

IN THE MATTER OF THE CHARTERED INSTITUTE OF ARBITRATORS' DISCIPLINARY
TRIBUNAL
B E T W E E N:

CHARTERED INSTITUTE OF ARBITRATORS

-and-

ANDRIY ASTAPOV

DECISION OF THE TRIBUNAL

1. Introduction

1.1 This Decision follows a disciplinary hearing pursuant to a complaint brought under the Bye-Laws of the Chartered Institute of Arbitrators (the Chartered Institute) against Mr. Andriy Astapov, Fellow of the Chartered Institute, by Mr. Louis Flannery, Fellow of the Chartered Institute, alleging misconduct in the course of professional dealings between them and their respective law firms.

1.2 Misconduct is a defined term which relevantly includes, by paragraph 15.2(1) of the Bye-Laws:

“Conduct which is injurious to the good name of the Institute [which], renders a person unfit to be a member of the Institute or is likely to bring the Institute into disrepute”.

1.3 Pursuant to paragraph 6 of the Schedule to the Bye-Laws, a complaint is to be referred initially to the Professional Conduct Committee (PCC) which is to investigate and, if of opinion that the matter is significant and/or discloses prima facie evidence of misconduct, may further investigate and:

- (1) request the Board of Management to appoint a Presenter and establish a Disciplinary Tribunal; and
- (2) refer the complaint to the Presenter so appointed for referral to a Disciplinary Tribunal.

- 1.4 The Chairman and Members of the Disciplinary Tribunal (the Tribunal) were accordingly appointed and Mr. Paul Newman of Counsel was appointed as the Case Presenter.
- 1.5 On 23 September 2014 the Tribunal was presented with a copy of the disciplinary charges against Mr. Astapov drawn up by Mr. Newman, together with two files containing (1) Case Summary, witness statements and exhibits and other documents and (2) redacted witness statements and exhibits which had been placed before the PCC. The Tribunal was also presented with a letter from Mr. Newman proposing that it should give directions leading to a substantive hearing in the matter, to include provision for a response from Mr. Astapov.
- 1.6 On 10 November 2014, after consulting with Mr. Astapov and Mr. Newman, the Tribunal directed that Mr. Astapov should submit his response to the complaint by 30 January 2015. This date was subsequently extended to 1 April and then to 15 April 2015. The date for the hearing was fixed as 29 May 2015.
- 1.7 On 21 January 2015 the Tribunal received by email from Mr. Charles Samek QC, Counsel for Mr. Astapov, a challenge contending that the presentation of the case by Mr. Newman was unfair and in breach of Article 6 of the European Convention on Human Rights (ECHR) and seeking a direction that Mr. Newman be removed as Presenter and that the present Tribunal members should recuse themselves. The email set out extensive grounds and authority upon which the application was based.
- 1.8 The Tribunal carefully considered the challenge, including a response from Mr. Newman, and on 10 February 2015 issued its Decision rejecting the challenge and reserving its decision on costs of the application.
- 1.9 Thereafter Mr. Astapov's response was submitted on 17 April 2015 together with two witness statements.
- 1.10 On 25 May 2015 the Tribunal issued further directions for the hearing which accordingly took place at the Chartered Institute, Bloomsbury Square, London, WC1 on 29 May 2015, when Mr. Newman acted as the case presenter on behalf of the Chartered Institute and Mr. Charles Samek QC represented Mr. Astapov.

2. The Disciplinary Proceedings

2.1 The PCC referred the complaint to this Tribunal. The Tribunal has been provided with redacted copies of the material before the PCC including two witness statements of Mr. Flannery, one from Mr. Astapov and one from Mr. Ivan Lishchyna. For these disciplinary proceedings Mr. Flannery produced a new witness statement (referred to as his first witness statement) with exhibited documents. The charges are further supported by the witness statement of Ms. Anna Korneva.

2.2 The case presenter drew up the following disciplinary charges against Mr. Astapov:

- (1) From about 25 November 2011 Mr. Astapov falsely represented that a sum of EUR 10,000 had been paid to an expert, namely Dr. Vinnitsky whereas it had in fact been paid into a Seychelles Offshore Account of Mr. Astapov's law firm and no payment whatsoever had been made to Dr. Vinnitsky; and/or
- (2) Mr. Astapov wrongfully allowed Stephenson Harwood (SH) to believe and proceed on the basis that a payment had been received by Dr. Vinnitsky, whereas he knew or ought to have known that no such payment had been received by Dr. Vinnitsky but was in fact held in an Offshore Seychelles bank account controlled by Mr. Astapov's firm [particulars (i)-(vii) provided].
- (3) The representation made by Mr. Astapov in the email of 19 January 2012 timed at 9:16 am that he or his firm had managed to force Dr. Vinnitsky to return the EUR 10,000 was false, given that Dr. Vinnitsky had not received EUR 10,000 or any sum in this regard and hence could not have been forced to return that sum (or any sum) contrary to what had been falsely alleged by Mr. Astapov
[particulars provided].
- (4) On or about 19 January 2012 Mr. Astapov falsely represented that EUR 10,000 had been paid to Professor Kucheriavenko as a retainer
[particulars (i)-(iii) provided].

2.3 The disciplinary charges further state that the above allegations, both when two or more of them are taken together or when considered individually, constitute misconduct on the part of Mr. Astapov contrary to paragraph 15.2(1) of the Chartered Institute's Bye-Laws, in that his conduct in respect of what is alleged under each of those paragraphs was in each instance:

- (1) Injurious to the good name of the Chartered Institute; and/or

- (2) Likely to bring the Chartered Institute into disrepute; and/or
- (3) Of such gravity as to render Mr. Astapov unfit to be a member of the Chartered Institute.

2.4 Mr. Astapov's response to the disciplinary charges was provided by Astapov Lawyers (AL) on 17 April 2015 and is supported by additional witness statements from Mr. Andriy Astapov and Mr. Ivan Lishchyna.

3. The Hearing

3.1 For the hearing the Tribunal was provided with a file containing the following documents:

- (1) Disciplinary charges against Mr. Astapov.
- (2) Case Summary on behalf of the Chartered Institute drawn up by Philip Newman dated 12 September 2014.
- (3) Witness statement of Louis Kruschev Flannery dated 7 August 2014.
- (4) Exhibit LKF1 to Mr. Flannery's witness statement, consisting of correspondence referred to therein.
- (5) First witness statement of Anna Korneva dated 17 July 2012.
- (6) Exhibit AK1 comprising exhibits to Ms. Korneva's first witness statement.
- (7) Letter from Mr. Flannery dated 17 July 2012, letters from the Chartered Institute dated 30 April 2013 to Mr. Flannery and Mr. Astapov and Notice of Appointment of Mr. Newman.
- (8) Copy of the Royal Charter, the Bye-Laws and Schedule to the Bye-Laws.

3.2 The Tribunal was also provided with a file containing the following documents as placed before the PCC, some redacted as follows:

- (1) Witness statement of Louis Kruschev Flannery dated 17 July 2012 (redacted for material no longer relevant) together with Exhibit LKF1 containing correspondence and other documents referred to therein.
- (2) First witness statement of Andriy Astapov dated 21 September 2012 (similarly redacted) together with Exhibit AA1 containing documents referred to therein.
- (3) First witness statement of Oleg Malskiy dated 21 September 2012 (similarly redacted) together with Exhibit OM1 containing documents referred to.

