SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 10086-2008

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

JOHN RHYS DAVIES Respondent

Before:

Miss T. Cullen (in the chair)
Mr J. N. Barnecutt
Mr M. G. Taylor CBE DL

Date of Hearing: 26th and 27th February 2013

Appearances

Jayne Willetts, Solicitor Advocate of Jayne Willetts & Co, Cornwall House, 31 Lionel Street, Birmingham, B3 1AP, for the Applicant.

The Respondent appeared for the preliminary issue, his adjournment application and represented himself. He was not present for the substantive hearing.

JUDGMENT

Allegations

1. The allegations against the Respondent, John Rhys Davies on behalf of the Solicitors Regulation Authority as amended with the consent of the Tribunal in respect of allegation 1.1 were that:

1.1 He claimed costs that he knew could not be justified in the administration of the estate of Ms N deceased (which was an allegation of overcharging and of dishonesty);

1.2 He utilised client monies for his own purposes (which was an allegation of dishonesty);

1.3 He failed to disclose material facts to his client (Mrs P) as to the progress of her case and in doing so contrary to Practice Rule 1 of the Solicitors Practice Rules 1990 ("SPR 1990") conducted himself in a manner that was likely to compromise or impair his integrity; his duty to act in the best interests of his client; the good repute of the solicitor's profession; and his proper standard of work;

1.4 He failed to provide clients with written notification of costs before transferring monies from client to office account in breach of Rule 19(2) of the Solicitors Accounts Rules 1998 ("SAR 1998");

1.5 He transferred monies from client account to office account otherwise than as permitted by Rule 22 of the SAR 1998;

1.6 He failed to provide cost information to his client (Mrs CP – the co-executor of the estate of Mr A (deceased)) contrary to Rule 15 of the SPR 1990;

1.7 That contrary to Rule 7 of the SAR 1998 he failed promptly to rectify a minimum cash shortage of £135,912.25 that was in existence as at 13 September 2007.

Documents

2. The Tribunal reviewed all the documents including:

Applicant:

- Amended Rule 5 Statement and re-dated February 2013 with exhibit
- Original Rule 5 Statement dated 26 August 2008
- Transcript of interview between the Investigation Officers and the Respondent dated 13 September 2007
- Grant of probate re Mrs N deceased dated 2 November 2005
- Handwritten schedule K2 bearing the name of the firm dated 26 June 2007
- Handwritten schedule K4 bearing the name of the firm dated 5 July 2007
- Letter from the firm to Mr Gordon Hair (Investigation Officer ("IO")) dated 16 July 2007 with enclosures
- Letter from the firm to Mr Gordon Hair (IO) dated 10 August 2007 with enclosures

- Email from Ms Willetts to the Respondent dated 8 October 2012 timed at 08.59
- Email from Ms Willetts to the Respondent dated 7 December 2012 timed at 12.45
- Email from Ms Willetts to the Tribunal dated 14 February 2013 timed at 13.21
- Email from Ms Willetts to the Tribunal dated 15 February 2013 timed at 08.22
- Email from Ms Willetts to the Tribunal dated 15 February 2013 timed at 14.35
- Letter from Ms Willetts to the Respondent dated 22 February 2013
- Judgment in the case of The Law Society v Andrew John Tilsiter [2009] EWHC 3787 (Admin)
- Schedule of costs dated 22 February 2013

Respondent:

- Request for an adjournment of 26 and 27 February 2013 hearing
- Email from the Respondent to the Tribunal dated 15 February 2013 timed at 11.40
- Respondent's response to the allegations dated 1 October 2012
- Psychiatric report of Professor Chris Thompson dated 5 March 2010
- Psychiatric report of Dr Damien Longson dated 26 March 2012
- Psychiatric report of Dr Damien Longson dated 24 July 2012
- Memorandum of adjournment and directions held on 22 May 2012
- Memorandum of case management hearing held on 11 August 2012
- Memorandum of case management hearing held on 14 August 2012

Preliminary Matter: Application for Adjournment by the Respondent and for withdrawal of part of allegation 1.1 by the Applicant

3. This application had been remitted back to the Tribunal for rehearing consequent upon a Consent Order made on 23 August 2010 following a hearing before the Tribunal in the Respondent's absence on 12 August 2009. At a Case Management Hearing on 11 October 2012, the Tribunal directed that the Respondent should file any further medical evidence on which he proposed to rely by 30 January 2013 and provide a copy to Ms Willetts by the same date. No further medical evidence had been filed.

4. The Respondent had made an application for an adjournment of this hearing in writing which had been refused and he now wished to make an oral application. The Respondent indicated that these proceedings had begun in the autumn of 2008. His firm had been the subject of an intervention. He was a sole practitioner. His files and papers had passed into the possession of the Applicant and he had no access to them. He had been diagnosed with burnout and depression. The proceedings were heard in August 2009 and he was not present because he was unwell. An Order striking off the Respondent from the roll had been made. At the end of 2009/beginning of 2010 he had been well enough to consult a solicitor who said their firm specialised in

representing solicitors appearing before the Tribunal and for clients who had mental health problems. The solicitor acting referred him to Professor Chris Thompson (a consultant psychiatrist) in March 2010 in order for a report to be prepared. In that report, Professor Thompson stated that the Respondent had been too ill to deal with matters in 2008 and 2009 and on the basis of that report the Respondent appealed the determination of the Tribunal. During his interview with Professor Thompson, the Respondent had been advised, as indicated in the Professor's report, that the Respondent had been under-diagnosed by his GP and those helping him previously. He offered the view that the Respondent needed better help in order to recover. The Respondent found a psychotherapist and began to see her in April 2010. He went to his Primary Care Trust ("PCT") to complain about the treatment he had received and they agreed that he had been failed by his local NHS and took over the funding of his psychotherapy. The Respondent told the Tribunal that to date he had undergone 157 weekly sessions of psychotherapy.

5. The matter continued through 2011. The Respondent submitted that he continued to be unwell and had no access to files and papers. There had been several interlocutory hearings, at one of these on 19 April 2011 he was advised by his solicitor that a direction had been made that if he was not well enough when the matter was scheduled to go ahead in November 2011, a report from a psychotherapist or psychiatrist should be filed with the Tribunal. (The memorandum of the April 2011 hearing was not before the Tribunal as the Respondent had only consented for specified memoranda to be available to this division of the Tribunal.) He had not been well enough and his solicitor had contacted his psychotherapist to obtain a letter which had been submitted along with an adjournment application which was refused on the papers. His solicitor then made an oral application on the day of the hearing, 1 November 2011, which was granted. The Respondent stated that he had not understood why the Tribunal had wished to go ahead with the November hearing and had not accepted his earlier adjournment application. He said he made further enquiries with his solicitor who would not send him a copy of the directions made. He had obtained the memorandum recording that he had been directed to see a psychiatrist jointly instructed by himself and the Applicant (not a psychotherapist *or* a psychiatrist as he had been given to understand). The Respondent had then been to see Dr Damien Longson in March 2012. The Respondent had decided to terminate his instructions to his solicitor. (The Tribunal understood that the Respondent had complained successfully to the Legal Ombudsman about his former solicitor.) The substantive hearing had been re-fixed for 22 May 2012. Dr Longson said that he was well enough to go through the Tribunal hearing if he had a solicitor. The Respondent had not discussed with him the possibility of representing himself. There was no report before the Tribunal on that occasion to say that the Respondent was fit to proceed on an unrepresented basis and so the hearing was adjourned for him to see Dr Longson. The Respondent thought that his depression had lifted but he still had an anxiety disorder. At the end of July 2012, Dr Longson had discussed with the Respondent how he would cope with representing himself. The Respondent had explained to Dr Longson that there were a number of documents which he needed to read. The doctor had told him that if he felt overwhelmed he should break the reading into smaller tasks and read a smaller amount of papers each day. Dr Longson said in his second report of 24 July 2012, the first having been prepared dated 26 March 2012, that the Respondent was unlikely to recover until the proceedings were over.

