SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11123-2013

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

DENIS FRANCIS MCKAY First Respondent

and

STUART ROGER TURNER Second Respondent

Before:

Mr D. Green (in the Chair)
Mr D. Potts
Mr M. C. Baughan

Date of Hearing: 11th November 2013 to 15th November 2013 and 16th December 2013

Appearances

Edward Levey of Counsel, Fountain Court Chambers, Temple, London EC4Y 9DH, instructed by Capsticks Solicitors LLP, 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant

Christopher Coltart of Counsel, 2 Hare Court, Temple, EC4Y 7BH instructed by direct access for the First Respondent who appeared

Jonathan Goodwin, Solicitor of Jonathan Goodwin Solicitor Advocate Ltd, 17E Telford Court, for the Second Respondent who appeared

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JUDGMENT

Allegations

1. The allegations against the First Respondent, Denis Francis McKay and the Second Respondent, Stuart Roger Turner, on behalf of the Solicitors Regulation Authority as amended with the consent of the Tribunal were that:

1.1 In breach of Rule 21(3) of the Solicitors Accounts Rules 1998 ("the SARs") they did not retain sums representing the payments received from third parties in legally aided cases in client account; and

1.2 In breach of Rule 7 of the SARs, they failed to remedy breaches of the SARs promptly on discovery; and

1.3 By not reporting payments of costs received from third parties to the Legal Services Commission ("the LSC") in legally aided cases and/or not retaining those sums in client account from December 2004 onwards they:

(i) failed to act with integrity, prior to 1 July 2007 contrary to Rule 1(a) of the Solicitors Practice Rules 1990 ("the SPR") and thereafter contrary to Rule 1.02 of the Solicitors Code of Conduct 2007 ("the Code"); and/or

(ii) prior to 1 July 2007 acted in a way which was likely to or did compromise or impair the good repute of the solicitor's profession contrary to Rule 1(d) of the SPR and thereafter acted in a way that was likely to diminish the trust placed by the public in them or the legal profession contrary to Rule 1.06 of the Code.

It was also alleged that the First Respondent acted dishonestly (alternatively, recklessly i.e. that he acted with a reckless disregard of his professional obligations) from 2004 onwards and that the Second Respondent acted recklessly from 2004 onwards. However it was open to the Tribunal to make a finding that the Respondents acted dishonestly or recklessly (as the case may be) only from a later period. For the avoidance of doubt, it was not necessary for dishonesty or recklessness to be proved in order for the other allegations to be made out.

Documents

2. The Tribunal reviewed all the documents including:

Applicant

- Index to bundle for hearing 11 November to 15 November 2013
- Rule 5 Statement dated 15 January 2013 with exhibit DP1 in Volumes 1 and 2
- Amended Rule 5 Statement filed 13 November 2013
- Re-amended Rule 5 Statement dated 12 December 2013
- Correspondence Volume 3 items 3 to 32
- Statements/further documentation Volume 4 items 33 to 36

- Letter from Capsticks Solicitors to the Tribunal dated 4 November 2013
- Letter from Capsticks Solicitors to the Tribunal dated 7 November 2013
- Note on behalf of the Applicant by Mr Edward Levey of Counsel dated 8 November 2013
- Closing submissions on behalf of the Applicant by Mr Levey dated 12 December 2013
- Extract from the SPR Rules 20, 21 and part of Rule 22
- Extract from the SARs Rules 20 and 21
- Schedule of costs relating to the hearing of 11 November to 15 November 2013 and resumed hearing 16 December 2013

First Respondent

- Second witness statement dated 11 November 2013 with exhibit DM1 (added to bundle 4)
- Third witness statement dated 12 December 2013
- Written submission on behalf of the First Respondent by Mr Coltart dated 12 December 2013
- Bundle of Authorities
- Bundle of testimonials

Second Respondent

- Outline Note of Closing on behalf of the Second Respondent by Mr Goodwin dated 12 December 2013
- Second statement of the Second Respondent dated 14 December 2013 with exhibit SRT1
- Extract from Solicitors Code of Conduct 2007, Rule 1 Core duties
- Extract from the SPR Practice Rule 1.01
- Bundle of Authorities
- Bundle of testimonials and appraisal notes

(In this judgment cross references, paragraph numbering and postal addresses are omitted from documents quoted unless necessary to aid comprehension.)

Preliminary Issues 11-15 November 2013

Amendment of the Rule 5 Statement

3. For the Applicant, Mr Levey asked the Tribunal for permission to make an amendment to the Rule 5 Statement. In allegation 1.3(i) relating to integrity and

1.3(ii) relating to public trust, Mr Goodwin had pointed out that the SPRs were in force only until the end of June 2007 and then the Code came into force on 1 July 2007. Mr Levey submitted that it was clear from the Rule 5 Statement that the Applicant was looking at the period December 2004 until December 2010, (in respect of the Second Respondent until around March 2010). He submitted that the wording of the SPRs and the Code was substantially the same in respect of integrity. In respect of good repute/public trust, there was just a slight difference in the wording. The SPRs referred to the good repute of the legal profession and the allegation as originally drafted related to impairing the public trust while Rule 1.06 of the Code related to diminishing trust. His note to the Tribunal repeated the error and he asked that it should be read to refer both the Code and SPRs. Mr Levey sought permission to amend the Rule 5 Statement and offered to produce an amended version of the Rule 5 Statement to which the Tribunal agreed, granting permission for the amendment in principle. Mr Coltart for the First Respondent did not object to the amendment.

Admission of witness statement of the First Respondent dated 11 November 2013 with exhibit

4. Mr Levey submitted that the previous afternoon he had received a supplementary witness statement and exhibit from the First Respondent. He did not formally object to its introduction but he might have submissions as to the weight to be attached to it and might wish to put in further documents relating to it. He had not had the opportunity properly to reflect on it.

5. For the First Respondent, Mr Coltart agreed that the statement was submitted at relatively short notice; the First Respondent wanted to deal with points of detail arising out of his original witness statement. If the Applicant needed to introduce further documents relating to the new statement, Mr Coltart stated that he would be in difficulty objecting. He understood that Mr Goodwin did not object. He had copies of the witness statement for the Tribunal but the other parties had asked that he did not put it in before making his application. The statement addressed two matters: it was the First Respondent's case that to a very large extent he inherited the problem (of debt to the Legal Services Commission ("LSC") from which the allegations arose) from two former partners going back to 2001 and later he did what he could do to deal with the issue and keep the firm going as he hoped it could repay the LSC. He now wished to introduce the case of client TD which was dealt with by the two former partners. He said that there was a failure by them to submit a Claim 2 Report on Case Form ("Claim 2") to the LSC and that he could show money passing from client account to office account for the client. In 2008, before the LSC and the Applicant came into the matter, the First Respondent of his own volition when he realised that there was no Claim 2, arranged to send one to the LSC, which inevitably led to recoupment of monies owing to the LSC, showing his honesty regarding what he was doing to redeem the situation. Secondly the Tribunal would hear from Ms Fiona Thomson ("FT") of the Legal Aid Agency (formerly the LSC) that one of the issues her colleague Mr MS relied on in his report, in reaching a conclusion of suspected dishonesty in respect of the First Respondent was the existence of a memorandum on a client file about the opportunity to make a 'turn' regarding the differential cost of a costs draftsman and the costs to be recovered from a third party. Mr Coltart said that it could be proved beyond doubt that this was best costs practice, the subject of seminars, lectures and academic commentary and he exhibited an extract from "Cook

on Costs" in support. Mr Coltart apologised for the late arrival of the First Respondent's second witness statement but hoped that the Tribunal would agree to accept service of it.