- (4) First witness statement of Ivan Lishchyna dated 21 September 2012 together with Exhibit IL1 containing documents referred to therein.
 - (5) Second witness statement of Louis Kruschev Flannery dated 11 October 2012 (similarly redacted).
- 3.3 The Response of Mr Astapov served on 17 April 2015 was accompanied by further witness statements as follows:
- (1) Second witness statement of Andriy Astapov dated 17 April 2015.
 - (2) Second witness statement of Ivan Lishchyna dated 16 April 2015.
- 3.4 At the hearing Mr. Newman and Mr. Samek each made short opening statements including reference to the evidence and the relevant law. Mr. Newman then called Mr. Flannery and Ms. Korneva in support of the case of the Chartered Institute. Their written evidence was taken as read and they were cross-examined and re-examined. Mr. Samek then called Mr. Lishchyna, Mr. Astapov and Mr. Malskiy. Their written evidence was also taken as read and they were cross-examined and re-examined.
- 3.5 Each witness was invited to and did make a declaration as to the truth of his or her evidence. The members of the Tribunal put additional questions to the witnesses. At the conclusion of the hearing Mr. Newman followed by Mr. Samek made brief closing addresses.
- 3.6 A transcript of the hearing was taken. It was agreed that both counsel would supplement their closing addresses in writing after receipt of the transcript, to be provided to the Tribunal by 8 June 2015, subsequently extended to 11 June 2015. The Tribunal informed the parties that its decision would be delivered in writing.

4. Narrative

- 4.1 The complaint which gives rise to the disciplinary charges is brought by Louis Flannery, a Solicitor, England & Wales and a Partner of the London law firm Stephenson Harwood. The Respondent to the charges is Andriy Astapov, a Managing Partner and Head of Dispute Resolution at AL, based in Kyiv, Ukraine. Other persons involved in this Narrative are:

Tatiana Minaeva, Associate of Stephenson Harwood
Anna Korneva, Paralegal assisting Ms. Minaeva
Olga Moore, Paralegal assisting Mr. Flannery

John Fordham, Head of International Arbitration Group, Stephenson Harwood.

Oleg Malskiy, Managing Partner of the Kyiv Office at AL

Ivan Lishchyna, Senior Associate at AL

- 4.2 In late 2009 Mr. Flannery was acting for an individual client in relation to legal actions which included an ICSID Arbitration brought against the Republic of Kazakhstan involving issues of Kazak tax law. Tatiana Minaeva, a Russian speaker who had been leading the search for an appropriate expert, met Mr. Astapov at a Law Conference in Moscow in September 2011. They discussed the need for an expert in Kazak Tax Law and in October 2011, after discussion with Mr. Flannery, Ms. Minaeva contacted AL. She received a response from Mr. Lishchyna. Ms. Minaeva then sent Mr. Lishchyna the detailed questions on which an expert opinion was needed. The exchanges also involved Ms. Anna Korneva, another Russian speaker at SH, and were in the Russian language.
- 4.3 Mr. Lishchyna sent the name of a proposed expert, Dr. Vinnitsky, with his full CV and a statement that the overall price of the project would be EUR 30,000 (1/57)¹. Mr. Lishchyna, after inquiry, confirmed that this price would be capped (1/62). This was followed, on instructions, by enquiries from Ms. Minaeva as to the make up of the proposed fee and whether it could be reduced (1/64). After further exchanges, Mr. Lishchyna emailed on 11 November 2011 to say that the expert was prepared to accept a fee of EUR 20,000 but would need a sum of at least EUR 10,000 as a retainer for commencing the research (1/70). All of these messages were copied to Mr. Astapov. As later transpired, most of what Mr. Lishchyna had passed on regarding the proposed fee was a fiction, seemingly invented by Mr. Lishchyna, since no such negotiations had ever taken place with Dr. Vinnitsky (see paragraph 4.12 below).
- 4.4 On 21 November 2011 Ms. Korneva emailed Mr. Lishchyna requesting him to instruct the expert to prepare the report, which should not be more than 5-10 pages, and requesting account details for the money transfer (1/72). On 22 November Mr. Lishchyna sent an invoice from "AL Law Ltd" for EUR 10,000 giving an address in Seychelles and bank transfer details with an address in Nicosia, Cyprus (1/75,76). On 24 November 2011 Mr. Lishchyna sent an email saying that "*according to our accountants we have so far not received the EUR 10,000 retainer ...*" (1/77). The

¹ References are to the main paginated bundle of documents.

following day, however, Ms. Minaeva emailed to say that she was informed that the requested advance *"has been transferred to professor [sic] Vinnitsky"* (1/77). Each of the latter emails was copied to Mr. Astapov.

4.5 On 30 November 2011, Mr. Astapov himself emailed Ms. Minaeva to say that *"our Russian colleague has started to 'wriggle' in providing his legal opinion after he has received the documents and found out who were the persons involved"* (1/79). On the same day Ms. Korneva received a call from Mr. Lishchyna also passing on concern from Dr. Vinnitsky (1/81). After further exchanges Mr. Lishchyna sent an email on 1 December 2011 (1/88) stating that Dr. Vinnitsky was now reluctant to produce a report, after discovering who were the parties in the case, but that another expert had been found, Professor Kucheriavenko of the National Law Academy of Ukraine. Ms. Minaeva responded the same day, pointing out that time was very short, asking about the new expert's rate and suggesting transfer of the money paid to Dr. Vinnitsky (1/90). Mr. Lishchyna responded stating that the budget was the same and the money could be transferred (1/90). Ms. Minaeva inquired whether the *"new guy"* would start working without waiting for the money (1/91). The foregoing messages were in Russian and are translated in Mr. Flannery's first witness statement at paras. 56-60.

4.6 Mr. Astapov, to whom the foregoing communications had been copied, then emailed directly to Ms. Minaeva, in English, later on 1 December 2011, to say (1/91):

"I am sure this will not be a problem ... also Ivan told me the new guy is ready to work im-ly". [immediately]

4.7 Ms. Minaeva accordingly approved the new expert, still on 1 December 2011 (1/91), and on 5 December 2011 Mr. Lishchyna forwarded the text of the new expert's report to Ms. Minaeva, in Russian, with an amended version being sent later the same day (1/92-102). However, after considering the report with Counsel, it was concluded that the report could not be used. Accordingly on 14 December 2011 Mr. Flannery sent an email to Mr. Lishchyna (1/103), copied to Mr. Astapov, telling him of the decision and saying that there was going to be an issue with the client as to payment. He asked for confirmation of precisely how much the expert's invoice was for.

