SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 10714-2011

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

NEWFORD EUSTACE SHILLINGFORD First Respondent

and

[RESPONDENT 2 – NAME REDACTED] Second Respondent

Before:

Mr I R Woolfe (in the chair)
Mr R Prigg
Mr S Howe

Date of Hearing: 8th February 2012

Appearances

David Barton, Solicitor Advocate of 13-17 Lower Stone Street, Maidstone, Kent ME15 6JX for the Applicant.

A. Ollennu, Counsel, instructed by Bensons Solicitors, 41D Kilburn High Road, London for the First Respondent

Errol Reid, Counsel instructed by Rock Solicitors, 199 Stockwell Road, London SW9 9SJ for the Second Respondent.

JUDGMENT

Allegations

1. The allegations against both Respondents were:-

Contained in a Rule 5 Statement dated 16 February 2011

1.1 Contrary to Rule 1.01 of the Solicitors Code of Conduct 2007 they have failed to act with integrity. The particulars are that on 19 March 2009 they wrote to Halliwells Solicitors to represent that they had received instructions not to pay over a stated sum of money whereas they were in fact never in possession of the money in the first place, thereby rendering their letter misleading;

[Withdrawn against the Second Respondent]

1.2 Contrary to Rule 10.05 of the said Code they have failed to fulfil an undertaking.

The allegations against the First Respondent alone were that:-

Contained in a Rule 5 Statement dated 16 February 2011

2.1 He withdrew money from client account in circumstances other than permitted by Rule 22 of the Solicitors Accounts Rules 1990 and thereby created a cash shortage;

2.2. In breach of Rule 7 of the said Accounts Rules he failed to remedy breaches promptly on discovery;

2.3 Contrary to the Solicitors' Indemnity Insurance Rules 2009 he has failed to pay professional indemnity insurance premiums;

2.4 He has failed to deliver his accountant's report for the period ended 28 February 2009, due by the 31 August 2009.

Contained in a Rule 7 Statement dated 4 January 2012

2.5 Contrary to Rule 5.01(g) of the Solicitors Code of Conduct 2007 he failed to make arrangements (or adequate arrangements) for the effective management of his firm to provide for the safekeeping of assets entrusted to him;

2.6 He has failed to deliver his Accountant's Reports for the following periods:

Year ended 28 February 2010;
Six months ended 31 August 2010;
Six months ended 28 February 2011.

2.7 Contrary to 20.05 he has failed to deal with the Authority in an open prompt and co-operative manner;

2.8 Contrary to Rule 20.03 of the said Code he practised as a sole practitioner when he was not authorised to do so.

Documents

3. The Tribunal reviewed all the documents submitted by the Applicant and the Respondents which included:

Applicant:

- Application dated 16 February 2011;
- Rule 5 Statement dated 16 February 2011 with exhibit DEB1;
- Rule 7 Statement dated 4 January 2012 with exhibit DEB2;
- Correspondence relating to costs.

First Respondent:

- Letter to the Tribunal dated 4 November 2011;
- Witness Statement dated 8 February 2012 with attached documentation;
- Bundle of references and testimonials.

Second Respondent:

- Letter to Tribunal dated 14 November 2011;
- Letter from Whittington Health NHS dated 31 October 2011;
- Chronology of events dated 31 January 2012;
- Witness Statement dated 3 February 2012;
- Bundle of references and testimonials.

Preliminary Matter (1)

4. Mr Barton, on behalf of the Applicant, advised the Tribunal that the Rule 5 Statement contained two errors. He explained that allegation 1.1 referred to Rule 1.01 of the Solicitors Code of Conduct 2007. This was an error and the allegation should have referred to Rule 1.02 of the Code instead. In addition, allegation 2.1 referred to the Solicitors Accounts Rules 1990 when it should have referred to the Solicitors Accounts Rules 1998. Mr Barton asked for permission to amend the Rule 5 Statement in accordance with Rule 11 (4)(c) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR"). The Tribunal consented to the amendment of allegations 1.1 and 2.1.

Preliminary Matter (2)

5. The Tribunal was told by Mr Barton that the First Respondent had now admitted in his statement that he alone had been responsible for the drafting of the letter dated 19 March 2009. Up until now, the Applicant's case had been that both Respondents had realised before the date of the letter that they would be in difficulties in fulfilling the undertaking that they had given to Halliwells Solicitors ("Halliwells"). Mr Barton explained that it would be necessary for the Applicant to show that the Second Respondent had been aware of the letter of 19 March or had been involved in the drafting of the letter in some way. He stated that in view of the admission made by the First Respondent in his statement, it was unlikely that the allegation would be

substantiated against the Second Respondent to the required standard of proof used by the Tribunal. Accordingly, he wished to make an application under Rule 11 (4) (a) of the SDPR to withdraw allegation 1.1 against the Second Respondent and the Tribunal consented to the withdrawal of the allegation against the Second Respondent.

Preliminary Matter (3)

6. Mr Barton told the Tribunal that the First Respondent had admitted allegations 1.2, 2.3, 2.4 and 2.6. He was unsure, from the wording of the First Respondent's statement, whether the First Respondent admitted allegation 2.8 or not. Mr Ollennu, on behalf of the First Respondent, confirmed that the First Respondent did admit allegation 2.8.

Preliminary Matter (4)

7. Mr Ollennu made an application to the Tribunal for extra time to prepare his case on behalf of the First Respondent. He explained that the First Respondent's statement had made reference to the High Court action against the firm's insurers. There had been some discussions about the matter between the parties that morning and he had only just been provided with a copy of the Judgment by Mr Barton. He had not yet had the opportunity to read the Judgment in its entirety. He told the Tribunal that the Judge in the High Court action had found that the undertaking which was the subject matter of allegation 1.2 was not, in fact, an undertaking. Mr Ollennu wished to consider the matter carefully as this might affect the First Respondent's case. He requested extra time in order to read the Judgment in full.