6. Mr Levey submitted that he wished to clarify that it was no part of the Applicant's case that dishonesty arose from the memorandum about the 'turn' on costs draftsmen's fees. The allegations that the Applicant said gave rise to dishonesty were set out in the Rule 5 Statement. When MS carried out his investigation he concluded that there were grounds for suspecting dishonesty for a number of reasons; the memorandum might be one of them but it was not an issue that the Applicant relied on. If the First Respondent wished to rebut an allegation that was not advanced that was a matter for him.

7. The Tribunal considered the submissions of the parties and determined that the witness statement would be admitted into evidence.

Approach to evidence of the First Respondent

8. On the second day of the hearing, before calling the First Respondent to give evidence, Mr Coltart submitted that the prosecution witnesses had dealt with matters by topic rather than chronologically and that as there was a 10 year history of events, the way matters had evolved over the period was central to the First Respondent's defence; he should be allowed to present his evidence in chronological fashion. This would involve jumping across the evidence bundles and looking at technical aspects of individual files but was unavoidable and essential to illustrate how the two former partners had undertaken the same exercise in breach of the rules as the First Respondent which was the genesis of the problem. Mr Coltart understood that his approach was not opposed by the other parties. For the Applicant, Mr Levey submitted that he had no objection but he would not want that to be taken as acceptance of the relevance of the approach or its assisting the Tribunal. The Applicant's submission was that if the problem was historic it made no difference. For the Second Respondent, Mr Goodwin had no objection but pointed out that he might have additional questions for the Second Respondent arising from the First Respondent's new witness statement. The Tribunal noted the Applicant's position and agreed that Mr Coltart could approach his examination in chief of the First Respondent in the manner proposed.

Approach to the evidence of the Second Respondent

9. Mr Levey reserved his position on the basis that the situation of the Second Respondent was entirely different from that of the First Respondent because in his submission the Second Respondent had not filed a witness statement at all. He was concerned that the Second Respondent was to be allowed to give evidence for the first time that he submitted should have been put in earlier, in accordance with the Tribunal's directions. Mr Goodwin submitted that the Second Respondent had filed a witness statement; it was short, he admitted the two breaches of the SARs and confirmed that he denied allegation 1.3 and also confirmed the contents of letters written by Mr Goodwin at his instructions. As to the Tribunal's Practice Direction No 5 in respect of adverse inferences, this related to a Respondent who did not give evidence and the Second Respondent would give evidence. It was for the Applicant

to prove its case to the criminal standard. The Second Respondent had given explanations through Mr Goodwin and the subsequent issue of the Rule 5 Statement did not alter the position and therefore Mr Levey was not being taken advantage of.

10. The Tribunal determined that it would deal with the evidence of the Second Respondent and the points which Mr Levey had raised as the hearing progressed.

Other issues relating to the admission of documents into evidence

11. During the course of the hearing, other procedural issues arose, which are dealt with below if significant and not recorded elsewhere in the body of the judgment.

12. A letter from the LSC to the Second Respondent dated 6 February 2007 referred to reports 1, 2 and 3 for one office of the firm and report 3 for the other office of the firm as enclosures but they were not attached to the FI Report. They ran to around 200 pages. The First Respondent informed the Tribunal that the Second Respondent had disclosed the enclosures in the litigation with the LSC and on 13 January 2013 his insurer's solicitors in that litigation (not Mr Goodwin) had them. The First Respondent had checked with his own solicitors and they had been delivered by DX to the Second Respondent's solicitors on that date. The Tribunal asked that the parties seek to obtain copies and the First Respondent managed to do so by personally collecting them.

13. On the first day of the hearing, the Tribunal noted the absence of audited accounts for the firm in the trial bundle. At the beginning of the fifth day, there was a discussion about whether documents procured by the Applicant and which were originally described as audited accounts but which were accountant's reports, should be admitted into evidence and could be used as the basis for cross-examination of the Second Respondent. Mr Goodwin expressed concern that if there was to be cross-examination on the documents, the First Respondent having completed his evidence, would not be able to give evidence upon them. He also submitted that the Applicant has closed its case and argued that the Tribunal could look at the documents but not on the basis that the Second Respondent could be cross examined on them. He could not now seek the Second Respondent's instructions upon them as he was giving evidence. The Applicant had been in possession of these documents and if it had felt they had evidential value could have introduced them. Mr Coltart also objected to the introduction of these documents on the basis that even if the First Respondent could come back to give evidence, it was unfair to put him in that position. Mr Levey submitted that there might be some issues in respect of the audited accounts on which the First Respondent could assist the Tribunal and should he wish to give evidence on them he should be given the opportunity.

14. The Tribunal considered the submissions of all parties. The Tribunal had raised its enquiry on the first day of the hearing and it was now the fifth day. At the time the issue was raised no one had objected although it subsequently transpired that the agreement of the representatives of the First and Second Respondents was given on the basis that the documents were to be provided out of courtesy to the Tribunal at its request and not formally put in evidence and therefore would not be documents upon which the Respondents could be cross examined. It now transpired that the documents were not in fact the audited accounts but accountant's reports. The Applicant had

closed its case and the Tribunal decided that it would not now look at the documents and so they should not be introduced into the proceedings. However Mr Levey could ask what questions he chose in the normal way. Mr Goodwin pointed out that these were not the Second Respondent's documents and were not in evidence and the Second Respondent would have to answer based on recall going back many years. Mr Levey submitted that the entire process of cross-examination was based on recollection; the Second Respondent had now seen these documents which would assist his recollection and could tell the Tribunal what his recollection was. The Tribunal considered that the question posed by Mr Levey as to the non-appearance in the accountant reports of the significant debt to the LSC was a relevant question which the Second Respondent could be asked to answer to the best of his knowledge and belief without the documents being admitted into evidence at this point. The accountant's reports were not admitted into evidence.