4.8 Nine days later, on 23 December 2011, Ms. Minaeva sent a reminder to Mr. Lishchyna (1/104), copied to Mr. Astapov. In the absence of any response Mr. Flannery sent a further reminder, this time directly to Mr. Astapov, on 5 January 2012 to which Mr. Astapov responded on 8 January 2012 stating that *"I believe we made a*

downpayment after receiving 10 K from you in the same amount in order to fix replacement of an expert" and that he would check and revert (1/105). After a further reminder directed to Mr. Astapov on 13 January 2012 (1/105) Mr. Astapov responded in a long email of 19 January 2012 (1/107) stating, *inter alia*, that the EUR 10,000 paid to Professor Kucheriavenko could not be returned but Astapov's lawyers would not charge any amount for their fees. The email also states that AL had "*managed to force*" Dr. Vinnitsky to return the EUR 10,000 advanced, which amount had been paid to Professor Kucheriavenko. As later transpired, this email was full of untruths. However in the two statements dated 16 and 17 May 2015, the Tribunal was informed that the email of 19 January 2012 had been drafted and sent, in Mr. Astapov's name, by Mr. Lishchyna who freely admitted at the hearing to the untruths contained in the email.

- 4.9 Mr. Flannery responded to the email of 19 January 2012 on the same day (1/109) expressing surprise that the expert opinion could be worth EUR 10,000 and asking for copies of all exchanges and confirmation that the expert had been paid. Mr. Astapov responded on 20 January 2012 (1/110) in a long email in effect re-stating the position after "*having looked into story once again*" but stating that to recover any of the fee it would be necessary to travel to Kharkov to talk to Professor Kucheriavenko. Clearly the exchanges at this point were on the basis that the problem with repayment lay with Professor Kucheriavenko, who was holding the money which Mr. Flannery sought to have repaid. On 23 January 2012 Mr. Flannery wrote again to Mr. Astapov (1/112) asking, in plainer terms, for proof of the payments and transfers. The email also asked for confirmation that AL Law Ltd, to which the original EUR 10,000 had been paid, was beneficially owned by Dr. Vinnitsky. After a reminder of 6 February 2012 (1/113) and in the absence of what he regarded as a proper response, Mr. Flannery wrote to Mr. Astapov on 28 February 2012 (1/115) summarising what he understood to be the facts as conveyed to SH, and asking for Mr Astapov's comments. On this occasion Mr. Astapov himself responded very promptly, but in dismissive terms and with no comment on Mr. Flannery's email (1/116).
- 4.10 In March 2012 Olga Moore, a Ukrainian paralegal with SH, contacted Professor Kucheriavenko without the knowledge of AL. Professor Kucheriavenko signed a statement confirming that he had not received any money from any source in respect of the work carried out. He stated that the figure of US\$ 5,000 had been mentioned by Mr. Lishchyna but was not an agreed figure and had not been paid (1/117). On 6 March 2012 Mr. Malskiy of AL, who had not previously been involved, tried to speak

to Mr. Flannery and left a phone message for him, to which Mr. Flannery responded by email, also in dismissive terms (1/118). Mr Malskiy then emailed Mr. Flannery on 26 March 2012 to say that *"we were able to obtain 3,000 EUR back"* and would be happy to transfer this *"back to you"* (1/118). On 27 March 2012 John Fordham, SH's Head of Commercial Litigation and who had become involved on behalf of SH, emailed Mr. Astapov (1/119). The email stated that *"There must have been some misunderstanding at your end"* and then referred to the signed statement which had been obtained from Professor Kucheriavenko confirming that he had not received any money and therefore requesting return of the full EUR 10,000 paid to AL.

- 4.11 A response was received from Mr. Oleg Malskiy on 14 April 2012 (1/120) regretting *"this minor misunderstanding"* but enclosing another signed statement from Professor Kucheriavenko, bearing the date of 11 April 2012, stating that, as initially discussed, the fee was to be approximately US\$ 5,000. However, due to the urgency and complexity of the case, *"the total fee eventually amounted to US\$ 13,000"* and that the final fee was transferred to him in early 2012 after some delay due to technical reasons (1/122). It was later confirmed in evidence that US\$ 5,000 (not US\$ 13,000) had in fact been paid to Professor Kucheriavenko in cash and that he had signed the second statement which had been drafted and sent to him by Mr. Malskiy; and that *"in early 2012"* meant in early April 2012 (transcript p. 107).
- 4.12 After further inconclusive exchanges between Mr. Fordham and Mr. Malskiy, Ms. Korneva on behalf of SH obtained confirmation from Dr. Vinnitsky that he had not concluded any agreement with AL and had not received any funds. Dr. Vinnitsky confirmed this in his letter to Mr. Flannery dated 2 July 2012 (1/127, 128, 129). On 29 May 2012 (1/130) Mr. Astapov, apparently concluding that friendly relationships between their two firms was unlikely to materialise in the near future, sent to SH an invoice for legal services of AL between October and December 2011 in the amount of EUR 6,250 (1/130-133). It is notable that Mr. Astapov, in this last letter, identifies himself as Andrey Astapov Managing Partner, FCI Arb.
- 4.13 Mr. Flannery and SH then took the decision to proceed with a complaint to the Chartered Institute about the conduct of Mr. Astapov, Mr. Flannery and Mr. Astapov both being Fellows of the Chartered Institute. The complaint was supported by Mr. Flannery's first witness statement dated 17 July 2012. Mr. Astapov responded with his first witness statement dated 21 September 2012 in which he states that *"it was normal practice of AL to first accept money to its foreign account and then pay the*

expert the agreed price in cash or from its accounts in Russian or Ukrainian banks” (para. 19). However, after Dr. Vinnitsky indicated his change of position, serious efforts were made to locate the alternative expert, Professor Kucheriavenko, who agreed that the first draft of his opinion would cost US\$ 5,000 with a further US\$ 5,000 reserved for amendments and adjustments (para. 23, 24). It was only later that Mr. Astapov learned that Dr. Vinnitsky had not been paid and that the amount of EUR 10,000 remained in AL’s account (para. 25). During the period in which Professor Kucheriavenko produced his report and discussions took place with SH, Mr. Astapov was most of the time away from the Kiev office and did not monitor the developments (para. 28).

- 4.14 Mr. Astapov was under the impression that the money paid to Dr. Vinnitsky was returned and transferred to Professor Kucheriavenko (para. 28). Mr. Astapov then states that *“On 19 January 2012 I sent an email stating that the full amount at issue had been paid to Dr [sic] Kucheriavenko. At the time of writing this email I still believed that the price agreed with Dr [sic] Kucheriavenko was EUR 10,000, which had been paid to him in full”* (para. 30). It is then stated that in early February 2012 Mr. Astapov was told by Mr. Lishchyna that Professor Kucheriavenko had not in fact been paid and that the outstanding amount was US\$ 5,000 rather than EUR 10,000 (para. 33). Mr. Malskiy, the Managing Partner of the Kiev office, then became involved and wrote to SH suggesting that EUR 3,000 of the sum originally paid could be repaid. However, SH insisted on repayment of the full amount (para. 36, 37). Mr. Malskiy had asked Professor Kucheriavenko to sign a letter confirming the total price of the project reached US\$ 13,000, i.e. the full amount of the EUR 10,000, which he did. Mr. Astapov was not aware of this request or of the decision to send the signed letter, otherwise he would have objected (para. 39). The board of AL had recently decided to refund the full amount of EUR 10,000 together with interest to SH (para. 40).

