SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11016-2012

BETWEEN:

SOLICITORS REGULATION AUTHORITY	Applicant
and	
VICTOR JOHN HATCH	First Respondent
and	
ROBERT VICTOR CLEREY	Second Respondent
and	
HUGH MACDONALD	Third Respondent

Before:

Ms T Cullen (in the chair)
Miss J Devonish
Mr R Slack

Date of Hearing: 7th and 8th May 2013

Appearances

Margaret Bromley, solicitor of Bevan Brittan LLP, Kings Orchard, 1 Queen Street, Bristol BS2 0HQ for the Applicant.

The First Respondent did not attend and was not represented.

Andrew Blatt, solicitor of Murdochs Solicitors, 45 Wanstead High Street, London E11 2AA for the Second Respondent

The Third Respondent appeared in person and was not represented

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JUDGMENT

Allegations

1. The allegations against the First Respondent alone were that:

1.1 He acted contrary to Rules 1 (a), (c) (d) and (e) of the Solicitors' Practice Rules 1990 in that he failed to disclose material information to and failed to comply with his lender clients' instructions:

1.1.1 in respect of the transaction relating to Flat 2, Fife Road;

1.1.2 in respect of the transaction relating to Flat 3, Fife Road;

1.1.3 in respect of the transaction relating to Flat 1, New Cross Road;

1.1.4 in respect of the transaction relating to Flat 2, New Cross Road;

1.1.5 in respect of the transactions relating to the sales of flats at Emarc House, Pickford Street.

1.2 He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that:

1.2.1 in respect of the transaction relating to Flat 15, Emarc House he gave confirmation to SPML in a letter dated 8 November 2006 which he knew or ought to have known was untrue;

1.2.2 in respect of the transaction relating to Flat 3, Fife Road he gave confirmation to Foster Wells in a letter dated 3 April 2007 which he knew or ought to have known was untrue;

1.3 Allegations 1.1 and 1.2 were put on the basis that the First Respondent had shown a reckless disregard for his obligations as a solicitor;

1.4 He failed to pay the premium due for indemnity insurance for the indemnity year 2009/2010 to Capita (which manages the Assigned Risks Pool ("ARP") on behalf of the SRA) within the prescribed period for payment and was in policy default in breach of Rule 16.2 of the Solicitors' Indemnity Insurance Rules 2009.

2. The allegations against the Second Respondent alone were that:

2.1 He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that he failed to comply with the undertakings given on behalf of his firm:

2.1.1 On 5 March 2007 to Foster Wells in respect of the transaction relating to Flat 2, Fife Road;

2.1.2 To the Bank of Scotland in respect of Emarc House, Pickford Street, Aldershot;

2.1.3 On 5 March 2007 to Foster Wells in respect of the transaction relating to Flat 1, New Cross Road;

2.1.4 On 5 March 2007 to Foster Wells in respect of the transaction relating to Flat 2, New Cross Road;

2.2 He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that in response to enquiries raised by the solicitors acting for the Bank of Scotland in connection with the charge over the property at New Cross Road he gave replies which he knew or ought to have known were untrue;

2.3 He acted contrary to Rules 1 (c), (d) and (e) of the Solicitors' Practice Rules 1990 in that in respect of Mr H's purchase he delayed in paying the SDLT and in registering Mr H's title and Barclay Bank's charge for a period of about 19 months;

2.4. He acted contrary to Rules 1(a), (c) and (d) of the Solicitors' Practice Rules 1990 in that he charged costs which were wholly disproportionate to the work involved and which he knew or ought to have known could not be justified:

2.4.1 in respect of the estate of Mrs J dec'd;

2.4.2 in respect of the estate of Mrs L dec'd.

2.5 He acted contrary to Rules 1(a) and (d) of the Solicitors' Practice Rules 1990 in that he acted towards Mr D in a way which was contrary to his position as a solicitor and/or used his position as a solicitor to take unfair advantage of Mr D for another person;

2.6 He acted contrary to Rule 1(a) of the Solicitors' Practice Rules 1990 and in respect of actions after 1 July 2007 contrary to Rule 1.03 of the Solicitors' Code of Conducts 2007 by entering into an agreement dated 13 October 2006 with Dr Hugh MacDonald, an unadmitted person, under which he agreed to sell the practice of Clereys to Dr MacDonald with the immediate payment of the consideration;

2.7 He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that he misappropriated client money due to the RNLI and the Royal British Legion, as legacies under a Will;

2.8 He improperly withdrew money from client bank account in breach of Rule 22 of the Solicitors' Accounts Rules 1998 and/or Rule 1 (a) and (d) of the Solicitors' Practice Rules 1990 and in respect of actions after 1 July 2007 Rules 1.02 and 1.06 of the Solicitors' Code of Conduct 2007 namely:

2.8.1 £13,500 in respect of the matter of Mr H;

2.8.2 money received in respect of counsel's fees.

2.9 He withdrew money from client bank account in excess of the money held on behalf of Mr H in client bank account in breach of Rule 22 (5) of the Solicitors' Accounts Rules 1998;

2.10 He withdrew money from client account other than in accordance with Rule 22 of the Solicitors' Accounts Rules 1998;

2.11 He made a paper transfer of money from the ledger of one client to the ledger of another client in circumstances other than those permitted by Rules 22 (1) and 15 in breach of Rule 30 (1) of the Solicitors' Accounts Rules 1998;

2.12 He failed to inform the Solicitors Regulation Authority of the existence of client accounts maintained by Clereys at the Halifax/Bank of Scotland and at Nationwide Building Society, nor to produce any statements or other documents related thereto, in breach of his obligations under Rule 34 (1) and (8) of the Solicitors' Accounts Rules 1998:

2.13 He failed to maintain separate client ledger accounts for each client in breach of Rule 32 (2) (b) of the Solicitors' Accounts. 1998;

2.14 He failed to keep accounting records properly written up to show the solicitor's dealings with client money received, held or paid by the solicitor in breach of Rule 32 (1) of the Solicitors' Accounts Rules 1998;

2.15 In relation to allegations 2.2, 2.4, 2.7 and 2.8 the Second Respondent was dishonest or alternatively reckless but it was not necessary to prove dishonesty or recklessness for the allegations to be made out;

3. The allegations against the First and Second Respondent jointly were that:

3.1 They acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that they failed to comply with an undertaking given by Mr Hatch on behalf of Clereys on 5 April 2007 to Foster Wells in respect of the transaction relating to Flat 2, Fife Road;

3.2 In breach of Rule 22 (5) of the Solicitors' Accounts Rules 1998 they withdrew money from client bank account in excess of the money held on behalf of 5K Estates in client bank account resulting in a shortage on client bank account;

4. The allegation against the Third Respondent alone was that:

4.1 In the opinion of the Society, he had occasioned or been a party to, with or without the connivance of solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in Section 43 subsection (1A) of the Solicitors Act 1974.

Documents

5. The Tribunal reviewed all of the documents submitted on behalf of the Applicant, the First Respondent, the Second Respondent and the Third Respondent, which included:

Applicant:

- Application dated 18 June 2012;
- Rule 5 Statement and exhibit "MEB1" dated 18 June 2012;
- Agreed Statement of Facts and Outcomes in relation to the First Respondent dated 3 May 2013;
- Agreed Statement of Facts and Outcomes in relation to the Second Respondent dated 3 May 2013;
- Authorities bundle;
- Statement of Costs dated 1 May 2013 and Draft Inspection Bill.

First Respondent:

- Letter from Richard Nelson LLP to the Tribunal dated 3 May 2013;
- Personal Financial Statement dated 30 April 2013;

Second Respondent:

- Correspondence from Dr P Clarkson to Murdochs Solicitors dated 16 December 2012 and 24 March 2013;
- Financial Means Statement of the Second Respondent.

Third Respondent:

- Response of the Third Respondent to the Rule 5 Statement undated;
- Draft Business Plan for MacDonald Law Associates LLP dated 25 April 2006;
- Memorandum of Advice from Blake Lapthorn Linnell to the Third Respondent dated 6 June 2006;
- Judgment of District Judge Batcup dated 22 August 2008;
- Correspondence from Gibson Hewitt dated 3 October 2008;
- Letter from the Third Respondent to Hampshire Police dated 20 October 2008;
- Letter from the First Respondent to Butler & Co Accountants dated 23 April 2009;
- Memorandum from the Third Respondent to Barclays Bank dated 4 September 2009;
- Correspondence from Oxford University Hospital to the Third Respondent various dates;
- Correspondence between the Third Respondent and Bevan Brittan for the Applicant various dates;
- Correspondence between the Third Respondent and the Tribunal various dates;
- Financial Statement of the Third Respondent dated 7 May 2013.

Preliminary Matter

6. Mrs Bromley referred the Tribunal to the two Agreed Statements of Fact and Outcomes in relation to the First and Second Respondents dated 3 May 2013. She apologised for the lateness in lodging them with the Tribunal on Friday 3 May 2013 but said that agreement had not been reached until then.

7. Mrs Bromley acknowledged that this was an unusual situation in that the First and Second Respondents were not in attendance and both had made full admissions and in the case of the Second Respondent, partial admissions in relation to allegations 2.2, 2.4, 2.7 and 2.8 with regard to recklessness. The Third Respondent disputed the allegation against him and Mrs Bromley said that that would remain a contested hearing.

8 Mrs Bromley said that the Agreed Statements of Facts and Outcomes had been agreed by the Applicant and the First and Second Respondents in relation to whom there were both individual and joint allegations which raised serious concerns as to their fitness to practice and ability to protect clients.

9. In relation to the First Respondent Mrs Bromley said that he had admitted all of the allegations against him, including allegations of recklessness.

10. In relation to the Second Respondent Mrs Bromley said that he had admitted all of the allegations against him save that he had not admitted dishonesty but he admitted that he had been reckless. Mrs Bromley told the Tribunal that the Applicant had accepted the Second Respondent's admissions of recklessness. She said that the Applicant had considered whether it remained in the public interest to pursue dishonesty against the Second Respondent and it acknowledged that the Tribunal would have very real concerns regarding the allegations of dishonesty.

11. Mrs Bromley said that the decision of the Applicant with regard to whether to pursue dishonesty or not had been made having taken into account that the Second Respondent had admitted recklessness, together with all of the other allegations against him and that he had agreed to come off the Roll of Solicitors and never to seek restoration or involvement in legal practice in the future. In those circumstances, Mrs Bromley said that the Applicant was satisfied that public interest did not require a full contested hearing on the issue of the Second Respondent's dishonesty and it was proposed that that should be left to lie on the file.

12. Mrs Bromley said that the Statements of Agreed Facts and Outcomes set out the basis upon which the allegations had been agreed in each case and the outcomes which the parties considered to be appropriate as to sanction and costs. She referred to the Tribunal case of Boulton [Case Number 10777-2011] which she said had also been a case of agreed facts and outcome.

13. Mrs Bromley said that the agreed outcomes for both Respondents were that they had undertaken to remove themselves from the Roll of Solicitors. In response to a question from the Tribunal as to the public's perception of this and whether the public would see agreed removal from the Roll as a formal strike off, Mrs Bromley said that the public would see that both Respondents had been removed from the Roll and she

submitted that the outcome would be the same whether undertakings had been given for removal from the Roll or the Respondents had been struck off.

14. Mrs Bromley confirmed that in both cases, the question of costs had been left for the Tribunal to decide.

15. Mr Blatt on behalf of the Second Respondent told the Tribunal that the Second Respondent's representations as to costs were set out in his Financial Statement. He told the Tribunal that his part in the proceedings was limited as the Second Respondent's representative and that he had limited instructions. He was able to assist the Tribunal with regard to the agreed facts and outcomes but said that he could not contest the matter on behalf of the Second Respondent. If the Tribunal did not approve the Agreed Statements, Mr Blatt said that he would have to withdraw.

16. Mr Blatt said that the Second Respondent was not well enough to attend the hearing or to contest the proceedings and that he wished the Tribunal to approve the agreement he had reached with the Applicant.

17. Mr Blatt said that the public would see the agreed facts and that the Second Respondent had accepted the seriousness of his failings and that he should not practise again and should have removed himself sooner from the Roll of Solicitors. Mr Blatt said that the Second Respondent was content for the Statement of Agreed Facts to be recited in the Tribunal's findings. He went further and said that a voluntary strike off was agreed by the Second Respondent but that in a previous case the Tribunal had been reluctant to agree that. Boulton had been dealt with by the Tribunal on agreed facts and outcome and Mr Blatt said that the Tribunal had referred to that as "practical".

18. Mr Blatt said that the Second Respondent accepted that the agreed outcome would effectively be a strike off. In response to a question from the Tribunal, Mr Blatt sought permission to take further instructions in this regard and he subsequently confirmed to the Tribunal that the Second Respondent had agreed to amend the outcome to record that the Second Respondent had agreed to be struck off the Roll of Solicitors in place of the proposed undertaking to remove himself from the Roll. Mr Blatt confirmed that the Second Respondent had instructed him to sign the amended outcome on his behalf.

The Tribunal's Decision

19. The Tribunal indicated that it was concerned not with the agreed facts which had been presented in relation to the First and Second Respondents but with the agreed outcomes with which it had been presented. Whilst it would take the Statements of Agreed Facts into account, the Tribunal indicated that it would not consider itself bound by the agreed outcomes. The Tribunal stated that the Respondents should understand that the Tribunal was not bound by the agreed outcomes nor by previous decisions of the Tribunal such as in Boulton.

20. The Tribunal was also concerned that public perception might be effected by the proposed undertakings which it believed were effectively resignations by both Respondents and not formal orders striking them off the Roll of Solicitors.

21. The Tribunal acknowledged that whilst this format had been used previously and case law supported that, the law was clear that it remained a judicial decision for the Tribunal as to sanction and there was no suggestion that such agreements as to outcome were binding upon the Tribunal.