Factual Background

15. The First Respondent was born in 1950 and admitted in 1976. He did not hold a current practising certificate.

16. The Second Respondent was born in 1959 and was admitted in 1992. He did not hold a current practising certificate.

17. The First Respondent and another solicitor established Lonsdales ("the firm") in 1986. The firm operated from a single office in Blackpool until 2000 when it established a further office in Preston. The Second Respondent joined the firm as a trainee solicitor in July 1990. Having qualified as a solicitor in September 1992, he became a partner in May 1993. The Second Respondent retired from the partnership on or around 2 March 2010.

18. At all material times both Respondents were equity partners in the firm with the First Respondent based at the Blackpool office and the Second Respondent at the Preston office.

19. One partner left the firm in 2001, at which point the firm had two other partners in addition to the Respondents; one of whom had become a partner in April 2000 and another who had become a partner in June 2001. The first of these left the partnership in April 2004 and the second left in October 2004. From that point until the retirement of the Second Respondent in March 2010, the First and Second Respondents were the only partners in the firm, sharing profits equally.

20. Concerns were raised about the firm by the LSC in early 2010 and an inspection was carried by the LSC into the firm's affairs on 29 and 30 November 2010. It was as a result of those investigations that the Applicant commenced its own investigation on 13 December 2010 at the Blackpool office. The Applicant's investigation culminated in a Forensic Investigation ("FI") Report dated 18 March 2011.

21. As part of its investigation, the Applicant sent the FI Report to the First and Second Respondents under cover of letters dated 1 April 2011 and 26 May 2011 respectively. The First Respondent replied by letters dated 6 April 2011, 11 April 2011 and 3 May 2011. Mr BN the Practice Manager of the firm also wrote to the Applicant on 6 April

2011. BN worked for the firm from about 1995 until the firm closed. Responses on behalf of the Second Respondent were dated 11 July 2011 and 24 August 2011 and 25 April 2012.

22. In the course of the Applicant's investigation, both the First and Second Respondents were interviewed by the Applicant's investigation officers ("IOs") on 2 March 2011 and 16 March 2011 respectively and transcripts prepared.

23. The Applicant resolved to intervene in the firm on 22 July 2011 on grounds of suspected dishonesty, having considered the matter earlier and decided not to do so.

24. The firm conducted a significant amount of legally aided work on behalf of claimants and from 1 January 2000 onwards held separate contracts with the LSC for both its Blackpool and Preston offices to conduct clinical negligence, personal injury and family cases.

25. All contracts between the LSC and firms of solicitors in relation to civil litigation were replaced by a Unified Contract which came into force on 1 April 2007 and which, subject to amendments remained in force until replaced on 15 November 2010 by the Standard Civil Contract 2010. The matters giving rise to these proceedings predated the 2010 contract.

26. The LSC made payments on account ("POAs") to solicitors for up to 75% of the value of the Legal Aid Certificate issued in any particular case. The POAs were paid by the LSC to the solicitor in respect of work done by the solicitor and in respect of disbursements (e.g. counsel's or expert's fees).

27. Under clause 18(5) of the Unified Contract, the solicitor was required to repay the POAs to the LSC on the happening of certain events. For example, the POAs became repayable after three months had elapsed since the conclusion of the case, or after three years from the date of the initial Funding Certificate.

28. Under clause 18(8) of the Unified Contract, even when POAs had become repayable under clause 18(5), a solicitor was then entitled to state why they believed that the POAs should not be repaid and, provided that there was a good reason, the LSC might elect not to seek repayment. For example, if the claim had been unsuccessful and no damages or costs had been recovered from the defendant, that would generally be a good reason why the solicitor should not be required to repay the POAs to the LSC. Similarly, even though repayable after three years from the date of the Funding Certificate, if a case were taking a very long time and was still live after three years, the LSC would generally not insist on immediate repayment of the POAs.

29. The LSC's billing process, whereby a solicitor was required to submit a Claim 2 at the conclusion of a civil claim to notify the LSC of costs recovered in full or in part from the other side, applied under the 2004 General Civil Contract in much the same way as it did under the subsequent contractual arrangements. The Claim 2 procedure had been in place for many years and solicitors who conducted legal aid work in relation to civil matters had, as part of their contract with the LSC, to comply with the notification process. Having notified the LSC by means of the Claim 2 that costs had been recovered in whole or in part from the other party, those costs were then

accounted for when the firm rendered its final bill to the LSC; the solicitor was required to set off the POAs which had been received against any sums outstanding.

30. The LSC became concerned in early 2010 at the size of the firm's balance of unrecouped POAs ("UPOAs"). UPOAs were the POAs paid to a firm by the LSC but which had not been repaid to the LSC.

31. The LSC had previously raised the issue of the UPOAs with the firm during audits conducted in November 2004 and in 2006. The issue was again brought to the attention of the firm in February 2007 when the LSC wrote the Second Respondent.

32. The LSC audit in 2004 was carried out on 11 November 2004 and a report was sent to the Second Respondent by the LSC on 8 December 2004. In that audit report the LSC highlighted that there were UPOAs in the total sum of £3.1 million (for both the Blackpool and Preston offices):

> "The figures owed under UPOA were discussed with [the Second Respondent] for both offices. As there were a large number of cases involved, a report of the oldest 'dead' cases was provided to the firm. Due to the extent of the UPOA outstanding, [the Second Respondent] requested a full list of all cases involved."

and later in the report it was set out:

> "UPOA
> There is a significant amount owed under UPOA of £1.6 million. The majority of the matters (£995,000) relate to Clinical Negligence claims and there are also large values in the Miscellaneous (£197,000), PI (£315,000) and Housing (£35,000) categories.
>
> There is also £1.5 million owed under UPOA at the Preston office… Again, a large amount owed is Clinical Negligence – £1.1 m, £160,000 Miscellaneous and £150,000 PI."

33. A subsequent LSC audit in 2006 also raised the issue of UPOAs and according to the body of the report, the issue was raised by the auditor at the time of inspection, but the report itself did not mention what the level of UPOAs was at that time.

34. On 6 February 2007, AD an Account Manager at the LSC's Merseyside regional Office wrote to the Second Respondent what was commonly referred to during the hearing as the "bombshell letter":

> "I refer to our telephone conversation today.
>
> I have been reviewing the payments on account which the Commission has made under the Licensed work conducted under the above account numbers, and enclose reports, as discussed. There are 3 types of report for the [account number] account and one Report 3 for the [account number] account.
>
> ...

> Report 3 –Payments on Account outstanding
>
> On this report, please would (sic) let me have a report on the present position in each of the cases in the Outcome box on the report within the next 28 days?
>
> The Outcome Codes are as follows:
>
> ...
>
> We spoke about the deadlines involved and I will contact you next week to discuss this further when you have seen the reports, I am happy to arrange a meeting with you to discuss this further if you would like to run through any of the issues face-to-face.
>
> ....
>
> Please note that I make this request pursuant to the provisions of Regulations 70 and 72 of the Civil Legal Aid (General) Regulations 1989..."