5. Submissions of Counsel

- 5.1 In oral submissions, Mr. Newman contended that Mr. Astapov’s case was largely that he had been misled by one of his own colleagues but he had been copied in on a large amount of the material. He fairly accepted that he should have gone further and ascertained the truth. It was beyond belief that Mr. Astapov could have had no knowledge of events. The email of 19 January 2012 was sent from his own email address (1/107). It was very unsatisfactory to cast blame on a subordinate. The

evidence of Mr. Malskiy sought to explain the meaning of the document which he himself drafted referring to the payment to Professor Kucheriavenko, whereas the document clearly indicated that the full fee of EUR 10,000 had been received, which was consistent to Mr. Astapov's email to Mr. Fordham telling him the "*simple fact*" that the expert had been paid in full (1/130).

- 5.2 In his oral address, Mr. Samek asked the Tribunal to accept that Mr. Astapov had reasonably relied on what Mr. Lishchyna had told him. Mr. Astapov may have been stupid or negligent, but he was not dishonest. To make such a finding the Tribunal would need to conclude that the evidence of Mr. Lishchyna and Mr. Malskiy was untrue as well as Mr. Astapov's own evidence. The test was not one of hindsight but of looking at the matter as it stood at the time. It was not sufficient to conclude that Mr. Astapov ought to have made further enquiries. Mr. Astapov had given an explanation, that is, that he had taken matters in an emotional way and that is why he asked Mr. Malskiy to get involved. It was implausible that a man should throw away his reputation for the sake of such a modest sum.
- 5.3 The Closing Written Submissions of Mr. Newman contend that the first charge has plainly been proven. Once established it is for the Tribunal to determine the nature of the false representation and why it was made. The second charge is accepted as overlapping with the first charge, but contains an express assertion of wrongful conduct and of what Mr. Astapov knew or ought to have known. All the particulars asserted are established on the evidence. During the email exchange with Ms. Minaeva, Mr. Astapov had personally intervened, but failed to reveal that Dr. Vinnitsky had not been paid the alleged retainer, nor that the sum was held in the offshore account of Mr. Astapov's firm. Mr. Astapov in cross-examination has accepted that he should have investigated the matter and it was extraordinary that he did not undertake his own enquiries. The Tribunal should conclude that Mr. Astapov should have carried out his own independent check, which he accepted he failed to do.
- 5.4 The third charge constitutes allegations of fact which are established by the documentary and oral evidence. All the assertions concerning payment to Dr. Vinnitsky are established as factually correct and it is a matter for the Tribunal to determine the nature and gravity of the facts. Mr. Astapov accepted in cross-examination that he read the email of 19 January 2012 before it went out or would normally have done so. It is submitted that Mr. Astapov's evidence shows him to be

obfuscating and evasive. The explanation that Mr. Astapov was too busy to review or amend the email was frankly incredible in the light of the firm views otherwise expressed with great clarity.

5.5 The fourth charge is also purely factual and well established by the evidence. Mr. Astapov accepted that he had written the email dated 20 January 2012 which asserts that he *"had looked into the story once again"* (1/110-111). Mr. Astapov accepted that this did not include checking whether the money had in fact been paid to the experts. He accepted that he should have checked and now apologises for that. However, Mr. Astapov then asserts that when he found out that he had been lied to by Mr. Lishchyna and decided to ask Mr. Malskiy to take the issue over *"because it was becoming too emotional for me"* (transcript, p. 89), Mr. Astapov did not then supervise or take note of what Mr. Malskiy was doing and saying, to ensure that the false information imparted in earlier emails had been corrected. Nor did Mr. Astapov write to SH or Mr. Flannery to apologise when he found out the truth. He had failed to respond to Mr. Flannery's email of 28 February, claiming that *"I took it emotionally and I took it as unfriendly and hateful and my reaction was also emotional to that"* (transcript, p. 91).

5.6 Mr Newman noted that Mr. Samek, in his Closing Oral Submissions, had asked the Tribunal to find that Mr. Astapov had taken the emails from Mr. Flannery in an emotional way and that was why he had got Mr. Malskiy involved and in effect washed his hands of the whole affair. In Mr. Newman's submission, while a convenient defence, this came nowhere near to providing an answer to Mr. Astapov's conduct as elicited in the oral evidence. It was for the Tribunal to decide whether there has been misconduct and if so, to determine the sanction, taking into account any mitigation on the part of Mr. Astapov. The test under paragraph 15.2(1) was whether the conduct was injurious to the good name of the Chartered Institute or likely to bring the Chartered Institute into disrepute or of such gravity as to render Mr. Astapov unfit to be a member of the Chartered Institute. It was submitted that all the charges were clearly established and it was a matter for the Tribunal to decide the appropriate sanction.

5.7 In the written submission on behalf of Mr. Astapov, Mr. Samek emphasised that Mr. Flannery and SH had been prepared to drop their complaint if the money had been repaid and that at the heart of the dispute was a relatively small (petty in Mr. Flannery's words) sum of money. The matter had been blown up as a result of strong

feelings on both sides. Mr. Malskiy had been asked to become involved because Mr. Astapov feared he was becoming too emotional. On any view, the demand for the return of the full EUR 10,000 was inappropriate since it was clear some work had been done as instructed.

- 5.8 It was important for the Tribunal not to go outside the specific charges, which should be precisely framed. Further, as a fundamental principle of fairness, a charge of dishonesty should be unambiguously formulated and adequately particularised: Salah v GNC [2003] UKPC 80. The burden was on the Chartered Institute to prove each of the four charges.
- 5.9 Messrs. Astapov, Lishchyna and Malskiy had taken these proceedings extremely seriously. All three had come over from Ukraine to attend and give evidence in the proceedings. Mr. Astapov had accepted that his email of 19 January 2012 was misleading but that he reasonably relied on what Mr. Lishchyna led him to believe. He candidly accepted that with hindsight he ought to have double-checked later. But that was with the benefit of hindsight and he was entitled to trust and rely on his subordinate. The Tribunal was also invited to accept the evidence of both Mr. Astapov and Mr. Malskiy who explained that he had not consulted Mr. Astapov when asking Prof. Kucheriavenko to sign the letter in April 2012 and sending it on to SH. It had not been suggested that the payment made to Professor Kucheriavenko was connected to his signing the statement and this matter in any event did not form any part of the charges against Mr. Astapov.
- 5.10 Mr. Lishchyna, conversely, had confessed to lying to Mr. Astapov in regard to what was said in the email of 19 January 2012 and as regards the statements concerning Dr. Vinnitsky and Professor Kucheriavenko. His evidence had been unchallenged and the suggestion that the three witnesses had conspired to present false evidence to the Tribunal should be rejected. Mr. Malskiy was a man of good character who had no previous involvement in the matter. Mr. Flannery, conversely, was given too long answers indicative of his strength of feeling. Much of the evidence of Messrs. Astapov, Malskiy and Lishchyna were not challenged in evidence. If a witness's evidence was not accepted, it must be challenged and put to the witness so that he has a fair opportunity to deal with it, particularly where allegations of dishonesty were involved.