Agreed Factual Background in relation to the First and Second Respondents

22. The First Respondent was admitted as a solicitor on 1 March 1966 and his name remained on the Roll of Solicitors. He no longer held a current practising certificate.

23. Until 31 March 2007 the First Respondent was an assistant solicitor at Foster Wells solicitors. On 1 April 2007 the First Respondent joined the Second Respondent's firm as an Assistant Solicitor. The Second Respondent had previously practised on his own account as Clereys Solicitors. On 13 October 2006 the Second Respondent entered into an agreement with the Third Respondent for the sale of the firm of Clereys and creation of a Limited Liability Partnership ("LLP").

24. On 5 June 2007 the First and Second Respondents became members of MacDonald Law Associates LLP and that firm had commenced trading as the successor practice to Clereys on 1 November 2007.

25. Allegations 1.1, 1.2 and 1.3 against the First Respondent arose from the Second Respondent acting for three business men, Mr F, Mr F2 and Mr T and their associated businesses, 5K Estates Limited, FFT Developments Limited and Traffco Trading. Mr F2 was a Director of FFT Developments Limited and Mr T was the Secretary. Mr T was also a Director and Shareholder of 5K Estates Limited and Mr F was the Company Secretary and Shareholder.

26. The Second Respondent acted in several transactions where one of the companies bought a development property and leases on flats in the properties were then sold by the company to either Mr F, Mr F2 or Mr T. The leasehold purchases were made with the assistance of a mortgage.

27. Whilst at Foster Wells the First Respondent had acted for the lenders in the leasehold transactions whilst the Second Respondent had acted for both the seller and the buyer.

28. The purchases of the development sites by the company were also made with the assistance of a mortgage, in most cases from the Bank of Scotland. In order for the leasehold title to be registered the Bank of Scotland either had to release the relevant flat from the charge on the freehold or had to give consent to the creation of the leasehold title.

29. The development properties purchased included Fife Road, which was purchased by FFT Developments Limited. The Second Respondent had acted for FFT in the sale of Flat 2 Fife Road to Mr T and Flat 3 to Mr F. The Second Respondent had also acted for Mr T and Mr F. The First Respondent had acted for the lender on each transaction which in both cases was DB Mortgages.

30. Another development was New Cross Road, which was purchased by FFT Developments. The Second Respondent acted for FFT Developments. The purchase

was made with the assistance of a loan from the Bank of Scotland and GCS Solicitors acted for the Bank of Scotland.

31. Following completion, the Second Respondent acted for FFT in the sale of the leasehold title of Flat 1 to Mr T and of Flat 2 to Mr F. The Second Respondent also acted for Mr T and Mr F. The First Respondent at Foster Wells had acted for the lender in each transaction which was again DB Mortgages.

32. The third development was a property at Stonemasons Yard, Aldershot also known as Emarc House. The Second Respondent acted for 5K Estates Limited in connection with the purchase of the property. In July 2004 the freehold of the property was charged to the Bank of Scotland. Following completion, 5K Estates sold the leasehold title to each of the 16 flats in the property to Mr F2. The Second Respondent acted for Mr F2 in his purchase and also for 5K Estates. Mr F2 was assisted in each of his purchases with mortgages from institutional lenders. There were five different lenders including DB Mortgages and Southern Pacific Mortgages Limited ("SPML").

33. Foster Wells acted for each of the lenders.

34. In respect of all of the transactions of the above developments the balance of the purchase price was not provided by the purchaser and consent was not obtained from the Bank of Scotland to the release of the leasehold interest from their charge.

35. In respect of the development at Pickford Street the Second Respondent failed to account to the Bank of Scotland for the proceeds of sale of the leasehold interest in each case. By 28 August 2007 there were still four flats (12, 8, 10 and 15) where the DS3 was still awaited. As a result it was not possible to register the interest of the lender.

36. In respect of the flats at Fife Road at the date of issue of the Rule 5 Statement a DS3 still had not been obtained and DB Mortgages' interest had not been registered. The position was the same with respect to the flats at New Cross Road.

Agreed Factual Background in relation to the Second Respondent

37. The Second Respondent was admitted as a solicitor on 2 July 1973 and his name remained on the Roll of Solicitors. He did not hold a current practising certificate.

38. The agreed factual background was as for the First Respondent other than in relation to the transaction involving Mr PD.

39. Mr PD was introduced to Mr F2 in about September 2005 and following a meeting he agreed to purchase a property, Anglesey House, jointly with Mr F2.

40. On 20 October 2005 Mr PD transferred £750,000 to the Second Respondent's client account and that sum was credited to the client ledger in respect of the purchase of Anglesey House. On the date the money was received, £49,993 was transferred to a client ledger in the name of Traffco Trading Limited re purchase of 127 High Street, Aldershot. Mr PD was never informed that his money was being used for that transaction.

41. The transaction in respect of Anglesey House did not proceed.

42. On 11 November 2005 the client ledger showed the payment of £695,000 of Mr PD's money to 5K Building and Civil Engineers. On 17 November 2005 the balance of Mr PD's money of £5,000 was transferred to the client ledger relating to the purchase of 55-59, Fife Road by FFT Developments.

43. There was no evidence on any of the files that Mr PD had authorised any of these transfers.

44. In about March 2006 Mr PD and his wife signed contracts for the purchase of 12 flats at New Cross Road at a price of £195,333.33 each. Mr PD did not pay any deposit in respect of these contracts and the intention was that his £700,000 would be put towards this. These were the pre-sale agreements referred to in correspondence between the Second Respondent and GCS Solicitors.

45. The Second Respondent was asked by GCS Solicitors to confirm that he held the 5% deposit for each of the 12 agreements in his client account. On 18 May 2006 the Second Respondent confirmed that he held this money. However at the time that he gave this confirmation no further money had been received from Mr PD. The only money was the £700,000 that had been received on 20 October 2005 and which had all been dispersed by 11 November 2005.

46. The other allegations against the Second Respondent showed a pattern of extremely poor practice, a failure to comply with basic management functions for his office and a failure to comply with the Solicitors' Accounts Rules 1998 ("SAR 1998") as well as the Solicitors' Practice Rules 1990 ("SPR 1990") and the Solicitors' Code of Conduct 2007 ("SCC 2007").

47. The Second Respondent was dismissed from the LLP on 23 April 2008.

48. On 28 November 2008 the Second Respondent was made bankrupt.

49. The firm was intervened into on 22 March 2011.

Factual Background in relation to the Third Respondent

50. The Third Respondent was unadmitted.

51. On 5 June 2007 the First Respondent and the Second Respondent had become members of Macdonald Law Associates LLP ("the LLP"). On 1 November 2007 the LLP had commenced trading as the successor practice to Clereys. The members of the LLP were the First and Second Respondents. The Third Respondent was the Head of Finance and Administration.

52. Until October 2006 the Second Respondent had practised on his own account trading as Clereys. On 13 October 2006 the Second Respondent had entered into an Agreement with the Third Respondent, an unadmitted person under which the Third Respondent agreed to acquire the goodwill of Clereys on the basis of a Bare Trust Agreement.

53. The Agreement with the Third Respondent was contained in three documents comprising:

(i) a letter from the Third Respondent to the Second Respondent dated 13 October 2006;

(ii) a side letter of the same date;

(iii) a Declaration of Trust of the same date.

54. The letter dated 13 October 2006 stated, inter alia:

> "…
>
> On the basis of the Conditional Agreement, the Trust and the side letters, I am pleased to confirm Casablanca's [the Third Respondent's Company] payment of £100,000 now and £35,000 in 6 months and a further £35,000 in 12 months, and a cheque for the first payment is attached…".

55. Of the payments referred to in the letter of 13 October 2006, £100,000 was paid on that date and the payment of £35,000 was made after about six months. The third payment was not made.

56. The Trust provided for, inter alia, that the Third Respondent would be responsible for and indemnify the Second Respondent in respect of all normal office expenditure.

57. The Applicant's records showed that Macdonald Law Associates LLP was formally recognised on 1 August 2007. The Third Respondent said that the LLP had not begun trading until 1 November 2007.

58. During interviews with the Second and Third Respondents, the Forensic Investigation Officer ("FIO") asked each of them whether it was the case that the Third Respondent had had effective control of the practice. Each of them had said that the Third Respondent had not had any input into the client side of the practice. They said that his involvement had been limited to the administration and finance of the practice.

59. The Third Respondent's case was that his role as Head of Administration and Finance was to look at, inter alia, the firm's trading, its business plans and to call and chair meetings and ensure that they were recorded. The Third Respondent confirmed in interview that he had paid £135,000 of the £170,000 provided for in the agreement evidenced by the letter dated 13 October 2006. It was the Applicant's case that the Third Respondent had stated in interview that this amounted to substantial performance and title had passed. This was disputed by the Third Respondent.

60. The Third Respondent's investment in the firm included introduction of new accounts and practice management software, introduction of new IT and improved recording of client files and refurbishment of the firm/LLP's premises. Between 13 October 2006 and 31 October 2007 Casablanca received fees of £15,000 in return for capital injections of approximately £170,000, other costs of £12,000 and the provision of management services valued at £15,000. The Third Respondent disputed the nature of the payments received by his company.

61. The Third Respondent also disputed that he had been a signatory on the firm's client account, as alleged.

62. The Third Respondent denied allegation 4.1.

63. On 10 June 2009 an inspection of the books of accounts and other records of the firm was commenced by an FIO of the Applicant. A forensic investigation report ("the first FI Report") followed, dated 18 November 2009.

64. On 17 March 2010 a second inspection of the books of accounts and other records of the firm was commenced by an FIO of the Applicant. A second FI report ("the second FI Report") followed, dated 3 November 2010.

Witnesses

65. The FIO, Mr Carey Whitmarsh and the Third Respondent gave evidence.

Mr Whitmarsh

66. Mr Whitmarsh confirmed the truth of his FI Report dated 18 November 2009.

67. He confirmed that he had interviewed the Second Respondent on 3 November 2009 and that his colleague, Mr Barry Cotter, had also been present and had taken contemporaneous notes.

68. Mrs Bromley referred to the Bare Trust Agreement and the handwritten interview notes, which stated:

> "CW [the FIO] showed Mr Clerey letter dated 13/10/06. Not signed. Mr C [the Second Respondent] said this was a statement of intent.
>
> There was a sale document but Mr M [the Third Respondent] was acquiring Goodwill & fixtures & fittings at a price to include the existing business…".

69. Mr Whitmarsh confirmed he had shown the Second Respondent the Bare Trust Agreement and that the letter dated 13 October 2006 had been from Casablanca, the Third Respondent's company.

70. Mrs Bromley referred to the interview notes, which continued:

> "Who were the beneficiaries of the trust?" to which the Second Respondent replied "Mr M [the Third Respondent] in his own person";
>
> "The agreement resulted in the transfer of Clereys to the trust pending the establishment of Macdonald Law Associates LLP. Is that right" to which the Second Respondent replied "Correct";
>
> "The effect of this was that you sold the business to a non-solicitor…" to which the Second Respondent replied "Well, in reality it was although the LLP was…existence but I had to keep trading as a sole practitioner. Title had

> not passed but was held on trust by Mr C [the Second Respondent] for Mr M [the Third Respondent] when an LLP…".

71. Mr Whitmarsh said that he had understood Casablanca to have been a general trading company of which the Third Respondent was the Director and Shareholder, and a device by which to have provided services to Macdonald Law Associates LLP.

72. Mrs Bromley referred to the interview notes, which continued:

> "…
>
> Section 15.3 provides that the Head of Finance and Administration shall chair management meetings. I understand that Mr Macdonald is the Head of Finance and Administration. Is that right?" to which the Second Respondent replied "Correct" and continued:
>
> "Does it follow then that Mr Macdonald is the person who was effectively controlling the LLP?" to which the Second Respondent replied "Yes, it has to be. It is his investment and his service co [company] drawing the benefits. So he will want to have control of mgmnt [management] decisions. We were the members, the working solicitors for the LLP…".

73. Mrs Bromley referred Mr Whitmarsh to the Second Respondent's answer to the question "Who, in your opinion, is the current owner of the LLP?" to which the Second Respondent had replied "Hugh Macdonald as the beneficial owner of the bear [sic] trust…".

74. Mr Whitmarsh confirmed that had been his response and that the Second Respondent believed that there had been substantial performance of the contract so that title had passed to Casablanca/the Third Respondent albeit full consideration had not been received. He said that the Second Respondent had received £135,000 and believed that that had effected substantial performance.

75. Mrs Bromley referred Mr Whitmarsh to a Law Society Gazette article dated 15 November 2011 to which he had referred the Second Respondent in interview and which stated, inter alia:

> "…
>
> While the ban on fee-sharing was relaxed in 2004 to give solicitors access to a wider range of investment, the SRA said that "contractual arrangements which include provision for the future sale of an ownership interest in a firm, in return for investment or services now, could breach the fee- sharing rule and compromise independence…".

76. Mr Whitmarsh said that the Second Respondent had said that he had not seen the article before and had commented "I wish to hell I had" and "It says it all that bit".

77. In relation to the Second Respondent's dismissal, Mr Whitmarsh said that it had been his understanding that the Second Respondent had been dismissed because there had been an agreement that the Second Respondent would transfer funds in Lloyds TSB to bank accounts of Macdonald Law Associates within 2/3 months once the LLP had

been established, and he had not done so. The firm had been concerned that the work in progress was not being properly accounted for and that there were SAR issues and the conveyancing transactions had come to light.

78. Mr Whitmarsh said that the Second Respondent appeared to blame a barrister for his dismissal, Mr PM regarding allegations of substantial unpaid professional fees owed by the Second Respondent.

79. Mrs Bromley referred Mr Whitmarsh to the conclusion of the interview with the Second Respondent. He said that the Second Respondent had not considered that his independence had been compromised at the date of the Bare Trust document but that it had subsequently been compromised by virtue of his [Mr Whitmarsh's] comments and in light of the Law Society Gazette article. At the date of the Bare Trust document Mr Whitmarsh said that the Second Respondent had not considered that he had put clients' interests at risk as he stated that he and the First Respondent only had dealt with clients' affairs but that he had agreed that subsequently he had done so.