35. On 4 March 2008, the LSC wrote to the firm under the heading "Outstanding Payments on Account" in the following terms:

> "I am writing to you because the Commission is currently reviewing all outstanding payments on account, and as part of that review I require reports on a number of cases conducted by your firm. I note that you may have received a similar report from your account manager previously. The Leeds office is now handling these matters and the report enclosed is updated and will not include any cases that you have previously confirmed could be closed.
>
> With this letter I am enclosing a number of lists designed to make the review as easy as possible to conduct. I am also enclosing some guidance on how to complete the reports required.
>
> I am the caseworker responsible for managing the review process with your firm. Your reports should be sent to me at the above address… Please provide your response on lists 3 and 4 within the next 21 days. For list 2 please provide your response by 20 April 2008. In relation to list 1 please see point 2 on the attached sheet. On receipt of the reports I will calculate the financial position on your account and contact you again. If appropriate we will make a payment into your account; if an outstanding balance is due to the Commission, we will discuss how that balance will be recovered."

A chaser letter was sent on 25 March 2008. On 26 March 2008, BN replied referring to a telephone conversation the previous day. On 15 April 2008, a letter was sent in the Second Respondent's name to the LSC caseworker enclosing the firm's reports on lists 3 and 4 and inviting him to contact the Second Respondent if he wished the Second Respondent to clarify anything. BN wrote on 22 April 2008 with further information about list 4.

36. On 1 May 2008, the LSC wrote to BN about a new approach it was taking to "historic" cases following litigation brought by The Law Society:

> "Since I first wrote to you to request information about cases on which a payment on account was outstanding and no final claim for costs had been received, the Commission, as part of its recent settlement with The Law Society, has changed its approach to dealing with payments outstanding on "historic" cases and specifically those which have been inactive on our computer system since 31 March 2002."

There was a second letter on 1 May 2008 to BN acknowledging earlier letters of his. On 2 May 2008 the LSC wrote to BN stating:

> "I am in receipt of a letter dated 15 April form (sic) your colleague [the Second Respondent] at the Preston office. This was received on 16 April 2008.
>
> Further to your request that all matters in relation to account numbers ... be forwarded to you I am now responding to the completed report from [the Second Respondent]. A copy is enclosed."

37. The LSC conducted a further investigation into the affairs of the firm in 2010. The level of UPOAs was found to be very high. It was also discovered that there was a large number of cases (some of which dated back many years) where the firm had recovered costs from the other party but those costs had been not been notified to the LSC.

38. The First Respondent had a meeting with the LSC (Ms SG) on 4 February 2010 and on 8 March 2010. The Second Respondent brought forward his departure from the firm to the end of February 2010 and was not therefore at the latter meeting. The LSC's Notes of the 8 March 2010 meeting at which were present the First Respondent, Ms NJ the LSC's Area Relationship Manager and Ms SG the LSC's Relationship Manager for the firm, included:

> "[The First Respondent] started the meeting by accepting that the firm are £1.7 million in debt to the LSC albeit the majority of Claim 2s have yet to be submitted.
>
> The remaining £550K POAs are live cases where either a claim 1 will be required or if a claim 2 is required, the firm will be able to pay the POA off in full when the other side settles.
>
> NJ asked why the firm are not in a position to pay this money back now in full. [The First Respondent] explained that the money has been spent over the years in clinical negligence solicitor salaries, drawings etc and when two partners left the firm a number of years ago; they received a "golden handshake" of £60K – [name] and £30K [name].
>
> [The First Respondent] explained that he has been trying to pay the debt off gradually by reducing the UPOA figure, then submitting a few claim 2s which then in turn increases the UPOA figure. He then pays some more off this over

a few months and then submits further claim 2s. He has been paying the debt off this way as if he submitted all claims 2s totalling £1.7 million in one go, then the firm would be deemed insolvent as the debt (sic) be far greater than any income levels.

Having said that, [the First Respondent] stated that he is confident and committed that the firm can repay the outstanding amount over a fixed number of years. He asked for a five to ten year repayment plan, NJ stated that this would not be an acceptable amount of time, as in effect, the firm have been given an interest free loan and the LSC could not justify this to the NAO [National Audit Office].

[The First Respondent] confirmed that he would be prepared for the LSC to place a charge on the firm's two properties. The total value of the properties combined is £650K, with a £220K mortgage. [The First Respondent] confirmed that the LSC is the only creditor

[The First Respondent] also confirmed that he has three clin neg cases, which will be finalised over the next 3-6 months.

…

… At a rate of £200 per hour (paid by NHS etc) minus any current POAs [the First Respondent] is committed to pay back all profit made on this case totally (sic) approx £170,000, minus POA payments should provide the LSC with £75,000.

He also confirmed other private income streams:

Contract to deal with Criminal Injuries Compensations (sic) scheme from Lancashire County Council – £200 per hr rate

Private family work– at £200 per hour
Probate work – at £200 per hour
Insurance work at £200 per hour.

NJ said that she would like to see how much income this private work generates and then after overheads have been taken off, assess what is left monthly to determine the firm's ability to repay this debt at a level acceptable to the LSC.

NJ explained that she would not make any final decision until speaking to DRU and that either NJ or SG would be in touch soon.

[The First Respondent] asked if he could meet with the DRU to progress this further."

39. As part of the LSC investigation, the First Respondent and BN produced a schedule of 43 cases in which costs had been recovered from the other party but where the firm had failed to notify those costs to the LSC at the conclusion of the case. The files

identified were then investigated by the LSC. When the Applicant conducted its investigation, shortly after the LSC had concluded its investigations, the earlier schedule had been updated and by that stage it included 45 cases.

40. As could be seen from the later version of the schedule ("the Schedule of Unreported Costs"), the firm had recovered total costs of £1,817,287.27 from other parties but had not submitted Claim 2s notifying the LSC of sums recovered and had not accounted to the LSC in respect of those funds. The earlier version of the Schedule of Unreported Costs, that is the one originally provided by the First Respondent to the LSC, had a column indicating the dates on which the firm recovered costs from the defendants in the various actions, whereas the later version did not contain such a column. As could be seen from the first version, the unreported costs spanned the period from January 2001 to November 2009.

41. As at 30 June 2010, the LSC's Debt Recovery Unit ("DRU") calculated the total of the firm's UPOAs as £2,351,824.90. As part of the Applicant's investigation in December 2010, the total of the UPOAs was calculated to be £2,150,643.27. Only a proportion of the total amount of UPOAs represented costs which the firm had recovered from third parties but not disclosed to the LSC.