6. By August 2012 the Respondent felt that he was able to give proper attention to defending the proceedings. He was in contact with Ms Willetts and asking questions about disclosure. He explained that to defend himself he needed to inspect everything. He had jotted things down about his matters in counsel's notebooks on a daily basis and believed that when he went through them, things would come back to him. He would then be able to decide what evidence to put the Tribunal. His memory was lost for a period of time. It was a great relief to him when out of the blue, Ms Willetts emailed that she had obtained possession of the files and could get hold of the notebooks. In October 2012, he had come to the Tribunal and was very hopeful that things would go smoothly again. He was grateful that the Applicant agreed to copy documents, the last instalment of which were received by him in December 2012. These were boxes containing the files of Mr A and Ms N. All that the Respondent and the psychotherapist ever talked about really was this Tribunal; he discussed diving in and just reading them all but she became concerned that he would have another breakdown if he worked too hard. The Respondent stated that he had found a way of working every day, inspecting documents, taking them in and making notes but he was not quick enough. At the end of January 2013 he had read the notebooks but needed to read the Mr A file. He was supposed to go to the Applicant's office in Birmingham as arranged for him by Ms Willetts but his wife had a health scare and he had looked at the Mr A file and found out that it was not complete. He emailed Ms Willetts and found that documentation had been sent to the client who had destroyed the file. At this point he informed Ms Willetts that he could not go to Birmingham as arranged. He then went on to deal with the Ms N file but by 4 February 2013 he knew that he was running out of time and he emailed Ms Willetts that he would need an adjournment; he said that the more pressure that was put on him the less he was able to do. He drafted his adjournment application on the basis that he had not seen the documents. He had gone through quite a bit of the Ms N file but had found out the previous Friday that it was incomplete. There had been 14 residuary beneficiaries under Ms N's Will and there was nothing in the file about the Respondent's contact with them or their contact with him. Letters were referred to and were not there which needed to be rectified. The Respondent had started reading the Mrs P file but he did not know if it was complete. He was up to mid-2006 in the notebooks and had two and a half years to go. (In his paper application dated 14 February 2013, the Respondent had referred to needing to read a total of 43,600 pages of documents of which he stated that he had read 20,500.)

7. Once he had inspected all the files referred to in the Forensic Investigation Report, the Respondent had planned to go back to Professor Thompson and ask him to undertake an overview of all that had happened. The Respondent submitted that no one knew exactly when he became ill. All anyone really knew was that by mid-2008 he was ill and the psychiatrists had indicated that one didn't become ill overnight and there was usually a progression towards the problem. He had not been to a psychiatrist with his statement or notebooks with his intrusive thoughts or been able to advise when his wife noticed changes in his behaviour. The psychiatrist needed evidence of his behaviour at the relevant time. Professor Thompson had now retired. The Professor's secretary said that the Respondent could be transferred to another psychiatrist Dr JW and made an appointment for the Respondent to see him on 8 February 2013 but the Respondent explained that he could not go because he had not read the documents and he was not sure about the charges he was facing because of the discussions taking place about the Mr A file. The Respondent submitted that his paper application for an

adjournment had not been as full as this. He must have a fair hearing in order for the Tribunal to reach the right decision whatever that was. The Respondent confirmed that while in the past he had been taking medication he was not at present. For a couple of years there had been side effects and he decided that as the medication had not made him better over that period, he should cease taking it. When taking it, his mind was not clear and he needed it to be clear to deal with the proceedings. He had weaned himself off the medication aided by his psychotherapist. His GP was not entirely in agreement but the Respondent preferred the psychiatric opinion of Professor Thompson.

8. Ms Willetts informed the Tribunal that when the investigation commenced in June 2007 the files of Ms N, Mr A and Mrs P were taken from the firm's offices. They were forwarded to an independent cost draftsman Mr Nick Shelley whose report was appended to the Rule 5 Statement. The Mr A and Ms N probate files had not been completed and they were returned to the Respondent via the Investigation Officer ("IO"). Those files remained in the Respondent's offices until the intervention took place in June 2008 when they were taken into the possession of the intervention agent. Because work on the Mr A file was not completed, it was released to the lay executor who dealt with finalising the administration of the estate. She then destroyed the file because of lack of storage. Ms Willetts, for the Applicant, submitted that the probate file Mr A related to part of allegation 1.1 regarding overcharging. However, in January 2012 it was ascertained that the lay executor had destroyed the papers and it was therefore considered appropriate to abandon that part of the allegation subject to the consent of the Tribunal.

9. Ms Willetts was not sure what happened to the Ms N file because it was only last Saturday that she had received the Respondent's email. The Applicant could only release what it had from the intervention archive and so it could not be discovered what had happened to a small part of the file relating to the charitable beneficiaries.

10. The Applicant had attempted to give disclosure on a voluntary basis even though a vast amount of copying files and notebooks had been required to assist the Respondent to prepare his case. The following had been copied and provided to the Respondent; on 16 July 2012 the IO's investigation files; on 29 October 2012 four files regarding P; on 29 November 2012, 11,500 pages of counsel's notebooks; on 12 December 2012 the Mr A and Ms N files. The files had been seen in 2007 by the cost draftsman. At that time the Respondent had been asked for any attendance notes from his counsel's notebooks to be provided to the cost draftsman. Ms Willetts referred the Tribunal to two letters dated 16 July 2007 and 10 August 2007 from the Respondent to the IO Mr Gordon Hair attaching attendance notes to be added to the files of Mr A, Ms N and Mrs P. Ms Willetts submitted that the Respondent had been given every opportunity to provide documentation to justify his costs. She referred the Tribunal to the transcript of an interview which had taken place on 13 September 2007 when Mr Hair had asked:

> "… Is there anything else with regard to the N (file) which you may have held back for whatever reason which could justify or could help to justify the figure of £80,000."

The Respondent had replied

"… I don't think so, no"

11. Ms Willetts submitted that five years had passed and it seemed that the Respondent was taking the opportunity to delay matters. He said that the Applicant could not produce evidence of this or that but Ms Willetts submitted that it was not the evidence of the Applicant being presented in the case but that of the cost draftsman. The cost draftsman had said that the maximum costs for the Ms N file with some doubling up to make an allowance for the Respondent should have been a maximum amount of £21,700 and the Respondent was attempting to find evidence to justify an increase to £80,000. She submitted that it was questionable whether the Tribunal should indulge that forlorn hope to find documents which were not there in 2007 and were not there now. The exercise to look through the counsel's notebooks had already been provided for in the 16 July and 10 August 2007 letters.

12. As to the seven probate files which the Respondent had intended to inspect at the Applicant's offices on 4 February 2013, Ms Willetts submitted that none of them had any allegations of overcharging, all of them related to delivering bills and breaches of Rule 19(2) SAR 1998 and the transfer of money from client to office account, breaches of Rule 22 and failure to replace shortages in client account. There was no need for the Respondent to go through these files in minute detail. He had admitted in an interview that bills had not been delivered to clients. The following exchange had taken place during the interview:

> "Mr Hair: Now in respect of those matters, is it correct that you have not delivered bills or given any other written prior notification of costs to the executors or the co-executor on those matters?
>
> Respondent: That's right, yes, that's what I'm putting right now
>
> Mr Hair: …the total amount of costs taken in respect of bills which haven't been delivered on those matters comes to £128,714 …
>
> Respondent: Yeah
>
> Mr Hair: Would you accept that the total amount is a minimum shortage on your client account?
>
> Respondent: Yes"

Ms Willetts submitted that these were all more straightforward matters, the Respondent had accepted that there was no evidence of bills sent to clients and that his actions created a client account shortage; the matters that he was now going over would not affect his challenge to those allegations.

