The Respondent's Appeal against the Tribunal's decision lodged with the High Court (Administrative Court) was withdrawn before the appeal hearing.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 10549-2010

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ERIC DONALD HUNTER Respondent

Before:

Mr. J. N. Barnecutt (in the chair)
Mr. R. Hegarty
Mr. R. Slack

Date of Hearing: 12th January 2011, 4th February 2011, and 22nd and 23rd June 2011

Appearances

Peter Cadman, solicitor of Russell-Cooke LLP of 8 Bedford Row, London, WC1R 4BX for the Applicant.

Andrew Lockley, solicitor of Irwin Mitchell Solicitors, Riverside East, 2 Millsands, Sheffield, S3 8DT for the Respondent.

JUDGMENT

Allegations

1. The allegations made against the Respondent Eric Donald Hunter were that:

1.1 The Respondent transferred funds from client account to office account on probate matters contrary to the Solicitors Accounts Rules;

1.2 The Respondent prepared bills of costs on probate matters that were excessive;

1.3 The Respondent failed to properly send bills of costs to entitled parties contrary to Solicitors Accounts Rules 19(2);

1.4 The Respondent prepared round sum bills in probate matters contrary to Rule 19 Solicitors Accounts Rules (note x);

1.5 [Withdrawn]

It was alleged that the Respondent's conduct in conveyancing transactions had been dishonest.

The Respondent admitted allegations 1.1, 1.3 and 1.4. The Respondent denied allegation 1.2 and the allegation of dishonesty.

This case came before the Tribunal on 12 January 2011 when the Applicant's case was presented and the Respondent started to give his evidence. The hearing was adjourned part heard to 4 February 2011. However, on 4 February 2011 the Respondent applied for permission to adduce new evidence, the content of which the Applicant had not had enough time to consider. It appeared that only after the previous hearing on 12 January 2011 the Respondent had properly considered the documents relied upon by the Applicant. The detailed position of both parties was set out in the Memorandum of Application and Directions dated 4 February 2011. The Tribunal, with reluctance, adjourned the hearing on 4 February 2011 to 22 and 23 June 2011, and ordered the Respondent to file and serve a detailed witness statement within 28 days and gave other directions. The Tribunal also stated that it expected the Respondent's witness statement to explain how he had arrived at the figure in each contested bill, what element represented time, and what element represented care and attention. The matter was then adjourned to 22 and 23 June 2011.

Documents

2. The Tribunal reviewed all the documents submitted by the Applicant and Respondent which included:

<u>Applicant</u>

- Application dated 4 June 2010 together with attached Rule 5 Statement and all exhibits;
- Applicant's Schedule of Costs;
- Applicant's additional bundle of documents.

Respondent

- Witness statement of Eric Donald John Hunter dated 6 January 2011 together with attached exhibits;
- Revised witness statement of Eric Donald John Hunter dated 21 March 2011 together with attached exhibits;
- Bundle of character references;
- Extract from Cordery on Costs 2009;
- Transcript of Tribunal Hearing on 12 January 2011;
- Copies of the client files for the clients MAH Deceased, M and MH, EW, GH Deceased, and MB Deceased;
- Client ledger for the clients M and MH.

Factual Background

3. The Respondent was born in 1946 and admitted to the Roll of Solicitors on 15 June 1973. He did not hold a current Practising Certificate. At the material times the Respondent was a partner with the firm of Blythe Liggins of Edmund House, Rugby Road, Leamington Spa, CV32 6EL ("the firm").

4. An investigation was conducted by the Solicitors Regulation Authority ("SRA") into the firm and a Forensic Investigation Report was produced dated 26 March 2008. During the course of the inspection certain probate and trust matters conducted by the Respondent were considered. Client matter files were examined by Nicholas Shelley of Bennett and Shelley Law Costs Draftsmen. He prepared a report dated 20 December 2006.

5. In his report of 20 December 2006 Nick Shelley concluded that:

> "9.1 I found that charges actually made were twice what I would expect on a time cost basis and in one matter costs were four times the maximum reasonable amount....
>
> 9.2 The solicitor provided no costs information in five of the six cases.... There is evidence for only one bill being sent to clients in the course of these matters.
>
> 9.3 There were several bills of costs in every matter. Although interim billing or requests for payments on account are appropriate in principle, many of the individual bills are disproportionate to work added to the file since the previous bill.
>
> 9.4 Where a solicitor fails to keep proper records, the forensic

investigation of costs may appear to conclude that there has been an overcharge unless the costs draftsman takes into account unrecorded work which had actually been done by the solicitor.... I found nothing in the files, which seemed well maintained, which might have indicated the existence of any substantial amount of unrecorded work.

9.5 ....

9.6 My conclusion is that the level of costs in each matter represents significant over-charging."

6. After correspondence between the Investigating Officer ("IO"), the Respondent and the firm's solicitors, the matter was reconsidered by Mr Shelley on the basis of the matters raised and "re-creation" of the files to deal with what the Respondent's representative described as "major omissions from the records on file". He prepared a further report dated 7 June 2007, in which he concluded:

"4.1 ....I note the submission that "billing is not an exact science and can depend on a number of factors other than time spent". It is not disputed that, as a result, there may be "a range of right figures". However for the avoidance of doubt, my opinion that none of the figures charged is within that range remains unchanged.

5. Summary

5.1 An analysis of the submission that the costs are justified by unrecorded time shows that the unrecorded time in every matter would far exceed the value of recorded time. Globally the solicitor has recorded only 17% of the time charged for. To put it another way, there is no record of 83% of the work done.