80. Mrs Bromley referred Mr Whitmarsh to the transcribed interview with the Third Respondent which Mr Whitmarsh said was an accurate transcript of the recorded interview. Mr Whitmarsh said that the Third Respondent had told him that he was the Head of Finance and Administration for Macdonald Law Associates LLP.

81. Mrs Bromley referred to the transcript of the interview, which stated:

"…

HM: Mr Clerey prepared the Declaration of Trust. He also prepared a leasehold agreement, he also prepared an option for me to buy the freehold of the premises. I prepared the Casablanca letter and side letter.

CW: Did you seek any independent legal advice over the Declaration of Trust?

HM: I didn't.

…

CW …The way I understand it is that the, the Bare Trust agreement, the results of it was that the practice was being held by Mr Clerey for your benefit, is that right?

HM: Yes, correct.

CW: Yeah. And the effect of this was that you had acquired the practice.

HM: I acquired the goodwill of the practice yes.

CW: Even though you're not a solicitor?

HM: Yes.

CW: And did you think that was permitted at that time?

HM: I, yes, I took advice from Blake Lapthorne and they told me that was permitted...

…

CW: Yeah. And so what is the role of the Head of Finance and Administration in the practice?

HM: Well once we um, got the LLP up and running, the role is to look at the firms trading, the firm's business plans, how the firm is effectively making it's way and as I say to call, to convene and chair these meetings and to make sure that they're recorded.

CW: And presumably then it would be reporting to the LLP members as to the financial position of the practice.

HM: Yes.

…

CW: Yeah, but in terms of providing capital to the LLP, who, where is that capital coming from?

HM: Well, it has only ever come from me since the 13th October 2006".

82. Mr Whitmarsh said that his understanding had been that the Third Respondent was responsible for the financial success of the practice, the IT systems and management of the practice including the book keeping but not the day-to-day affairs of clients. Mr Whitmarsh said that it had been his understanding that the Third Respondent's case was that Clereys had been sold to the Bare Trust and that it had been held on the Bare Trust for the Third Respondent/Casablanca until the LLP had been created and would be sold to Casablanca once the Legal Services Act 2007 ("LSA 2007") had come into force.

83. Mr Whitmarsh said that by this time the Second Respondent had been dismissed and the LLP was only therefore the First Respondent. The Third Respondent had become the Head of Finance and Administration prior to the LSA coming into force. He said that the First Respondent had not provided any capital and the Third Respondent had provided 100% of the capital for the LLP.

84. Mr Whitmarsh confirmed that he understood that the Third Respondent had agreed in interview that there had been substantial performance of the contract and that title had passed to him.

85. Mr Whitmarsh said that the Third Respondent had stated the role of Casablanca, his company, had been effectively to have provided his services to Macdonald Law Associates including financial services and IT and administration. He confirmed that he had also shown the Law Society Gazette article to the Third Respondent who had not accepted that any rules had been breached.

86. Mr Whitmarsh confirmed that in relation to the firm's bank accounts, the accounts for the LLP had been with Barclays Bank and all income had been paid into those accounts to which he said, the signatories had been the First Respondent and the Third Respondent. Mr Whitmarsh said that the Third Respondent had not been allowed to be a signatory to a client account at the material time.

87. Mrs Bromley referred Mr Whitmarsh to a company search which he confirmed he had undertaken against Casablanca and which showed the Third Respondent as the sole director and as holding 95 out of 100 shares in the company.

88. In relation to the FI Reports, Mr Whitmarsh confirmed that the second FI Report had concentrated on the conveyancing transactions and had been less to do with the Third Respondent. Mrs Bromley referred Mr Whitmarsh to the interview with the First Respondent and he confirmed that it was an accurate record.

89. Mrs Bromley referred to the transcript of the interview with the First Respondent, which stated:

> "…
>
> BJC [Mr Cotter] We cannot go to banks and get statements, they won't give them to us.
>
> VH [the First Respondent] Hugh [the Third Respondent] does all that correspondence, whether you should or not, I don't know, but it's impossible for me to do it. It's a struggle to keep the firm going without me doing all this admin. He was head of finance and admin, it's his bloomin' firm, I'm just here as an employee…".

90. Mr Whitmarsh agreed that the interview recited the difficulties he had had in obtaining bank statements for all of the different accounts. He said that in relation to the First Respondent his intention had been to join the firm/LLP and to retire within a couple of years but that after the Second Respondent had been dismissed, that had not been possible and he had been left to deal with matters. Mr Whitmarsh said that the First Respondent had viewed his responsibilities as a solicitor as important, but that he had had less interest in management of the practice and he had felt that finances were the responsibility of the Third Respondent.

91. Mr Whitmarsh said that the investigation had in part been triggered by matters referred by the First and Third Respondents but that there had also been qualified Accountant's Reports. He rejected that it had wholly been due to the Third Respondent's own efforts. He acknowledged that the Third Respondent had undertaken his own investigations with the firm's insurers which he said had assisted but the Applicant had undertaken its own separate investigations.

92. Mrs Bromley referred Mr Whitmarsh to the Third Respondent's Response to the Rule 5 Statement, which stated:

> "iv. Page 50 Para 273: In the Applicant's first interview with the Second Respondent on 3 November 2009 he states that the 'sale document' of October 2006 provided that "Mr Macdonald was acquiring the goodwill and fixtures and fittings at a price to include the existing business".
>
> Casablanca acquired only the Goodwill of Clerey's but did not at any time acquire fixtures and fittings, intellectual property or any other tangible asset. The Second Respondent correctly contends during his first interview with the Applicant's Investigator that this payment was not "Capital introduced". It is

> believed that that payment of £100,000 and a subsequent payment of £35,000 to the Second Respondent were treated as personal payments and not capital introduced in SAR Accounts drawn up by the Second Respondents auditors and accepted by the Applicant".

93. Mr Whitmarsh said that he did not know if that was correct but that the payment of £135,000 had been made to the Second Respondent for the practice and would therefore have been a personal payment.

94. The Third Respondent's Response continued:

> "v. Page 50 Para 274: In the Applicant's Interview with the Second Respondent on 3 November 2009, asked if it was Mr Macdonald who controlled the firm following the Declaration of Trust, the Second Respondent replied, "Yes, it has to be. It is his investment and his service company drawing the benefits.
>
> The Applicant has been given and accepted information that at all times until he was expelled from the LLP in April 2008 the Second Respondent controlled Bank Accounts and payments made by the LLP, and it was him and not Casablanca, who took all of the benefits...".

95. Mr Whitmarsh said that payments had been made into the Barclays Bank accounts for the LLP and had therefore been within the remit of the Third Respondent.

96. In cross examination by the Third Respondent, Mr Whitmarsh confirmed that the double payment out of the Barclays Bank client account in early June 2007 to Bank of Scotland had resulted from the Second Respondent's actions. He said that it was his understanding that after 2/3 months, it had been agreed that the Lloyds TSB accounts were to have been closed and funds transferred to Barclays Bank for the LLP. He said that he recalled that the Second Respondent had initially been the signatory and that once the LLP had been established it had been the First Respondent and the Third Respondent.

97. Mr Whitmarsh referred to the first FI Report which he said stated that there had been two Barclays Bank client accounts, one of which had been used to ring fence the Lloyds TSB monies. The Third Respondent stated that only the Second Respondent had been signatory for the client accounts. Mr Whitmarsh said that the Second Respondent had ceased to be a signatory once he had been dismissed.

98. The Third Respondent referred Mr Whitmarsh to the interviews with the Second Respondent. Mr Whitmarsh said that it was a reasonable proposition that the Second Respondent's replies regarding title and ownership of the practice had been influenced by the fact that Casablanca had made him bankrupt. Mr Whitmarsh accepted that the Third Respondent would have sent him a copy of the Judgment of District Judge Batcup in the bankruptcy proceedings against the Second Respondent and the Memorandum of legal advice he had received.

99. Mr Whitmarsh told the Tribunal that he had not made any enquiries regarding legal or equitable title passing but he said that he was familiar with title passing as his

background was in trading standards. He said that he had relied on the Bare Trust Agreement document as it stood.

100. Mr Whitmarsh confirmed that he had found no evidence of the SAR having been breached after the Second Respondent had been dismissed.

Findings of Fact and Law

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

102. **Allegation 1: The allegations against the First Respondent alone were that:**

Allegation 1.1: He acted contrary to Rules 1 (a), (c) (d) and (e) of the Solicitors' Practice Rules 1990 in that he failed to disclose material information to and failed to comply with his lender clients' instructions:

1.1.1 in respect of the transaction relating to Flat 2, Fife Road;

1.1.2 in respect of the transaction relating to Flat 3, Fife Road;

1.1.3 in respect of the transaction relating to Flat 1, New Cross Road;

1.1.4 in respect of the transaction relating to Flat 2, New Cross Road;

1.1.5 in respect of the transactions relating to the sales of flats at Emarc House, Pickford Street.

Allegation 1.2: He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that:

1.2.1 in respect of the transaction relating to Flat 15, Emarc House he gave confirmation to SPML in a letter dated 8 November 2006 which he knew or ought to have known was untrue;

1.2.2 in respect of the transaction relating to Flat 3, Fife Road he gave confirmation to Foster Wells in a letter dated 3 April 2007 which he knew or ought to have known was untrue;

Allegation 1.3: Allegations 1.1 and 1.2 were put on the basis that the First Respondent had shown a reckless disregard for his obligations as a solicitor;

Allegation 1.4: He failed to pay the premium due for indemnity insurance for the indemnity year 2009/2010 to Capita (which manages the Assigned Risks Pool ("ARP") on behalf of the SRA) within the prescribed period for payment and was in policy default in breach of Rule 16.2 of the Solicitors' Indemnity Insurance Rules 2009.

Allegation 2: The allegations against the Second Respondent alone were that:

Allegation 2.1: He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that he failed to comply with the undertakings given on behalf of his firm:

2.1.1 On 5 March 2007 to Foster Wells in respect of the transaction relating to Flat 2, Fife Road;

2.1.2 To the Bank of Scotland in respect of Emarc House, Pickford Street, Aldershot;

2.1.3 On 5 March 2007 to Foster Wells in respect of the transaction relating to Flat 1, New Cross Road;

2.1.4 On 5 March 2007 to Foster Wells in respect of the transaction relating to Flat 2, New Cross Road;

Allegation 2.2: He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that in response to enquiries raised by the solicitors acting for the Bank of Scotland in connection with the charge over the property at New Cross Road he gave replies which he knew or ought to have known were untrue;

Allegation 2.3: He acted contrary to Rules 1 (c), (d) and (e) of the Solicitors' Practice Rules 1990 in that in respect of Mr H's purchase he delayed in paying the SDLT and in registering Mr H's title and Barclay Bank's charge for a period of about 19 months;

Allegation 2.4: He acted contrary to Rules 1(a), (c) and (d) of the Solicitors' Practice Rules 1990 in that he charged costs which were wholly disproportionate to the work involved and which he knew or ought to have known could not be justified:

2.4.1 in respect of the estate of Mrs J dec'd;

2.4.2 in respect of the estate of Mrs L dec'd.

Allegation 2.5: He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that he acted towards Mr D in a way which was contrary to his position as a solicitor and/or used his position as a solicitor to take unfair advantage of Mr D for another person;

Allegation 2.6: He acted contrary to Rule 1 (a) of the Solicitors' Practice Rules 1990 and in respect of actions after 1 July 2007 contrary to Rule 1.03 of the Solicitors' Code of Conducts 2007 by entering into an agreement dated 13 October 2006 with Dr Hugh MacDonald, an unadmitted person, under which he agreed to sell the practice of Clereys to Dr MacDonald with the immediate payment of the consideration;

Allegation 2.7: He acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that he misappropriated client money due to the RNLI and the Royal British Legion, as legacies under a Will;

Allegation 2.8: He improperly withdrew money from client bank account in breach of Rule 22 of the Solicitors' Accounts Rules 1998 and/or Rule 1 (a) and (d) of the Solicitors' Practice Rules 1990 and in respect of actions after 1 July 2007 Rules 1.02 and 1.06 of the Solicitors' Code of Conduct 2007 namely:

2.8.1 £13,500 in respect of the matter of Mr H;

2.8.2 money received in respect of counsel's fees.

Allegation 2.9: He withdrew money from client bank account in excess of the money held on behalf of Mr H in client bank account in breach of Rule 22 (5) of the Solicitors' Accounts Rules 1998;

Allegation 2.10: He withdrew money from client account other than in accordance with Rule 22 of the Solicitors' Accounts Rules 1998;

Allegation 2.11: He made a paper transfer of money from the ledger of one client to the ledger of another client in circumstances other than those permitted by Rules 22 (1) and 15 in breach of Rule 30 (1) of the Solicitors' Accounts Rules 1998;

Allegation 2.12: He failed to inform the Solicitors Regulation Authority of the existence of client accounts maintained by Clereys at the Halifax/Bank of Scotland and at Nationwide Building Society, nor to produce any statements or other documents related thereto, in breach of his obligations under Rule 34 (1) and (8) of the Solicitors' Accounts Rules 1998:

Allegation 2.13: He failed to maintain separate client ledger accounts for each client in breach of Rule 32 (2) (b) of the Solicitors' Accounts. 1998;

Allegation 2.14: He failed to keep accounting records properly written up to show the solicitor's dealings with client money received, held or paid by the solicitor in breach of Rule 32 (1) of the Solicitors' Accounts Rules 1998;

Allegation 2.15: In relation to allegations 2.2, 2.4, 2.7 and 2.8 the Second Respondent was dishonest or alternatively reckless but it was not necessary to prove dishonesty or recklessness for the allegations to be made out;

Allegation 3: The allegations made against the First and Second Respondent jointly were that:

Allegation 3.1: They acted contrary to Rules 1 (a) and (d) of the Solicitors' Practice Rules 1990 in that they failed to comply with an undertaking given by Mr Hatch on behalf of Clereys on 5 April 2007 to Foster Wells in respect of the transaction relating to Flat 2, Fife Road;

Allegation 3.2: In breach of Rule 22 (5) of the Solicitors' Accounts Rules 1998 they withdrew money from client bank account in excess of the money held on behalf of 5K Estates in client bank account resulting in a shortage on client bank account;

Allegation 4: The allegation against the Third Respondent alone was that:

Allegation 4.1: In the opinion of the Society, he had occasioned or been a party to, with or without the connivance of solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in Section 43 subsection (1A) of the Solicitors Act 1974.