13. As to the question of expert medical evidence, Ms Willetts submitted that she was not fully convinced that the factual points that the Respondent hoped to discover from the files would assist an expert to come to a view on the Respondent's medical condition. The Tribunal had seen the report from Professor Thompson showing that the Respondent was ill in 2007 and 2008. There was no evidence that he was unwell at

the date of the misconduct alleged. Ms Willetts could not understand why the factual challenges that he wanted to make would assist a medical expert to come to that view. This case had been remitted for rehearing in August 2010. Two and a half years on it was not progressing very quickly. The Respondent had been aware of this hearing since August 2012 and the N files had been sent to him on 12 December 2012 and only recently had he began to look at them to prepare his defence. Ms Willetts submitted that there had been delay at every step of the way and despite the Applicant's best efforts to assist the Respondent. It was damaging to the public interest and the reputation of the profession to allow this matter to be delayed further. The Applicant had sympathy for the Respondent's difficulties but he was a solicitor and not a lay person and it was up to him to prepare his case. He was looking for evidence which was not there and grasping at straws.

Decisions of the Tribunal upon preliminary issues

14. The Tribunal noted that as the papers relating to Mr A had been destroyed by the lay executor; the Applicant was seeking leave to withdraw the aspect of allegation 1.1 which related to it. The Respondent did not object to that application. The Tribunal consented to Ms Willetts application to withdraw allegation 1.1, in so far as it related to costs in the administration of the estate of Mr A deceased.

15. The Tribunal emphasised to the Respondent during the course of submissions on his application to adjourn that he should take the same approach to the proceedings as he had to the papers and if he needed a break at any time he should say so but the Respondent indicated that he wished to proceed even if he became distressed. The Tribunal was concerned that the Respondent should have a fair hearing and confirmed with the Respondent that the basis of his application to adjourn was that he needed notebooks and files in order to establish that he had had intrusive thoughts and a pattern of behaviour. As set out in the Tribunal's policy/practice note on adjournments, reasons which would not generally be regarded as providing justification for an adjournment included the lack of readiness on the part of the Respondent, a claimed medical condition of the Respondent unless this was supported by a reasoned opinion of an appropriate medical adviser or inability to secure representation. The Respondent had made it clear that he now wished to represent himself and Dr Longson in his second report had concluded that he was probably able to do so and that further delay on the grounds of mental health seemed unnecessary. The Respondent had indicated that if the adjournment application was not granted, he intended to remove himself from the Tribunal even if the matter proceeded because he did not feel able to address both the adjournment application and the substantive hearing and because he had not completed the work which he wished to undertake or obtained a further psychiatric report which he thought would establish his mental health at the time of the alleged misconduct. The Respondent and his previous medical advisers considered that the completion of the proceedings would assist his mental state. The Respondent was applying for an adjournment based on lack of readiness.

16. The Tribunal noted that the Respondent had not had disclosure of all that he felt that he needed nor had he had taken the opportunity to inspect the probate files but these were not associated with allegations of overcharging. The relevant allegations were based on evidence of fact and were offences of strict liability. As to the other

allegations, the Respondent had possession of the files of Mr A, Ms N and Mrs P before they were sent to the cost draftsman in 2007. He served various attendance notes on the Applicant for perusal by the cost draftsman at that time. The Applicant had already provided him with a significant amount of documentation. As to the issue of the Respondent obtaining a further psychiatric report, the Respondent had ignored the Tribunal's direction to obtain a further report by 30 January 2013. The Tribunal did not accept that it was necessary for the Respondent to peruse all the documentation which he wished to see before returning to the psychiatrist for the further report. The Tribunal indicated that it would make every allowance for the Respondent proceeding on an unrepresented basis. The Tribunal did not consider that it was in the interests of justice to delay the proceedings any further. The allegations were serious and needed to be determined. Accordingly the Tribunal refused the Respondent's application for an adjournment of the substantive hearing.

17. In answer to the question from the Tribunal the Respondent confirmed that he was aware that the Tribunal had discretion to proceed in his absence and left the courtroom at that point.

18. The Tribunal then proceeded to consider whether it was appropriate to continue in the Respondent's absence. For the Applicant, Ms Willetts directed the attention of the Tribunal to the case of R v Jones (Anthony) [2002] 2 WLR 524 in which Lord Bingham said that "the discretion to commence a trial in the absence of the Defendant should be exercised with the utmost care and caution" but she submitted the Jones case did not prevent the Tribunal from proceeding if there was a voluntary absence and the Respondent was fully informed of the forthcoming trial where it could be appropriate to continue. The case of Yusuf v The Royal Pharmaceutical Society of Great Britain [2009] EWHC 867 (Admin) had adopted the test in R v Jones for disciplinary cases. Ms Willetts submitted that the substantive hearing should continue. The Tribunal had regard to the authorities; the Respondent had initially attended the hearing and chosen to leave when his application to adjourn had been refused. The Tribunal had confirmed with the Respondent that he was fully aware that it had discretion to continue with the substantive hearing in his absence. The Tribunal had regard to the fact that there were allegations of dishonesty and that the matters raised were very serious. The Tribunal took the view that the Respondent had voluntarily absented himself at the hearing of serious matters which had been outstanding for a considerable time and considered that it was in the interests of justice for the substantive hearing to proceed in his absence, exercising its discretion under Rule 16(2) of The Solicitors (Disciplinary Proceedings) Rules 2007.

Factual background

19. The Respondent was born in 1953 and admitted as a solicitor in 1977. He practised on his own account at Parkington Holliday & Co ("the firm") in Denton, Manchester until the Applicant intervened in his practice in June 2008.

20. On 11 June 2007, an inspection commenced at the Respondent's practice and was concluded with a meeting between the IO and the Respondent on 13 September 2007. As a result the IO prepared a Forensic Investigation ("FI") Report dated 24 September 2007.

Overcharging

21. The IO reviewed a sample of nine probate client matters. Costings in support of bills were available for only five of the total of 33 bills raised on these matters. For six of the client files reviewed, costs expressed as a percentage of the value of the gross estate were in the range of 9.9% to 19.79%.

22. An independent cost draftsman was commissioned by the Applicant to assess the level of costs on the files of Ms N and Mr A deceased.

Ms N deceased

23. The Respondent acted in the administration of the estate of Ms N deceased ("Ms N"). He was also the sole executor. The deceased left some chattels and modest legacies to friends and relatives but left most of her estate to 14 charities. Probate was granted on 2 November 2005 and the gross estate value shown as £477,357.

24. The Respondent raised bills in the total sum of £ 80,000 plus VAT on the Ms N matter as follows:

Date	Costs	VAT	Total
16 December 2005	£55,000	£9,625	£64,625
23 December 2005	£25,000	£4,375	£29,375

25. The IO did not find any costings on the client file in support of these bills. The Respondent was unable to justify the level of costs charged but stated that they had not been estimated. Further, he could offer no explanation as to why the second bill was raised just seven days after the first one.

26. On 7 September 2007, the cost draftsman produced a report confirming that the chargeable work as evidenced on this client file was valued at £9,300. Further, even by adopting a broad brush approach and allowing for a separate charge for value (the Respondent did not charge for the value element on probate files) the maximum figure for costs would be £21,700. In conclusion, the cost draftsman stated that he "could see no justification whatsoever for costs of £80,000 raised on this matter".

27. The cost draftsman described the background as follows (omitting the paragraph numbering):

> "The deceased, who died in June 2005 aged 94, was a widow residing in sheltered accommodation for the elderly. Her estate, declared for probate at £477,000 consisted of a share portfolio, savings bonds, insurance policies, and her leasehold flat. She appointed the solicitor as sole executor. He had prepared her will on her instructions in 2001…"

28. The cost draftsman commented :

> "This was a routine estate administration undertaken as executor. At the outset there were specific duties and responsibilities, which included registering the

death and arranging the funeral. There was much administrative work involved in dealing with the share portfolio and other financial assets. The solicitor was responsible for selling the property and dealing with the bequests to individuals. In April 2006 he sought Counsel's advice because two of the charitable residuary beneficiaries had undergone changes since the date of the will, raising issues as to identifying their successors and how distribution of the residue would be affected if those bequests failed. Although the administration was largely complete, there were no estate accounts on file.