5.2 The solicitor submits that in all the cases under investigation the executors and beneficiaries have approved the costs. It is disputed that approvals were obtained in all matters. In some instances there are qualified approvals. In others, the approval is at best implied rather than express.

5.3 I remain of the opinion that the costs are not within the range of figures which would be regarded as right."

7 Mr Shelley had examined the following probate matters:

7.1 MAH Deceased. In this matter the bills of costs over a 5½ year period totalled £14,695. In his first report Mr Shelley stated that in his opinion a reasonable cost for handling the matter would have been in the region of £3,620. He also concluded that many of the bills were "manifestly disproportionate to the work on the file" and the overcharge was "significant". After the further representations made by the Respondent Mr Shelley re-assessed the reasonable costs upwards to £4,059. Even on that higher figure the overcharge exceeded £10,000.

7.2 M and MH. In this matter bills of costs were raised in the sum of £8,575. The beneficiary (Dr B) said he did not receive any of the bills of costs. In his first report Mr Shelley assessed the reasonable costs as £2,942.50 with an overcharge of approximately £5,500. Following further representations by the Respondent, Mr Shelley re-assessed the reasonable cost to be £4,788.50 with an overcharge of £3,750.

7.3 EW. In this matter Mr Shelley assessed the file and concluded that "some of the bills were manifestly disproportionate to the work on the file". He stated that the total cost of £4,992.46 was more than twice what he would have expected, an overcharge of £2,900. Following submissions made on behalf of the Respondent, and a re-assessment, Mr Shelley concluded that a maximum reasonable charge would have been £1,934 with an overcharge exceeding £3,000.

7.4 GH Deceased. In this matter the bills of costs were £17,725. Mr Shelley assessed that reasonable costs would have been £6,340. Following further representations made on behalf of the Respondent Mr Shelley reassessed the reasonable costs as £6,896. That higher figure still left an overcharge in excess of £10,800.

7.5 MB Deceased. In this matter the bills of costs were £8,250. In his initial report Mr Shelley concluded that the bills were twice what he would have expected to see. Following the representations made on behalf of the Respondent Mr Shelley stated there was an overcharge but to a lesser extent. He said that the maximum reasonable costs would have been £5,841. This created an overcharge of £2,400.

8. These probate files also showed the following:

8.1 Round sum bills of costs in circumstances where there had been little or no evidence of any work conducted since raising the last bill of costs;

8.2 Bills of costs were excessive in view of the amount of work actually undertaken;

8.3 Monies transferred from client account to office account with no evidence that the bills of costs had been rendered to entitled parties.

8.4 Even where approval of bills was sought, on many occasions that approval was sought several years after the costs had been taken.

Witnesses

9. The following witnesses gave oral evidence:

- Kathleen Beenham (Investigation Officer with the SRA);
- Nicholas Shelley (Law Costs Draftsman)
- Eric Donald John Hunter
- Nigel Human

The Respondent's Application of No Case to Answer on Allegation 1.2

The Submissions of the Respondent

10. At the conclusion of the Applicant's case, Mr Lockley on behalf of the Respondent submitted an application of no case to answer on allegation 1.2. He submitted that the evidence the Tribunal had heard did not provide any arithmetical basis for the Tribunal to judge the appropriate rate of charging in any of the cases presented before the Tribunal.

11. Mr Lockley had cross-examined Nicholas Shelley, the Costs Draftsman, in relation to the guideline rates for summary assessment hearings. Mr Shelley accepted that he had used hourly rates which were used in summary assessment hearings when he had done his calculations and he accepted that these guidelines did not apply to non-contentious matters. Mr Shelley had also accepted that the factors which determined what a solicitor may claim as a fair and reasonable charge were the factors set out in The Solicitors (Non-Contentious Business) Remuneration Order 1994. Mr Shelley had accepted the way the solicitors charged time to clients was still to employ a Factor A and Factor B formula which included the cost of work, the actual overheads, plus a mark-up representing the profit element. In non-contentious cases Mr Shelley had accepted that the nine pillars referred to at Article 3 of the Solicitors (Non-Contentious Business) Remuneration Order 1994 were applicable. Mr Lockley submitted that the difficulty for the Tribunal was that there was no benchmark in relation to non-contentious cases and therefore no indication of where or how calculations of costs could be made. Mr Lockley reminded the Tribunal that the Tribunal was not here to perform the role of Costs Judge and the evidence given by Mr Shelley had been rather different from the reports he had prepared. Mr Shelley had confirmed that there was no prohibition on charging a value element and indeed, on trust activities, solicitors did charge an annual fee which was a percentage of the value of the estate which they were allowed to do.

12. Mr Lockley submitted that Mr Shelley's views on cross-examination undermined the basis of his calculations, as he did not have any basis for those calculations. Mr Lockley submitted that as the Tribunal could not assess what would be a reasonable and proper charge in each of the matters before the Tribunal, it could not make a decision as to whether those charges were excessive, if so excessive, were they culpable and, if so excessive were they dishonest. Mr Lockley submitted that the Tribunal could not get to base point on quantum and therefore could not go beyond this point. It was for the SRA to prove on the balance of probabilities their case, and they had failed to do so.

The Submissions of the Applicant

13. The Applicant submitted that the Respondent's application of no case to answer could only succeed if there was no evidence at all before the Tribunal. The Tribunal had heard evidence from the Investigation Officer, Kathleen Beenham, who had analysed dates, bills and the amount of work recorded on each file. That evidence had been unchallenged by the Respondent. Furthermore, the Tribunal had heard evidence from

Mr Shelley who had not changed the opinion given in his report. His conclusions in his report had not been challenged and that was evidence before the Tribunal. Each of Mr Shelley's reports had concluded that there had been overcharging.