8. The Tribunal were of the view that the First Respondent could have provided a copy of the Judgment to his Counsel earlier. Mr Ollennu explained that the First Respondent had made a note of the Judgment but he had not had a copy of the Judgment itself. He repeated that he had only been given a copy of the Judgment that morning by Mr Barton. He submitted that it was in the interests of justice for the Tribunal to allow him extra time in order to consider his client's case.

9. The Tribunal refused Mr Ollennu's application for extra time on the basis that there had already been time that morning for Mr Ollennu to consider the Judgment. There would also be a further opportunity during the lunch adjournment for Mr Ollennu to look at the Judgment again. There had been some delay in starting the case and the Tribunal wished to proceed.

Factual Background

10. The First Respondent was born on 31 August 1956 and admitted as a solicitor on 1 September 1993. The Second Respondent was born on 24 September 1956 and admitted as a solicitor on 1 August 1990. Both Respondents remained on the Roll of Solicitors.

11. At times material to the joint allegations, the Respondents were partners in the firm of NES Solicitors practising from Suite 39c, Imperial House, 64 Willoughby Lane, London N17 OSP ("the firm"). The Respondents practised in partnership during the periods 1 March 2004 to 30 September 2005, and again from 1 October 2006 to 31

October 2009. Since October 2009 the First Respondent had practised on his own account. The firm ceased trading on 30 September 2010.

12. On 17 March 2010, Helen Maskell, a Forensic Investigation Officer ("FIO") employed by the Solicitors Regulation Authority ("SRA") commenced an investigation of the books of accounts and other documents at the firm which resulted in a report dated 30 September 2010 ("the Report").

Allegations 1.1 and 1.2

13. The Respondents gave an undertaking in writing to Halliwells Solicitors in a letter dated 22 December 2008. The letter contained a confirmation that "... we are holding funds from our client in the sum of £1,500,000.00 sterling..." The client was stated to be a Dr HAH. The undertaking set out in the second paragraph of the letter was as follows:-

> "We hereby undertake to pay the sum of £1,500,000.00 sterling (One Million Five Hundred Thousand Pounds) to your firm's client account on or before 10 March 2009 ("The Maturity Date"), upon our receiving your written request for payment and your account details on a date not before 6 March 2009, such payment to be made within 24 hours of our receiving your written request for payment. We hereby undertake that we shall hold the monies referred to in paragraph 1 from the date hereof in our client account to abide the undertaking here given and that we have irrevocable instructions from our client in this regard."

The third paragraph of the letter set out the circumstances in which the undertaking would become effective.

14. The client ledger showed that the only money received into the firm's client account was the sum of £5,000 in respect of costs received and transferred as such on 23 December 2008.

15. In a letter dated 6 March 2009, Halliwells called upon the Respondents to fulfil their undertaking. In a letter dated 19 March 2009, the Respondents informed Halliwells that they had received instructions from their client not to release any funds. Thereafter Halliwells commenced proceedings in the High Court for an Order requiring the Respondents to fulfil their undertaking.

16. On 14 April 2009, the Respondents reported the position to their professional indemnity insurers. The Respondents told their insurers that it was difficult to challenge the assertion of breach of undertaking, other than to state their inability to fulfil it. They attributed this, in part, to their client's failure to pay the sum of £1.5 million into the firm's client account.

17. The Respondents' insurers instructed Mr BP of Counsel to advise the Respondents and he provided an opinion dated 29 May 2009. He stated that the Respondents had no defence to the claim. A separate firm of solicitors provided advice to the firm's insurers as a result of which the insurers declined to indemnify the firm in relation to the claim.

18. In interview with the FIO, the First Respondent confirmed that Dr HAH had been referred to the firm by Mr G who was a mortgage broker. The First Respondent told the FIO that Dr HAH had produced a United Nations Identity Card on 9 December 2008 as identification and that initially he had been reluctant to act. The Second Respondent had signed the undertaking when the First Respondent was absent abroad between 11 December 2008 and 5 January 2009.

Allegations 2.1 and 2.2

19. The FIO identified a shortage on client account of £3,181.02. The First Respondent agreed the cash shortage but was unable to provide a full explanation. He told the FIO that on 18 February 2010, the sum of £2,306.73 (£2,251.73 plus a £55 bank charge) was improperly withdrawn from client account. On 10 February 2010, an interim third party debt order had been made by Edmonton County Court against the firm. This was a business debt arising from a Court Order. The First Respondent told the FIO that he had successfully represented a client in a planning matter against H Council and as a consequence the Council had become liable for the firm's fees. The fees had been paid to the firm twice in error and once this had been identified, it had been agreed that the overpaid monies would be repaid in instalments. The firm had fallen behind with the payments and the Council had obtained Judgment against the firm.

20. The interim order allowed the funds to be removed and held by the third party who were HSBC Bank pending a final third party debt order. The firm's office account details were provided on the second page of the Order. The sum due was removed from the client account on 18 February together with an administration fee of £55. As at 13 April 2010, the First Respondent had not restored the money to the client account.

Allegation 2.3

21. The firm fell into the Assigned Risks Pool, which provided the firm with professional indemnity insurance for the period 1 October 2009 to 30 September 2010. The SRA wrote to the First Respondent in a letter dated 5 August 2010 following his failure to discharge the Assigned Risks Pool premium.

Allegation 2.4

22. The First Respondent confirmed to the FIO that he had failed to deliver his Accountant's Report for the year ended 28 February 2009 which had become due on or before 31 August 2009. On 10 June 2010, the Adjudicator made a decision in which the First Respondent was expected to deliver the report within 28 days. The First Respondent failed to comply and was referred to the Tribunal.

Allegation 2.5

23. On 8 April 2011, the SRA commenced a second inspection of the books of account and other documents of the firm at which the First Respondent was now the sole principal. The First Respondent was interviewed by Forensic Investigation Officers

Sarah Taylor and Praful Parmar ("the FIO's") on 8 April 2011 and a second report was prepared dated 23 June 2011 ("the Second Report").

24. The First Respondent told the FIO's that the firm had ceased trading due to the recession on 30 September 2010. The First Respondent continued to retain client money in a client account held with HSBC and which mostly comprised monies deposited with him on 2 June 2009 from the sale proceeds of a property at 76 Farrant Road.