Submissions on behalf of the Applicant

102.1 Mrs Bromley referred the Tribunal to the Statements of Agreed Fact for both the First and Second Respondents.

102.2 In the case of the First Respondent Mrs Bromley said that there had been repeated failures on his part to act in the best interests of lender clients and she referred the Tribunal to the table of transactions detailed in the Rule 5 Statement, which stated:

Flat No	Lender	Amount of Loan	Purchase Price	Amount sent to Clereys	Date of Completion	Shortfall	Date of DS3
1	SPML	£117,730	£140,000	£115,967	15/11/06	£24,033	5 April 2007
2	GMAC		£150,000 (based on payment of stamp duty)	£114,265	09/11/06	£35,735	
3	SPML	£116,030	£140,000	£114,265	09/11/06	£25,735	June 07
4	Rooftop	£114,750	£140,000	£114,267	10/01/07	£25,733	5 April 2007
5	GMAC	£163,561	£185,000	£161,173.25	07/09/06	£23,826.75	
6	GMAC	£163,561	£185,000	£161,165.25	07/09/06	£23,834.75	5 April 2007
7	Infinity	£157,250	£185,000	£156,765	10/01/07	£28,235	5 April 2007
8	Infinity	£157,250	£185,000	£156,802.25	15/12/06	£28,197.75	
10	Infinity	£158,985	£185,000	£156,802.25	15/12/06	£28,197.75	
11	Infinity	£158,985	£185,000	£156,802.25	15/12/06	£28,197.75	
12	Infinity	£158,985	£185,000	£156,765	20/12/06	£28,235	
13	Rooftop	£119,000	£140,000	£118,517	23/11/06	£21,483	
14	db mortgages	£119,000	£140,000	£118,515	16/02/07	£21,485	
15	SPML	£120,280	£140,000	£118,517	09/11/06	£21,483	
16	Rooftop	£106,250	£140,000	£105,767	29/11/06	£34,233	

102.3 In every case, Mrs Bromley said that the amount sent by the First Respondent had been less than the actual amount of the loan and the shortfalls were evident ranging from £21,483 up to £35,735. She said that this vividly illustrated the nature of the issues at the firm/LLP and the basic failings of the First Respondent.

102.4. Mrs Bromley said that the Applicant accepted that the non-payment of the ARP premium due for the indemnity year 2009/2010 was less serious than the other allegations against the First Respondent and that he had made arrangements to begin discharging what the firm owed and had liaised with Capita who had subsequently agreed to waive the remainder of the premiums.

102.5 Mrs Bromley referred the Tribunal to the two joint allegations with the Second Respondent and she said that the First Respondent had admitted compromising or impairing his independence or integrity and his good repute or that of the profession by his failure to comply with an undertaking dated 5 April 2007 to Foster Wells and he had admitted that money had been withdrawn from client account in excess of money held on behalf of the client, in particular that a double payment had been made in error to the account of 5K Estates at the Bank of Scotland amounting to an overpayment of £62,599.69.

102.6 Mrs Bromley said that the First Respondent had admitted all of the allegations against him including that he had acted recklessly.

102.7 Mrs Bromley said that with regard to the Second Respondent there were wide ranging allegations against him. She said these included frequent breaches of undertakings which she submitted were very serious since undertakings were described as being the "bedrock" of the conveyancing system.

102.8 Mrs Bromley said that the other allegations included that the Second Respondent had taken unfair advantage of a third party, Mr PD, had entered an improper agreement with the Third Respondent, had breached the SAR 1998 including having withdrawn client money resulting in debit balances on client account/client ledgers and having misappropriated client funds in relation to estate legacies. In relation to the two allegations of overcharging Mrs Bromley said that these were serious and the Second Respondent accepted that the amounts charged had been excessive.

102.9 Mrs Bromley said that the Second Respondent had admitted all of the allegations against him save dishonesty but he had admitted recklessness. It had been agreed that the dishonesty allegation should lie on the file. Mrs Bromley submitted that even without dishonesty, the allegations against the Second Respondent were of the utmost seriousness.

102.10 Mrs Bromley submitted that allegations such as these caused serious damage to the reputation of the profession and damaged public confidence. There had been a complete failure by the Second Respondent to manage his practice.

102.11 Mrs Bromley said that the Applicant was not seeking to bind the Tribunal as to outcome but invited the Tribunal to dispose of the matters as agreed between the parties if the Tribunal considered it appropriate.

102.12 Mrs Bromley referred the Tribunal to the case of The Secretary of State for Trade and Industry v David Michael Rogers [CHANF 96/0265/B] and the Judgment of Sir Richard Scott which stated:

> "…
>
> … If the Secretary of State and the Respondent director place before the Court an agreed Statement of the facts that are agreed and of the facts that the Respondent does not propose to dispute and invite the Court to deal with the case on the basis of that agreed Statement, it is not for the Court, in my judgment, to insist that other allegations be pursued…or that cross-examination of any deponent or of the director should take place…
>
> … I repeat that, in my opinion, the Secretary of State is entitled to decide what allegations in support of the disqualification allegation he will put forward or, having put forward, will persist in. It is for the Court to deal with the application on the admitted or proved facts. It is not for the Court to speculate whether the disputed facts might, if pursued, be proved or to ask itself whether, if they were proved, the seriousness of the unfitness would be affected.
>
> The parties cannot, however, by their agreement require a judge to find that the director's conduct as described in an agreed Statement of facts warrants a disqualification order. I find it almost inconceivable that, in the case where the director agrees that his conduct warrants the disqualification order, the judge would not so find. A judicial finding must remain an matter for the judge's judgment reached on the facts agreed or proved before him…".

102.13 Mrs Bromley submitted that the principle was therefore that a case should be dealt with on agreed facts and admitted allegations and no account taken of disputed facts. She acknowledged that an agreed outcome was not binding upon the Tribunal and it was for the Tribunal to decide on the agreed facts but she submitted that in Rogers, it had been stated that it would be unusual for a Court to disagree with an outcome both parties had agreed.

102.14 Mrs Bromley referred the Tribunal to the Tribunal case of Boulton [Case Number 10777-2012] and she submitted that there had been a virtually identical order made in that case as was being sought in this case. That case had also involved dishonesty and Mrs Bromley said it had been dealt with without a finding of dishonesty but the Respondent had still come off the Roll.

102.15 In this case Mrs Bromley said that both Respondents were older and suffering from a degree of ill health which had contributed to the decisions made by the Applicant including the proposed outcomes. She submitted that the public would be protected by the First and Second Respondents removing themselves from the Roll [in the case of the Second Respondent he had agreed to be struck off the Roll] and for this to remain in force forever as both had agreed to undertake not to seek re-admission to the Roll.

102.16 In relation to the Third Respondent Mrs Bromley said that he disputed the case against him and denied allegation 4.1. She said that the allegation arose from his plan in 2006 to turn solicitors' practices into an LLP in his name prior to the coming into force of the LSA 2007 which had introduced the mechanism for Alternative Business Structures ("ABSs").

102.17 In 2006 as a non-lawyer Mrs Bromley said that the Third Respondent had been prohibited from having any ownership interest in a law firm or of having exercised any control or management over a law firm. She said that ABSs had not been authorised until October 2011 and all events in this case had taken place prior to that.

102.18 Mrs Bromley told the Tribunal that the Applicant sought a Section 43 Order against the Third Respondent. She referred the Tribunal to Section 43 of the Solicitors Act 1974, which stated:

> "43. Control of [solicitors' employees and consultants]
>
> (1) Where any person who is or was [employed or remunerated by a solicitor in connection with his practice] Art is not himself a solicitor –
>
> (a) …
>
> (b) has, in the opinion of the Society, occasioned or been a party to, with or without the connivance of the solicitor [by whom he is or was employed or remunerated], an act or default in relation to that solicitor's practice [which involved conduct on his part of such a nature that in the opinion of the Society, it would be undesirable for him to be employed [or remunerated] by a solicitor in connection with his practice…".

102.19 Mrs Bromley submitted that the Tribunal had to be satisfied that the Third Respondent had firstly been employed or remunerated, secondly, that he had been party to an act or default in relation to the solicitor's practice and thirdly, that as a result of his conduct it would be undesirable for him to be employed or remunerated by a solicitor in the future.

102.20 Mrs Bromley said that the arrangements between the Second and Third Respondents had continued from October 2006 until the intervention in March 2011.

102.21 Mrs Bromley referred the Tribunal to Section 43 of the Solicitors Act 1974, as amended by the LSA 2007, post 31 March 2009, which stated:

> "43 Control of solicitors' employees and consultants
>
> (1) Where a person who is or was involved in a legal practice but is not a solicitor –
>
> (a) …
>
> (b) Has, in the opinion of the Society, occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in subsection (1A),
>
> the Society may either make, or make an application to the Tribunal for it to make, an order under subsection (2) with respect to that person.

(1A) A person is involved in a legal practice for the purposes of this section if the person –

(a) Is employed or remunerated by a solicitor in connection with the solicitor's practice;

(b) is undertaking work in the name of, or under the direction or supervision of, a solicitor;

(c) is employed or remunerated by recognised body;

(d) is employed or remunerated by a manager or employee of a recognised body in connection with that body's business;

(e) is a manager of a recognised body;

(f) has or intends to acquire an interest in such a body".

102.22 Mrs Bromley said that as for the earlier Section 43, the Tribunal had to be satisfied that the Third Respondent met the criteria under Section 43. She said that Macdonald Law Associates LLP had been a recognised body and that the Third Respondent's purpose had been to acquire an interest in a recognised body.

102.23 Mrs Bromley said that the Third Respondent disputed that he had been employed by or remunerated by the practice. She referred the Tribunal to the Tribunal case of Cunnew [Case Number 6134/1992 5102] which she said had addressed the question of "employed or remunerated" and whilst this had been dealt with under Section 41 of the Solicitors Act 1974, the wording had effectively been the same. The Findings stated:

"…

9. In the latter part of 1990, the respondent became acquainted with Peter England who had been a solicitor of the Supreme Court but, following an Order of the Solicitors' Disciplinary Tribunal, had been struck off the Roll of Solicitors on 23rd April 1959. Mr. England introduced business to the respondent and attended at the respondent's offices. It was the applicant's case that Mr. England had worked on papers for the respondent, dealt with telephone calls, made notes, drafted letters and assisted in dealing with litigation matters. It was also alleged that the respondent paid sums to Mr. England and expenses incurred in carrying out duties connected with the work of the firm such as travelling expenses to see litigation clients and subsistence [sic] in connection with setting about the business of the firm…

…

12. … He [the respondent] was certain that he had not employed either of these gentlemen and he was sure that the reimbursement of expenses incurred in connection with client's affairs of which his firm had conduct could not be construed as remuneration…

…

30. … He [the respondent] would argue that because there was no master and servant relationship in existence between him and these two

> gentlemen he could not be said to have "employed" them. The Tribunal's attention was drawn to an earlier decision of the Tribunal in respect of Weeramuni (5879/1990) in which case the Tribunal had no doubt as to the honesty and integrity of two solicitors but which provided the best possible illustration of the prudence and common sense of checking first with the Law Society as to the status of an employee as a clerk. The Tribunal was referred also to the judgment of the Divisional Court in the matter of Picton Butler, being an appeal to the Divisional Court of a decision made by the Tribunal. That decision endorsed the view that a person was a "clerk" if he undertook work on behalf of a solicitor, albeit in the capacity of an independent contractor. The Tribunal followed that view in the case of a solicitor's clerk, Ullman, who worked as a book-keeper with an independent contractor status for a number of different solicitors…
>
> …
>
> As to the question of "employment" it is well established that a master and servant relationship is not a fundamental requirement to establish that a person has acted as a solicitor's clerk. The Tribunal consider that "employment" should be construed in the wider sense of "keeping busy" or "keeping occupied". It follows from that that payment of a wage is not essential to establish employment… Although not argued before them, the Tribunal believe it is useful to add that, in its view the word "remunerate" should also be interpreted in its widest sense, so that it not only means "to reward" or "to pay for services" but also "to provide recompense for". The payment of out of pocket expenses by the respondent was therefor [sic] remuneration".

102.24 Mrs Bromley submitted that it was clear that the Third Respondent on his own case had taken on the role of Head of Finance and Administration at the firm and whilst he had not undertaken fee earning work, he had been responsible for finance and administration of the firm, which she submitted fell within the meaning of both the original Section 43 of the Solicitors Act 1974 and Section 43 as amended under the LSA 2007.

102.25 Mrs Bromley said that a further argument of the Third Respondent was that he had not personally entered into an agreement with the Second Respondent but that it had been his company, Casablanca and that written documentation had involved Casablanca and not him. Mrs Bromley referred the Tribunal to the Tribunal case of Shah [8447/2001] which she said had also been a case dealt with under Section 41 of the Solicitors Act 1974 but that the wording "employed or remunerated" had been the same. The Findings stated:

> "…
>
> 3. Nicholas Richard Littledale Bentley, ("Mr Bentley") was suspended from practice as a solicitor for an indefinite period by the Tribunal on 24th November 1994. Between November 1997 and May 1998 Mr Bentley provided general legal assistance to B. J. Brandon & Co. His services were invoiced by a company controlled by Mr Bentley named "Key-to-the-Door Limited". Although a PR was described as a

company director on those invoices the sole director of the company was in fact Mr Bentley, and the registered office of the company was situated at Mr Bentley's home address.