14. The Applicant submitted that the Tribunal's role was to look at whether the SRA had been able to prove that the Respondent had been overcharging clients. He submitted that it would be ironic if the Respondent could appear before the Tribunal and claim that because no hourly rates were sent to the clients, Mr Shelley could now be criticised for using County Court hourly rates used in detailed assessment hearings. There had been no suggestion that Mr Shelley should have used a different hourly rate, or any suggestion as to what the expense rate should have been. There had been no challenge to any of the calculations made by Ms Beenham or Mr Shelley and the Applicant submitted that this was evidence before the Tribunal which could allow the Tribunal to come to a conclusion that the Respondent's bills of costs had been excessive.

The Tribunal's Decision on the Respondent's Application of No Case to Answer on Allegation 1.2

15. The Tribunal had considered carefully the submissions of both parties, and the evidence and documents submitted by the Applicant to support the allegation that the Respondent had prepared bills of costs on probate matters that were excessive.

16. The Tribunal had heard evidence from Ms Beenham, which had not been challenged by the Respondent. In her evidence Ms Beenham had considered a number of probate files which were dealt with by the Respondent, she had considered various bills raised, the period between those bills and the amount of work recorded on the file between those bills. There had been a number of occasions when Ms Beenham had not been able to find any evidence or only very little evidence of work carried out to support the bill of costs.

17. The Tribunal had also heard evidence from Mr Shelley and whilst Mr Shelley was cross-examined by the Respondent, the conclusions at the end of his report remained unchanged. His reports had concluded that the level of costs in each matter represented significant overcharging, that the costs were not within the range of figures which would be regarded as right and on his reassessment of the reconstituted files, he remained of the opinion that there was overcharging but to a lesser degree than he had previously assessed.

18. The Tribunal was satisfied that there was sufficient evidence before the Tribunal that could allow the Tribunal to conclude that the Respondent had prepared bills on probate matters that were excessive. Accordingly, the Respondent's application of no case to answer on allegation 1.2 was dismissed.

Findings of Fact and Law

19. **Allegation 1.1: The Respondent transferred funds from client account to office account on probate matters contrary to the Solicitors Accounts Rules.**

19.1 The Respondent had admitted this allegation and accordingly the Tribunal found this

allegation proved.

20. **Allegation 1.2: The Respondent prepared bills of costs on probate matters that were excessive.**

20.1 The Tribunal had considered carefully all the documents provided, the evidence given by all witnesses, the character references provided and the submissions of both parties.

20.2 On 12 January 2011 at the beginning of the Applicant's case, the Applicant had stated that this allegation was pursued on the basis that the Respondent had acted dishonestly.

20.3 Mr Lockley had submitted, during the closing submissions of the Respondent's case on 23 June 2011 that the Applicant in his Rule 5 Statement had alleged that the Respondent was dishonest in relation to conveyancing transactions. Mr Lockley submitted that the allegation of dishonesty was specific to conveyancing transactions and did not cover any of the probate matters. The Applicant had not made any application to the Tribunal to amend the Rule 5 Statement and the Respondent referred the Tribunal to the case of Singleton v The Law Society [2005] EWHC 2915 (Admin), in which it had been held that in the context of disciplinary proceedings against a solicitor, adequate notice and particulars of dishonesty were necessary. Mr Lockley submitted that it was insufficient for the Applicant to refer to dishonesty in relation to conveyancing transactions, although he accepted this appeared to be a typing error.

20.4 On this point the Applicant distinguished the case of Singleton v The Law Society as in that case there had been no reference to any dishonesty in the Rule 4 Statement, whereas in the case before the Tribunal today, it was clear from the Rule 5 Statement that an allegation of dishonesty was pursued. Furthermore, it had not been suggested that the Respondent did not know the nature of the allegation he was facing, and this issue had been clarified in correspondence between the parties. The Applicant submitted that the Respondent was fully aware of the nature of the dishonesty allegation made against him, and that the allegation was in relation to the bills of costs and not on conveyancing transactions.

20.5 The Tribunal when considering this issue were mindful of the fact that this hearing had taken four days over a period of six months. On the first day, on 12 January 2011, when the Applicant opened his case, he had clearly stated

> "…. the contested matter that you will have to determine, the bills of costs on probate matters that were excessive, and the Authority's proposition is that is dishonest…."

Furthermore, the Applicant had stated:

> "The difference of work of the amounts between the work done and what the bill should have been as the Authority says, is in the Authority's view so high that it is excessive and is so excessive it is both subjectively and objectively dishonest."

The Applicant had assured the Tribunal that in correspondence between the parties, it had been made quite clear the basis upon which dishonesty was pursued, and this matter was not challenged by the Respondent. Indeed, the Tribunal was mindful that the Respondent's evidence dealt with the issue of dishonesty in relation to the bills of costs as did the Respondent's advocate's cross-examination of other witnesses. In all the circumstances, the Tribunal was satisfied that whilst the Rule 5 Statement made reference to dishonesty in conveyancing transactions, it had subsequently been clarified between the parties that the dishonesty allegation related to the bills of costs in probate matters and furthermore, the Applicant had made the position clear on the first day of the hearing on 12 January 2011. Accordingly, the Respondent had been given a period of at least six months to consider that dishonesty allegation, in relation to probate matters.