- 5.11 As regards Charges 1 and 2, it became clear in the course of the evidence that SH knew the Seychelles Account was not Dr. Vinnitsky's account and it was obvious that the account in question was that of AL. Furthermore, the person who had "*proceeded*" on the basis that the payment had been received by Dr. Vinnitsky was Ms. Minaeva, who was not called to give evidence. There was thus no evidence as to her belief or that SH did anything in reliance on the belief that the money had been paid to Dr. Vinnitsky.
- 5.12 The real issue in relation to charges 3 and 4 was the email of 19 January 2012 from Mr. Astapov. It was accepted that this email was misleading and contained a number of falsities for which Mr. Lishchyna had admitted responsibility. Mr. Newman's challenge on the basis that the drafting of the email showed Mr. Astapov and not Mr. Lishchyna to be the author was an unsound basis for a finding of dishonesty, which would require expert evidence. The Tribunal is thus being asked to accept that both Mr. Astapov and Mr. Lishchyna have given untruthful evidence. But there was no motive for Mr. Astapov to lie to SH; and the only rational or logical reason for Mr. Astapov to have lied was that he was repeating what Mr. Lishchyna had told him. When the truth was discovered Mr. Lishchyna was disciplined and it was not suggested this was only for the purpose of these disciplinary proceedings.
- 5.13 Mr. Astapov accepts that by February 2012 he knew Professor Kucheriavenko had not been paid. Mr. Malskiy had been brought in and Mr. Astapov was not responsible for dealings with Professor Kucheriavenko. By the time of the emails from Mr. Fordham, the expert had been paid and the relationship with SH was at an end. It is to be noted that Mr. Astapov is charged under paragraph 15.2(1) but is not charged under sub-paragraphs (2) or (3). There is thus no fall-back position. The only consideration for the Tribunal is whether, if any of the charges is made out, this renders Mr. Astapov "*unfit to be a member of the institute or (is) likely to bring the institute into disrepute*".
- 5.14 Should any of the charges be upheld, it is to be taken into account that Mr. Astapov is a man of good character, highly respected and well regarded in the CIS Arbitration community; has never been the subject of disciplinary proceedings; his reputation and that of his firm has already been irreparably damaged; the charges involve a petty sum of money which has been repaid in full; and credit is to be given for the admission of the falsity of the email of 19 January 2012. If any of the charges is made out the penalty should be proportionate to the charge. If found to have acted

negligently there should be no penalty or at most a reprimand or warning or an order to pay some of the costs. Any other penalty would be disproportionate.

6. Consideration of the issues

6.1 The Tribunal considers first the standard of proof required, as to which submissions have been addressed to the Tribunal as summarised above. The Schedule to the Bye-Laws under which these proceedings are brought provides, by paragraph 8.4 as follows:

"In determining the charge against the member, the Disciplinary Tribunal shall operate the civil burden of proof, namely, the balance of probabilities."

6.2 The requirement to apply the civil standard could be seen as inconsistent with any charge involving dishonesty, where it might be anticipated the higher criminal standard would be applicable, namely proof beyond reasonable doubt. Mr. Samek in his written submissions contended that despite paragraph 8.4 of the Schedule to the Bye-Laws, the authorities made clear that the higher standard of proof beyond reasonable doubt applied to disciplinary proceedings: see in Re D [2008] 1 WLR 1499, and despite the fact that Phipson on Evidence 18th Edition² regarded the point as moot. Mr. Samek relied on the speech of Richards LJ in R(N) v Mental Health Review Tribunal [2006] TB 468, which had been adopted by Lord Carswell in Re D, as follows:

"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability) but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities".

6.3 The Tribunal accepts Mr. Samek's submission and will accordingly approach the issues to be decided on the basis that, although the civil burden of proof is to be applied, in determining more serious accusations carrying with them more serious consequences, the stronger and more convincing must be the evidence on the allegation before it should be taken to be proved on the balance of probabilities.

² Para. 6-57.

6.4 Before considering the charges in detail it is appropriate to clarify what the Tribunal is to consider and the powers of the Tribunal in the event that the charges or any of them are found proved. First as the sanctions, para. 8.5 of the Schedule to the Bye-Laws provides that if the Tribunal finds that the charge is proved, it may decide to impose “no sanction” or to impose one or more of the following sanctions:

- “(1) to reprimand or warn the member as to his future conduct;
- (2) to suspend the member from membership of the Institute for a period not exceeding twelve months;
- (3) in the case of a member having chartered status, to withdraw that status without limit of time or for a specific period;
- (4) to expel the member from the Institute;
- (5) to make an appropriate order for costs in accordance with Schedule paragraph 8.6 below.”

6.5 Further, pursuant to para. 8.6 of the Schedule to the Bye-Laws, the Tribunal has discretion to recommend how the costs and expenses shall be borne. This provision stipulates that, in allocating the costs and expenses, the Tribunal

“shall take all circumstances into account including (but not limited to) the nature of the charge, the nature of the sanction and the conduct of the member during the course of the investigation prior to and during the hearing.”

6.6 Para. 9.8 of the Schedule to the Bye-Laws further provides that:

“In imposing any sanction under Schedule paragraph 8.5 above, the Disciplinary Tribunal shall be entitled to take into account any previous finding of misconduct made against the member.”

6.7 It is notable that, while paragraph 8.6 of the Schedule expressly requires the Tribunal to take into account “all circumstances ... including (but not limited to) the nature of the charge, the nature of the sanction and the conduct of the member ...”, such words are not expressly included in paragraph 8.5 of the Schedule. However, it is clear that they must apply equally to this paragraph, not least because of the reference in paragraph 8.6 to the “nature of the sanction”.

6.8 The point above is relevant because Mr. Samek emphasised in his oral and written submissions that the Tribunal’s “sole” function was to “hear and determine any charge of misconduct against a member of the Institute” (see paragraph 8.1 of the Schedule to the Bye-Laws). While the Tribunal had heard a considerable amount of evidence which ranged well outside the scope of the four disciplinary charges laid, Mr. Samek contended that it was important for the Tribunal to concern itself only

with seeing whether the specific charges were made out by the Chartered Institute: see *Ridge v Baldwin* [1963] 2 AER 66, *Strouthlas v London Underground* [2004] EWCA Civ. 402 and *Salha v GMC* [2003] UKPC 80.

- 6.9 In the view of the Tribunal, however, these cases go no further than to emphasise that a person charged is entitled to know with adequate particulars the charges which he faces and to have the opportunity to respond to them. There is no suggestion that such requirements have not been complied with in this case. If Mr. Samek's submission extends to suggesting that the Tribunal should disregard or not take into account other factors comprising the "*circumstances*" surrounding the precise charges, then the Tribunal, with respect, does not agree. In the Tribunal's view, all the circumstances surrounding the charges must be taken into account when addressing both the sanction, if any of the charges is found proved, under paragraph 8.5 and the disposition of costs pursuant to paragraph 8.6.
- 6.10 Considering now the first and second charges, both relate to the payment that was supposed to have been made to Dr. Vinnitsky which is now accepted as never having been made. In the view of the Tribunal the written and oral evidence submitted shows beyond question that AL in the persons of Mr. Lishchyna and Mr. Astapov were complicit in creating the impression that the money was to be paid to, and had been paid to, Dr. Vinnitsky. Mr. Samek drew attention to various documentary references suggestive of the money being paid, not directly to Dr. Vinnitsky but into an intermediary account. The Tribunal accepts that the evidence does not establish that SH was genuinely under the impression that the money had been transferred directly to Dr. Vinnitsky. They could and should have deduced from the invoice, indicating a Seychelles bank account in the name of AL LAW LIMITED, that the account was at least likely to be owned or controlled by AL. Indeed the subsequent questioning and requests for information by SH was, in the Tribunal's view, an indication that SH did not believe the money had been paid directly to Dr. Vinnitsky but had in fact gone through the account of AL Law. This much might have been deduced from Mr. Lishchyna's email of 24 November 2011 stating that the money had not yet been received "*according to our accountants*" (1/77).
- 6.11 However, it is equally clear that SH did believe that the money had been paid, directly or indirectly, to Dr. Vinnitsky as SH had been led to anticipate. This assertion, although now accepted as false, was persisted in by Mr. Lishchyna and Mr.