…

29. In his letter of 4 February 2002, the Respondent had said that he did not employ Mr Bentley but Key-to-the-Door Limited.

30. The Applicant submitted that this must be a wholly spurious line of defence.

31. Key-to-the-Door Limited could not be an employee, it was a company and it was the creature of Mr Bentley.

32. The company was the agent for Mr Bentley and contracted on behalf of him as its principal. There was therefore a contract between the Respondent in his firm and Mr Bentley and that contract must have been one of employment.

33. If the Applicant was wrong in that submission then the fact of remuneration remained as admitted on the correspondence and Section 41 said "employed or remunerated". The fact that the remuneration passed through an agent did not mean that it was not remuneration.

34. The argument that interposing a company defeated Section 41 was ingenious but wholly misconceived…

…

The Findings of the Tribunal

…

The Tribunal had considered the status of Mr Bentley and have concluded that he was employed by the Respondent. The Tribunal adopted the argument of Mr Miller that the company was the agent of Mr Bentley. To find otherwise would drive a coach and horses through Section 41 of the Solicitors Act and could not have been what was envisaged in the legislation…".

102.26 Mrs Bromley said that she adopted that Tribunal's findings and she submitted that it would completely circumvent Section 43 if this was allowed. The Third Respondent had attended at the firm/LLP, he had been writing letters and carrying out work as Head of Finance and Administration at the firm.

102.27 Mrs Bromley said that the Third Respondent was also arguing that his agreement with the Second Respondent had been permitted under SPR 1990, Rule 7 (1A) in relation to fee sharing. Mrs Bromley referred the Tribunal to the rule, which stated:

"…

Rule 7 of the Solicitors' Practice Rules has been amended, primarily by the insertion of a new paragraph (1A) as follows:

'(1A) (Fee sharing - exception for introducing capital or providing services)[emphasis added]

Notwithstanding paragraph (1) of this rule a solicitor may share his or her professional fees with a third party ("the fee sharer") provided that:

a) the purpose of the fee sharing arrangement is solely to facilitate the introduction of capital and/or the provision of services to practice;

b) neither the fee sharing agreement between the solicitor and a fee sharer, nor the extent of the fees the solicitor shares with fee sharers, permits any fee sharer to influence or constrain the solicitor's professional judgement in relation to the advice given to any client;

c) the operation of the agreement does not result in a partnership prohibited by paragraph (6) of this rule;

d) if requested by the Law Society do so, the solicitor supplies details of all agreements between the solicitor and fee sharers and the percentage of the annual gross fees of the practice which has been paid to each fee sharer; and

e) the fee sharing agreement does not involve a breach of the Solicitors' Introduction and Referral Code".

102.28 Mrs Bromley referred the Tribunal to the guidance notes to the rule, which included:

"3. Rule 7 has been partially relaxed so as to give practitioners greater freedom of choice as to the methods available to fund their practices or to pay for services provided to their practices…

4. Solicitors who have fee sharing agreements should take particular care that they comply with all the rules and principles of professional conduct.

5. In particular, solicitors should take account of the requirements of practice rule 1 (basic principles), and, most specifically of the requirements of independence and integrity, and of the solicitor's duty to act in the best interests of the client…

…

9. Rule 7 (1A) allows a solicitor to share fees with a non-solicitor third party, but only in return for the fee sharer third party providing capital and/or services to the solicitor's practice. So the purpose of the rule is to permit capital and/or services to be provided to the solicitor's firm but not to the clients of the solicitor's firm…

10. Examples of the kind of arrangements which the rule permits include:

(a) A bank may provide a loan to a solicitor's practice in return for a sum, in whole or part, calculated as a percentage of the gross fees of the solicitor's practice. The fact that some clients of the solicitor's practice are also customers of the bank would not, of itself, prevent the bank from becoming a fee sharing with the solicitor…

…

11. Although the rule does not specify any cap or limit on the amount of fees which a solicitor may share with third parties, solicitors should ensure that the extent of the fees shared does not put at risk the solicitor's duties to act independently and in the clients' best interests… In assessing whether a firm may have been in breach of these duties, particularly where the percentage of all fees shared is higher than 15 per cent of gross fees, the Law Society may ask for evidence of this risk assessment".

102.29 Mrs Bromley said that the Third Respondent had interpreted clause 11 such that he had had an absolute right to take 15% from the firm by way of gross income. Mrs Bromley said that that was not the correct interpretation and the reference to 15% was that it automatically triggered concerns and not that there was an automatic entitlement to a share of 15% of the practice's fees. She said that the arrangement as a whole had to be considered.

102.30 Mrs Bromley referred the Tribunal to the case of Ojelade v The Law Society [2006] EWHC 2210 (Admin) which she said provided guidance as to the types of conduct which fell within Section 43. The Judgment stated:

"5. What happened was this. A man called Martins, who also worked for Nathanial & Co, but also worked for another firm, R C Hall & Co, asked the appellant who was junior to him at the firm if he would represent an appellant, E, an asylum seeker, before the Immigration Appellate Authority on 31st July 2003 in a bail application… It was when he looked at the papers that day on the way to court that he says that he realised that E was not a client of Nathanial & Co but was in fact a client of R C Hall & Co, the other firm for which Martins worked. Nonetheless, the appellant continued to the IAA and represented E for the purposes of his bail application.

…

12. The position, in my judgement, is this. The starting point is that a section 43 order is not a punishment. As was submitted by the Law Society to the Tribunal, and as is plainly correct, section 43 is a regulatory provision designed to afford safeguards and exercise control over those employed by solicitors when in any given case that was considered to be appropriate. It should not be viewed as a punishment…

…

14. …it was appropriate and considering it simply on the basis of the facts found and the mitigation considered, there is plainly a proper basis for the making of such an order. It is not right for someone who is employed by Firm A to act and appear on behalf of someone who is not a client of that firm and instead to act on behalf of the client of another firm, with whom he has no connection. It is a good illustration, notwithstanding the mitigation that has been put forward, of the

> circumstances in which an error of judgment of that sort requires somebody to work under close supervision".

102.31 Mrs Bromley also referred the Tribunal to the case of Gregory v The Law Society [2007] EWHC 1724 (Admin) which stated:

> "[21] in considering what type of conduct is undesirable I do not read s 43 (1) (a) as necessarily limiting the natural meaning to be given to the words of s 43 (1) (b)… Section 43 (1) (b) deals with activity wholly inside the work environment of the solicitors practice.
>
> [22] I note that in the case of Ojelade [2006] EWHC 2210 (Admin), this Court declined to interfere with findings made in relation to "a serious error of judgment" on a single occasion, albeit a judgment that the unwell Respondent had been forced into making at the last minute. That gives some indication, although it is not binding upon this court, of the level of conduct which is capable of attracting in order pursuant to s 43 (1) (b).
>
> [23] … Mr Treverton-Jones has sought to import some pejorative undertones into the use of the word "connivance" of a sort which supports his submission that particularly grave misconduct is required to satisfy s 43 (1) (b). I do not accept that submission. The word "connivance" is a perfectly ordinary noun used for a particular purpose to define the mental state of the solicitor. It does not assist, in my judgment, in construing the subsection".

102.32 Mrs Bromley referred the Tribunal to the letter dated 13 October 2006 from the Third Respondent to the Second Respondent, which stated:

> "…
>
> On the basis of the conditional Agreement, the Trust, and the Side Letters, I am pleased to confirm Casablanca's payments of £100,000.00 now and £35,000.00 in six months and a further £35,000.00 in twelve months, and a cheque for the first payment is attached.
>
> In exchange, I am pleased to accept your confirmation that Casablanca will receive £7,500.00 pcm, representing Management Fees, and that the balance of earnings accruing from the LLP Agreement will be held in an account with Barclays Bank, and that these earnings may be revised consistent with Law Society Regulations regarding the payment of Gross Fee Income to investors…".

102.33 Mrs Bromley said that the payments were consideration for the purchase of the Second Respondent's firm and the letter detailed the fees Casablanca was to receive. Mrs Bromley referred the Tribunal to the side letter of the same date, which stated:

> "The investment in & acquisition of Clerey's by Hugh Macdonald/Casablanca Marine Ltd via the Bare Trust and Draft LLP Agreements to be signed between Robert Clerey and Hugh Macdonald or by Robert Clerey alone pro tem incorporate all of the specific agreements and understandings made between January 2006 and the present date, even though these were made with

the intention that there would be two Designated Members (and two firms to be brought together).

Specifically,

…

ii. The arrangement whereby WiP in the new arrangements is to be taken from pre-existing Accounts with Lloyds Bank and assessed by Robert Clerey until a new LLP Agreement is signed and registered is a temporary exception to the previously negotiated arrangements whereby all Bank Accounts are to be with Barclays Bank from the outset, and WiP is to be taken out only on month-by-month agreement between Designated Members and Casablanca.

iii. The Bank Accounts of Clerey's with Lloyds are to be closed following the transition period of WiP extraction anticipated and agreed as 2-3 months from the date of exchange of contracts, and any remaining WiP due after that time is to be withdrawn from the Barclays Bank Accounts of the business only by mutual agreement and assessment.

iv. The status of Casablanca and Casablanca's Management and other Fees are not to be understood as those of a commercial client of Clerey's, but as those of an investor under Law Society Regulations entitling Casablanca to 15% of all GFI of Clerey's/MLA, as confirmed in advice received from Blake Lapthorn Linnell on 21st August 2006 (BLL Memo dated 6th June 2006 is attached for scrutiny by Robert Clerey)".

102.34 Mrs Bromley said that this showed that Casablanca had a say in what drawings could be taken from the LLP, how work in progress was to be withdrawn and there was a clear agreement between the Second and Third Respondents for which the Third Respondent had paid £135,000 albeit the third instalment of £35,000 had never been paid.

102.35 Mrs Bromley told the Tribunal that the Declaration of Trust document had been intended to be an interim arrangement pending creation of the LLP. The Declaration of Trust stated:

"…

(1) Mr Clerey and Mr Macdonald hereby mutually confirm and agree that following conditional exchange of the LLP Partnership Agreement all monies in the new Barclays Bank Plc Office Account subject to appropriate apportionments in respect of works in progress will be held by Mr Clerey on trust for Mr Macdonald until the LLP Partnership Agreement comes unconditionally following the appointment of a further member;

(2) Mr Clerey HEREBY ACKNOWLEDGES [emphasis added] that he is not holding the Barclays Bank Office Account funds for his own absolute use and benefit but upon trusts hereinafter declared **NOW IT IS HEREBY DECLARED** [emphasis added] that if and when the said

trusts hereinafter declared shall become effective in law the funds in the Barclays Office Account shall be vested in Mr Macdonald".

102.36 Mrs Bromley said that this showed that the Third Respondent benefited from the work in progress and that the office account had been held on trust for him.

102.37 Mrs Bromley referred the Tribunal to the Limited Liability Partnership Agreement dated 5 June 2007 between the First and Second Respondents, the Third Respondent not having been a party to that Agreement as he was a non-lawyer. The Agreement stated:

> "9. Profits and losses
>
> …
>
> 9.3 The profits and losses of the LLP shall be credited to or debited against the Members' Current Accounts in the proportions as follows:
>
> 9.3.1 Robert Clerey 7.5%; Victor Hatch 2.50%; and Jeremy Elliott --%
>
> 9.3.2 the residue of any profits as set out in Schedule 3 shall be regulated by the Additional Terms of clause 28.
>
> …
>
> 28. Additional terms
>
> …
>
> 28.1.1 …the LLP may be sold at any time as a going concern to Casablanca Marine Motor Group and General Trading Co. Ltd for the consideration of £1 and this will include the assets assigned to the LLP by Clerey's of Aldershot on the formation of the LLP…
>
> …
>
> 28.1.4 …Members will restrict their drawings to amounts determined upon creation of the LLP for Consultancy Fees and other agreed drawings, and that the balance of allocated profits of the LLP will be held in an Account of the LLP under the control of the Head of Finance and Administration and that as and when legislation may permit this Account will form part of the assets acquired by Casablanca Marine Motor and General Trading Company Ltd for the sum agreed in 28.1.1…".

102.38 Mrs Bromley told the Tribunal that she relied upon that as showing that consideration for acquisition had already been paid by the Third Respondent, namely the £135,000 and there would only be nominal consideration of £1 at the moment at which Casablanca/the Third Respondent acquired the LLP. Mrs Bromley said that the Third Respondent was also referred to as the Head of Finance and Administration which was referred to in clause 15 of the Agreement which stated:

> "…
>
> 15.3 Meetings of Members shall be chaired by the Head of Finance and Administration under 15.9 [following] or if he shall not be present by

such Member as shall be appointed for the purpose by those present at the meeting".

102.39 Mrs Bromley referred the Tribunal to the EWW letter dated 9 December 2009 to the Third Respondent, which stated:

> "…
>
> 3. In relation to paragraphs 24-37 of the report, please explain why, as a non-solicitor, you entered into an arrangement for the sharing of fees with Mr Hatch and Mr Clerey, in breach of Rules 1 and 8 of the Solicitors Code of Conduct 2007".