Although the administration of the estate had not been finalised and the Bills of Costs were raised in December 2005, it appears that most of the work had been done. Although the administration continued into mid-2006, (and it seems may not yet have been finalised), I have made the assumption that the costs taken in December 2005 were intended to cover both work done and a modest amount of work yet to be done in finalising the estate."

29. The client ledger revealed that the file was not opened until 14 June 2005, six months prior to the Respondent raising bills of £80,000.

Mr A Deceased

30. The Respondent acted in the estate of Mr A (deceased) ("Mr A") for which he was a joint executor with Mrs CP ("the co-executor"), a relative of the deceased. Probate was granted on 26 May 2005 and the gross estate value as declared on Inheritance Tax Form 205 was £176,888.62.

31. The Respondent had raised bills in the total sum of £40,000 plus VAT on this matter as follows:

Date	Costs	VAT	Total
22 June 2005	£10,000	£1,750	£11,750
30 June 2005	£5,000	£875	£5,875
31 August 2005	£15,000	£2,625	£17,625
27 October 2005	£10,000	£1,750	£11,750

32. The IO did not find any costings on the client file in support of these bills, nor evidence that these bills had been forwarded to the co-executor nor that she had been given prior written notice that costs were to be transferred from client account. The Respondent confirmed that he had not delivered his bills or other written notification to the co-executor (allegation 1.4). The Respondent was unable to justify the level of costs charged and failed to provide any subsequent evidence in support.

33. The IO was unable to locate a client care letter on the file relating to Mr A in compliance with Rule 15. The Respondent was unable to provide any evidence that the co-executor had received such a letter (allegation 1.6).

34. The IO identified that the Respondent had transferred costs from client to office account in respect of bills raised without prior notice or other written notification to

the client (allegation 1.4). The Respondent stated that he was not aware of this requirement.

35. The Respondent was asked to review his probate files to ascertain to which clients he had not given prior notice with regard to the transfer of costs. No information was provided by the Respondent.

36. A minimum cash shortage of £135,912.35 was identified as a result of the transfer of costs from client to office account in respect of five probate matters where written notification of costs had not been made to the clients (allegation 1.5). These were as follows:

Mr A (deceased)	£47,000.00	(£40,000 plus VAT)
HO (deceased)	£22,701.00	(£19,320 plus VAT)
HOD (deceased)	£27,318.75	(£23,250 plus VAT)
BE (deceased)	£18,800.00	(£16,000 plus VAT)
BR (deceased)	£20,092.50	(£17,100 plus VAT)

37. The Respondent agreed the minimum cash shortage as calculated by the IO and was asked to provide evidence that the cash shortage had been rectified as soon as it was available. No evidence was received that the Respondent had rectified the minimum cash shortage (allegation 1.7).

Mrs P

38. The Respondent had acted for Mrs P in respect of matrimonial proceedings that were concluded by way of a Consent Order. In 2001, Mrs P instructed the Respondent to set aside the Consent Order.

39. The Respondent issued an application on behalf of Mrs P to set aside the Consent Order but did not attend the final hearing on 23 September 2003 so the application failed. An order was made that Mrs P pay Mr P's costs from her share of the proceeds of sale of the former matrimonial home. At a subsequent hearing on 22 April 2004, again in the absence of the Respondent, Mr P obtained an order to complete the conveyance in the absence of Mrs P.

40. By letter dated 3 June 2004, the solicitors acting for Mr P confirmed that pursuant to Court Orders dated 23 September 2003 and 22 April 2004 they had completed the sale of the former matrimonial home and that Mrs P's share of the proceeds of sale was £23,548.27. A cheque for that amount was enclosed. A figure for costs was proposed by Mr P's solicitors and deducted from Mrs P's profit share. The Respondent was required to agree the costs or to revert to Mr P's solicitors within 14 days for a detailed assessment of costs. The Respondent did not take any action to protect his client's position in regard to costs and also did not bank the cheque.

41. Mrs P wrote to the Respondent on 4 July 2004 asking for the Respondent's assurance that she was still the legal owner of the property; stating that she would like to buy out Mr P but that she had been to the Building Society and been informed that the mortgage had been paid off. She also noted that the "for sale" board had been taken down. She asked for the Respondent's opinion on her legal position on the basis that

her name was still on the title deeds. The Respondent did not advise his client that Mr P had obtained an Order to complete the conveyance in her absence or that the property had already been sold.

42. By letter dated 25 January 2005, the Respondent was notified by Mr P's solicitors that the cheque sent for Mrs P on 3 June 2004 had not been banked.

43. Mrs P wrote to the Respondent on 26 January 2005 asking for a set of keys and stating that if they were not made available she assumed she was within her rights as joint owner of the property to change the locks. The Respondent did not inform his client that she had not been joint owner since May 2004 when the property had been sold.

44. The Respondent requested a further cheque by letter dated 31 January 2005.

45. Mrs P wrote again to the Respondent on 3 April 2005, stating that she had been more than patient and that she wanted the Respondent to do whatever he could to get the property sold and the proceeds divided up fairly. Again the Respondent did not inform his client of the situation.

46. Mrs P wrote again on 22 November 2005, requesting a progress report from the Respondent. The Respondent again did not advise her that the property had already been sold.

47. A further cheque for £23,548.27 was sent to the Respondent on 19 December 2005.

48. On 19 December 2005, Mrs P again asked the Respondent for a progress report.

49. On 20 December 2005, the Respondent prepared an invoice for £23,548.27, the exact sum received from Mr P's solicitors in settlement of her share in the former matrimonial home.

50. On the same day, the Respondent transferred funds of £80,000 from office account into client account on Mrs P's ledger and sent her a cheque from client account for this amount. There was no evidence that Mrs P was entitled to £80,000. The Respondent explained to the IO that this payment was compensation for his negligent conduct but he did not communicate this fact to Mrs P.

51. The client ledger revealed that on 21 December 2005, the Respondent transferred £23,548.27 from client to office in settlement of the invoice for Mrs P's costs. There was no evidence that he provided Mrs P with written notification of costs or that he was entitled to such costs.

52. The "compensation payment" of £80,000 to Mrs P was funded in part by the sum received from Mr P's solicitors paid into office account as costs by the Respondent (£23,500) and in part from office account (£56,500). The Respondent's ability to part fund the payment from office account was dependent upon using the costs from the estate of Ms N deceased already referred to above. The Respondent's overdraft facility was explained in the FI Report. The Respondent told the IO that the overdraft facility on his office bank account was £40,000. On 15 December 2005, the balance

on the firm's office bank account was £6,925.74 overdrawn. On 16 May 2005, a client to office bank account transfer in the sum of £65,576.80 was made which included costs in respect of the first bill raised on the Ms N matter in the sum of £64,625 (£55,000 plus VAT). Following the payment of £80,000 to Mrs P four days after the transfer on 20 December 2005, the balance office account was £25,482.38 overdrawn. If the transfer in respect of Ms N's costs had not been made, the balance in office account after payment of £80,000 to Mrs P would have been £90,107.38 overdrawn; £50,107.38 in excess of the overdraft limit of £40,000. The Respondent admitted that he could not have made the payment to Mrs P without the costs transferred on Ms N's probate matter but contended that he was entitled to those costs.

53. The Respondent acknowledged that he had failed to attend a hearing on behalf of Mrs P but could not recall which one or when it was. He did not advise his client of this fact. The Respondent stated that he did not inform her that he was holding monies on her behalf because he had made a mistake in not attending the court hearing. He did not report the matter to his insurers and decided to "shoulder it himself". The Respondent acknowledged that Mrs P believed that she was still co-owner of the property. He accepted that he had misled her and had not protected his client's interests.