42. As a result of its investigations, the LSC:

- Instructed C Solicitors to seek payment of the debt owing to the LSC, being £1,426,237.98 on the contract for the Preston office and £724,405.29 on the contract for the Blackpool office.

- Issued a contract notice on 3 December 2010 to the firm, compelling the firm to submit claims for all unclaimed cases identified on a list provided by the firm. The LSC also stopped all future payments to the firm; and

- Issued a Notice of Termination to the firm on 4 March 2011 advising it that the LSC was terminating all contracts held by the firm across both offices.

The LSC subsequently issued proceedings against the First Respondent and the firm to which the Second Respondent and others were joined. The First Respondent had joined the two former partners into those proceedings.

43. In a letter to Ms SB of the Applicant dated 19 July 2011, the First Respondent stated:

> "[MS of the LSC] was presented with all files he requested and I spent a considerable amount of time with him and his colleagues explaining them. The history and the build up of the LSC debt had been exhaustively explained by me to the LSC over the period after the departure of [the Second Respondent] who had, as is recorded, held numerous meetings with the LSC and both were naturally aware of the overall 'take' (from the LSC) by the firm. I enclose a letter to [MS] dated 1 February 2011 as an example. When costs were recovered from third parties it is, of course, correct that thee (sic) was no timely reporting to the LSC with the Claim 2 Form."

44. As part of the Applicant's investigations the IO wrote to former partners including the individual who had left in October 2004 to whom he wrote on 9 February 2011. The response letter dated 14 February 2011 included:

> "I am happy to assist in the investigation you are undertaking and in answer to your questions, using the same enumeration as your letter, state as follows:
>
> 1. ...
>
> 2. ...
>
> 3. I was not responsible in any way for management of the firm's civil contract with the LSC.
>
> 4. I had no involvement in the review of "Unrecouped Payments on Account Schedules". All accounting matters were dealt with by [the First Respondent], the senior partner, with assistance from the practise (sic) manager [BN], both of whom were based at the Blackpool office. The accounts department was based at Blackpool. I have no recollection of ever seeing a UPOA schedule in my time at [the firm]. It may well be that the first of such schedules came following my departure from the practise. In any event as it related to an accounting matter, any such schedule as received at Preston, would have been sent straight to [the First Respondent at Blackpool.]
>
> 5. [The First Respondent] was responsible for all costs matters as he was the senior partner and also a Deputy Costs Judge. He dealt with all the firm's cash flow..."

The reply dated 21 February 2011 from the partner who left in 2001 included:

> "I refer to your letter of 9th February 2011, which contains a number of inaccuracies. ... My involvement in practice management matters effectively ended earlier when I announced my intended departure.
>
> I note that your investigation relates to the recoupment of monies due to the Legal Services Commission but you do not say over what period they have accrued. On the assumption that they have accrued since I ceased to be involved I cannot see what relevance the questions you raise can have. Whatever was the subsequent management structure is not within my knowledge. Clearly I would not be aware of any amounts due to the Legal Services Commission then being held back. In the circumstances I am unable to be of assistance to you in your investigation."

45. There was an exchange of letters between the Respondents in February/March 2010. Quotations are set out below as the letters were frequently referred to during the hearing. The Second Respondent wrote on 25 February 2010 including:

"...I am aware of the Legal Services Commission debt. In the brief discussions we have had you have made it clear that you hold me liable, just as much as you, for the debts of the business. You have asked me what my proposals are in relation to the practice. You have also suggested, amongst other things, that on my departure I should provide you with an indemnity against the firm's liabilities.

I thought the comment about me providing you with an indemnity a strange one to make. Normally it is the departing partner who seeks an indemnity from the remaining partner in relation to the liabilities of the business. This made me decide to give the UPOA lists closer scrutiny and to say I am shocked by what I have discovered is an understatement. [SG's] provision of more up-to-date UPOA reports for both LSC accounts in my view only makes the situation worse and confirms the view I have now reached.

To go back in time, I think it would not be controversial to say that upon [former partner's] departure in 2001 you took over the costs recovery of concluded cases in the Clinical Negligence department…

Jumping forward to 2004, [former partner.] unexpectedly and suddenly resigned and you came to a decision that [former partner.] should be expelled from the partnership, I went along with your decision, I trusted your judgment. That left the two of us and with two offices to run it was clear that a partner was needed at each branch. It was also clear that you had no intention of moving to Preston so at the beginning of November 2004 I did. I have remained there continuously since then save for the short period when we were required to move out on the expiry of our lease.

Moving forward again, this time to February 2007, I received a letter from the LSC regarding their view of Payments on account made to [the firm]. I sent the letter and enclosure over to you at the Blackpool Office. I sent it to you because you were the person who dealt with all the costs recovery of the clinical negligence cases and you were the one who dealt with the finances of the business. I admit that I did know about some unrecouped payments on account because on occasions the LSC's auditors had mentioned it at the closing meetings of audits carried out on the firm. Figures were never mentioned and I thought nothing of it. Why should I? We were a firm with the highest reputation for quality. We passed all our audits, we achieved quality standards, and overall the firm was doing well, or at least on paper it was if the accounts were to be believed.

This letter was different however to what had gone before as it enclosed lists of clients for whom Legal Aid had been granted and payments on account made to us. We did speak about it and the impression you gave me at the time was that this was a legacy left by departing partners, namely [name.] and [name.]. I took this at face value. Why wouldn't I? It came from my Partner; someone 10 years my senior, a founding partner of the firm that I had borrowed money heavily to become a partner of. It came from someone I trusted implicitly and without question."

...

"In each case you have taken it upon yourself to not submit the Claim 2 and to not account to the LSC. In each case you have acted in bad faith towards the firm and me and I will not accept that I have any responsibility for your actions.

What makes matters worse is that after the receipt of the letter from the LSC in 2007 it did nothing to stop your practice. [Client M] is a prime example. The LSC letter was received on 7th February. It is clear from it the LSC are looking to recover payments on account. In the knowledge of this and in the knowledge that they are already owed hundreds of thousands of pounds where we have effectively had double recovery the firm received £109,000 costs in March 2007 to conclude the case and in October 2009 we still owed the LSC £85,000.

I have also now looked at the UPOA reports [SG] left at the beginning of February. To my horror the situation has continued. You have recovered costs and in the face of the LSC's exercise to recover payments on account you have failed to refund them costs paid out and subsequently recovered. Examples are…"

...

"My conclusion is that you were fully aware of what you were doing. It was wholesale and systematic. It has been compounded by your continuance of the practice to the present day in the knowledge that it was wrong.

… Your conduct over the years has deceived me. To my knowledge costs were recovered from third parties. I trusted you to act properly and repay the LSC once those monies were received. You failed to do that and failed to make me aware of what you were doing. In other words you acted in bad faith towards me.