102.40 Mrs Bromley said that the Third Respondent had replied on Clerey's headed notepaper on 18 December 2009 and had signed his letter as Head of Finance and Administration. In his response to the FI Report, Mrs Bromley said that the Third Respondent wrote to the Applicant by letter dated 8 January 2010 on Macdonald Law Associates LLP headed notepaper and stated:

> "…
>
> Para 5: The basis for my investment in Clerey's was a Business Plan for integrating and modernising Sole Practice firms, with my retun [sic] on investment permitted -and limited – by Solicitors Practice Rule 7 i [sic] (a) [sic], which permits fee-sharing with non-solicitors in specific circumstances…
>
> …
>
> Para 11: We believe that the firm's Bank Accounts with Barclays Bank are in order and have been properly conducted. The firm uses only one Office and one Client Account…
>
> …
>
> 3. Fee sharing arrangements: As a non-solicitor the arrangements made by Hugh Macdonald with Mr Clerey and subsequently Mr Clerey and Mr Hatch were made under Practice Rule 7 i [sic] (a) [sic]. This rule permits fee-sharing in exchange for the introduction of capital subject to clear provisions as to the integrity of the firm, its clients, and the independence of its professional solicitors…The injections of capital and the provision of services made by Casablanca to Clerey's in 2006/7, and to MLA subsequently, premitted [sic] the following developments: (a) Preparations for the retirement of Mr Clerey, as opposed to the closure of the firm (b) The creation of an LLP as a more robust structure for the future conduct of the firm (c) Introduction of new Accounts and Practice Management software (d) Introduction of new IT and related capabilities (e) Secure storage and much improved recording of Client files and related information (f) Refurbishment of the firm's premises (g) Introduction of additional management skills.
>
> (i) Between 13 October 2006 and 31 October 2007 Casablanca received Fess of £15,000 in return for capital injections of some

£170,000, other costs of some £12,000, and the provision of management services valued at £15,000.

(ii) Between 15 November 2007 and the present date Casablanca received Fees of £17,500 in return for capital injections of some £20,000, other costs of some £15,000, and the provision of management services valued at £67,500.

4. Hugh Macdonald's involvement with the firm: Until the dismissal of Mr Clerey and the firm's Cashier (who had co-operated in his misdeeds in respect of Client funds and the diversion of fee Income), Hugh Macdonald's role was largely limited to the provision of the capital and services described in (3) above. In addition, periodic Management meetings were held to review the development of the business, as provided for under the LLP Agreement. Since April 2008 the role has necessarily been more pro-active, including dealing with Quill/Pinpoint, identifying actions taken by Mr Clerey and the firm's Cashier, preparing Reports etc…

…

Firstly, I agree that the record is an accurate record of the interview [between the FIO and the Third Respondent]…".

102.41 Mrs Bromley said that the Second Respondent stated in his response dated 28 January 2010 to the EWW letter that

> "…I agreed to pay him [the Third Respondent] administrative fees for services (supplied by HM via Casablanca) and the fee income in the meanwhile was held on trust in Barclays office account until such time as the LLP came into existence"

and he confirmed that the Third Respondent had been involved in

> "…supplying IT, expertise and financial administration".

Mrs Bromley said that the Second Respondent had also stated that £15,000 was contracted between him and the Third Respondent, via Casablanca, to acquire the goodwill and fixtures and fittings of the firm/LLP and that the monies were paid to him direct.

102.42 Mrs Bromley referred the Tribunal to a letter dated 29 April 2010 from the Applicant's case worker to the First Respondent, which asked:

"…

1. Does Dr Macdonald have, or has he ever had, authority to be a signatory on any firm office or client account. If so, please provide details of the dates of such authorities and details of the accounts.

…

3. Please confirm what services are or have been provided to MLA by Casablanca.

4. What payments has MLA made to Dr Macdonald, Casablanca or any other firm in which Dr Macdonald has an interest?".

102.43 Mrs Bromley said that the First Respondent had replied by letter dated 25 May 2010 and stated:

"…

1. Dr Macdonald has been a signatory on the Barclays Bank Accounts of this firm since the inception of MLA LLP on 1 November 2007…

…

3. Casablanca has provided (a) working capital and (b) human and management resources to Clerey's and MLA LLP. In the period to 31 October 2007 working capital (not including payments for the acquisition of Clerey's Goodwill) amounted to some £37,000, and Casablanca's human and management resources produced a completely updated IT network, extensive office refurbishment, and much improved management and staff planning…Casablanca…has been responsible for the firm's rental arrangements of £15,000 per annum…

4. MLA has paid Casablanca £1,000 per calendar month since April 2009 in consideration of Dr Macdonald's expenses in travelling to Aldershot for meetings etc and in conducting expensive research, administration and correspondences on behalf of MLA LLP from Casablanca's Registered Office…".

102.44 Mrs Bromley said that the case worker had written again to the First Respondent by letter dated 22 June 2010, which asked:

"…

3. Please confirm how Dr Macdonald is remunerated…

4. Please confirm where Dr Macdonald is based. Where is the registered office of Casablanca? How often does Dr Macdonald attend the office of MLA LLP?

…

6. I note that you state that Casablanca is responsible for the firm's rental agreement of £15,000 per annum. What is the agreement and why are Casablanca responsible for this and not MLA LLP directly?".

102.45 Mrs Bromley said that the First Respondent replied by letter dated 24 June 2010 in which he stated that the Third Respondent was remunerated by monthly cheque or bank transfer to Casablanca and that he attended the office of Macdonald Law Associates an average of four times per month. The First Respondent also stated:

"…

6. In October 2006 Dr Macdonald signed a Lease with Mr Clerey for the rental of 12 Station Rd. He also acquired a five-year Option to

> Purchase, which Mr Clerey undertook to register at the Land Registry, but failed to do so. It was intended that the LLP would become the Tenant. However, Mr Clerey's conduct within the LLP meant that he avoided signing a new Lease. At the point of becoming Bankrupt in October 2008 Mr Clerey sold the premises to Mrs Ann Merina Clerey. Since that date there have been Possession Proceedings, which Dr Macdonald is defending".

102.46 Mrs Bromley submitted that the Tribunal needed to consider:

- Whether the Third Respondent fell within the meaning of Section 43. She relied upon the case of Cunnew and the definition of "employed or remunerated" and she submitted that there was overwhelming evidence that the Third Respondent had been employed and remunerated by both Clerey's and MLA LLP. She said that on his own evidence he had carried out work for the firm/LLP and had been described as the Head of Finance and Administration. Whilst payments had been received via Casablanca, Mrs Bromley said that the case of Shah made it clear that that did not prevent him from falling within the operation of Section 43. Mrs Bromley submitted that the Third Respondent fell within the meaning of Section 43 both pre and post-2009;

- Whether entering the Agreements in 2006 and 2007 respectively led to the conclusion that the Third Respondent had been guilty of conduct of such a nature that it would be undesirable for him to be involved in legal practice in the future. Mrs Bromley said that the Second Respondent had admitted breach of allegation 2.6 against him in relation to Rule 1 (a) of the SPR 1990 and Rule 1.03 of the SCC 2007 by his having entered into the agreement of 13 October 2006 with the Third Respondent. Mrs Bromley said that he had admitted that after taking advice from experienced regulatory solicitors and she submitted that weight could be attached to that and that it was also relevant to the allegation against the Third Respondent;

- The only person to have invested in the LLP was the Third Respondent. He had paid the bulk of the monies and he had been in effect the owner of the firm/LLP. Mrs Bromley said that the First Respondent had stated in terms that "…it was his [the Third Respondent's] bloomin' firm…";

- Mrs Bromley said that it was the Applicant's case that the Third Respondent had pre-empted the LSA 2007 and that in 2006 it had not been possible to enter into arrangements to become an Alternative Business Structure. That could only have happened once the regulatory structure was in place after the LSA 2007 had come into force and ABSs could be licensed and vetted;

- Mrs Bromley submitted that the Third Respondent had sought to acquire a solicitor's practice before essential controls were in place and no vetting could be undertaken.

102.47 Mrs Bromley reminded the Tribunal that the purpose of a Section 43 Order was not punitive but a regulatory provision to afford safeguards and controls for those involved in legal practices, such as was the case in Ojelade.

Submissions on behalf of the First Respondent

102.48 The Tribunal had regard to the Agreed Statement of Facts and Outcomes and the letter sent to the Tribunal on behalf of the First Respondent from Richard Nelson Solicitors dated 3 May 2013.

Submissions on behalf of the Second Respondent

102.49 Mr Blatt referred the Tribunal to the Agreed Statement of Facts and Outcomes in relation to the Second Respondent.

102.50 Mr Blatt told the Tribunal that the Second Respondent admitted all of the allegations against him and that he had been reckless in relation to certain of the allegations. He said that the dishonesty allegation had been agreed to lie on the file.

102.51 Mr Blatt said that as per the further instructions he had taken from the Second Respondent, he had agreed to be struck off the Roll of Solicitors.

Submissions of the Third Respondent

102.52 The Third Respondent made his submissions on oath.

102.53 The Third Respondent told the Tribunal that he had taken legal advice within the previous ten days but that prior to this he had been dealing with matters on his own due to his lack of finances. He accepted that the Tribunal had jurisdiction to deal with him and the allegation against him.

102.54 The Third Respondent said that he had never within the last seven years sought to avoid being scrutinised by the Law Society/the Applicant. He told the Tribunal that he had gone out of his way to assist the Applicant once he had become aware of the serious issues at the firm/LLP and that prior to that, he had made clear in his Business Plan and by the legal advice he had taken from Blake Lapthorn Linnell that he wanted to be fully compliant with all of the rules.

102.55 The Third Respondent questioned what his motivation would have been in owning or part owning the firm of Clerey's. He said his only motivation had been to address the difficulties he had regarding his pension resources. He said that the College he had been employed by was closing and he decided to take advantage of the relaxation of the rules by virtue of Rule 7 (1A) of the SPR 1990 with a view to the LSA 2007 coming into force. He told the Tribunal that he considered himself to be an outside investor and not a solicitor or paralegal.

102.56 The Third Respondent told the Tribunal that he had a public reputation and that any order made against him would damage that reputation. He said that he had suffered financially as a result of the proceedings and that his health had also suffered. He said that he had suffered loss of capital which he would not recover and that he had sought

to keep the LLP going to assist the Applicant in its investigation. The Third Respondent said that in 2008 when he had discovered the Second Respondent's misconduct he could have walked away from the LLP but that there had been five/six solicitors and approximately six other staff at the LLP who would have lost their jobs.

102.57 The Third Respondent said that he understood the Applicant's duty to safeguard the public interest but that he could not understand what he had done which had prejudiced public interest or had been contrary to the rules as they were at the material time. He said that the authorities relied upon by the Applicant with regard to Section 43 appeared to be relevant to solicitors which he was not or to cases where there had been clear errors or rule breaches which there had not been in his case.

102.58 The Third Respondent referred the Tribunal to his Business Plan which he said he had written in April 2006 with the intention of bringing together two small legal practices as a Limited Liability Partnership. He said that the Plan referred to Rule 7 (1A) and later referred to the LSA 2007 when that would come into force.

102.59 The Third Respondent referred the Tribunal to his Memorandum of Advice from Blake Lapthorn Linnell dated 6 June 2006, which stated, inter alia:

> "…
>
> I have looked through the Draft Legal Services Bill, together with various provisions contained in the Administration of Justice Act 1985 and the Solicitors' Practice Rules 1990, and have reached the following conclusions as to Hugh's proposals.
>
> With regards to paragraph 3, Hugh is correct in stating that under present provisions (namely Rule 7 (1) (A) of the Solicitors' Practice Rules 1990), he would (as a non-solicitor providing capital) be entitled to 15% of the gross fee income of Macdonald Law Associated LLP (the LLP).
>
> With regards to paragraph 4.1, it would be possible for Hugh to receive 15% of the fee income, and retain an option to take 100% ownership of the LLP provided that:
>
> (a) the Draft Legal Service's Bill enters into Statue in its current form (thereby impliedly repealing Section 9 of the Administration of Justice Act 1985); and
>
> (b) the provisions of Sections 67, 73(2) and 74 (as interpreted by Section 90) of the Bill, and in addition, paragraphs 6,7 8,9,10, 13 and 15 of Schedule 11 are correctly followed upon its enactment.
>
> ...
>
> Other than this, the proposal that Wayne Millard [another firm] and Robert Cleary [sic] become members of the LLP upon incorporation – in the knowledge that with the passing of the Legal Services Bill, Hugh Macdonald takes over ownership of the LLP – is in keeping with the Companies Act 1985 and the Law Society provisions above…".

102.60 The Third Respondent said that he had been aware of the rules and regulations and that he had been mindful of them at all times when making arrangements for the fee

sharing agreement. He said that although there was reference to "ownership" he had never intended to own the firm/LLP personally but it would have been corporate ownership and to have become an ABS by virtue of the LSA 2007 when it came into force. He said that he could then have been regulated as a non-lawyer manager of a regulated entity and it had all been future oriented.

102.61 The Third Respondent told the Tribunal that he had wanted to make use of his managerial experience in the legal sector by the provision of new technology, to consolidate the firms involved and make them more efficient. He said that from the time the LLP Agreement had been signed in June 2007 and recognition had been applied for, he had been in contact with the Applicant to identify himself as an outside investor who wished to become a non-lawyer manager in due course. He said that he had had conversations with the Applicant in this regard and had been told to wait until the LLP was trading and the NL1 provisions had been dealt with but it had ultimately not happened due to the issues concerning the Second Respondent. He said that once the crisis had broken his role had been as administrator of the LLP and he had applied as soon as he could to become regulated. The Applicant had accepted his application and he said that there had never been any pretence to deal with procedural matters other than appropriately.

102.62 The Third Respondent said that the contracting party had been his company, Casablanca of which he was the sole director and 95% shareholder. He said that it had become clear that the LLP was in a financial mess and someone had to take charge and deal with it and he had done so. He submitted that his role in investigating what had gone wrong at the firm/LLP had been vital to the case to date.

102.63 The Third Respondent told the Tribunal that employees of the LLP had issued proceedings in the Employment Tribunal and he had been written to by their solicitors as Head of Finance and Administration of the LLP. He said that he had made representations to the Employment Tribunal and that it had decided that Casablanca and the Third Respondent were one and the same and were not the LLP and any employment claims against him had been dropped.

102.64 The Third Respondent said that the last thing he had wanted to do was give an impression that he was a solicitor or legal professional. He said that the First and Second Respondents had both stated that at no time had he had any dealings with client matters in the firm. His title as Head of Finance and Administration had seemed appropriate and had been part of the provision of services to the LLP by Casablanca for which he had invoiced the LLP. He said that he had helped the LLP to outsource their accounts to Quill but he had not at any time moved any money within the LLP. He said that between 1 November 2008 and mid-March 2011 Casablanca had received approximately £20,000.