25. The First Respondent had been instructed to act for K & MS in connection with the estate of their late father. There had been a dispute between the executors and their mother who were represented respectively by SB Solicitors and BM Solicitors. The First Respondent did not act in the dispute but he gave an undertaking to hold the net proceeds of sale of 76 Farrant Road pending resolution of the dispute. The sale proceeds of £380,895.05 were credited to the relevant ledger on 2 June 2009. One of the FIO's requested a copy of the client account bank statement showing the receipt of the money but as at the date of the Second Report this had not been received.

26. As at 10 August 2010, the firm's client account held money totalling £421,507.87. When the First Respondent met with the FIO's on 8 April 2011 he provided a bank statement dated 10 August 2010. He was asked to provide copy client account statements to support the reconciliation dated 23 September 2010 together with office bank account statements. At the date of the Second Report, these had not been received by the FIO's. The reconciliation dated 23 September 2010 appeared to be the last one performed before the closure of the firm. One of the FIO's calculated a shortage of £381,461.90 which was slightly more than the proceeds of sale of 76 Farrant Road.

27. In a letter dated 22 October 2010, BM Solicitors authorised the transfer of the sale proceeds to SB Solicitors and told the First Respondent that he could be released from his undertaking upon the transfer of the money. The sum had been transferred from the firm's client account to a Mr S on 8 October 2010 which was eight days after the firm had ceased trading. The First Respondent sent an email to the SRA on 1 December 2010 to report a fraud/unauthorised withdrawal from the firm's client account. In his email, he stated that he could not find the security device that he needed to transfer the funds to SB Solicitors and he had activated a new one. The email confirmed that he had discovered that the money was no longer in his client account on 18 November 2010.

28. In an email dated 25 November 2010, BM Solicitors asked the First Respondent to confirm that the money had been passed to SB Solicitors. The First Respondent replied on 29 November 2010 and stated that his client account had been "hacked" and that his bankers and the police were investigating. He stated that the money had been removed whilst he had been abroad.

29. In a letter dated 4 January 2011, HSBC Bank wrote to the First Respondent and stated that the bank had been unable to retrieve the money because of the lapse in time between the date that it had left the account (8 October) and the date on which its loss had been reported (18 November).

30. In interview with the FIO's, the First Respondent stated that on a date in November, which he could not recall, he had been unable to locate his HSBC "Net" Card which he required in order to make the transfer. He stated that he had four other cards that were kept at the firm's premises in an unsecured desk drawer. He had retrieved and activated one of these cards and it was upon activation of the other card that he had realised that the money had gone from the client account.

31. The First Respondent told the FIO's that on 6 October 2010 he had travelled to Spain for two to three weeks but on the second day had become aware that he had lost his wallet. He was uncertain if he had lost the wallet in Spain or in the UK before departure. He was unsure whether the security card that he could not find was in his wallet or at his home address. He did not know whether he had taken the card with him to Spain or left it at home.

Allegations 2.6, 2.7 and 2.8

32. On 18 May 2011, the SRA wrote to the First Respondent stating that the three Accountant's Reports for the year ended 28 February 2010, the six month period ended 31 August 2010 and the six month period ended 28 February 2011 were outstanding. The First Respondent's practising certificate for the year 2009/2010 had been issued subject to a six monthly reporting condition.

33. The First Respondent did not reply and a further letter was sent to him on 14 July 2011. The First Respondent did not reply to that letter. On 23 August 2011, a caseworker telephoned the First Respondent and on the same date the First Respondent confirmed that he had received the letters and was dealing with them. A further letter was sent by the SRA to the First Respondent on 26 August 2011. The First Respondent did not reply. The reports remained outstanding.

34. The Second Respondent left the firm on 31 October 2009 and the First Respondent thereafter practised alone. The First Respondent required authorisation in order to practise on his own but did not obtain it.

35. The SRA wrote to the First Respondent in relation to this issue on 3 March 2010, 22 July 2010, 26 August 2010 and 6 September 2010. Further letters were sent on 12 April 2011 and 10 May 2011. The First Respondent did not reply to any of the letters.

Witnesses

36. The First Respondent gave oral evidence and confirmed that his statement was true and accurate to the best of his knowledge and belief. He was examined in chief by Mr Ollennu and cross examined by Mr Barton and Mr Reid. His evidence is referred to below.

Findings of Fact and Law

37. The Tribunal determined all the allegations to its usual higher standard of proof, that is beyond reasonable doubt.

38. **Allegations 1.1. Contrary to Rule 1.01 of the Solicitors Code of Conduct 2007 they have failed to act with integrity. The particulars are that on 19 March 2009 they wrote to Halliwells Solicitors to represent that they had received instructions not to pay over a stated sum of money whereas they were in fact never in possession of the money in the first place, thereby rendering their letter misleading;**

[Withdrawn against the Second Respondent]

Allegation 1.2 Contrary to Rule 10.05 of the said Code they have failed to fulfil an undertaking.

38.1 Mr Barton referred the Tribunal to the undertaking given by the firm on 22 December 2008 when the First Respondent had been away from the office and which had been signed by the Second Respondent. He submitted that the terms of the undertaking had been clear and unqualified. He told the Tribunal that according to the First Respondent's statement, he had first met Dr HAH on 9 December 2008 following an introduction by Mr G. The First Respondent had taken a copy of Dr HAH's United Nations Identity Card and Dr HAH had then placed instructions with the firm regarding the acquisition of shares. On 6 March 2009, the firm had been called upon to fulfil the undertaking that they had given on 22 December 2008.

38.2 The Tribunal was told that the firm had only ever held the sum of £5,000 which appeared to have been paid on account of costs on 23 December 2008. The money had been transferred to the firm's office account on the same date. A bill had been drawn on 24 December 2008 for an agreed fee of £5,000 for the work carried out.