20.6 Mr Lockley, on behalf of the Respondent, had submitted that the Tribunal should consider whether the amounts charged in the bill of costs were excessive, and if so, was the level of charging serious professional misconduct and were the amounts culpably excessive to amount to serious professional misconduct. When considering the evidence, the Tribunal was urged to:

(a) Look at whether the bills of costs had been approved by clients;

(b) Consider the issues in light of Articles 3 and 5 of the Solicitors (Non-Contentious Business) Remuneration Order 1994;

(c) Consider whether there had been an element of deliberation and whether there had been a deliberate course of conduct.

20.7 Mr Lockley further submitted that the amount of costs billed could be correct if it fell within a range of figures, and could only be excessive if it was outside that range of figures. Even if it was outside that range of figures, that did not necessarily mean there was evidence of misconduct.

20.8 The Tribunal had been referred to Article 3 of the Solicitors (Non-Contentious Business) Remuneration Order 1994, which stated:

"**3. Solicitors' Costs**

A solicitor's costs shall be such sum as may be fair and reasonable to both solicitor and entitled person, having regard to all the circumstances of the case and in particular to:-

(a) the complexity of the matter or the difficulty or novelty of the questions raised;

(b) the skill, labour, specialised knowledge and responsibility involved;

(c) the time spent on the business;

(d) the number and importance of the documents prepared or perused, without regard to length;

(e) the place where and the circumstances in which the business or any part thereof is transacted;

(f) the amount or value of any money or property involved;

(g) whether any land involved is registered land;

(h) the importance of the matter to the client; and

(i) the approval (express or implied) of the entitled person or the express approval of the testator to:-

(i) the solicitor undertaking all or any part of the work giving rise to the costs or;

(ii) the amount of the costs."

20.9 The Tribunal had also been referred to Article 5 of the Order which stated:

"**5. Disciplinary and other measures**

(1) If on a taxation the taxing officer allows less than one half of the costs, he must bring the facts of the case to the attention of the Council.

(2) The provisions of this order are without prejudice to the general powers of the Council under the Solicitors Act 1974."

20.10 Mr Lockley had submitted that one of the pillars to be considered under the Solicitors (Non-Contentious Business) Remuneration Order 1994 was the amount or value of any property involved. He submitted that Mr Shelley in his evidence had accepted that his re-calculations on the reconstituted files were based on time only and did not take into account Article 3 of the Solicitors Remuneration Order. He had not included any value element or mark-up, and whilst Mr Shelley concluded that the figures had been calculated on a time basis, he conceded that the factors set out in Article 3 of the Solicitors (Non-Contentious Business) Remuneration Order 1994 remained good law in view of the case of Jemma Trust Co Ltd v Liptrott and Others [2003] EWCA Civ 1476, in which the Court of Appeal had held a solicitor may still make a separate charge for value, which should be transparent on the face of the bill. The Court also restated that, where there was a separate charge for value in probate administration, it should be calculated as a percentage of the value of the estate. Mr Lockley submitted that even on the estimates of time costing made by Mr Shelley, if an additional amount was added for the value element and care and conduct, the final figure would be in excess of the amount the Respondent had actually charged on each bill. This was particularly in relation to the file of GH Deceased.

20.11 The Tribunal had heard evidence from Kathleen Beenham, the Investigation Officer with the SRA which had not been challenged by the Respondent, and the Tribunal had also heard evidence from Mr Shelley who had confirmed that he had used the hourly rates of the Coventry County Court on detailed assessment hearings as a benchmark in the absence of any hourly rate on the file. In particular, Mr Shelley confirmed that he had taken some comfort from the fact that in one case, where the Respondent had quoted an hourly rate, that rate matched the rates Mr Shelley had used for that period.

20.12 Whilst Mr Shelley had accepted that the hourly rates he had used did not apply to Non-Contentious matters, he was of the view that the matters he had assessed were not difficult or complex and the conclusions he gave in his written reports remained unchanged. Whilst some parts of Mr Shelley's evidence were a little confusing, the Tribunal accepted his reports and the conclusions contained in those reports.

20.13 The Respondent in his evidence admitted that he did not carry out time recording and that he would often do work on files which was not recorded. At the hearing on 12 January 2011 the Respondent stated that an hourly rate was set for all fee earners by the Executive Committee of the partnership of the firm for the forthcoming year subject to review. This rate would be an A rate, which was the cost of doing the work with no profit element. He confirmed that the figures were prepared at the base rate without any value element. The Respondent stated that he was aware of the Solicitors (Non-Contentious Business) Remuneration Order 1994 and that when he prepared bills for his clients, he would consider the criteria set out in Article 3. This included the time spent on the matter, the immediate response to client needs, expertise on Inheritance Tax advice etc. He also confirmed that a value element was charged in probate administration which related to the value of the trust fund on a percentage basis. This would usually be 0.5% on an annual basis for the administration of the trust.

20.14 However, in his evidence on 22 June 2011, the Respondent stated that the bills of costs were not calculated purely on a time basis, but included time plus mark up. In the Respondent's revised witness statement, dated 21 March 2011, the Respondent exhibited Minutes of a partner's meeting at the firm held on 25 July 2001. Also exhibited to the statement was a Charge Rates Report dated 7 March 2011 which gave the charge out rates for the Respondent from 1980 to 2004. The rate in 1980 was stated to be £130 per hour, the rate in 1995 was stated to be £135 per hour, the rate in 1999 was stated to be £145.00 per hour, the rate in 2003 was stated to be £160 per hour and the rate in November 2004 was stated to be £165 per hour. There was no reference to A or B rates. On cross examination, the Respondent stated that when calculating quantum before rendering a bill, he would take into account expertise, seniority of the solicitor within the practice and care and attention, which he considered were all relevant. He also stated that he calculated bills from time to time, having in mind, work that might have been done from time to time.