102.65 The Third Respondent said that he had never at any time owned the firm/LLP and it was a question of his having had an equitable interest under the Bare Trust and not a legal interest.

102.66 The Third Respondent referred the Tribunal to his letter dated 2 May 2013 to the Applicant's legal representatives and which he said he relied upon in defence of the

allegation against him. He read in full the content of his letter, which included, inter alia:

> "1. The Bare Trust arrangement (which was advanced by the Second Respondent, and never previously contemplated by the Third Respondent) clearly fell within the then current regulatory regime:
>
> …
>
> (ii) The Bare Trust arrangement fell under Rule 7.1.(A) [sic] which provides for (a) fee-sharing by a solicitor with a third party ("fee sharer") so long as the purpose of the arrangement is "solely to facilitate introduction of capital and/or provision of services to a practice" (b) the fee-sharing should not "constrain a solicitor's professional judgement in relation to the advice given to any client".
>
> (iii) The Bare Trust arrangement satisfies these conditions.
>
> …
>
> (v) The Applicant's Rule 5 Statement para 381.1 to 381.13 are advanced as "facts relied upon in support of the Allegation that the agreement with Mr Macdonald (Third Respondent) compromised Mr Clerey's (Second Respondent) independence".
>
> (vi) However, these do not provide such evidence but (except as stated below) simply describe the structure of the arrangements arrived at between Mr Clerey and Mr Macdonald, which arrangements were specifically allowed by amended Practice Rule 7.1.(A) [sic] and the Guidance Notes thereto.
>
> …
>
> (viii) With regard to sub-para 381.2 there are issues as to the date when title passed and whether that title was to a legal or beneficial interest…Under the LLP Agreement of 5 June there was to be substantial performance of £150,000 [£170,000] provided by Casablanca and this did not occur until after the First and Second Respondents had signed the Agreement.
>
> …
>
> (x) Sub-para 381.9 states that the "balance of allocated profits of the LLP will be held in an account under the control of the head of finance and administration…This is not accepted.
>
> (xi) Schedule 4 of the LLP Agreement is titled "Secondary Profit Share Principles" and states "Other profits of the LLP will be held at Barclays Bank in an Investment Account and will be re-invested of otherwise disbursed by the Management Committee chaired by the Head of Finance & Administration".
>
> …

(xiv) Sub-para 381.11 stated that "Mr Macdonald was a signatory on the firm's Client Account". This is accepted.

(xv) However, the Bank Account in question was never used and the banking arrangements established on behalf of the LLP were in anticipation of Mr Macdonald being admitted as a non-lawyer Manager of the LLP (NL-1) regulated by the Law Society.

(xvi) The Third Respondent never at any time signed or co-signed any cheque or other authority for the payment of Client funds into or out of any Bank Account of Clerey's of the LLP. His exceptional concern over the Second Respondent's actions and their implications for the firm in relation to Solicitors Accounts Rules led him to alert the Applicant of this as early as June 2008…His subsequent actions to retrieve and secure the firm's SAR compliance are well known to the Applicant.

(xvii) District Judge Batcup at Guildford Court in Bankruptcy on 22 August 2008 observed that the Second Respondent was "a solicitor with more than forty years [sic] experience, signing his own documents, and Mr Clerey knew what he was signing for".

2. The Fee Sharing arrangement negotiated between the Second Respondent and the Third Respondent was in conformity with amended Solicitors [sic] Practice Rule 7.1(A) [sic]:

(i) The Applicant asserts that the fee-sharing arrangement with Mr Macdonald compromised the independence of Mr Clerey as a solicitor, but produces no evidence in support of this part of the allegation.

(ii) On the contrary, District Judge Batcup at Guildford Court in Bankruptcy on 22 August 2008, having examined all of the arrangements made between the Second and Third Respondents in October 2006, concluded that the arrangement arrived at under Casablanca's letter and Side Letter of 13 October 2006 was "as clear as crystal" on the nature and limits of the arrangements…

…

(iv) Fees shared between Clerey's and Casablanca and between the LLP and Casablanca were always below 15% of GFI [Gross Fee Income}.

…

(vi) In exchange for fees amounting to some £44,776 over the course of the Bare Trust and LLP arrangements with Casablanca, Casablanca provided capital of some £325,000 and management services valued at some £100,000.

…

3. As established above Casablanca's investment in Clerey's by way of the Bare Trust was in conformity with the relevant legislation in Rule 7.1(A) [sic] of Solicitors [sic] Practice Rules 1990 (as amended).

(i) The investment made by way of the Bare Trust did not result in the Third Respondent having "ownership" of a regulated firm of solicitors.

…

(iii) The Applicant's Rule 5 Statement asserts that "Mr Clerey was dismissed from the LLP at the instigation of Mr Macdonald". This is not accepted.

(iv) The Second Respondent and the firm's Cashier were dismissed following many weeks of consultation about emerging evidence and considerations about the nest way forward. The Third Respondent considered deploying Casablanca's option to acquire the LLP, thereby ending it as a regulated body, but was dissuaded from this step. Others closely involved in the decision to dismiss the Second Respondent and try to "clean up" the firm under Law Society regulation were the First Respondent, the firm's litigation solicitor Rhiannon Kynaston (who presented her own evidence of the Second Respondent's wrongdoing), Dr Paul McCormick of Counsel, the LLP's Auditors Messrs Cox Hinkins & Co, and Hillary Fisher of Quill Ltd.

(v) A properly constituted meeting of the LLP's Management Committee was held on 23 April 2008, which in addition to the Third Respondent included the First Respondent, the Second Respondent, Mrs Kynaston and Dr McCormick. The Second Respondent was apprised of the findings of the investigation (so far) into his conduct; was given a Memorandum of the meeting's discussion which under the terms of the LLP Agreement he had a period of time to reply to; and was served with two Statutory Demands, which were arranged on behalf of the LLP by Mrs Kynaston and presented by a Process Server…".

102.67 The Third Respondent told the Tribunal that taking all of these points into account, it was his case that allegation 4.1 had not been properly brought against him and had no foundation.

102.68 The Third Respondent referred the Tribunal to further documentation produced by him during the course of the hearing. He said that he had produced details of the firm's/LLP's bank mandates and accounts to the FIO and had referred the FIO to the Barclays Bank Manager. He referred the Tribunal to the Memorandum dated 4 September 2009 from himself to the Bank Manager, which stated, inter alia:

"…

I have explained to the Investigator that the firm did not use the new MLA Client Account opened in 2007 because of the existence of a Client Account Breach on the Clerey's Account arising in June 2007…".

102.69 The Third Respondent said that the intention had been to only use the LLP client account, for which there had been a mandate in his name, in the future and it had not happened. He said that he and the firm's cashier had been made counter-signatories but only with a designated member and had had no authority in their own right. He

told the Tribunal that the mandate for him and the cashier had been revoked on the advice of the FIO.

102.70 The Third Respondent referred the Tribunal to the letter and report from Gibson Hewitt dated 3 October 2008. He said that this had been the Trustee in Bankruptcy of the Second Respondent and the report stated "3.1 Barclays Bank were appointed as bankers during the Bare Trust period". He submitted that he had never held the Barclays Bank office account.

102.71 The Third Respondent referred to the letter dated 23 April 2009 from Butler & Co who he said had prepared draft accounts for the firm for 2006/2007. He said that any suggestion by the Applicant that the firm had been partly owned or owned by him was completely ill-founded. It was evident that the Second Respondent had continued to operate parallel bank accounts and when that had come to light the Third Respondent said that it had been a matter for the LLP as well as for him and the First Respondent. The draft accounts had been disavowed and the Applicant had been advised of the dubious nature of the accounts which had been produced.

102.72 The Third Respondent said that the LLP had been unable as a result to submit full accounts as it had not had access to the required information and the accounts produced by Butler & Co for the Second Respondent had not been acceptable.

102.73 The Third Respondent told the Tribunal that although the Second Respondent had repeatedly stated that Casablanca had acquired the fixtures and fittings of Clerey's, that was not true. He said that the arrangement had been predicated on the coming into force of the LSA 2007 and he had ensured that that was what happened; District Judge Batcup had said that that was "as clear as crystal".

102.74 The Third Respondent submitted that the notion that Casablanca had or wanted to acquire part of a legal practice in advance of the LSA 2007 did not stand up to scrutiny unless only very selective documents were looked at as produced by the Applicant. He submitted that the Bare Trust document had manifestly not conferred any title in law upon him/Casablanca for any part of the firm in which he had invested. He submitted that title had never passed to him and he had maintained that in interview with the FIO.

102.75 The Third Respondent told the Tribunal that he had arranged for due diligence to be undertaken by BDO Stoy Haywood, as any investor would and the Second Respondent had agreed to clear all/any debts of the firm, to open new accounts with Barclays Bank and to ensure that the entity was "good to go". He said that all steps had been taken to ensure compliance with Rule 7 (1A) of the SPR 1990, his Business Plan and the advice taken by him from Blake Lapthorn Linnell.

102.76 The Third Respondent submitted that had there been no misconduct by the Second Respondent, the arrangements would have gone forward, been inspected by the Applicant and he could not have foreseen any reason why he would be appearing before the Tribunal.

102.77 In cross-examination the Third Respondent said that in 2006 it was his understanding that non-lawyers could not own legal practices. He said that the LSA 2007 had been

intended to liberalise the legal profession in the future and he acknowledged that it had not been in force in 2006. He said that he had taken advice from Blake Lapthorn Linnell for his proposed agreement with the Second Respondent based on the LSA coming into force and that whilst the Bill was not an Act at the time, he said that it had been in an advanced stage of drafting and highly developed by that stage.

102.78 He agreed that Blake Lapthorn Linnell had not seen the Bare Trust document or the 13 October 2006 letters because he had spent considerable sums on other matters and could not afford to have his agreement with the Second Respondent independently scrutinised by Blake Lapthorn. He said that unfortunately he had thought highly of the Second Respondent who had appeared to be a decent and honest person and who had offered to prepare the Declaration of Trust.

102.79 The Third Respondent confirmed that he had paid £100,000 to the Second Respondent on 13 October 2006 and a further £35,000 approximately six months later. He said that the final £35,000 which had been due in October 2007 had not been paid. He told the Tribunal that the sums paid had been investment sums paid to the Second Respondent and that he had been free to do with them as he wished but he had undertaken that all of the firm's debts had been cleared. He said that Casablanca had brought the firm's goodwill at a cost of £170,000 and that he had not paid any lump sums to the Second Respondent beyond that.

102.80 The Third Respondent said that the LLP Agreement had stated that following the LSA 2007 coming into force and appropriate recognition of Casablanca, then and only then would the acquisition have occurred. The Third Respondent said that he had complied with the legislation in force at the material time in 2006 being Rule 7 (1A) of the SPR 1990.

102.81 Mrs Bromley referred to the Judgment of District Judge Batcup in the bankruptcy proceedings against the Second Respondent, which stated:

> "…
>
> 3. It is clear that the arrangements between the parties were governed by a letter dated 13th October, 2006 by Casablanca to Mr Clerey and that under the terms of the agreement the sum of £35,000 remains due to Mr Clerey by way of capital payment to him for the purchase of his solicitor's practice, Clerey's of Aldershot…".

102.82 The Third Respondent said that this was a perverse construction. He said that the District Judge had commented on the LLP Agreement and the continuity provisions and it was in that context that his comments should be read. He said that the LLP Agreement had been approved by the Law Society in June 2007 and he had subsequently discussed the LLP with the Applicant. He said that the First and Second Respondents had dealt with the LLP application and he did not know whether the letters of 13 October 2006 had been sent to the Applicant.

102.83 The Third Respondent agreed that the balance of profits of the LLP (90%) were to have been held in an account under the control of the Head of Finance and Administration but in anticipation of the LSA 2007 coming into force. He said that the intention had been to re-invest those profits in further expansion of the LLP and

provision of resources once the LSA was in force. The Third Respondent denied that the intention had been to pre-empt the LSA or to act in an underhand manner.

102.84 The Third Respondent said that he had agreed in his role as the Head of Finance and Administration to deal with the administration of the firm/LLP. He had wanted to run the new entity properly and he said this had involved management meetings and ensuring that they were documented but he had never been the controlling voice in meetings. He said that his purpose had been to deliver services to the firm to make it more efficient.

102.85 Mrs Bromley referred to the First Respondent's comment in interview that "…It's his bloomin' firm…" in relation to the Third Respondent. The Third Respondent said that he did not accept the First Respondent's perception that it was his firm. He said that he had not been aware of this until he had seen the Rule 5 Statement and he had been taken aback and saddened when he had learned of the First Respondent's involvement in the conveyancing transactions. He said that it had been clear from the interview that the First Respondent had been distressed and his principle role in the firm had been fee earning and to ensure profitability. He said that that had been the context in which he had made the remark.

102.86 The Third Respondent said that he maintained his comments as detailed in his letter dated 2 May 2013 to the Applicant's legal representative. He said that there had been an issue with regard to payment of the rent and that Mrs Clerey had issued proceedings against him/Casablanca for recovery of £200,000. He said that he had paid £10,000 in settlement of the claim.

102.87 Mrs Bromley referred to the letter and report from Gibson Hewitt dated 3 October 2008, which stated:

> "…
>
> 2.2 …the goodwill and asset of Clereys was sold and eventually transferred into a newly created LLP ("MLA"). Unfortunately, there is no clear trail of contractual documents…".

102.88 The Third Respondent said that the only point of this document had been to show that he had not had control of the Barclays Bank office account and he only attached weight to that clause 3.1. He said that clause 2.2 had been Mr Hewitt's version of events as told to him by the Second Respondent.