38.3 Mr Barton stated that the letter from the firm dated 19 March 2009 formed the basis of allegation 1.1 against the First Respondent. He submitted that the firm knew that it did not have the £1.5million in client account which was required in order to fulfil the undertaking. Mr Barton pointed out that the First Respondent's statement indicated that Dr HAH had drafted the form of the undertaking and had also appeared to have been involved in the letter of 19 March. Mr Barton told the Tribunal that the First Respondent should have been frank and open, and told Halliwells that the firm did not have the money to fulfil the undertaking. The letter of 19 March perpetuated the breach of the undertaking and incorrectly described the reality of the situation as it included information that was factually incorrect.

38.4 Mr Barton referred the Tribunal to the First Respondent's statement which suggested that there were various ways in which the letter of 19 March could have been interpreted. In Mr Barton's view, the letter demonstrated that the First Respondent had failed to act with integrity. He submitted that this was the only way in which the letter could be construed. The firm had only ever held the sum of £5,000 on account of costs. The entire basis of the undertaking had been false and the First Respondent had failed to take any steps to correct the position.

38.5 The Tribunal was told that Halliwells had instituted proceedings against the firm due to the failure to fulfil the undertaking. The firm had reported the matter to their indemnity insurers and had made reference to a Gold Delivery Certificate which had been deposited with the firm by Dr HAH. Mr Barton told the Tribunal that the firm

had attached great significance to the Certificate but it had ultimately proved to be worthless.

38.6 The firm had subsequently taken advice from Counsel as to the enforceability of the undertaking. Mr Barton referred the Tribunal to extracts from Counsel's Advice in which it was stated that the Second Respondent had met with Dr HAH and Mr B on 22 December 2008. An attempt had been made by Mr B to persuade the Second Respondent to accept a cheque that was made payable in Euros. The Second Respondent had discovered that the cheque would take some weeks to clear and Dr HAH had then provided a cheque for £1.5 million and agreed to transfer the money to allow the cheque to clear. It was later discovered that the cheque had not been paid into the firm's bank account. The money had never been obtained from the client and Counsel had concluded that the undertaking was binding upon the firm.

38.7 Mr Barton referred the Tribunal to the Judgment given in the case of Halliwells LLP v NES Solicitors and Quinn Direct Insurance Ltd (2011) EWHC 947(QB). The Judgment related to proceedings brought by the firm against their professional indemnity insurers. The firm had been seeking a declaration that the insurers were required to indemnify them in respect of the claim brought by Halliwells. Mr Barton had not intended to include the Judgment in his case and had only referred to it now as it had been mentioned by the First Respondent in his statement. The Judgment had concluded that the insurers did not have to indemnify the firm in relation to the Halliwells claim.

38.8 The Tribunal was asked to note that the First Respondent had argued in the High Court proceedings that the undertaking had been given during "solicitor type" work and as such, the insurers should indemnify the firm. Mr Barton stated that it now appeared that the First Respondent was going to rely on the Judge's finding that the undertaking had not been given as part of a "solicitorial" transaction. Mr Barton referred the Tribunal to the Judge's comments where he had stated:

> "I am satisfied that this claim does not arise from the provision by NES of services in private legal practice as solicitors within the meaning of clauses 1.1 and 7.19 of the policy of insurance."

38.9 In his submissions to the Tribunal, Mr Ollennu confirmed that he had now had the opportunity of taking instructions from the First Respondent in relation to the High Court Judgment and the First Respondent wished to withdraw the admission that he had made in relation to allegation 1.2. Mr Ollennu acknowledged that the letters of 22 December and 19 March had been sent and were capable of amounting to an undertaking. However, he submitted that the transaction involving Dr HAH was not "solicitorial" work and the undertaking that had been given could not amount to such. It was his case that the First Respondent had admitted to something that was incorrect in law.

38.10 The Tribunal invited Mr Barton's comments in relation to the withdrawal of the First Respondent's admission in relation to allegation 1.2. Mr Barton stated that this was a novel position and in effect, the First Respondent had done a "U turn". He submitted that the withdrawal of the admission was inconsistent with Counsel's opinion. He reminded the Tribunal that the opinion had been subject to a Civil Evidence Act

Notice since last year and had not been challenged by the First Respondent. Mr Barton stated that the First Respondent could not resile from the evidence that he had given to the High Court in which he had claimed that the undertaking had been given in the course of a legitimate transaction.

38.11 Mr Ollennu told the Tribunal that the First Respondent was not going back on what he had said in the High Court proceedings. At that time, he had believed that he was acting in a "solicitorial" way but the High Court Judge had ruled differently and he was entitled to rely on that. It would now be a matter for the Tribunal to decide. Mr Ollennu explained that at first instance, it had been found that the work carried out by the First Respondent had been "solicitorial". This had "fuelled" the First Respondent's action against the insurers. In the subsequent High Court case, the Judge had made a finding that the undertaking had not been given as part of a solicitor's work. This had left the Respondent in a "cleft stick" and it was only right that the matter should be raised. Mr Ollennu reminded the Tribunal that he had only very recently been instructed by the First Respondent who had previously been representing himself. He had wanted time to discuss the matter with his client. He needed to make sure that the First Respondent had been right to make the admissions that he had made previously.

38.12 The Tribunal noted that the First Respondent had admitted allegation 1.2 in his letter to the Tribunal dated 4 November 2011 and in the statement that he had filed that day. This was a very unusual situation. The Tribunal had complete discretion under the Rules to regulate its own proceedings. The Tribunal considered that the matter should have been raised much earlier but, with reluctance, allowed the withdrawal of the First Respondent's admission in relation to allegation 1.2.

38.13 In evidence, the First Respondent provided the Tribunal with details of the documents that he had attached to his witness statement. He referred the Tribunal to a note of a telephone conversation between Dr HAH and himself on 11 March 2009. The note confirmed that Dr HAH had stated that he did not want Halliwells to ask for the money and recorded the fact that Dr HAH believed that it was Mr B who should pay the money to Halliwells. The First Respondent also referred to a completed bank transfer slip which showed that Mr B had given instructions to the bank to release the funds to Halliwells. He said that it was this that had convinced him that the money was going to be sent. He also referred the Tribunal to a letter from Dr HAH in which the client had given instructions that no money or assets should be released to Halliwells. It was Dr HAH who had insisted that he write a letter in those terms to Halliwells and he had felt obliged to do so.