20.15 The Tribunal was referred by Mr Lockley on behalf of the Respondent to an extract from Cordery on Costs 2009. This made reference at paragraph 176 to Jemma Trust Company Ltd v Liptrott in which the Court of Appeal had given guidance stating that the factors specified in the 1994 Order could be taken into account when adding to the cost of time spent any mark-up. The total figure must represent a fair and reasonable sum. The Tribunal noted that at paragraphs 177 to 300 of Cordery on Costs, it was

stated:

> "In all other routine non-contentious matters, where there is an ascertainable value element, consider whether the non-value factors are subsumed by value. It used to be only in exceptional circumstances that there would be a mark-up expressed as a percentage of time in addition to the value factor. However, the fall in the value of money since the value yardsticks were set means that there are now probably fewer cases where a value factor in itself is sufficient. If there is a value factor the usual mark-up on time might be less, perhaps between 25% and 33% in matters other than routine domestic conveyancing, or none at all following Jemma Trust Company Ltd v Liptrott ...."

20.16 The Tribunal considered each of the client files provided and took into account the green "backfill" pages which set out work that had been carried out but that had not been recorded on the file originally. In particular, the Tribunal considered the files of MAH Deceased, M and MH and GH Deceased, which had been particularly exemplified during the Respondent's evidence on 22 and 23 June 2011. The Tribunal also took into account the Respondent's comments on each of the individual files relating to MAH Deceased, M and MH, EW, GH Deceased and MB Deceased, which had been dealt with in the Respondent's evidence on 12 January 2011 and his second witness statement dated 21 March 2011.

20.17 In his evidence on 12 January 2011 the Respondent stated that the bills charged to clients did not have any mark-up. He also stated that a mark-up was not added at the time because:

> "...the day we come, when the thing came to an end, and we would then review your previous on account billing, and then you would add a value element."

However, in his revised witness statement dated 21 March 2011, the Respondent stated:

> "10. During the investigation, I went through the particular files which are the subject of these allegations and inserted on green paper, notes and other indications of activities which were unrecorded. I have called this process "back-filling". I then calculated the costs again as I would normally have done, and, with the usual 25%-33% mark-up, and a value element in appropriate cases, the costs figure was in each case, except [H] (see below), at or very near what was in fact charged."

The Respondent went on to say in his revised witness statement:

> "15. .... I recall that when giving evidence on 12 January, I gave the impression that bills on account were calculated on the basis of "expense of time" rates only. That was erroneous. I apologise for my confusion.
>
> 16. Round sum bills during the course of a matter covered "expense of time", care and conduct, and value, pending the eventual completion of

a matter."

The evidence the Respondent gave on 12 January 2011 was inconsistent with his subsequent revised witness statement and the Tribunal was of the view that the Respondent himself did not know how he had calculated the bills of costs. The Tribunal considered it was very unsatisfactory that the Respondent had never produced any evidence of a proper breakdown or explanation or supplied any detailed calculation of the bills of costs despite having been given many opportunities, requests and time to do so.

20.18 Mr Shelley, in his first report dated 20 December 2006 stated on each file that he considered that he had allowed an amount of estimated time, for time that had not been recorded in his final assessment. He had also added "tolerance", above the usual level of estimate. Having done so, he still concluded that the bills were manifestly disproportionate to the work on each file. In particular, on the file of EW, Mr Shelley was of the view that the total costs were more than twice what he would have expected on that file. On each of the files examined by Mr Shelley he stated that some of the bills on those files were disproportionate to the work on the file since the previous bill, and the costs presented were, in some cases, a significant overcharge.

20.19 In his second report dated 7 June 2007 Mr Shelley confirmed that the approval (express or implied) of the client or residuary beneficiary was one of the nine factors to be taken into consideration under the Solicitors (Non-Contentious Business) Remuneration Order 1994 when assessing whether a solicitor's costs were fair and reasonable to both solicitor and entitled person. In the files reviewed by Mr Shelley, in some instances there were qualified approvals and in others, the approval was at best implied rather than express. All the approvals referred to were obtained long after the bills of costs had been rendered. It was also pertinent that many of the bills had been addressed to the Respondent only as Executor. Mr Shelley concluded that the costs were not within the range of figures which would be regarded as right.

20.20 In Mr Shelley's third report dated 30 September 2008, Mr Shelley pointed out that in Jemma Trust 2003, whilst the Court of Appeal held that a percentage uplift under the Solicitors Remuneration Order 3(f) was permissible (the value element), this was subject to stringent guidelines such as the requirement that solicitors advise their clients at the commencement of the retainer where a value element would be charged and solicitors take steps to ensure that the composite rate did not already reflect value, even in part. Mr Shelley remained of the opinion that there was overcharging, but to a lesser degree than he had previously assessed.

20.21 The Tribunal having considered the client files provided in detail was not satisfied that a number of items recorded on the green backfill sheets were chargeable items. Examples of these were:-

- "Calculation of interest". The Respondent confirmed that the cashier would send interest calculations on a Memorandum of all matters, and these were recorded on the files. The Respondent would consider if interest payments were to be made to clients.

- Transfer of costs from one ledger to another; the Respondent had stated that he

would complete a form to transfer costs from client to office.