Just some of the consequences to me are that I have unnecessarily paid tax on inflated profits, I have had to pay VAT on inflated profits…

…

My anger at the position you have put the firm in by your bad management of the firm's finances I cannot express in words strong enough. All of the current problems stem from your conduct."

.....

This brings me to your notion that I should repay half the overdraft on my departure. Last week you increased the sum by £25,000 to £100,000. I take the view that the (sic) if it were possible to have taken on a successor or successors in partnership it would not be necessary for the overdraft to be

reduced as you suggest it has to be. I have explained the reason why no successors are in place and that is because of your conduct.

It is also a fact that the overdraft is at its limit is (sic) because a significant amount of income each month is diverted to make payments to the LSC in respect of unrecouped payments on account. Again this is in my view directly as a result of your conduct. I therefore have no proposals towards repaying half of the overdraft when I am not responsible for its making.

Since November you have focused wholly on the liabilities and how I will reduce them for you. As you can see from the above that because of your conduct towards me I do not consider myself responsible for any of the liabilities. Additionally, I have invested a great deal in [the firm] over the past two decades, not withstanding the difficulties the firm now faces I await your proposals to buy my share of the equity in the business and the freehold premises..."

46. On 4 March 2010, the First Respondent replied to the Second Respondent including:

"...I have not responded until today as since your letter I have been fighting in every quarter to do everything possible to satisfy the LSC that their debt can be managed by the firm on a structured basis. I will return to this again but here is an email to them today following a discussion I had on Monday with the senior accountant in London. The lines of further payment are likely to be suspended and hence I have arranged an urgent meeting with [SG] and her boss [NJ] on Monday, 8 March 2010 at 11.00 am at LSC in Matthew Street Liverpool. I have also arranged to see [M, the firm's accountant] after the meeting. He is all at sea as to the dissolution and is staggered at the contents of your letter. You should be at both meetings, especially the LSC. The bank has also today asked me to update them on the overdraft position and how the loans are to be re-structured. I can't tell them anything. They believe you will be paying half the overdraft on 31 March 2010, in order to relieve the firm of the immediate pressure on the account and, go some way to provide a credible future for the firm.

I do not intend to answer your individual points at this stage (although I shall in due course) but I start from the straightforward statement that a partner who retires from a firm does not cease to be liable for partnership debts incurred by the partnership before his retirement. All I say at this stage is that you have concocted a most extraordinary tale in an attempt to escape your responsibilities now that you have secured a safe and sound financial haven with the MOJ. In all our years of partnership you have never raised any of this with me or [BN]. And all your allegations are totally untrue. The facts, which can be clearly demonstrated, are that we have both been aware of the LSC position from [former partner's] departure and year in year out (including [former partner's] and then [former partner's] retirement) we have bitten the bullet and accepted that we shall have to continue to work on recoupments and reduce the debt over time. Nevertheless you ignore this as well as, it seems, the very substantial benefits you have reaped from the firm from the very

beginning and now present me with a cowardly excuse to leave scot-free. I see it in no other light.

I have worked tirelessly over the years to deal with repayment of LSC payments which had never been addressed by the Preston office as well as reductions in a numerous outstanding Counsels' fees, as well you know. This was especially true when I had to deal with the mess [former partner] left, never having paid these numerous Counsels' fees as well as files being 'closed' without any thought of what was needed. Many were still 'closed' in your Preston Garage (even now) but it was still left to me to seek them out and report to the LSC even as recently as the [W] case. I took on this task (besides continue to fee earn) whilst you dealt with the SDT work, although sadly that went, as we well know. You were aware of all this as our cash flow has been our constant problem. Moreover the LSC sent you (direct to Preston) a series of Recoupment Lists over the years and I have all the evidence that you were fully aware of them as we have periodically worked (together with [BN]) on them. As I have said I can demonstrate how we approached it and, more especially, how we were constrained by cash flow from submitting recoupments at any one time..."

47. On 6 April 2011, BN wrote to Ms SB of the Applicant including:

"[The First Respondent] has shown me [the IO's] recent report following his visits to the firm including his interviews with me as the Practice Manager, of the firm since 1997.

I have noted [the IO]'s letter dated 9 February 2011 addressed to [the Second Respondent], [the Second Respondent's] reply dated 14 February 2011 (enclosing his letter dated 25 February 2010 to [the First Respondent] – which I had already seen) and the notes made of the interview with [the Second Respondent] on 16 March 2011.

I should point out from the outset that I have no reason to prefer either partner's version of events but wish to state the plain facts. Clearly I am still employed by the First Respondent on a one to two days per week basis [F wife of BN] is the firm's cashier although I am past retirement, have no financial need to continue in employment, but do wish to see [the firm] over this difficult period. I have been involved in all aspects of the firm's finance, including preparation of monthly Management Accounts and regular cash flow charts for the partners since the early days when [former partner] was in charge of the clinical negligence department.

I had already made it clear to [the IO] in interviews with him that [the Second Respondent], as the Legal Aid representative of the firm as well as an equal sharing partner, was fully aware of all the aspects of UPOAs as well as the fullest details of the firm's income and liabilities.

I will be specific,

In his letter dated 14 February 2011 [the Second Respondent] states that he was not responsible for the management of the LSC contract and that this was [the First Respondent's] responsibility as "he had control of the firm's finances."

This is completely untrue. [The Second Respondent] was always responsible for LSC matters including the Civil Contract as can be demonstrated from the numerous audits and visits that the LSC made to him. By way of example I see that there is one Audit Report attached to which is his memo dated 13 December 2004 addressed to me. I prepared a response on 24 January 2005 which is also shown. I refer, under **UPOA**, to "[the Second Respondent] will shortly be submitting a proposal on how we will report…" My original draft of that response is now attached. It refers to "([the Second Respondent] to action) which naturally was directed to him to prepare a response which he simply avoided. Regrettably this was a pattern he often followed.

I have now looked into more of the audit files and I am attaching a further letter from the LSC dated 21 November 2006 addressed to [the Second Respondent] following another Audit visit – in this case by [SG, MS and AG]. [MS] and [AG] were the lead team members in the recent investigation and I know [the First Respondent] had never met them before then. You will see from the Audit Plan the *Fund take details* and under **Scope of audit**, "The main reasons for the audit…" The figures speak for themselves.

I have also read with deep sadness [the Second Respondent's] responses and remarks about all the financial aspects of the LSC recoupments... I know that [the Second Respondent] was fully aware of all aspects of the finances of the firm and in particular the UPOA which I had discussed with him on a number of occasions. He also demanded daily financial information in the form of a cash flow for the forthcoming weeks. He was insistent on this every single morning. Frustratingly he retained the fortnightly BACS statements for the Preston Account [number] and would only allow a faxed copy to be sent to Blackpool for processing by accounts staff insisting that the originals belonged to him. Needless to say, he also, required copies of the Blackpool Account (number) statement immediately it arrived at Blackpool.