38.14 The Tribunal was also asked to consider emails from RF, who was a manager at Barclays Bank and which confirmed that instructions had been given by Mr B for the transfer of £1.5million to Halliwells. The First Respondent had later contacted RF to try and confirm the position regarding receipt of the money and he referred the Tribunal to his telephone note and email message to the bank. He also referred to the note of his telephone call to Dr HAH on 10 March 2009 in which he had asked the client to confirm that he had made the payment directly to Halliwells. The note recorded the fact that Dr HAH and Mr B were due to attend at the firm's offices that day but had not turned up. In addition, the First Respondent referred to an email sent by Mr B and dated 9 March 2009 in which Mr B had confirmed that the matter would

be dealt with the following day and agreeing "...that we will lodge to Halliwells account tomorrow."

38.15 The First Respondent told the Tribunal that he had received a call from IB, who was a partner at Halliwells on either 17 or 18 March. He confirmed that IB had told him that he was not directly involved in the matter but had asked whether the firm had the money. The First Respondent stated that he had been frank with IB and told him that he was in a difficult position as the money had not been received. He had told IB that unless he could keep the client "on side" then he would not be in a position to pay over the money.

38.16 In cross examination, the First Respondent did not accept that the transaction had been unusual but admitted that he had not understood the instructions in full at the time. He had been flattered that Dr HAH had approached the firm to deal with the matter. He confirmed that he had been booked to travel abroad on 11 December and had been approached to carry out the work on 8 December. He had been aware that his holiday would be disrupted but had not expected a great deal to happen in his absence. He had given instructions to the Second Respondent as to how to deal with the matter.

38.17 He had originally drafted an undertaking which was to be given to AB and Co Solicitors. It had been on the same terms as that given to Halliwells. He admitted that he had not held the £1.5 million at the time of the undertaking to AB & Co. He had believed that his client was protected because AB & Co were to give a cross undertaking in the same terms and he had been holding the Gold Certificate. He had subsequently been told that AB and Co were no longer involved in the transaction and the undertaking should be given to Halliwells instead.

38.18 The First Respondent confirmed that he had believed that he was acting in a "solicitorial" role at the time that he had given the undertaking and he still believed this now. He told the Tribunal that he found the situation difficult to understand but he was in an impossible position as the High Court Judge had found that he was not acting as a solicitor at the time of the undertaking. He acknowledged that he had intended Halliwells to rely on the undertaking. He had been aware that the client account was in credit in the sum of £5,000 and he had authorised the transfer of the money in payment of the firm's costs. He told the Tribunal that he understood that a cheque for £1.5million had been paid in to the firm's account and he believed that it would clear at some point over the Christmas period. He had seen evidence of the payment in the account.

38.19 In continuing cross examination, the First Respondent conceded that in retrospect the transaction had been a huge risk. At the time, he had believed that the client was wealthy as he had deposited the Gold Certificate with the firm. He had seen the transaction as a good business opportunity for the firm. He had believed that the payment would be honoured by the client as the client had much to gain from the completion of the transaction. He confirmed that he had expected to receive £5,000 in costs when the matter exchanged and a further £10,000 on completion but denied that he had deliberately avoided seeing the transaction as a risk because he had been too interested in making money for the firm. He acknowledged that a solicitor's word was his bond and admitted that as at the date of the undertaking, he had known that

the £1.5million was not in the firm's client account. However, he believed that the payment had been made as he had been shown a receipt to confirm this.

38.20 The First Respondent acknowledged that he had understood the outcome of the High Court case. He accepted that the Judgment did not mean that he was released from his duty to Halliwells and he acknowledged that by 19 March 2009, he had been in a very difficult situation. The letter of 19 March had not referred to his conversation with IB at Halliwells. The First Respondent stated that this was because the letter had been addressed to someone else at Halliwells as IB had not been directly involved in the transaction. He denied the suggestion made by Mr Barton that the conversation with IB had never taken place. He told the Tribunal that he believed that he had made a note of the conversation with IB and this had been sent to the solicitors who had represented him in the High Court action. He had not retained a copy of the note as he had not appreciated the significance of the conversation at the time. He acknowledged that, with the benefit of hindsight, he should have told Halliwells that he did not have the money. This had not occurred to him previously as he had wanted to keep the client "on side" so that he would pay over the money. During the three years that had elapsed since the event, he had been able to do a lot of "soul searching" and he was very sorry that the Second Respondent had been caught up in the matter.

38.21 He acknowledged that the letter of 19 March might have implied that the firm was holding the £1.5 million at the time. However, he had never intended to be misleading. He had simply been informing Halliwells of the instructions that he had received from his client. He asked the Tribunal to consider the letter in context. He had been told by his client that the money had now been sent directly to Halliwells. He had seen the emails from the bank and the bank payment slip and believed that the money had been sent or was on its way. He confirmed that he had questioned his client about the payment and had been told that Halliwells had been paid. He had not appreciated that the letter could have given the impression that the firm was holding the money but accepted now that the letter could be taken to have that meaning.

38.22 In cross examination by Mr Reid, the First Respondent admitted that the Second Respondent had not been involved in the early stages of the transaction. He acknowledged that the Second Respondent had dealt with the matter when he had been away from the office and it was the Second Respondent who had alerted him to the fact that there was some doubt as to whether the firm would be placed in funds prior to giving the undertaking. They had discussed the options between themselves and believed that the cheque from Dr HAH would clear in time for them to fulfil the undertaking. He confirmed that he had drafted the undertaking.

38.23 The First Respondent stated that both he and the Second Respondent had been put under pressure from the client during the transaction. The Second Respondent had called him regularly whilst he was away. He told the Tribunal that with the benefit of hindsight, he now believed that he was not meant to understand the transaction and he regretted that both he and the Second Respondent had ever become involved.