<u>Law Society investigation</u>

54. A copy of the FI Report was forwarded to the Respondent under cover of a letter dated 20 December 2007 and the Respondent replied by letter dated 21 January 2008. He confirmed that the cash shortage had not yet been rectified and admitted that costs had been transferred without prior notice to the clients. He denied intentionally overcharging on any of the probate files.

55. By letter dated 19 March 2008, a caseworker of the Applicant requested evidence that the cash shortage had been rectified and an explanation of the charges made in respect of the file relating to Ms N deceased. No further response was received from the Respondent. The matter was referred to the Tribunal on 19 March 2008.

Witnesses

56. Mr Gordon Hair gave evidence that he had worked in the Forensic Investigation Unit of the Applicant for approximately 10 years and at the time that it carried out the investigation into the Respondent' firm, he had four or five years experience. He confirmed the truth of the FI Report and the transcript of the interview with the Respondent which took place on 13 September 2007; a copy of the recording had been handed to the Respondent.

57. Mr Nicholas Shelley gave evidence. He was a fellow of the Association of Law Costs Draftsmen. The witness confirmed the date and contents of his report. When he had inspected Ms N's file he noticed that while there were correspondence clips and subject clips in order, there were very few attendance notes. He contacted the IO and received two tranches of copies of attendance notes which belonged to the file; he stated in the report:

> "The solicitor then served photocopies of 36 attendance notes which I have added to the files and taken into account in my assessment. "

The witness confirmed his methodology. As well as adding in all the time recorded in the attendance notes and an allowance consisting of the same amount for any unrecorded time, (this meant adding 30 hours 35 minutes to the time spent) and at the same hourly rate he assessed that the chargeable items could have been valued at as much as £15,500, which took him to a total of £15,500. He then made a further allowance because it was the Respondent's practice to have a separate value element in his bills. This would no longer be usual (a composite hourly rate would be used) unless it has been specifically agreed beforehand with the client. In adding the value element he had used the appropriate Law Society guidance which stated that in the administration of an estate a solicitor-executor might charge 1.5% of the gross value of the estate (0 .75% of the value of the deceased's residence). This led him to add an additional £6,200 (total £21,700). Even the Respondent's single bill of £25,000 was well in excess of the witness's maximum figure. He also noted that two bills were prepared in succeeding weeks and that raised issues. It was common practice for a solicitor to assess his charges shortly after the grant of probate but this had not been done here; the witness would have expected an interim bill to be drawn after the grant of probate in October and then he would normally only expect to see a final bill at a later stage to justify work done. The only other situation where there might be two bills in such a matter was where the first was inadequate which was not the case here. The witness saw nothing on file in terms of costing notes or on the bills themselves to give an account as to how they had been arrived at. His overall conclusion was that there had been a substantial overcharge in the case of Ms N.

Findings of Fact and Law

58. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

59. As the Respondent was not present the Tribunal had regard to his response dated 1 October 2012. In that document the Respondent made various references to evidence being excluded but there was no direction from the Tribunal to that effect and the Respondent had made no such application while attending upon the Tribunal.

60. Allegation 1: The allegations against the Respondent, John Rhys Davies on behalf of the Solicitors Regulation Authority as amended with the consent of the Tribunal in respect of allegation 1.1 were that:

Allegation 1.1: He claimed costs that he knew could not be justified in the administration of the estate of Ms N deceased (which was an allegation of overcharging and of dishonesty)

60.1 For the Applicant, Ms Willetts submitted that allegation 1.1 and allegation 1.2 alleged non-statutory misconduct. The conduct involved had occurred before 1 July 2007 and so the Solicitors Code of Conduct 2007 did not apply. In order to find the allegations proved, the Tribunal must be satisfied so that it was sure that there was an act or

failure to act which the Tribunal considered amounted to conduct unbefitting a solicitor. It was not necessary to prove dishonesty for allegations 1.1 and 1.2 to be made out. In respect of allegation 1.1, overcharging, Ms Willetts referred the Tribunal to a document "Summary of Probate and Related files reviewed at [the firm]", prepared by the IO about probate files examined during his inspection. On none of the nine files (including those of Mr A and Ms N) had a client care letter been seen. On three of the files there were manual time costing records; on one file for £1,820 dated 23 December 2004 and on another for £2,720 on 22 January 2003, for £928 on 21 March 2003 and for £896 on 1 May 2003 and on a third file for £3,500. In the first case, the billing history showed three invoices and in the second case six invoices and in the third there were four invoices. Ms Willetts submitted that in respect of the two bills totalling £80,000 plus VAT raised on Ms N's file, the IO did not find any costings on the client file in support of those bills. Ms Willetts referred the Tribunal to the report of Mr Shelley the cost draftsman. At paragraph 3.4.2 he said:

> "Taking into account all work on the file, *including work done after December 2005,* the value of the chargeable work was **£9,300.00**, calculated as 46 hours 30 minutes at £200 per hour. "

Taking a broad brush approach, the cost draftsman had arrived at a total of £21,700. Ms Willetts submitted that this was an approximate amount which the Applicant considered to be reasonable and that there was a wide chasm between that amount and the £80,000 charged by the Respondent. The other facts upon which the Applicant relied were the timing of the invoices, the first on 16 December 2005 for £55,000 and the second seven days later for £25,000. She submitted that these costs could not have been incurred in that time. She referred the Tribunal to the invoices which were both in round sum figures plus VAT with no information about the work done the narrative being:

> "To our professional charges in connection with Administration of the estate of [Ms N] deceased."

Ms Willetts submitted that bearing in mind that Ms N had died on 9 June 2005, it would have been difficult to undertake that amount of work in that period of time. There was no corroborative evidence on the files that work had been done or any details of hours recorded or of the hourly rate charged. There was no information to assist a client or residuary beneficiaries to be satisfied that the bills were justified. The Applicant alleged dishonesty regarding overcharging and Ms Willetts referred the Tribunal to the test for dishonesty set out in the case of <u>Twinsectra Ltd v Yardley</u> 2002 UKHL 12. That test had two limbs and the Tribunal had to be satisfied both on the objective and subjective basis. She submitted that someone taking money to which he was not entitled was acting dishonestly; overcharging involved taking money to which one was not entitled and the residuary beneficiaries were charities and someone taking costs by overcharging would recognise that that was dishonest by the standards of reasonable and honest people (the objective test). The Respondent had been asked to justify the costs on many occasions. He said that he would need to refer to his files and had been given the opportunity to do so and did not. It may be that he believed the costs were justified but there was no evidence to justify his belief. He alluded to records in counsel's notebooks and had forwarded to the cost draftsman attendance notes from those notebooks and so the evidence from them was taken into

consideration in arriving at the cost draftsman's figure. Ms Willetts submitted that the Respondent was deluding himself regarding the £25,000 billed for the seven day period. She submitted that there was no shred of evidence that he was entitled to those costs. For charges of this magnitude, one would have expected to see a probate file with attendance notes to show what work had been done before the invoices were calculated. There was no methodology to show how the Respondent had reached these figures. The bills had been discussed at the interview with the IO on 13 September 2007:

> "IO: …now these bills were raised close together in terms of time. There was a bill for £55,000 raised on 16th December
>
> Respondent: Yeah
>
> IO: And then a bill for £25,000 raised on the 23rd December
>
> Respondent: OK
>
> IO: Why were the bills so close together?
>
> Respondent: I don't know
>
> IO: Had £25,000 worth of chargeable work being done from 16th to 23rd December?
>
> Respondent: I thought that £80,000 of work had been done on that file
>
> IO: Up to what point in time?
>
> Respondent: Up to 23rd December
>
> IO: Why did you raise two bills rather than one bill?
>
> Respondent: I don't know
>
> IO: Just thinking about it now, it's possible that the £55,000 bill may have been to provide monies for the payment to Mrs [P]
>
> Respondent: I can't remember"

Ms Willetts submitted that it was the Applicant's case that there had been a complete lack of accountability in this matter; the Respondent was the sole executor with no one to check up on him; he had free rein and he took monies to which he was not entitled . The amount raised bore no reference to work done and there was an inescapable conclusion that this was deliberate overcharging and that the Respondent knew that it was dishonest. The Respondent had alluded to various medical reports but Ms Willetts submitted that there was no medical evidence to show that he was mentally ill at the date of the alleged misconduct. The key date in respect of allegations 1.1 and 1.2 was December 2005. In respect of allegation 1.3 it was alleged that the Respondent had misled Mrs P from 2003 until December 2005. In respect of

allegations 1.4, 1.5, 1.6 and 1.7, these related to probate files between 2003 and 2006. The medical report from Professor Thompson showed that the Respondent was ill at the date of the hearing in August 2009. It contained no evidence about illness at the time of the alleged misconduct. It showed that the Respondent had a breakdown in 2008 which was quite some time after the misconduct alleged in 2005 and 2006. All the other medical evidence had related to the fitness of the Respondent to appear before the Tribunal.