- Receipt of a telephone message from a secretary or support staff advising the fee earner that the client had telephoned;

- Diary Entries relating to the payment of bills for clients. The Respondent stated that every four weeks he would tell his secretary to pay nursing home fees and he would dictate a letter to go with the cheque.

The Tribunal did not accept that any of these items were chargeable other than the dictation of a letter to accompany the cheque for the nursing home fees.

20.22 The Tribunal noted from Mr Shelley's final report dated 30 September 2008 that he confirmed that in 1999 the Law Society advised that solicitors costs should be charged at a composite rate including both A and B factors. The majority of the bills delivered by the Respondent were delivered after this date. Accordingly, the Tribunal would have expected the bills to have been calculated in line with the guidance provided by the Law Society.

20.23 Furthermore, the Tribunal had considered Article 3 of the Solicitors (Non-Contentious Business) Remuneration Order 1994 and was satisfied that most of the files considered were relatively straightforward and relatively low value estates. The Respondent had not informed clients that he intended to add a value element at the commencement of the retainer and any value that may have been charged was not transparent on the face of any bill. The Tribunal also noted that the Respondent's advocate in his letter dated 18 April 2007 to the Authority had accepted that a number of the files were not unduly onerous or complex or difficult. On the basis of the evidence before it, the Tribunal was satisfied that the exemplified cases were not complex or difficult, and was further satisfied that they would not have justified the addition of a value element or an annual charge of the percentage of the estate for administration purposes. The Tribunal considered each of the files with this in mind.

20.24 The Tribunal was not assisted by Article 5 of the Solicitors (Non-Contentious Business) Remuneration Order 1994 as it was specifically related to taxation proceedings. The Tribunal concluded that in the files before it, the addition of a value element was not justified and that the base rates set out in the Charge Rates Table attached to the Respondent's second witness statement included any element of mark up. Using this as the basis of the calculation of the bills, particularly those rendered after 1999, the Tribunal then considered each of the files in turn.

<u>MAH Deceased</u>

20.25 The Respondent accepted that he could not justify the bills that had been rendered on this particular file, and although he stated that a great deal of work had been carried out, and gave the Tribunal some explanations as to what that work entailed, the Respondent was unable to say or prove all the work he had carried out. He accepted that the bills were excessive and that he had not sought the client's approval of the bills before they were delivered. He put this down to poor management. After Mr Shelley's report had been produced, the Respondent had refunded the clients the difference between the bill and Mr Shelley's assessment together with interest from

his own capital account, as the Authority had taken the view that an overcharge had occurred over costing. The Respondent maintained that the client had not been charged any mark-up or value element and that the Respondent had billed the file from time to time, "effectively having a feel for the file rather than purely scientifically". The Respondent indicated that he would have added for value probably 1% but possibly a mark-up of 25% to 33% for the actual work. The Respondent confirmed in his evidence on 12 January 2011 that the bills did not reflect any trust administration charges. However in his witness statement of 21 March 2011, the Respondent stated "It was my view, for example, that a charge equivalent to 0.5% of the trust fund per annum was a not unrealistic fee" On cross examination the Respondent accepted an hourly rate of £165 would apply.

20.26 The Tribunal noted that on the file of MAH Deceased, bills had been rendered over a period from 24 January 2001 to 25 July 2006 in the total sum of £14,695. Whilst the Respondent had provided some explanation of the work he had carried out, he had accepted that he could not justify the amount of the bills that were rendered and furthermore, approval of the bills from the client was sought subsequently in November 2006. The Tribunal particularly noted in a letter to the client dated 8 November 2006, the Respondent had stated

> "Since your sister's passing away we have been involved in the administration of the estate itself to start off with and then subsequently we continue as Trustees of the estate which consists of the property and the cash funds. Unfortunately there are charges involved with that, rather like leaving your electrical appliances on standby."

20.27 The Tribunal noted that a bill was rendered on 1 December 2003 in the sum of £1,000. There was then a record of two units for a telephone call, a letter sent to the client enclosing a cheque and then on 19 January 2004 a further bill was rendered for £1,000. There was then a letter received from the client, a form that appeared to be a transfer of costs form, a telephone call recorded and a file note before another bill was rendered on 15 March 2004 in the sum of £4,000. The file then noted a letter from a building society containing a statement before another bill was rendered on 22 October 2004 in the sum of £1,500. The file then recorded a series of interest calculations which could not have taken the Respondent very long to absorb but yet another bill was sent on 18 January 2005 in the sum of £750. The file showed one more incoming letter from a building society containing a statement before another bill was rendered on 15 April 2005 in the sum of £1,500. In the Tribunal's opinion those bills were excessive and grossly excessive. The Respondent had not provided any proper explanation or supplied detailed calculations of those bills despite many opportunities, requests and time to do so. The Tribunal was satisfied allegation 1.2 was proved in relation to this file.

<u>M and MH</u>

20.28 In his evidence on 12 January 2011, the Respondent provided the Tribunal with details of various visits to see the client which had not been recorded on the file. He also confirmed that Mr Shelley's figures did not include mark up, but that 33% uplift would be justified which would justify all the bills. In his evidence on 22 June 2011, the Respondent provided the Tribunal with further details of work that had not been

recorded and indicated that although a second file had been opened on the death of one of the clients, the probate work for the deceased client continued to be done on the original file. In his witness statement of 21 March 2011, the Respondent stated that a 33% mark up and the addition of a 1.5% value element would come to a total that was well above the fees actually charged. On cross examination the Respondent accepted that an hourly rate of £150 would apply.