Astapov, the latter being copied into all the relevant emails and having had ample opportunities to correct the record. Not only did they assert that the payment had been made, which they both knew was false, or at the least Mr. Astapov ought to have known was false, they both persisted in the charade of pretending that the money was being recovered from Dr. Vinnitsky: see Mr. Astapov's response to Ms. Minaeva's enquiry of 1 December 2011 "*How quickly Vinnitsky can send the money back?*"; to which Mr. Astapov's response was "*I am sure this will not be a problem*" (1/91).

6.12 Thus the Tribunal considers it irrelevant whether SH believed that the money paid went directly to Dr. Vinnitsky or initially into an account controlled by AL. They probably suspected the latter but the important point is that they believed and were encouraged to believe that the money did reach Dr. Vinnitsky from whom the money had subsequently to be extracted, again a time-wasting fiction said to be invented by Mr. Lishchyna. Mr. Samek contended that the reference in Charge 2 to SH having been allowed to believe and "*proceed*" on the basis that the payment had been received by Dr. Vinnitsky was not made out, since the only person to proceed was Ms. Minaeva, who was not called. There was thus no evidence as to her belief or that SH did anything in reliance on such belief. In the view of the Tribunal it is clear that SH did proceed on the belief that Dr. Vinnitsky had been paid, this being on the basis, as SH had been induced to believe, that payment was a condition of the work proceeding, which was also false. Thus Mr. Samek's objection to this part of the charge has no substance and the Tribunal is satisfied and concludes that Charges 1 and 2 are made out.

6.13 It is appropriate at this point to review the wider "*circumstances*" surrounding these charges, although not expressly part of them. Thus, although the charade created by AL related eventually to the sum of only EUR 10,000, it is to be recalled that the initial proposal, which was entirely the invention of AL, was for the payment of the sum of EUR 30,000 (first witness statement of Andriy Astapov of 21 September 2012, para. 17; first witness statement of Ivan Lishchyna of 21 September 2012, para. 8), somewhat less of a trivial sum to demand in circumstances where, as subsequent events demonstrated, AL had no intention of paying the whole of this sum to the expert. The negotiation that then led to the further fictional agreement for the initial payment of EUR 10,000 was clearly on the basis that SH believed that the whole of this amount would be going to the expert. The charade was then spiced up further by the explanation given by Mr. Lishchyna in the email of 9 November 2011 that the fee

would involve the use of two assistants, both PhD candidates, who would work at a lower hourly rate (1/67). The negotiation was then rounded off with the agreement for a capped fee of EUR 20,000 and initial deposit of EUR 10,000 (1/70).

- 6.14 The point which emerges is that all this deception can only have been intended to persuade SH to pay over more money in circumstances where AL had no intention of paying the whole sum over to the expert in accordance with the story created by the false negotiations. This is evident from the fact that Dr. Vinnitsky had no knowledge of the negotiation being conducted supposingly concerning his fee (1/129). The suggestion that Mr. Astapov himself had no part in these events, which were all conducted by Mr. Lishchyna, cannot be accepted for reasons already given. In addition, Mr. Astapov states in his first witness statement of 21 September 2012, at paragraph 18, that following the request of SH for the initially quoted fee to be reduced:

“I instructed Mr. Lishchyna to lower the overall sum of the estimated expert's fees to EUR 20,000 considering that this would suffice for the submission of one expert opinion. However, I asked that an advance payment of EUR 10,000 would be made, covering the amount of the fee agreed with Dr. Vinnitskiy ...”.

- 6.15 Thus, Mr. Astapov was not merely in the picture but was controlling events. In the Tribunal's opinion these circumstances would be relevant to any sanction which the Tribunal has to consider.
- 6.16 Turning to the third charge against Mr. Astapov, it was freely admitted at the hearing that the representation in the email of 19 January 2012 as to forcing Dr. Vinnitsky to return the EUR 10,000 was false, given that no payment was ever made to him. Irrespective of who was the author of this email, it was sent in Mr. Astapov's name and he should be held liable for its content. The explanation by Astapov that he was too busy to verify the draft prepared for him was unconvincing. The email was sent out in his name. As a managing partner of AL he is responsible for any formal statements made on behalf of his firm and should have checked the truthfulness of the facts that were allegedly presented to him by Mr. Lishchyna.
- 6.17 Furthermore it was admitted that Mr. Astapov alone was the author of the email sent the following day, 20 January 2012, in response to Mr. Flannery's email in reply to the original misleading email of 19 January. Mr. Flannery's email of 19 January 2012 contained pertinent observations including the statement that:

“We were never advised that the second expert, curiously, would require precisely the same deposit as the first expert. Nor that this second deposit was also not-refundable”.

- 6.18 These statements, as Mr. Astapov ought to have been well aware, were all based on earlier untruths which it was clear SH had accepted at face value. Here was the opportunity for Mr. Astapov, now writing his own emails, to put the record straight. But he chose instead to ignore Mr. Flannery’s entirely reasonable inquiries.
- 6.19 Even if it is accepted that there was no intention on part of AL to appropriate the money which SH had paid over, and that AL thought it appropriate to retain a fee in return for assisting in the appointment of experts, it must be accepted that AL chose not to tell SH and to go about the arrangement in a non-transparent way. Then, while trying to avoid having to explain to SH what they had done, AL manoeuvred themselves into an even more awkward situation in which they failed to react honestly when further problems arose.
- 6.20 It is appropriate at this point to consider the “defence” offered by the statements of Mr. Lishchyna dated 16 April 2015 and Mr. Astapov dated 17 April 2015, to the effect that the incriminating email of 19 January 2012 was not written by Mr. Astapov himself but by Mr. Lishchyna. For reasons set out above, the Tribunal considers this issue to be of no relevance to the charges but it is clearly part of the circumstances giving rise to the charges. In the course of the hearing, Mr. Newman sought to analyse the email of 19 January 2012 and suggested that its drafting was more characteristic of Mr. Astapov himself than Mr. Lishchyna. Mr. Samek properly pointed out that such a contention ought to be supported by expert evidence and we agreed that this would not be a sound basis on which to form any view on this issue.
- 6.21 However, it is of considerable relevance, in the Tribunal’s opinion, that in his first witness statement in the PCC proceedings dated 21 September 2012, Mr. Astapov makes no mention of the email having been drafted for him. At paragraph 30 of that witness statement it is stated as follows:
- “On 19 January 2012 I sent an email stating that the full amount at issue was paid to Dr Kucheriavenko [sic]. At the time of writing of this email I still believed that the price agreed with Dr Kucheriavenko [sic] was EUR 10,000, which had been paid to him in full”.*
- 6.22 Likewise in the witness statement of Mr. Lishchyna of the same date, it is stated at paragraph 23, after reference to the events of December 2011, as follows:

“At that point in time I was very much occupied with other projects and did not pay much attention to the correspondence. In early February 2012 Mr Astapov suggested that I should go to Kharkiv to negotiate the lowering of Dr [sic] Kucheriavenko’s fee. At that moment I remembered that the outstanding amount was not EUR 10,000 as Mr Astapov believed but USD 5,000, i.e. the price of the initial draft of the opinion which Dr Kuchariavenko [sic] produced and that he had not been paid this amount. Mr Astapov was extremely displeased and punished me with a cut in my salary”.

- 6.23 Mr. Samek, on a number of occasions, contended that various statements in the evidence of Mr. Astapov and Mr. Lishchyna had not been challenged. It is right to say that neither of these witnesses was cross-examined on the basis that they had simply made up this story as a convenient way of avoiding the embarrassment of having to acknowledge the large number of untruths contained in the email of 19 January 2012. It must be borne in mind that these were not criminal proceedings and Mr. Astapov is not charged with a criminal offence. The hearing was not conducted in the same manner as a criminal trial and the Tribunal must make the best judgment it can in the circumstances. However, bearing in mind the discussion above as to the standard of proof and the “*strength or quality of the evidence*” required, the Tribunal does not feel it can reach any concluded decision on this issue. However, it remains the case that the Tribunal is satisfied that the third charge is made out and, as stated above, Mr. Astapov must be held responsible for statements made in his own name as well as on behalf of his firm including those contained in the email of 20 January 2012 admittedly written by Mr. Astapov himself and in circumstances where he was fully aware of what had been said to Mr. Flannery in the email of the previous day, 19 January 2012, and of the fundamental untruths contained therein.
- 6.24 The fourth Charge concerns the representation on or about 19 January 2012 of payment of EUR 10,000 to Professor Kucheriavenko as a retainer, which was again accepted as false as at 19 January 2012. Significantly, despite Mr. Astapov’s plea of reliance on Mr. Lishchyna as the author of the email in question, the topic of expert retainers was raised in Mr. Flannery’s responsive email and answered by Mr. Astapov himself on 20 January 2012 without correcting the impression that Mr. Flannery clearly had as to this alleged payment. Even ignoring the email of 20 January 2012, Mr. Astapov’s position as a managing partner should have led him to check the facts allegedly presented to him.
- 6.25 The story concerning the eventual payment to Professor Kucheriavenko is summarised above but does not impact on the untruth of the statement made on 19 January 2012. The decision to make some payment to the Professor was no doubt the

result of embarrassment over the signed statement sent to AL on 27 March 2012 by Mr. Fordham, revealing that SH were aware that no payment at all had been made. The manner in which AL did make limited payment to Professor Kucheriavenko and produced a “counter-statement” from him was almost comical in its crudity. However it had no effect on the initial untruth which was the subject of the fourth charge. It is also convenient here to deal with the contention that Mr. Astapov handed conduct of the case to Mr. Malskiy because he was becoming too emotional. It is true that certain of Mr. Astapov’s emails seem to suggest an emotional response to the events. But the Tribunal cannot seriously entertain the suggestion that Mr. Astapov’s ability to respond in an honest manner had become impaired by emotion. The statements suggestive of this reaction were mere bluster, no doubt employed to avoid the embarrassment of facing up to the truth.

- 6.26 The detailed account of the eventual limited payment to Professor Kucheriavenko is again part of the circumstances although not part of the actual charges. In this regard it must be recalled that Mr. Malskiy had emailed Mr. Flannery on 26 March 2012 (1/118) stating that:

“we were able to obtain 3,000 EUR back. We will be happy to transfer them back to you”.

- 6.27 It was thus in response to this untruth that Mr. Fordham replied on the following day to Mr. Astapov, enclosing a copy of the signed statement from Professor Kucheriavenko confirming that he has not received any money at all in relation to his draft expert report. The letter (generously) states that *“there must have been some misunderstanding at your end ...”*.

- 6.28 There was then an apparent silence until 14 April 2012 when Mr. Malskiy, also expressing regret at *“this minor misunderstanding”*, sent to Mr. Fordham the further statement signed by Professor Kucheriavenko containing the somewhat ambiguous statement that *“the final fee amount was received by me in full. As far as I understand it was transferred to me in early 2012, however, that amount reached me with some delay due to technical reasons”*.

- 6.29 The actual events which occurred between Mr. Malskiy’s two emails of 26 March 2012 and 14 April 2012 were revealed in the course of the evidence. First, in Mr. Malskiy’s witness statement dated 21 September 2012 in paragraph 4 it is said:

“On 26 March 2012 I started to negotiate with SH, suggesting at first that some EUR 3,000 could be repaid, believing that after the extended correspondence with Mr Flannery the possibility of further co-operation with SH unlikely and seeking to compensate at least a part of EUR the time and efforts of AL spent for the location of two experts and the aid to SH in preparation of the expert opinion. However, SH apparently was not prepared to accept anything less than the repayment of the full amount of the initial payment”.

- 6.30 The claim to have obtained EUR 3,000 back was an obvious fiction but Mr. Malskiy does not refer to this in his statement. In his oral evidence to the Tribunal³ it emerged that in early April 2012 Mr. Malskiy himself had travelled to Kharkov to meet Professor Kucheriavenko where an agreement had been reached that he would be paid US\$ 5,000 and would sign a new statement acknowledging the payment. The statement was later drafted by Mr. Malskiy and sent to Professor Kucheriavenko with a translation dated 11 April 2012. The money was paid a few days before this.
- 6.31 The pretence that Professor Kucheriavenko had been paid at some earlier date, in order that the money might have been recovered from him by 26 March 2012, was a crude attempt by Mr. Malskiy to paper over the obvious cracks appearing in the story. Mr. Fordham when sending the earlier statement of Professor Kucheriavenko on 27 March, had offered a way out in terms of *“some misunderstanding”*. However, instead of coming clean and telling Mr. Fordham what had happened, Mr. Malskiy’s email of 14 April persisted in the crude fiction he had created.
- 6.32 Any suggestion that Mr. Astapov had by then washed his hands of the story was dispelled by Mr. Astapov’s email of 29 May 2012. Having had plenty of time to consider the matter, he decided to bill SH for the time which AL had allegedly spent on the engagement of experts between October and December 2011. The email added that:
- “it appears that as you are not able to accept the simple fact that this unfortunate amount has been actually paid to the expert as confirmed by his statement”.*
- 6.33 This was indeed the last straw which finally convinced SH and Mr. Flannery to proceed with their complaint to the PCC. Mr. Flannery then produced his first lengthy witness statement with full exhibits. This may have been what finally persuaded Mr. Astapov to authorise the full repayment to SH, by coincidence 2 days before his statement submitted to the PCC.