102.89 Mrs Bromley referred the Third Respondent to his interview with the FIO and the question of Mr Cotter relating to the LLP agreement and purchase of the goodwill and capital investment. The Third Respondent said that he had purchased the goodwill, not the assets; not the client files, furniture or building.

102.90 In response to a question from the Tribunal the Third Respondent said that the advice he received from Blake Lapthorn had highlighted those aspects the solicitors felt he had not interpreted correctly and the advice had told him a lot about what needed to be done. He said that the LLP Agreement had been drafted having received the advice and had been sent to Jordans Limited for review, which said that he had to be careful regarding the Management Committee. He said that advice had also been taken from

the auditors Cox Hinkins that Casablanca could legitimately acquire the goodwill in consideration of a capital investment but that it could not take physical assets of intellectual property until the LLP came into effect.

102.91 The Third Respondent said that he was a non-lawyer. He had a reputation to protect which was important in connection with his other business activities and if the Tribunal made an order against him it would not be understood by members of the public in the way in which it would by solicitors. He said that he had learned dire lessons from his experiences over the last seven years and he had no intention of repeating that. The Third Respondent told the Tribunal that he defended his integrity but that if the Tribunal made an order against him, he would be willing to give an undertaking that he would not have any future interest or investment in the legal profession without full prior authorisation. He said that he deeply regretted not having taken legal advice in relation to the LLP arrangements and having relied upon the Second Respondent.

The Tribunal's Findings

103. The Tribunal had regard to the Statements of Agreed Facts in relation to the First and Second Respondents. It noted that all of the allegations against the First and Second Respondents respectively had been admitted and it found them proved on the facts and on the documents. It was satisfied that in relation to the Second Respondent, he had admitted recklessness and that it was not in the public interest to pursue the dishonesty allegation against him. The Tribunal noted that the First Respondent had also admitted the allegations of recklessness against him.

104. The Tribunal had carefully listened to the submissions on behalf of the Applicant and those of the Third Respondent on oath. The Third Respondent accepted that the Tribunal had jurisdiction to hear the allegation against him, having taken legal advice. The Tribunal was satisfied that the status of the Third Respondent fell within Section 43 including as per the authority of Cunnew.

105. The Tribunal had regard to the wording of Section 43 both pre and post-2009 to which it had been referred. It had to be satisfied that the Third Respondent had occasioned or been a party to… an act or default in relation to a legal practice which had involved conduct on his part of such a nature that… it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in section 43 (1A).

106. The Tribunal had regard to the Declaration of Trust document and the two letters dated 13 October 2006 from the Third Respondent. It was satisfied that there had been an intention on the part of the Third Respondent to acquire an interest in the firm but only once the LSA 2007 had come into effect. The Tribunal did not find on the documents or having heard the Third Respondent's evidence that he had either tried to or in the event, had acquired the legal practice before the LSA had come into force. Instead, the Tribunal was satisfied that the arrangement with the Second Respondent had been conditional upon that happening and there had clearly been continuity provisions in the LLP Agreement, which the Tribunal accepted.

107. The Tribunal found that the Third Respondent had consistently stated in evidence what he had said in interview and that he had been a credible witness whose evidence had been tested in cross-examination and which had withstood that testing.

108. As the fee sharing arrangement was put to the Tribunal, it found that the arrangement and the Third Respondent's conduct per Rule 7 (1A) of the SPR 1990 had been compliant. It had regard in particular to the guidance notes to Rule 7, which addressed the introduction of capital or services to a legal practice. It was satisfied that the Third Respondent had provided capital and services to the firm, not the clients of the firm and that he had thereby been entitled to share fees, as limited, in accordance with the rule. The Tribunal accepted the Third Respondent's evidence regarding the services he had provided and it was clear that that had not involved any fee earning or other work he was not entitled to undertake.

109. It was evident to the Tribunal that the Third Respondent had effectively whistle blown in relation to the firm/LLP and the Second Respondent's misconduct and it was satisfied that he had assisted the Applicant in its investigations as much as possible.

110. The Tribunal found that the Third Respondent had sought to act in accordance with the rules of the solicitor's profession and to protect the public despite not being a solicitor himself.

111. The Tribunal did not find proved beyond reasonable doubt that the Third Respondent had acted contrary to Section 43 of the Solicitors Act 1974 and it dismissed the allegation against the Third Respondent.

Previous Disciplinary Matters

112. The First Respondent had appeared before the Tribunal previously on 3 June 2004 under Case Number 8983-2004 and was fined £1,000 and ordered to pay costs of £5,000.

113. The Second Respondent had appeared before the Tribunal previously on 16 January 1997 under Case Number 6938/1995 and was reprimanded and fined £500 and ordered to pay costs of £5,003.95.

Mitigation

First Respondent

114. The Tribunal had regard to the Statement of Agreed Facts of the First Respondent and the letter on his behalf from Richard Nelson LLP.

115. The Tribunal noted that the First Respondent stated in the agreed facts that, as soon as he suspected misconduct by the Second Respondent, he had reported the suspicions with the Third Respondent to the Applicant and had subsequently reported the matter to the police. It noted that dishonesty had never been alleged against the First Respondent.

116. The Tribunal had regard to the fact that the First Respondent was now aged 68 and had retired with no intention of working in any capacity in the future. The First Respondent had stated in his written mitigation that he was in very poor health.

Second Respondent

117. The Tribunal had regard to the Statement of Agreed Facts of the Second Respondent and the written submissions as to mitigation and the oral submissions of Mr Blatt on behalf of the Second Respondent.

118. The Tribunal noted that the Second Respondent was now aged 70. It noted that he accepted having made a number of mistakes and that there had been a number of failings by him with the technicality of the rules which governed him as a solicitor and he stated that he had had poor judgment in dealing with others.

119. The Tribunal noted that the Second Respondent stated in his agreed facts that he had suffered from poor health since 2004 and the proceedings had been stressful for him. He had accepted without any hesitation that he should not practice again.

Sanction

120. The Tribunal had regard to its Guidance Note on Sanctions.

121. The Tribunal had found proved all of the allegations against the First and Second Respondents both respectively and jointly.

122. The Tribunal was not however constrained by the agreed Outcomes and it refused to make orders based on the agreed outcomes. The Tribunal considered that as acknowledged by the Applicant, sanction remained a matter for the Tribunal alone as was supported by case law.

123. The Tribunal had regard to the allegations which it had found proved against the First and Second Respondents and it was mindful of the need to protect both the public interest and public confidence in the profession and also the reputation of the profession by imposing a sanction which would reflect the utmost seriousness of the breaches of which it had found both Respondents guilty. It had also taken into account that both Respondents, albeit independently of each other, had previously appeared before the Tribunal; in the case of the First Respondent only two years prior to these matters now before the Tribunal, he had been found guilty of conduct unbefitting and in the case of the Second Respondent he had been found guilty of SAR breaches and a conflict of interest.

124. The Tribunal was not satisfied that voluntary removal from the Roll was either acceptable or appropriate, taking into consideration all of the circumstances of their respective cases, it ordered that the First and Second Respondents, should be struck off the Roll of Solicitors.

Costs

125. Mrs Bromley told the Tribunal that both the First and Second Respondents had agreed

that costs should be decided by the Tribunal. She said that she also sought costs from the Third Respondent.

126. Mrs Bromley acknowledged that the costs were substantial in the sum of £88,321.08 but said that there had been three Respondents, a seventy page Rule 5 Statement containing a number of allegations and exhibits which ran to approximately 1,500 pages. She submitted that the costs were not excessive.

127. Mrs Bromley referred the Tribunal to the FIO's costs of approximately £23,000 and the breakdown which covered the two FI Reports which were lengthy.

128. Mrs Bromley said that in relation to the First Respondent he had provided a financial statement which revealed that he had a one quarter share in a property and no mortgage but she said that there was no valuation detail other than the First Respondent's opinion of its value of approximately £600,000. In accordance with Solicitors Regulation Authority v Davis and McGlinchey [2011] EWHC 232 (Admin) Mrs Bromley submitted that the First Respondent had to provide evidence of his means and he had not done so.

129. Mrs Bromley said that the First Respondent had not challenged the quantum of costs, rather that he had stated he could not afford to pay a costs order. She asked the Tribunal to make a costs order against the First Respondent and that any such order should be immediately enforceable as it could be secured against the property interest disclosed by the First Respondent.

130. Mrs Bromley told the Tribunal with regard to the Second Respondent that he had also provided a brief statement of means but no evidence of the figures referred to albeit the statement was signed and contained a statement of truth.

131. Mrs Bromley said that the Second Respondent's outgoings appeared to exceed his income. She said that he was also a discharged bankrupt.

132. Mrs Bromley submitted that the Second Respondent should be responsible for 50% or more of the total costs; both FI Reports concerned the Second Respondent and he had faced fifteen allegations as against the six allegations faced by the First Respondent and the one allegation faced by the Third Respondent.

133. Mrs Bromley said that whilst the allegation against the Third Respondent had not been found proved, she was still instructed to apply for costs against him. She submitted that the proceedings had been properly brought against the Third Respondent.

134. Mrs Bromley submitted that since these were regulatory and not civil proceedings, and taking into account the case of Baxendale-Walker v The Law Society [2007] EWCA Civ 233 there was very clear authority that costs did not follow the event. She said that whilst the Third Respondent's evidence had clearly had a significant impact upon the Tribunal, his documents had only been received very late in the day by the Applicant on the Friday preceding the substantive hearing date which had not assisted.

135. Mrs Bromley said that if the Third Respondent sought a costs order against the Applicant, that was resisted and Baxendale-Walker relied upon. Mrs Bromley said that the Third Respondent had a high hurdle to overcome if he wished to persuade the Tribunal to order costs against the Applicant as he had to show that the case had been a shambles from start to finish which it had not been.

136. Mrs Bromley referred to the Third Respondent's financial information which she said was not supported by any documentation although he had been referred to Davis and McGlinchey.

137. The First Respondent had provided a Personal Financial Statement document and covering letter dated 3 May 2013 from Richard Nelson on behalf of the First Respondent which detailed mitigation on his behalf regarding any costs order and which included, inter alia that any costs order should be limited due to his lack of means and if an order was made that it should not be enforced without leave.

138. The mitigation on costs on behalf of the First Respondent also included that the First Respondent had co-operated fully with the Applicant's investigation including admissions by him as to his errors in his initial interview with the FIO, the intervention had already had a devastating effect on his personal finances and he was liable to pay the intervention costs of £75,000 as at March 2012 and he would not work again given his age and health issues. The First Respondent had a quarter interest in his late mother's property worth approximately £150,000 subject to Capital Gains Tax and the letter stated that it had always been the intention of his mother that his wife should receive 50% of his share.

139. It was also submitted that the First Respondent and his wife might become financially responsible again in the future for their eldest daughter due to her health problems and that she might have to leave sheltered accommodation in which she was living which was under threat of closure. If that were to happen, the First Respondent's property would require adaptation at great cost.

140. It was submitted that the First Respondent's costs liability should be proportionate having regard to the number of allegations and the seriousness of the allegations found proved against him as opposed to those faced by and found proved against the Second Respondent.

141. Mr Blatt referred the Tribunal to the short statement of means of the Second Respondent. He said that the Second Respondent was now aged 70 and in ill health. He confirmed that the Second Respondent was a discharged bankrupt but he said that he was now "a broken man" and would not work in the future.

142. Mr Blatt submitted that the Second Respondent should not bear more than one third of the costs. He told the Tribunal that if it decided he should bear a greater share of the costs, he was not instructed to contest that but he asked that any costs order should not be enforced without leave.

143. The Third Respondent acknowledged that he had submitted paperwork late in the day which he said had been as a result of ill health and because he had not had the benefit of legal advice. He said that he had replied to the Rule 5 Statement some weeks

previously and had argued that the allegation was not made out against him. He said that he had asked the Applicant to withdraw the allegation at that stage and he believed that costs could have been avoided if the Applicant had more thoroughly scrutinised the allegation against him.

144. The Third Respondent said that he had looked to the Applicant for assistance but it had not been provided and the Applicant had allowed the matter to take its course resulting in these proceedings.

145. The Third Respondent told the Tribunal that if the Applicant did not seek costs against him he had no intention of seeking a costs order against the Applicant.

146. The Third Respondent told the Tribunal that his finances were limited. He said that he had a monthly income of £3,200. He said that he owned a rental property in Oxford which was mortgaged as was his family home. He told the Tribunal that his assets had been affected significantly by his investment in Clerey's and the LLP. The Third Respondent referred the Tribunal to his letter dated 7 May 2013 which he said outlined his financial circumstances.

147. The Tribunal had listened very carefully to the representations on costs made on behalf of the Applicant and the Second and Third Respondents and had read the documents submitted on behalf of the First Respondent.

148. The Tribunal had found proved all of the allegations against the First and Second Respondents. It noted that the First Respondent had a quarter share interest in property with a value of at least £150,000 subject to CGT.

149. In relation to the Second Respondent's financial circumstances, it noted all that had been stated in the Statement of Agreed Facts but it had seen no documentary evidence in support.

150. The Tribunal noted that the agreement as to facts and admissions by the First and Second Respondents had only very recently been reached and the costs of the proceedings were substantial even without a fully contested hearing.

151. The Tribunal had made no order against the Third Respondent and it noted that he had made his position clear from the outset, during interview with the FIO and it had been re-iterated to the Applicant.

152. The Tribunal summarily assessed the costs of the Applicant and it ordered that the First Respondent pay costs in the sum of £28,000 and the Second Respondent pay costs in the sum of £40,000. The Tribunal made no order for costs against the Third Respondent.

Statement of Full Order

153. The Tribunal Ordered that the First Respondent, Victor John Hatch of, solicitor, be Struck Off the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £28,000.00.

154. The Tribunal Ordered that the Second Respondent, Robert Victor Clerey, solicitor, be Struck Off the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £40,000.00.

Dated this 11th day of June 2013
On behalf of the Tribunal

Ms T Cullen
Chairman