20.29 The Tribunal's attention had been drawn to a number of bills prepared on this file. In particular, a bill of costs had been rendered on 30 April 2003 in the sum of £500. Subsequently, a further bill of costs was rendered on 15 March 2004 in the sum of £1,000. The work carried out between the two bills recorded five units, one attendance note for 45 minutes and a note to write to the client to confirm the situation. The Respondent in his evidence on 22 June 2011 stated that there would have been unrecorded telephone calls and that the bill reflected his general expertise and knowledge. The Tribunal found no evidence of additional work carried out and rejected the Respondent's submission that the bill should reflect his expertise in this case. The Tribunal was satisfied that the bill of costs rendered on 15 March 2004 was excessive and allegation 1.2 was proved in relation to this file.

EW

20.30 The Respondent was the sole surviving Executor and trustee of this estate. In his evidence on 12 January 2011, the Respondent confirmed that the figures used by Mr Shelley were base rates to which a 33% mark up would have been added as an "exasperation factor if nothing else", as the client did not respond to correspondence. In his witness statement of 21 March 2011, the Respondent also stated that if 1.5% of the trust fund value were also added to Mr Shelley's figures in addition to 33% mark up, the total calculation would be above the sum charged. Again the Respondent sought to provide details of work carried out that had not been recorded on the file.

20.31 A bill had been sent to the client, who was the Respondent himself as Executor of the late EW Deceased, dated 19 April 2000 in the sum of £250. The file showed four letters received, two letters written and two transfer of funds forms. A further bill was then sent on 18 December 2000 in the sum of £600. There was then a further bill on 30 December 2003 in the sum of £2,250 and although three years had lapsed between the two bills, only four letters had been written, six letters had been received and one additional unit recorded during the intervening period. Furthermore all the bills had been addressed to the Respondent as the Sole Executor. Although unqualified approval of those bills had been obtained from the beneficiary, the Tribunal was satisfied that the bills were excessive in view of the work carried out on the file. Allegation 1.2 was proved in relation to this file.

GH Deceased

20.32 The Respondent's evidence on 12 January 2011 was that with mark up without value, the total fees would be in excess of the amount actually charged. This was reiterated in his witness statement of 21 March 2011. The Tribunal heard evidence from Mr Human on this file. Mr Human thought very highly of the Respondent and confirmed that he would expect to pay a premium for the Respondent's talent and abilities. Indeed, the repayment of costs and interest was returned to the Respondent in this

case. The Respondent on cross examination accepted that an hourly rate of £165 would apply.

20.33 The Tribunal noted that a bill had been rendered on 30 April 2003 in the sum of £1,750. A further bill had been rendered on 17 July 2003 in the sum of £1,000 and the only thing recorded on the file between the two bills was a calculation of interest (one unit). Nothing else appeared to have been done on the file. The bills had been addressed to the Respondent as an Executor. The Tribunal was satisfied that the second bill of 17 July 2003 was excessive in view of the work recorded on the file, and accordingly allegation 1.2 was proved in relation to this file.

MB Deceased

20.34 In his evidence on 12 January 2011, the Respondent submitted that a mark up could be added to Mr Shelley's figures as well as 1% value of the property and this would lead to a figure in excess of the amount charged.

20.35 The Tribunal noted a bill addressed to the Respondent, as an Executor of the late MB Deceased, was dated 20 October 2003 in the sum of £500. There was then a record of one unit for "Interest to Client Account notified. checked." and a further bill was then delivered on 15 March 2004 in the sum of £1,000. There was then a further calculation of interest (four units), one letter written, a transfer of funds form and then a further bill was sent on 27 January 2005 in the sum of £1,000. This bill was also addressed to the Respondent as an Executor. The Tribunal was satisfied that the bills of costs dated 15 March 2004 and 27 January 2005 were excessive in view of the amount of work done on that matter, and found allegation 1.2 proved in relation to this file.

20.36 The Tribunal, having been satisfied that a number of the bills rendered were excessive, then went on to consider whether the level of charging was culpably excessive so as to amount to serious professional misconduct. The Tribunal had been referred to the case of Donkin v The Law Society [2007] EWHC 414 (Admin) in relation to a number of references that had been provided. In that case it had been held that evidence of good character was relevant to the issue of dishonesty. Mr Lockley had also referred the Tribunal to the case of Twinsectra Ltd v Yardley and Others [2002] UKHL 12, in which Lord Hutton had set out the test to be considered on the issue of dishonesty. The Tribunal had to consider whether the Respondent's conduct was dishonest by the ordinary standards of reasonable and honest people. The Tribunal also had to consider whether the Respondent himself realised that by those standards his conduct was dishonest.

20.37 The Tribunal was mindful that the Respondent had repaid each of the clients the difference between the total amount of costs rendered and the amount that Mr Shelley had assessed, together with interest, from his own capital account. However, the Tribunal rejected this was relevant to the issue of dishonesty.

20.38 The Tribunal had heard evidence from Mr Human who spoke very highly of the Respondent. However, it was clear to the Tribunal that Mr Human had not been provided with any formal terms of business or hourly rates by the Respondent. The Tribunal had also taken into account the large number of character references which

were in glowing terms. However, the Tribunal was satisfied that by the ordinary standards of reasonable and honest people, the Respondent's conduct in rendering bills of costs where little work had been carried out would be regarded as dishonest. A reasonable and honest person would not expect a solicitor to render a bill for a substantial figure when only a tiny amount of work had been done. In each of the cases considered by the Tribunal, the Tribunal was of the view that the costs rendered were not even within an acceptable range of figures.

