings of Flaux J were based on evidence and cross examination of him at the March 2015 Hearing and he gave evidence and was cross examined again before the SDT. He had a fair opportunity to deal with the case against him and many of the points from the judgment of Flaux J to which the SDT referred were irrefutable in any event, given that they were demonstrated by the documents and/or the Appellant's admissions.
- ii) That the SDT did not address its mind to whether the Third Affidavit was *deliberately* misleading as it needed to in order to find a breach of Outcome 5.1 (Ground 3.1). It did. This is plain from the SDT's reasons. As I have pointed out, in relation to Allegation 1.1 the first part of its findings dealt with "*the facts known by the Respondent prior to him swearing the Third Affidavit*" ([44.29]) before considering the Appellant's explanation ([44.31] and [44.32]) and the text of the impugned paragraphs of the Third Affidavit ([44.33]). It later found that Allegation 1.1 involved dishonesty on the part of the Appellant, contrasting what he knew with what he said in the Third Affidavit ([49.11.1(a)-(c)]).
- iii) That the SDT failed to have any or any adequate regard to the fact that the wrongly dated transcripts were mistakenly exhibited to the Third Affidavit in error when the Appellant's intention had been to exhibit correctly dated transcripts (Ground 4.1). The SDT did have regard to this point in coming to its decision. The point was not in dispute and the exhibiting of the wrongly dated transcript was not relied on by the SRA. The point was expressly referred to by the SDT at [44.23] in noting Mr MacDonald's submission on the point.
- iv) That the SDT's decision was plainly wrong in the sense that no reasonably tribunal could have come to it (Ground 1.6). It will be quite apparent that I disagree with this contention. It seems to me that the case against the Appellant was very strong and it is unsurprising that the SDT upheld it.

### **The challenge to the SDT's decision on costs**

204. The issue under in relation to costs was whether there should be a reduction in the costs claimed (£42,525) to reflect the fact that Allegation 1.4 had not been upheld. The SDT set out the competing arguments and decided as follows:

*“63. The Tribunal assessed the costs for the hearing. The Tribunal had heard the case and considered all of the evidence. The Tribunal noted that no claim had been made by the Applicant for day six of the hearing or for the time spent defending the Respondent’s unsuccessful application for a stay of proceedings. The Tribunal rejected Mr MacDonald’s submissions that costs should be reduced to reflect the fact that Allegation 1.4 was found not proved. Costs did not follow the event in regulatory proceedings, and it was not advanced on the Respondent’s behalf that Allegation 1.4 had been improperly brought.*

*64. Weighing all of the attendant circumstances in the balance, the Tribunal determined that the costs claimed were reasonable and proportionate thus awarded the same in full.”*

205. The SDT has a wide discretion as to what orders it makes in respect of costs. In my view it was entitled to look at matters in the round, as it did, and this was a permissible exercise of its discretion.

### **Conclusion**

206. For all of these reasons the appeal is dismissed.