60.2 The Respondent was not present but in his response document dated 1 October 2012 he had denied the allegation indicating:

> "The evidence placed before the Tribunal so far refers to what was found by the investigation officer ("IO") in my client files. The files that the IO refers to were however incomplete. They were incomplete because it was my practice to work from notebooks. The evidence of the work I did in those notebooks was not on the files that the IO looked at. Also the filing was not up to date. There were many notes, letters, and drafts of letters in my office which had not been filed. These also were not on the files the IO looked at. I informed the IO that not everything that was relevant to the files was on the individual files at a meeting which I believe took place at my firm's premises on 15 June 2007. The IO acknowledges this in the written applications he made to a Legal Officer at the [Applicant] to obtain a s44 direction to remove files and also in a telephone call to me on 5 July 2007. These matters are not however referred to in the FI Report."

In response to allegation 1.1, the Respondent stated that he did not know that an independent cost draftsman was to be commissioned and was not given a chance to peruse the files or get them into a state of preparedness to be assessed. He challenged the competence of the cost draftsman because he had not been a solicitor and had not acted in the administration of the estate of a deceased person. In respect of the estate of Ms N, the Respondent stated that work on the file was ongoing; that he was the sole executor instructing himself as a solicitor. He referred to the work which he had done because Ms N had no relatives. He explained the complexities about two of the charities which no longer existed. The Respondent admitted that he had raised the two bills. He stated that he was not sure if the IO found any costings on the file in support of the bills. He stated:

> "I did not look at the file to check. Sometimes I did costings in my notebooks."

He also said that he believed that he was mentally unwell at the time that he met with the IO. He also stated:

> "The ledger for Ms N was opened on 14 June 2005. She had died some days earlier. No reasoning is given as to why it was not possible for me to have completed work to that value in the six months between 14 June and 16 December or for work to be done to the value of the bill between 16 December and 23 December and no evidence to support that opinion. It is just a matter of opinion. It is not therefore reliable evidence. I did in fact (work) extremely long hours and at weekends and I did not take holiday. No

> facts are used to support this asserted "fact" and I dispute it. There is also no rule which says how a bill should be drawn up. There is no rule which states what information needs to be included in a bill. I was never asked to redraw bills to include more information by the IO."

60.3 The Tribunal considered all the evidence including the oral evidence of the IO and the costs draftsman and the Respondent's submissions in the response dated 1 October 2012. The Tribunal noted that the Respondent had been given ample opportunity to provide information to the Applicant and the costs draftsman at the time his charges in respect of the probate of Ms N were being investigated and he had provided copy attendance notes at that time. He had drawn bills totalling £80,000 when the maximum amount he was entitled to charge based on a generous estimate by the cost draftsman was £21,700. The Respondent had provided no evidence or justification to cast doubt on the cost draftsman's report, including that he had failed to justify why, approximately one week after delivering a bill for £55,000 he delivered a further bill for £25,000. In interview the Respondent had been asked if there was anything else with regard to the Ms N matter which he might have held back to justify or help to justify the figure of £80,000 and he said that he did not think so. The Tribunal found as a fact that there had been significant overcharging in respect of the probate of Ms N. The Tribunal was satisfied to the required standard that the Respondent's conduct was dishonest by the standards of reasonable and honest people and that the objective test in the case of Twinsectra was satisfied. As to the subjective test, and whether he himself realised that by those standards his conduct was dishonest, the Tribunal had noted that the Respondent wished to establish that at the time he had delivered the bills he was suffering from mental ill health. A psychiatric report had been obtained from Professor Thompson in March 2010 and two reports from Dr Damian Longson dated 26 March 2012 and 24 July 2012. The Tribunal had felt it appropriate to take into account Professor Thompson's report as it had not been challenged by the Respondent; indeed he had relied on it in his appeal against the decision of the earlier Tribunal and referred to it often. In the report Professor Thompson said:

> "…at no time has [the Respondent] claimed that he was depressed much before 2007 and I know the allegations go back to 2005. In view of this I do not think it likely that the depression could have been the cause of the alleged acts of dishonesty unless it can be shown that there were already significant psychiatric symptoms at the time. These would have to be corroborated by a witness such as his wife as they are not to be found in the medical record."

The reports of Dr Longson related mainly to the Respondent's mental health in respect of his fitness to undergo Tribunal proceedings. There were references to earlier mental health problems reported by the Respondent and to the death of his mother in 2001 and that his father had been ill since 2002 which the Respondent said had an adverse impact upon him but the Tribunal had not been provided by the Respondent with any medical evidence relating to the Respondent's capacity at the time when the alleged misconduct has occurred in December 2005. The Respondent had been directed to file further medical evidence but had chosen not to do so. The Tribunal had noted that the bills in question had never been delivered; the Respondent was the sole executor. The amounts on the bills were grossly excessive in respect of the amounts which the evidence showed the Respondent would have been justified in

charging. The timing of the raising of the second of the bills was inexplicable. The Tribunal considered long and hard before concluding that on the evidence the Respondent himself realised that by the standards of reasonable and honest people his conduct was dishonest. Accordingly the Tribunal found allegation 1.1 proved with dishonesty.

61. **Allegation 1.2: He utilised client monies for his own purposes (which was an allegation of dishonesty).**

61.1 For the Applicant, Ms Willetts submitted that if the Tribunal was satisfied the Respondent had taken monies as alleged in allegation 1.1 to which he was not entitled, they could proceed to find that he took the money and used it for his own purposes to pay Mrs P. The Respondent decided voluntarily to pay Mrs P £80,000 not through his insurers but because he was seeking to avoid a professional negligence matter. He had failed to deal expeditiously or at all with Mrs P's matter. There was no evidence how the £80,000 was calculated. It was clear from the evidence of the IO that £40,000 was the Respondent's overdraft limit and when he was preparing to pay Mrs P, his office account was overdrawn by over £25,000. Without the money removed from Ms N as costs, the office bank account would have been over £90,000 overdrawn. The Respondent was not able to pay Mrs P without costs being deducted from the file of Ms N. During his interview with the IO the Respondent admitted that. Ms Willetts submitted the link was that the Respondent realised that he had failed Mrs P and wished to "shoulder alone" the payment to her which involved using Ms N's costs for that purpose. Ms Willetts submitted that using client's money to which he was not entitled would be regarded as dishonest by reasonable and honest people and therefore the objective test in Twinsectra was satisfied. She submitted that the subjective test was also satisfied because the Respondent had carried out a conscious act to make payment to Mrs P and was well aware that he was making the payment to avoid a professional negligence claim. He was also aware of the office bank account overdraft limit and aware that he had no money to pay Mrs P. He therefore took and used Ms N's funds.