20.39 The Tribunal went on to consider the second part of the test in Twinsectra, namely whether the Respondent himself realised that by those standards his conduct was dishonest. The Tribunal took into account the fact that the Respondent had admitted that he was unable to justify the bills rendered on the file of MAH Deceased. The Tribunal also took into account that the bills of costs were not sent to clients and nor were clients advised of the amount of the bills until some time later. Furthermore, the Respondent had been completely unable to provide calculations as to how the bills were calculated when asked, other than to provide the Tribunal with green backfill sheets that he had filled in retrospectively. The Tribunal gave some consideration as to whether the Respondent had simply been sloppy in the manner in which he had rendered bills of costs. However, the Tribunal was mindful that any solicitor who bills a client must carry out an honest assessment of the work that he has done for that client and bill the client accordingly. The Tribunal was not satisfied that the Respondent had made a proper assessment of the work he had carried out on a number of files and, particularly taking into account the file of MAH Deceased where the Respondent admitted that he could not justify or explain a number of the bills on that file the Tribunal was satisfied that the Respondent himself realised that by the ordinary standards of reasonable and honest people his conduct was dishonest. In all the circumstances the Tribunal was satisfied there had been culpable over-charging and that the Respondent had been dishonest in rendering bills of costs on probate matters which were excessive.

21. **Allegation 1.3: The Respondent failed to properly send bills of costs to entitled parties contrary to Solicitors Accounts Rules 19(2).**

21.1 The Respondent admitted this allegation and accordingly the Tribunal found it proved.

22. **Allegation 1.4: The Respondent prepared round sum bills in probate matters contrary to Rule 19 Solicitors Accounts Rules (note x).**

22.1 The Respondent had admitted this allegation and accordingly the Tribunal found this allegation proved.

Previous Disciplinary Matters

23. None.

Mitigation

24. Mr Lockley, on behalf of the Respondent, referred the Tribunal to the case of Salsbury v The Law Society [2009] 2 All ER 487. In that case the Court of Appeal

recognised that there was a very small residual category of cases where it was not necessary to strike off a solicitor on a finding of dishonesty. The Tribunal was asked to take into account the extent of the repayments made by the Respondent from his own resources, possibly beyond what had been required. The Tribunal was also asked to take into account the early admissions made by the Respondent in relation to the file of MAH Deceased, the extent of the character references provided and to have particular regard to the types of references. A number of references had been provided by the Respondent's clients, some were from other professionals and some were from his colleagues. They were all glowing and complimentary about the Respondent's integrity.

25. The Respondent was approaching the age of 65 and was close to retirement. The Tribunal was referred to the case of Giele v General Medical Council [2005] EWHC 2143 (Admin). In that case, a surgeon who was approaching retirement was not erased, and a suspension of twelve months was imposed instead.

26. The Tribunal was also referred to the case of Bijl v General Medical Council [2002] Lloyds Law Reports. In that case Lord Hoffman stated:-

> "13. The Committee was rightly concerned with public confidence in the profession and its procedures for dealing with doctors who lapse from professional standards. But this should not be carried to the extent of feeling it necessary to sacrifice the career of an otherwise competent and useful doctor who presents no danger to the public in order to satisfy a demand for blame and punishment."

Mr Lockley submitted that the Respondent did not present any danger to the public, there had never been any complaints about him by clients and the character references provided were evidence of his competency. He submitted that the public confidence in the profession would not be served by removing the Respondent from the Roll. He further submitted that this case fell within the residuary category of cases where striking off was not necessary.

Sanction

27. The Tribunal had considered carefully the Respondent's submissions and all the various documents the Tribunal had been referred to. The Tribunal had taken into account the cases drawn to its attention, particularly Salsbury v The Law Society. The Tribunal was not assisted by the cases of Giele v GMC or Bijl v GMC as the Tribunal was of the view that both these cases had now been overtaken by the decision in Salsbury v The Law Society. Furthermore, the Tribunal was also mindful of the case of the Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin). In that case, Mr Justice Coulson had confirmed that only an exceptional case would justify a sentence of anything other than striking off the Roll of a solicitor who had been found to have acted dishonestly. The Tribunal had considered the Respondent's conduct very carefully and noted that the bills of costs had been rendered over a substantial period of time, a number of those had been rendered in cases where the Respondent had been the Sole Executor and in all the cases, the client's approval had only been sought retrospectively. The Tribunal did not consider that the Respondent's admissions and the fact that monies had been repaid to clients

put this case into the exceptional category. Indeed, the Tribunal was not satisfied that this case was an exceptional case.

28. Any solicitor who overcharged in bills of costs was a danger to the public and the public required protection from such solicitors. Such behaviour seriously damaged the reputation of the profession as well as the reputation of the solicitor himself. Accordingly, the Tribunal was satisfied that the appropriate sanction was to strike the Respondent off the Roll of Solicitors.

Costs

29. Both parties confirmed that the Respondent had agreed to pay the Applicant's costs in the sum of £35,000. Accordingly, the Tribunal made an order that the Respondent do pay the Applicant's costs in the agreed sum of £35,000.

Statement of Full Order

30. The Tribunal Ordered that the Respondent, Eric Donald Hunter of Underbank House, 44 Oldborough Drive, Loxley Park, Warwick, CV35 9HQ, 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 agreed in the fixed sum of £35,000.00

Dated this 26th day of August 2011
On behalf of the Tribunal

J. N. Barnecutt
Chairman