38.24 In re-examination by Mr Ollennu, the First Respondent told the Tribunal that he had honestly believed that this was a genuine transaction. He had visited the development site and had been shown relevant documentation. It had all seemed very plausible.

He now questioned how it was that both he and the Second Respondent had become involved in the matter and believed that they had been tricked.

38.25 In his closing submissions, Mr Ollennu asked the Tribunal to consider that the First Respondent was in great difficulty in relation to the undertaking. He reminded the Tribunal that a higher court had found that the First Respondent was not acting in a "solicitorial" way at the time that the undertaking had been given and it would now be for the Tribunal to decide. He reminded the Tribunal of the circumstances surrounding the transaction and suggested that it was easy to look at the matter objectively now and to draw certain conclusions. He asked the Tribunal to consider how the transaction had played out at the relevant time and reminded the Tribunal of the efforts made by the First Respondent to get the money paid into the firm's account. The firm had also held the Gold Certificate which had ostensibly been worth $10million.

38.26 Mr Ollennu asked the Tribunal to consider the way in which the First Respondent had given his evidence. He submitted that the First Respondent would not have acted without integrity simply for the sake of £5,000. The First Respondent had acknowledged in his evidence, that a solicitor's word was his bond and clearly thought highly of his profession. He submitted that both Respondents had been duped. The First Respondent had believed that his client was genuine. He did not believe that the allegation of a failure to act with integrity had been substantiated to the high standard that was required by the Tribunal.

38.27 The Tribunal found that the letter of 19 March 2009 was deliberately misleading. No evidence had been presented of the conversation between the First Respondent and IB of Halliwells. The Tribunal would have expected the conversation to have been mentioned in the letter of 19 March. Having considered the evidence given by the First Respondent and on the facts and documents before it, the Tribunal found allegation 1.1 substantiated against the First Respondent.

38.28 It had been held in the High Court Judgment that the undertaking given by the Respondents did not arise from the "provision of services in private legal practice". However, the Tribunal considered that both Respondents had given an undertaking as solicitors, even if the undertaking had been given outside of the course of practice and so Rule 10.05 of the Code applied. Having considered all the circumstances and taking into account the evidence that it had heard, the Tribunal found allegation 1.2 substantiated against both Respondents and indeed the Second Respondent had admitted the allegation.

39. **Allegation 2.1. He withdrew money from client account in circumstances other than permitted by Rule 22 of the Solicitors Accounts Rules 1990 and thereby created a cash shortage;**

Allegation 2.2. In breach of Rule 7 of the said Accounts Rules he failed to remedy breaches promptly on discovery;

39.1 Mr Barton referred the Tribunal to the Report which had identified a cash shortage on client account. A large part of the cash shortage had resulted from the withdrawal from client account on 18 February 2010. Mr Barton acknowledged that the bank should not have allowed a withdrawal from the client account in relation to the third party debt order. Mr Barton told the Tribunal that the First Respondent had been aware of the cash shortage on 18 February 2010 and had not taken steps to replace it until 12 April 2010.

39.2 In evidence, the First Respondent confirmed that the interim third party debt order had included details of the firm's office account. However, the bank had taken the money from client account instead. He had become aware that the money had been taken from the client account when he had received the letter from the bank dated 18 February 2010. He had been shocked and had written to the bank to ask them to return the money. There had been no reply and he had chased them. When the bank had not complied with his request, he had repaid the money to client account from his own resources. He had not acted any more quickly as he had wanted the bank to acknowledge its error and return the money. He confirmed that he had not given permission to the bank to withdraw the money from client account.

39.3 In his closing submissions to the Tribunal, Mr Ollennu stated that it was clear that the money to pay the third party debt order should not have been taken from the client account. The removal from client account was the fault of the bank and not the First Respondent. He had replaced the money when the bank had failed to do so.

39.4 The Tribunal considered that the money that had been incorrectly taken from client account by the bank was not the fault of the First Respondent. However, the Report had indicated that the money taken by the Bank did not account for the total amount of the cash shortfall. The Tribunal calculated that there was a shortage of £874.02 which was not attributable to the bank error and which the First Respondent had not denied. The First Respondent had not repaid the cash shortage until 12 April 2010 and the Tribunal considered that the time taken by the First Respondent to repay the money was not prompt within the meaning of the Rules. The Tribunal found the allegations substantiated against the First Respondent.

40. **Allegation 2.3. Contrary to the Solicitors' Indemnity Insurance Rules 2009 he has failed to pay professional indemnity insurance premiums;**

Allegation 2.4. He has failed to deliver his accountant's report for the period ended 28 February 2009, due by the 31 August 2009.

40.1 The Applicant's case in relation to these allegations was set out in the Rule 5 Statement. The firm had been provided with indemnity insurance for the period 1 October 2009 to 30 September 2010 and the First Respondent had failed to discharge the premium due.

40.2 The First Respondent had told the FIO that he had failed to deliver his accountant's report for the period ended 28 February 2009 which had been due on or before 31 August 2009.

40.3 The Tribunal found the allegations substantiated against the First Respondent on the facts and documents before it and indeed the First Respondent had admitted the allegations.

41. **Allegation 2.5. Contrary to Rule 5.01(g) of the Solicitors Code of Conduct 2007 he failed to make arrangements (or adequate arrangements) for the effective management of his firm to provide for the safekeeping of assets entrusted to him;**

41.1 Mr Barton told the Tribunal that the First Respondent had been entrusted to look after client money and to make proper arrangements to secure clients' assets and he had failed to do so. He had been under a duty to know the whereabouts of his account cards and to keep them safe. Mr Barton told the Tribunal that the police were still conducting an investigation and the First Respondent had been interviewed. There was no evidence that the First Respondent had been personally involved in the transfer from client account or that there was any relationship between the First Respondent and Mr S who had been the recipient of the payment. Mr Barton also pointed out that the First Respondent had failed to carry out routine reconciliations of his client account which would have alerted him to the absence of the money earlier and thereby increased the prospect of recovery.