61.2 For the Respondent's comments in respect of Mrs P's matter see allegation 1.3 below.

61.3 The Tribunal considered all the evidence including the oral evidence of the IO and the costs draftsman and the Respondent's submissions in the response dated 1 October 2012. The bill for £55,000 on the matter of Ms N was raised on 16 December 2005. He also had a cheque from the solicitors acting for her former husband for £23,548.27 which was paid into his client account on 20 December 2005. The payment of £80,000 to Mrs P was made on 20 December 2005. The Respondent in his interview with the IO appeared to regard £50,000 of the money paid to Mrs P as his own. The Tribunal accepted Ms Willetts' submission that a finding that allegation 1.1 was proved, would lead on to a similar finding in respect of allegation 1.2. The conduct occurred at the same time and at least some of the money derived from the bills raised on the case of Ms N was used to compensate Mrs P. The Tribunal accepted the Respondent's explanation in interview that he did not wish to tell his insurance company about his conduct in respect of Mrs P and decided to shoulder the burden of it himself. The Tribunal found that the Respondent had utilised client money for his own purposes, the recompensing of Mrs P. The Tribunal further found that what the Respondent had done satisfied the objective standard for dishonesty and he knew that

his actions to carry out his intentions regarding recompensing Mrs P were dishonest. Accordingly allegation 1.2 was found proved with dishonesty.

62. Allegation 1.3: He failed to disclose material facts to his client (Mrs P) as to the progress of her case and in doing so contrary to Practice Rule 1 of the Solicitors Practice Rules 1990 ("SPR 1990") conducted himself in a manner that was likely to compromise or impair his integrity; his duty to act in the best interests of his client; the good repute of the solicitor's profession; and his proper standard of work.

62.1 Ms Willetts submitted that while no dishonesty was alleged in respect of this allegation, the Respondent's conduct showed a serious failure to disclose material facts to Mrs P about the progress of her case. Ms Willetts referred the Tribunal to the history of the matter as set out in the Rule 5 Statement. The Respondent had failed to attend a court hearing in September 2003 and he prejudiced his client's interests in terms of being able to take part in the sale of her former matrimonial home. The Respondent had given no explanation for his non-attendance at court. At no point during the correspondence did the Respondent tell the client that the house had already been sold and that from June 2004 he had a cheque for her share of the net proceeds of sale. Ms Willetts referred the Tribunal to the correspondence which was exhibited to the Rule 5 Statement in particular the client's letter of 19 December 2005 which read:

> "Dear Mr Davies
>
> No money in my account?
>
> No paperwork?
>
> What *is* the problem?
>
> Can you ring me today!"

Ms Willetts submitted that that stage the Respondent began to take action; he came up with the idea of making the payment of £80,000 to Mrs P. He admitted in interview that he had misled the client when asked for an explanation for letting Mrs P believe that she was still effectively registered as a co-owner of the house:

> "IO: What explanation can you give us for doing that?
>
> Respondent: I can't
>
> IO: but you do agree that you've misled your client?
>
> Respondent; Yes"

In respect of the compensation payment there was the following exchange:

> "Respondent: I'd made a mistake. What had actually happened was that I had already had an insurance claim and I'd been told off by the insurance company that I had to tell them promptly if I had a claim and this had dragged on and on

and on and I thought the insurance company wouldn't pay out so that's why I thought I'd shoulder it myself.

IO (RF - Senior IO): And not disclose it to your client or to the insurance company

Respondent: or the insurance company, yeah

IO (Gordon Hair): I mean that's

IO (RF): Do you think that was the proper thing to do?

Respondent: I understand why I did at the time

IO (RF): Do you think it was the proper thing to do?

Respondent: It's not the right thing to do, but"

Ms Willetts submitted that this exchange contained the reason why the Respondent had acted as he did. It belied belief that he allowed the client to go on for 19 months believing that she was still the owner of the house. Regardless of his ultimately making recompense, the Respondent still let her remain under a misapprehension and it was damaging to the reputation of the profession for a solicitor to proceed in that fashion.

62.2 The Respondent was not present but in his response document dated 1 October 2012 he had denied the allegation. He stated:

"I am not sure what I was instructed to do by Mrs P. I have asked to see the file so that I can go over what happened but I have not yet had access to the file…

I do not know if I issued an application to set aside a consent order. I do remember that I did attend the hearing on 23 September 2003. I believe the District Judge did not set aside a previous order but I cannot remember why. The case was complicated. The parties had been married and then divorced in about 1990 and then resumed cohabitation in 1990 and then obtained a court order about their finances in about 1990 and Mrs P who I represented at that time did not tell me that she had resumed cohabitation with her ex-husband that she had just divorced and she did not tell the court. Mr P did not tell the court that he had resumed cohabitation with his ex-wife either. I do not know what he had told his solicitor. The period of cohabitation post divorce lasted from say 1990 to say 2001 and had come to an end in 2001 but it was not clear whether the order made previously when both Mrs P and Mr P had misled the court that their circumstances could stand. The application to the court was to tell the court what had happened at the time of the court order in 1990 and what had happened since then to explore the legal position. I cannot remember what happened after that. I do know that I did not attend a court hearing but what the context was and why I did not attend I do not know. I believe there will have been a reason. There are gaps in this narrative which need to be

filled. Now that I know more about my mental difficulties I wonder if I was unwell at the time of the hearing that I missed. I know that I had become anxious about my elderly and widowed father's health. He started to suffer from dementia probably in 2002 and my life became difficult because of the impact of this upon me. My working diaries contain relevant information about my father's health and its effect upon me."

62.3 In respect of the first cheque sent to the Respondent's firm by Mr P's solicitors following the sale of the property, as well as questioning whether the evidence was allowable on the basis that he could not challenge it as he did not have access to the file, the Respondent stated:

"There is a lot of the narrative to the case missing here. I believe a lot of incidents happened between 2003 and 2004 including from memory that Mr P wanted to buy the house for himself and that the valuation was not agreed and that Mrs P said she would not attend any more court hearings and possibly that she would not pay for any more advice from me. How all these matters played out I cannot remember but I do know that the whole story is not contained in this summary and it has been distorted…"

62.4 In respect of the remainder of the history of Mrs P's matter set out in the Rule 5 Statement, the Respondent variously stated that letters were being taken out of context; that he needed to check the dates on letters because there might have been made a mistake about dates quoted and that:

"There is more to the narrative than just the letters and more documents relating to the file and a lot more to the story."

62.5 As to the admissions which the Respondent had made to the IO to the effect that he acknowledged that Mrs P believed that she was still co-owner of the property and that he accepted that he had misled her and had not protected his client's interests, the Respondent stated that he believed that the Applicant should not be able to rely on anything said by him as he was mentally unwell and it was not clear how much he understood of what was happening. He also relied on lack of access to the file.

62.6 The Tribunal considered all the evidence including the oral evidence of the IO and the Respondent's submissions in the response dated 1 October 2012. The Tribunal was satisfied that for a considerable period of time the Respondent had failed to disclose material facts to his client Mrs P as to the progress of her case, despite having numerous opportunities to inform her of the situation. His continued failure to disclose material facts was not in the best interests of his client. In failing to attend a hearing and to protect his client's position, he had failed to achieve a proper standard of work and the reputation of the profession was likely to be comprised or impaired. Accordingly allegation 1.3 was found proved.

63. **Allegation 1.4: He failed to provide clients with written notification of costs before transferring monies from client to office account in breach of Rule 19(2) of the Solicitors Accounts Rules 1998 ("SAR 1998").**

Allegation 1.5: He transferred monies from client account to office account otherwise than as permitted by Rule 22 of the SAR 1998.

(Allegations 1.4 and 1.5 are dealt with together as they arose out of the same facts.)