³ Transcript pp.105-107.

6.34 The Tribunal thus accepts, that on the proper application of the burden of proof, the four charges against Mr. Astapov have been established to our satisfaction and it falls to consider what sanction is appropriate having regard to the gravity of the charges and to the circumstances surrounding the charges.

7. Sanction

7.1 The list of available sanctions is set out in para 6.4 above. It is clear that the appropriate sanction must depend upon the gravity of the charges found to be proved including, for the reasons set out above, the circumstances surrounding the charges.

7.2 As submitted by Mr. Samek and not contested by the Chartered Institute, Mr. Astapov has not previously been the subject of any disciplinary charge before the Chartered Institute or any other professional body. Mr. Samek contended that AL and Mr. Astapov personally have good standing in the CIS arbitration community. This was not supported by any independent evidence but there was equally no evidence to the contrary. The Tribunal notes that the money was repaid to SH with interest so that SH's client, to whom the money belonged, suffered no loss. The Tribunal takes note of these mitigating factors and also takes note of the date and circumstances in which the money was repaid as set forth in para 6.33 above.

7.3 While in the overall result SH and Mr. Flannery have suffered no direct financial loss as a result of the events described, it cannot be said that they were unaffected. We have not been addressed on the effects which the foregoing events had on either SH, Mr. Flannery and others within the firm. But we have seen the events in which they found themselves caught up and noted their understandable efforts to achieve a settlement which would not involve taking the matter further. Mr. Samek seized on Mr. Flannery's acceptance that the matter would not have been pursued had the money been repaid, as an indication that the matter was not of great moment. In our view the reluctance to bring a complaint of professional misconduct is both understandable and laudable, given the serious consequences for both parties. We entirely reject the suggestion that this is indicative that the events in question were not grave and serious. We are in no doubt that they were.

7.4 Once Mr. Flannery and SH decided they had to take the matter further the record demonstrates the amount of work and effort needed to bring the case to a hearing.

Although we have not been presented with any details, we were informed by Mr Astapov himself (email dated 20 October 2014) of a disciplinary complaint to the Chartered Institute brought by Mr. Astapov against Mr. Flannery, which Mr Astapov initially requested should be dealt with simultaneously with the present hearing. It transpired that Mr. Astapov's complaint had been rejected by the PCC and has not been pursued before us. However it is clear that the events described, for which Mr. Astapov and AL have full responsibility have imposed a grave burden on both Mr. Flannery and SH.

- 7.5 In our view the members of AL showed a remarkable and consistent lack of candour throughout the events described above, from October 2011 onwards. They were party to repeated untruths and demonstrated a complete disregard for any concept of good faith. They indulged in repeated cover-ups to avoid telling the truth, and manufactured a web of lies which got worse as earlier untruths began to be revealed. The professional conduct of the members of AL amounted to systematic deception.
- 7.6 Mr. Andriy Astapov is the managing partner of the firm, which also carries his name. We are in no doubt that he knew of the manner in which his colleagues considered it appropriate to conduct their business; and there were many instances in which he was clearly a willing participant in, if not the instigator of the deceptions being practised. We have set out in sections 5 and 6 above the occasions on which relevant emails were copied to Mr. Astapov and on which Mr. Astapov himself contributed to the email traffic, clearly on the basis of having knowledge of the matters being discussed. We consider that Mr. Astapov is to be held fully responsible for the conduct of the firm, irrespective of the particular individual acting for the firm.
- 7.7 The definition of Misconduct in the Bye-Laws includes conduct "*which is injurious to the good name of the Institute [which], renders a person unfit to be a member of the Institute...*". As regards the possible effect on the good name of the Chartered Institute, it may be said that the events described herein were private and would not therefore have any effect on the Chartered Institute itself. However, it is unlikely that these events will remain confidential for long. Para. 12 of the Schedule to the Bye-Laws provides that the Board of Trustees is empowered to publish a report of any such proceedings which may identify the persons taking part. The Chartered Institute has in the past published both a summary and the full decision of a disciplinary

tribunal where issues of importance were raised⁴. Of more importance is the fact that membership of the Chartered Institute is part of Mr. Astapov's professional standing, representing as it does the highest ethical standards. We must ask if the Chartered Institute would be injured by being seen as associated with the name of Mr. Astapov and his firm. In our view the answer must be affirmative.

- 7.8 We note that the website of AL at astapovlawyers.com lists, as part of its philosophy "Ethics". The website states:

"We are a firm that takes ethics seriously. Our ethics are the foundation of long-term relationships of trust and confidence with our clients. We value these relationships most; we value our ethics most."

- 7.9 In January 2011 The Legal 500 announced on its website that Mr. Andriy Astapov had been admitted as a Fellow of the Chartered Institute. We must conclude that it is inappropriate that Mr. Astapov and his firm should continue to have any connection with the Chartered Institute while their conduct so clearly falls far below their own proclaimed standards and below any level which can be considered acceptable. Mr. Andriy Astapov is unfit to be a member of the Chartered Institute.

- 7.10 Given these conclusions, and pursuant to para. 8.5 of the Schedule to the Bye-Laws, we have considered whether an appropriate sanction might be a substantial period of suspension during which Mr. Astapov and his firm would have the opportunity to take appropriate corrective action. However, the maximum period of suspension is stated to be one year, which we consider wholly insufficient, particularly as this case has been ongoing for nearly four years.

- 7.11 It is appropriate also to note that para. 9.8 of the Schedule to the Bye-Laws provides that in imposing any sanction under Schedule para. 8.5 above, the Disciplinary Tribunal shall be entitled to take into account any previous finding of misconduct made against the member. However, while this provision might lead to a harsher sanction being required, the absence of any such previous finding is not a ground for mitigating what is otherwise to be regarded as the proper sanction.

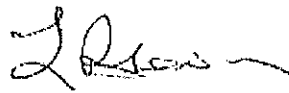
- 7.12 We have therefore come to the conclusion that the only appropriate penalty is that Mr. Astapov be expelled from the Chartered Institute. In reaching this conclusion we

⁴ See e.g. a summary of the disciplinary findings against the former President of the Chartered Institute, John Campbell QC that was reported in Arbitration Vol. 77 No. 4 at p. 495 where a web-site reference was provided to the full decision.

do not rule out the possibility that Mr. Astapov and AL may decide in future to adopt a mode of professional conduct which does match the statement made on their website. Should this be the case there would be no reason why a fresh application for membership should not be made at some future date. That is not, however, a matter which can affect the decision we have to make, which is that expulsion should take effect immediately.

- 7.13 We consider also that Mr. Astapov should contribute to the costs incurred by the Chartered Institute in conducting these disciplinary proceedings. We take account of the fact that Mr. Astapov will have to pay his own costs of representation. On this basis we consider that Mr. Astapov should pay to the Chartered Institute a contribution towards its costs of GBP 25,000.

DECISION GIVEN THIS 20TH DAY OF JULY 2015



Mr Leslie Sewell, Lay Member.



Dr Georg von Segesser FCI Arb



Prof John Uff CBE QC FCI Arb (Chairman)