41.2 In evidence, the First Respondent confirmed that in order to authorise the withdrawal of the money to SB Solicitors, he needed to access the system that had been set up by the bank. He had been given an HSBC "Net" card which was like a small calculator. He would enter a four digit number into the card which then generated a random number which he would use to activate the online system. He kept the card about his person or close to him in a black wallet. He had lost his wallet but he could not be sure whether this had been in the United Kingdom or when he had been abroad in Spain.

41.3 He told the Tribunal that if a third party had managed to get hold of the card and his pin number then it would not have been difficult to get access to the client account. He did not believe that anyone else at the firm had known his pin number but he had written the number down "cryptically" as he had difficulty in remembering it and acknowledged that it might have been possible for a third party to obtain the number. He had activated another card in order to ascertain the balance on the client account and had been shocked to discover that the balance was so small. He had called the bank and it was at that stage that he had discovered that the money had been withdrawn. The bank had told him that the withdrawal had been activated using the "Net" card and he had then reported the withdrawal as a fraud. He denied that he had transferred the money from client account himself. He confirmed that he did not know Mr S who had been the recipient of the money.

41.4 In cross examination by Mr Barton, the First Respondent told the Tribunal that he had made attempts to be released from the undertaking that he had given to BM Solicitors. He admitted that he had not carried out reconciliations of client money following the closure of the firm and conceded that if the reconciliations had been carried out as required, then he would have discovered that the money had been withdrawn earlier and it may have been possible to retrieve it. He was not sure of the location of the card when the money had been removed from the client account. He normally carried it in his wallet. He had subsequently lost the wallet but could not recall if the card

had been in it or not. He told the Tribunal that other cards were kept at the firm's premises following the closure and acknowledged that the cards had been kept in an unsecured desk drawer. He pointed out that the cards were useless until they had been activated by the bank.

41.5 In continuing cross examination, the First Respondent told the Tribunal that he had discovered that he had lost the card following receipt of the letter dated 22 October 2010 from BM Solicitors. He had tried to find the card but without success and had decided to collect one of the other cards from his office premises. There had been a delay in gaining access to the premises as he had been in dispute with his landlord. It was once he had retrieved the card and checked the client account balance that he had discovered the withdrawal.

41.6 In his closing submissions to the Tribunal, Mr Ollennu reminded the Tribunal that the First Respondent had not been instrumental in effecting the transfer. He suggested that someone else must have carried out the withdrawal and that this was not the fault of the First Respondent. He had been entitled to keep the card on his person and he did not have any involvement in the withdrawal of the money.

41.7 The Tribunal considered the matter carefully. There was no evidence that it was the HSBC "Net" card which had been used to transfer the money improperly. The money could have been transferred from the client account in any number of ways. In the circumstances, the Tribunal did not find the allegation substantiated against the First Respondent.

42. **He has failed to deliver his Accountant's Reports for the following periods:**

Year ended 28 February 2010;
Six months ended 31 August 2010;
Six months ended 28 February 2011.

42.1 The Applicant's case in relation to this allegation was contained within the Rule 7 Statement. On 18 May 2011 the SRA had written to the First Respondent stating that the three accountant's reports for the year ended 28 February 2010, the six months ended 31 August 2010 and the six months ended 28 February 2011 were outstanding. The reports remained outstanding.

42.2 The Tribunal found the allegation substantiated on the facts and documents before it and indeed the First Respondent had admitted the allegation.

43. **Allegation 2.7. Contrary to 20.05 he has failed to deal with the Authority in an open prompt and co-operative manner.**

43.1 Mr Barton told the Tribunal that the First Respondent had failed to reply to the SRA's letter of 18 May 2011 in relation to the outstanding accountants' reports. In addition he had not responded to the reminder letters sent on 14 July and 26 August 2011. The Tribunal was also referred to a number of letters sent by the SRA to the First Respondent regarding the closure of the firm and to which the First Respondent had failed to reply.

43.2 In cross examination, the First Respondent conceded that he had not replied specifically to the letters regarding the firm's closure. He believed that he had already answered many of the questions by giving information to the FIO. He acknowledged that he had not replied to the letters regarding the outstanding accountants' reports. He told the Tribunal that he had been trying to find sufficient resources in order to file the outstanding reports and confirmed that these would be filed, albeit late. He pointed out that there had been a minimal number of transactions from client account following the office closure.

43.3 Having considered the evidence given by the First Respondent and on the facts and documents before it, the Tribunal found the allegation substantiated against the First Respondent.

44. **Allegation 2.8. Contrary to Rule 20.03 of the said Code he practised as a sole practitioner when he was not authorised to do so.**

44.1 The Applicant's case in relation to this allegation was set out in the Rule 7 Statement. The Second Respondent had left the firm on 31 October 2009. The First Respondent had practised alone after that date but had not obtained the necessary authorisation to do so. The SRA had written to the First Respondent in relation to this issue but he had failed to reply.

44.2 The Tribunal found the allegation substantiated on the facts and documents before it and indeed the First Respondent had admitted the allegation.

Previous Disciplinary Matters

45. There had been a previous disciplinary finding against the Second Respondent in case number 10084/2008 which was heard on 11 June 2009. It had been ordered that the Second Respondent be reprimanded.

Mitigation

<u>First Respondent</u>

46. The Tribunal was asked to consider the references and testimonials that had been submitted on behalf of the First Respondent. Mr Ollennu told the Tribunal that the First Respondent continued to do good work for his clients. The references and testimonials spoke highly of him. He asked the Tribunal to give the First Respondent credit in relation to those allegations to which he had made admissions.

47. Mr Ollennu acknowledged that these were serious matters. The solicitors' profession was an honourable one and individuals were entitled to have confidence in their solicitors. He told the Tribunal that the First Respondent had already lost a great deal. He had been subject to court action brought by Halliwells, and he had issued proceedings himself against his own indemnity insurers. He had also been under considerable strain in relation to the current proceedings before the Tribunal. He had been in a "twilight zone" which had affected his ability to work.