63.1 For the Applicant, Ms Willetts submitted that the remainder of the allegations were less serious and all linked together. It was set out in the FI Report that the minimum cash shortage of £135,912.25 arose due to client funds having been transferred from the client bank account, in respect of costs and VAT, prior to any bills or other written notification being provided to the clients concerned. The Respondent stated that he was not aware of the rule that his clients had to be given prior written notice before the transfer of his costs from client to office bank account. He agreed the minimum cash shortage in the sum of £135,912.25 as calculated by the IO. With particular regard to allegation 1.4 this related to the seven files that the Respondent had intended to inspect at the Applicant's offices. Where invoices were raised they were purely internal and left in the file. In the case of Ms N where the Respondent was sole executor he was entitled to act in this way, but Ms Willetts submitted that he was obliged to account to others.

63.2 In his response the Respondent said:

> "This comment that is attributed to me [that he was not aware of the rule that his clients had to be given prior written notice before the transfer of his costs from client to office bank account] is taken completely out of context and I do not know in what circumstances I may or may not have said this remark. In any event I was unwell at this time as I have previously explained and I wish to have any remarks made by me excluded from the evidence placed before the tribunal."

63.3 The Respondent continued:

> "I do not believe that I was asked to review my probate files as suggested. If such an exercise was suggested I did not understand it to have been an instruction or request."

63.4 In response to the statement in the FI Report, that costings in support of bills were available for only five of the total of 33 bills raised in nine probate matters and that for six, the client files reviewed costs expressed as a percentage of the value of the gross estate were in the range of 9.99% to 19.79%, the Respondent stated:

> "I have made a request to look at these nine probate files myself so that I can see for myself whether there are any costings on the files. I did on occasions do the costings in my notebook. The entries from my notebooks may not have been made to the relevant client file. I have not yet been allowed access to the files and the notebooks. Also I do not accept the costs as a percentage of gross estate is necessarily a relevant consideration. Also I need to check in the files whether these figures and therefore the percentages are correct."

63.5 The IO identified that the Respondent had transferred costs from client account in respect of bills raised without prior notice or other written notification to the client. It was recorded that the Respondent stated that he was not aware of this requirement.

63.6 The Respondent agreed in his response that bills had been raised totalling £40,000 plus VAT in the matter of Mr A. He stated:

> "I do not remember stating that I had not delivered bills to Mrs CP. There may be costings in my notebooks. Mrs CP had said to me she wanted nothing more to do with the administration of the estate. I may well have discussed with her what to do about payment at that time. In any event I should have been asked to put this right and been given the opportunity to do so. It would have been fair to do this. I was never asked to justify the level of costs charged. I was not asked to produce any evidence unless I misunderstood what was being said to me. In the event I became too unwell to work."

63.7 The Tribunal considered all the evidence including the oral evidence and the Respondent's submissions in the response dated 1 October 2012. Four bills had been raised in 2005 in the estate of Mr A for which the Respondent was co-executor with Mrs CP. The Tribunal was satisfied that the Respondent had failed to provide Mrs CP with written notification of costs before transferring monies from client to office account. It also found that the misconduct alleged had occurred in the four probate matters as set out in the Rule 5 Statement. The Tribunal found allegations 1.4 and 1.5 to have been proved on the evidence.

64. Allegation 1.6: He failed to provide cost information to his client (Mrs CP – the co-executor of the estate of Mr A (deceased)) contrary to Rule 15 of the SPR 1990.

64.1 For the Applicant, Ms Willetts submitted that the Respondent had failed to provide Mrs CP, his co-executor with costs information in respect of the file of Mr A. It was set out in the Rule 5 Statement that the IO was unable to locate a client care letter on the file relating to Mr A in compliance with Rule 15. The Respondent was unable to provide any evidence that Mrs CP had received such a letter.

64.2 In his response, the Respondent stated that Mrs CP and her brother were disappointed in the contents of the will of Mr A and considered challenging it. A decision was made by them not to contest the will "but Mrs CP said that she did not want to have anything further to do with the administration of the estate." He said that he did not know if there was a Rule 15 letter on file or why there was not one and in any event he was not given the opportunity to rectify this which he should have been.

64.3 The Tribunal considered all the evidence including the oral evidence and the Respondent's submissions in the response dated 1 October 2012. The Tribunal was satisfied that the Respondent had failed to provide cost information to his client Mrs CP and found allegation 1.6 to have been proved on the evidence.

65. **Allegation 1.7: That contrary to Rule 7 of the SAR 1998 he failed promptly to rectify a minimum cash shortage of £135,912.25 that was in existence as at 13 September 2007.**

65.1 For the Applicant, Ms Willetts relied on the minimum cash shortage of £135,912.35 which resulted from the transfer of costs from client to office account in respect of five probate matters where written notification of costs had not been made to the clients. The shortage existed as at 30 September 2007 and no evidence had been received that the Respondent had rectified it.

65.2 In respect of the minimum cash shortage and how it was made up and the statement in the FI Report that the Respondent had not provided any evidence that he had rectified it, the Respondent said:

> "The alleged cash shortage arises because I allegedly had not sent a copy of the bill concerned to the person who was entitled to see the bill before I transferred the money. I do not believe that I was asked to do this by the IO but if I was asked I did not understand what I was being asked to do."

65.3 The Respondent also said:

> "I believe that by this time I was too ill to deal with this request."

65.4 The Respondent also stated:

> "I am aware that the [Applicant] have since 2007 altered their procedures and that an Investigation today may have been undertaken differently from one in 2007. Also today I wonder if during a meeting with the IO on 15 June 2008 (sic) to discuss what he had found that he was implying that he had concerns and that he was giving me time to put things right. Unfortunately I was not able to pick up on this implication. I was clearly of the impression that the IO was carrying out an Inspection by the [Applicant] similar to a previous Monitoring Visit I had had. I believed that the IO was giving me suggestions similar to a "To Do" list and that his next visit was because he had not finished his work."

65.5 The Tribunal considered all the evidence including the oral evidence and the Respondent's submissions in the response dated 1 October 2012. The Tribunal found allegation 1.7 proved on the evidence.

Mitigation

66. The Respondent was not present but had denied all the allegations. The Tribunal however had regard to his submissions in respect of the allegations.

Sanction

67. Two allegations of dishonesty had been found proved against the Respondent involving a considerable amount of money, as well as an allegation relating to breaches of Practice Rule 1 of the SPR 1990 arising out of his failure to disclose material facts to a client over a considerable period of time (where no dishonesty was alleged). Also proved were a number of other allegations relating to breaches of the SRA 1998. At the very least, the Tribunal considered the seriousness of the Respondent's conduct was such that the Respondent should be indefinitely suspended

from practice for the protection of the public and the reputation of the solicitor's profession. As allegations of dishonesty had been found proved the Tribunal considered that such a suspension would not be adequate and that the Respondent should be struck off the Roll of Solicitors.

Costs

68. For the Applicant, Ms Willetts applied for costs in the sum of £80,858.55. She informed the Tribunal that the schedule of costs excluded the costs of the first substantive hearing before the Tribunal, and the costs of the appeal to the Administrative Court where each party had been ordered to pay their own costs. The schedule had been served on the Respondent on 22 February 2013 under cover of a letter sent by post and email and following the case of The Solicitors Regulation Authority v Davis and McGlinchey [2011] EWHC 232 (Admin) inviting him to make representations about his financial position. No reply had been received. The only other financial information which the Applicant had about the Respondent was that the intervention costs in respect of his former firm were in the region of £204,000 and that payments had been made from the compensation fund to clients in the region of £534,000 in respect of matters after the intervention.

69. The Tribunal considered the costs schedule to be reasonable but the Respondent was not present and the Tribunal had only limited information about his situation. The Respondent did not appear to be in employment and by its sanction the Tribunal was removing his ability to practice, and accordingly the Tribunal determined that although an Order for Costs would be made in the Applicant's favour that Order for costs should not be enforced without leave of the Tribunal.

Statement of full order

70. The Tribunal Ordered that the Respondent John Rhys Davies, solicitor, be Struck Off the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £80,858.55, such costs not to be enforced without leave of the Tribunal.

Dated this 27th day of March 2013
On behalf of the Tribunal

T. Cullen
Chairman