In summary he was not deceived by anyone. He was a full blown equal partner and knew exactly what was happening with recoupments. Both [the First Respondent] and he were left to deal with the huge legacy of substantial payments on account made in the early years of the clinical negligence department and although [the Second Respondent] attempted to deal with a number of them it was eventually left to [the First Respondent] to take on the task with [the Second Respondent's] full knowledge.

I have also mentioned [the Second Respondent's] letter of 25 February 2010 to [the First Respondent]. I know that this is the only communication that the First Respondent has ever received from [the Second Respondent] after he suddenly left the crucial LSC meeting which we all attended with [SG] in Blackpool in February 2011. It was at that meeting that [the First Respondent] gave a full account of how he intended to deal with the problem. I have been

provided with copies of all the correspondence, particularly following that meeting and I can see that [the Second Respondent] has ignored every approach including vitally important matters with the bank which [the First Respondent] has been left shoulder.

As a final thought [the Second Respondent] had always remarked to me that the LSC would "write it off" or somehow the old accounts would go away.

It therefore seems abundantly clear that when [the Second Respondent] was given the opportunity to leave the practice he was likely to totally distance himself from the LSC debt which he has now tried to do although he has apparently accepted that the LSC should have his share of the tax refund.

I am more than happy to provide any further information I can but I do believe that for the record you need to know the truth."

Witnesses

Ms Fiona Thomson

48. The witness worked for the Legal Aid Agency (formerly LSC) as an Intelligence Analyst in the Counter Fraud and Intelligence Team. She confirmed the accuracy of her statement dated 10 October 2013 and the statement of her colleague MS dated 9 January 2013. They had meetings with the First Respondent with BN present on 29 November 2010. She had a separate meeting with BN on 30 November 2010 and she and MS had each made contemporaneous handwritten notes which were typed up on unsigned documents headed "Witness Statement". Her typed versions were dated 9 December 2010 (MS's were undated). She confirmed the truth of these documents. The witness stated that throughout discussions with BN and the First Respondent, BN presented as an open and honest individual who had a sense of loyalty to the firm. He was happy to give very open and honest answers. He was a bit more open on his own. He was not trying to hide anything. On occasions he did not know the answer but if he did, he was prepared to give it.

Cross-examination by Mr Coltart for the First Respondent

49. The witness was referred to a paragraph in MS's witness statement dated 9 January 2013 referring to the interview with the First Respondent on 29 November 2010 where MS sought to summarise the most important points coming out of the interview during which the First Respondent was stated to have confirmed the following:

"a. That he had sole responsibility for the completion and submitting of the Claim 2 forms to the LSC since 2006.

b. That he had not submitted Claim 2 forms as required as the firm no longer had the funds required to cover the recoupment.

c. That the partners in the firm had been aware of the practice of not submitting Claim 2 forms from at least 2001. It was never formally recorded in partners meetings but all partners were aware of the issue.

d. Produced for the LSC staff a report detailing 43 cases covering a period from 2001 to 2009. These were cases where the firm had received a total of £1,605,992.85 from the defendants in settled costs but had not notified the LSC who had already paid the firm a proportion of their costs. In effect the firm had been paid twice and retained the monies.…"

50. The witness was also referred to her typed note of the meeting with the First Respondent. The witness agreed that although the First Respondent was responsible for the Claim 2 forms these were not done in isolation. She recorded in the note that she understood that the First Respondent's PA who was the wife of BN, completed the Claim 2s with him. The witness's note continued that the First Respondent stated:

> "I've been doing this for the last 4-5 years getting to grips with what you (the LSC) do. The clinical negligence cases over the years – there are numerous amounts of payments. After [former partner] departed in 2004 the clinical negligence department was unprofitable for 4 to 5 years. We were funding four partners at the time. We needed to get funds into office account. On 4th November 2010 costs came in and recouped off the Blackpool account. We were entitled to transfer £60,000 because £30,000 was being recouped for UPOA. When the recoupment takes place we can put the additional £30,0000 (sic) into the office account.
>
> I have been responsible for costing between 2005 and 2010. I had been meeting with [the Second Respondent] before he left. [The Second Respondent] was doing some of this in Preston and we looked at the CLAIM 2s, "we were not innocent of any failure to remit the CLAIM 2 but we have been trying to run them off. There was o (sic) money to send the CLAIM 2s back and I was determined with [the Second Respondent] to address this on the file of [S] we owe the LSC £25,000. We have to get through Christmas and paying VAT (*for the year).*
>
> Between 2005 – 2010 the number of fee-earners were reduced. We did have five clinical negligence fee-earners but we reduced their number, [KM] was made redundant. [The Second Respondent] did not do this. I had to deal with this. [Former partner] left the partnership – … got £60,000 because … said that if … did not get the money … would bring the practice to dissolution.
>
> [The First Respondent] also said "We had a £10,000 prosecution by the Solicitors Disciplinary Tribunal and were rebuked by the [Applicant]. *(However I checked the position with the SDT on 9th December 2010 and they had no record of any proceedings against any of the firm's partners in their records.* [The First Respondent] continued "When [former partner] left it secured [the Second Respondent's] position. He was retained by the [Applicant] to act as prosecuting solicitor for them". *(This was confirmed by the Solicitors Disciplinary Tribunal on 9th December 2010 although they would not confirm the dates to me. They did confirm that he was no longer acting for them).*"

The witness stated that on the basis of what the First Respondent told her on the day of the interview, he was explaining that other partners in the firm including the Second Respondent were aware of the difficulty and that they were to an extent to blame for what had been done and that the First Respondent felt that they jointly shared responsibility. The witness also agreed that she had either recollected inaccurately or misunderstood what the First Respondent had said about the SDT fining the firm; he had not said that but rather that the firm was earning money from the Second Respondent's work at the Tribunal.