48. Mr Ollennu asked the Tribunal to consider suspension rather than a strike off as a more humane course of action. He suggested that the Tribunal might wish to consider placing stringent controls on the First Respondent's practising certificate following any period of suspension. He told the Tribunal that the First Respondent regretted ever becoming involved with the client and his colleagues and concluded by acknowledging that although the First Respondent had transgressed in a serious way, this did not merit the ultimate sanction of a strike off.

49. The Tribunal was told that the First Respondent was not earning at the current time. He was living on a day to day basis and had no income. He owned a property which was subject to a mortgage and a charge in favour of those who had taken over from Halliwells. The property was in negative equity.

Second Respondent

50. Mr Reid told the Tribunal that the Second Respondent apologised for his part in these proceedings. The Second Respondent wished to acknowledge the serious nature of the allegation against him and wanted to explain the circumstances which had led him to make such a serious mistake.

51. The Tribunal was asked to treat the Second Respondent separately from the First Respondent. The Second Respondent had not been the senior partner at the firm. He had never operated the banking mandate and had not been a cheque signatory. It was the First Respondent who had been the equity partner at the firm. The Second Respondent had attended the office two or three times a week. He had covered for the First Respondent during holiday periods. He had not been an active or pivotal member of the firm.

52. The Tribunal was told that it was the First Respondent who had taken on Dr HAH's matter two days before he was due to go away on holiday. By his own admission, the First Respondent had acknowledged that the case was beyond him. It was the First Respondent who had opened this "Pandora's Box" and the Second Respondent had been put in an impossible situation. It was the First Respondent who had drafted the undertaking and who had been in contact with the client and Mr B. The Second Respondent had been on the periphery of matters only.

53. Mr Reid stated that the letter of 19 March 2009 had nothing to do with the Second Respondent and he was grateful that the First Respondent had acknowledged this. The Second Respondent had found himself in a hopeless dilemma. He had been pressurised into signing the undertaking. He had been shown proof of the cheque payment and he had believed that the cheque would clear in time. He had been foolish to sign the undertaking when the money had not been there and was now before the Tribunal. He had not stood to gain anything from the transaction and had only agreed to look after the file in the absence of the First Respondent. He had helped a friend and had been duped.

54. Mr Reid told the Tribunal that the testimonials filed on behalf of the Second Respondent spoke highly of him. He was a family man and in no way could be described as of questionable integrity. He came from a Christian background and he contributed greatly to his church and local community. He felt a sense of shame at

being involved in these proceedings and had lost face with his church and amongst his family and friends. His health had suffered as a result of these proceedings. He had experienced depression. The mental stress and anxiety of the proceedings had caused him to believe that he was suffering from cancer at one stage. He was not the same person as before.

55. Mr Reid acknowledged that the Tribunal must protect the public and the reputation of the profession. He acknowledged that the Second Respondent's conduct had caused the reputation of the profession to be diminished. He submitted that the Second Respondent had failed in his approach due to naivety and a lack of due diligence. He had made a mistake. He asked that the Second Respondent be allowed to continue in practice. He had not played a significant role in this matter and he had suffered much already.

56. The Tribunal was told that the Second Respondent was currently working in local government. He earned over £2,000 per month which was taken up in expenses. He was paying £1,000 a month towards the High Court proceedings. He did not have a lot of money.

Sanction

57. The Tribunal considered the range of sanctions available. The First Respondent had faced a greater number of allegations and had been more culpable than the Second Respondent. The allegations were serious and in all the circumstances the Tribunal considered that the appropriate order was an indefinite suspension. The Tribunal did not wish to fetter the discretion of any future Tribunal but recommended that any application made by the First Respondent for a termination of the indefinite period of suspension should not be granted until he had filed all outstanding accountants' reports, including a cease to hold report if appropriate, or unless the requirement to file the reports had been waived by the SRA. In any event, the Tribunal recommended that the term of indefinite suspension should not be terminated before the expiry of a period of twelve months.

58. The Second Respondent had signed the letter containing the undertaking and was liable. He had been foolish and should not have done so. He had relied on the First Respondent which had been acknowledged. The Second Respondent did not stand to gain anything from giving the undertaking but the Tribunal could not ignore the fact that others had relied on it. The Tribunal noted that the Second Respondent had appeared at the Tribunal before. In all the circumstances, the Tribunal considered that the appropriate sanction was that the Second Respondent should pay a fine of £3,000.

Costs

59. Mr Barton wished to make an application for costs on behalf of the Applicant. He confirmed that both Respondents had been provided with details of the Applicant's costs prior to the adjourned hearing in October 2011. He had now updated the costs information and had included the estimated costs of today's hearing. He acknowledged that the Tribunal might not wish to include the costs of the second forensic investigation on the basis that allegation 2.5 had not been substantiated against the First Respondent.

60. The Tribunal was told that the total claim for costs against the First Respondent was £30,341.79. This included the costs of both forensic investigations and the legal work that had been carried out. The costs claimed against the Second Respondent were £23,471.15 including the costs of the first forensic investigation. Costs had been split equally between the Respondents up until the adjourned hearing on 14 October 2011 on the basis that the work that had been carried out had been the same for both but had been separately apportioned between the Respondents since the October hearing date.

61. Mr Ollennu asked for the costs of the second forensic investigation to be discounted from the Applicant's costs on the basis that allegation 2.5 had not been found substantiated against the First Respondent. Mr Reid submitted that the majority of the investigation had concerned the First Respondent and so costs should be apportioned accordingly. He had no issue with the amount of the legal costs that had been claimed.

62. Following discussions between the parties, the Tribunal was informed that the First Respondent had agreed to pay costs of £13,000 and the Second Respondent had agreed to pay costs of £12,695 and the Tribunal so ordered.

Statement of Full Order

63. The Tribunal Ordered that the Respondent, Newfold Eustace Shillingford solicitor, be suspended from practice as a solicitor for an indefinite period to commence on the 8th day of February 2012 and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £13,000.00.

64. The Tribunal Ordered that the Respondent, [Respondent 2 – Name redacted] solicitor, do pay a fine of £3,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £12,695.00.

Dated this 6th day of March 2012
On behalf of the Tribunal

I R Woolfe
Chairman