Cross-examination by Mr Goodwin for the Second Respondent

51. The witness confirmed that no one from the LSC had interviewed the Second Respondent because he was not at the firm's premises on 29 and 30 November 2010 and they were informed that he had left the partnership at the end of March 2010. She would not say that whether he was involved was not considered directly relevant but the firm was presented as a sole practice. The witness agreed that the 2004 LSC audit report exhibited to MS's witness statement was a normal routine audit, although she had not taken part. She agreed that UPOAs had been discussed and to the LSC's knowledge those UPOAs existed, that the amounts involved were also discussed and that the firm passed its audit with corrective action. It was designated a Category 1 firm and the witness explained that this related to Legal Help work which the firm had a contract with the LSC to deliver and had no relation to certificated work undertaken by the firm [to which UPOAs related]. The witness confirmed that the 2006 audit was similar and was principally undertaken because of the length of time since the last one and because of the firm's "take" from the legal aid fund (recorded as £1.2 million ending 30 September 2006) rather than because of UPOAs. This also resulted in a Category 1 for Legal Help in respect of the Contract Compliance Audit. As to certificated work, the Finance team looked at that by examining bills. There would be a visit once a year but scrutiny was risk-based and so could be more frequent. As to whether a Category 1 rating meant that the firm was doing things well across the board; the witness stated that it meant they were doing things well regarding Legal Help because it was there that the audit was carried out. Certificated work could be looked at by the Contract Manager calling for a sample of files. However during the Contract Compliance Audit, UPOAs would be raised as an issue and if the firm had a very high level of UPOAs in respect of work in progress, the auditors would discuss it with the firm. The witness agreed that if there were concerns, the Contract Manager could go out to talk to the firm and but she would not say that that meant there were no concerns because she did not know what conversations had taken place. She agreed that the General Quality Concern at the beginning of the 2006 audit report did not express concern about UPOAs (when referring to them). The witness disagreed that the LSC's concern about UPOAs only materialised in 2010; the LSC would have kept mentioning the position throughout the period.

52. The witness was referred to the so-called "bombshell letter" of 6 February 2007 from the Merseyside Regional Office of the LSC to the Second Respondent. She stated that the dedicated UPOA team at Leeds would have advised the Contract Manager to contact the firm. As to MS, in his statement saying that "The LSC became concerned in early 2010 that the firm had an excessive outstanding balance of UPOAs", the witness agreed that this would be against the background of the LSC's full knowledge in 2004, 2006 and 2007. The witness confirmed that she did not have a copy of the

reports attached to the bombshell letter; she had not been asked for them but she could not speak for anyone else at the LSC.

Re-examination by Mr Levey

53. Mr Levey referred the witness to the 2004 audit report and asked whether the fact that the firm had UPOAs was of itself a matter of concern. The witness stated that the legal aid system allowed for UPOAs to exist in order to enable the firm to conduct the case properly and maintain cash flow. If the case was carried out correctly; if a report was made on time, UPOAs were not a matter of concern. If firms failed to report that money had been recovered from third parties and there was a failure to reimburse the LSC for POAs, (then it would be a concern). If the LSC had been aware that some or a large part of the UPOAs represented monies recovered and not accounted for to the LSC, it would have taken a much more robust approach; it would go into the firm, seek assurances and reimbursement. The LSC relied on the solicitor's integrity and trusted them to report to it appropriately and to reimburse the LSC. In an ordinary case, the LSC would not know other than by being told by the solicitor that the firm had recovered sums from third parties. The rules in the legal aid contract required the firm to report within three months of the end of a case and three years after the issue of the certificate and so the firm knew it was obliged to do so. Each firm nominated a representative to be responsible for liaison with the LSC and the Second Respondent was the firm's Quality Representative. The Tribunal noted that the 2004 audit report was not signed by anyone at the firm. The witness stated that normally it would be signed by the representative at the firm. If the audit report was prepared after the event, it would just be sent out to the firm.

54. The witness was not aware of changes in LSC policy regarding UPOAs; the LSC might have become more proactive over the last 10 years in respect of recording payments out and payments in. It was an evolving process and did not date from a specific time. The LSC was always concerned to ensure UPOAs were properly recouped. There was not a policy decision to take LSC's eyes off the ball between 2001 and 2009. A risk-based approach was adopted; if UPOAs were high and potentially increasing, the Contract Manager would approach the firm to see why and what steps had been taken to address it. The LSC was under pressure as a public body and had to account to the NAO; it had external government pressures to ensure monies were appropriately out in the public domain but there was no change in approach; the LSC would always have acted to ensure that.

55. As to how quickly the LSC would respond to a claim and recoup monies, the witness did not have details but the LSC had targets to process Claim 2s and to recoup. The Claim 2 would be looked at by the case management team and a check made for POAs on the LSC system. If the firm confirmed that there was no claim on the fund and POAs had been made, the LSC would recoup the money and tell the firm it could move money from client to office account. This would take a maximum of four weeks but it would depend on work throughput in the LSC office at the time. The witness thought that authority to retain the balance would go to the solicitor by means of a standard letter; the firm would have received some form of notification. The witness was not in that particular team.

Gordon Hair IO

56. The witness confirmed the truth of the FI Report dated 18 March 2011 and his witness statement dated 9 January 2013. He was referred to the FI Report where he had summarised his interviews with the First Respondent, BN and the Second Respondent. He had recorded that the First Respondent told him that:

> "[the First Respondent] and the [Second Respondent] only became aware of the backlog of unreported settled cases in 2005/06 ([BN] said that [the First Respondent and [the Second Respondent] became aware in 2004);"

Mr Levey asked the witness about the demeanour of BN; how he found him in respect of his willingness to assist and cooperate with the investigation. The witness stated that he met BN two or three times during the investigation. He was a competent bookkeeper and the witness believed that the information BN gave him was reliable. He had a degree of loyalty to the First Respondent and he and his wife were paid by the firm but the witness believed that the information he gave was reliable and the witness had no reason to think he was not entirely truthful.

Cross-examination by Mr Goodwin for the Second Respondent

57. Mr Goodwin put to the witness that he had stated:

> "The firm had not consistently reported to the LSC following recovery of costs and disbursements from third party insurers…"

The witness stated that he had used the phrase deliberately but did not believe that there was a policy and agreed that it was not wholesale or systematic, generally. The witness agreed that in his table of identified breaches in the FI Report, he had made no reference to the SPRs. In respect of his making reference to breaches of Rules 1.02 and 1.06 of the Code, the witness agreed that he believed that there had been a lack of integrity and acting in a way likely to diminish the public's trust in the firm and the legal profession by not reporting to the LSC amounts due to it. He agreed that he had identified five people as being in breach, the First and Second Respondents and three former partners. He stated that he was not party to the decision as to who to bring before the Tribunal.

58. The witness confirmed that the interview referred to as taking place on 16 March 2012 with the Second Respondent had in fact taken place in 2011; sometime after the matters touched on in the report as taking place in 2004. The witness stated that the Second Respondent was no longer at the firm but he did his best to answer questions.

59. In respect of the reports attached to the bombshell letter the witness was not sure whether he had copies. He did not think that he had requested them from the LSC's representatives. It was a while ago but he recalled that at the interview, the Second Respondent tried to find a letter and it could well be this one. He agreed that a reference to the February 2007 letter could not be seen in the interview transcript until the Second Respondent raised it and the indications were that the witness did not have a copy. He agreed that the Second Respondent said: "I may be able to find it on a PC" and stated that it was provided on the day. As to why, after it had been provided to

him, the witness still did not think it appropriate to obtain the enclosed reports, the witness stated that he had evidence of debt to the LSC of £2 million which was not disputed. He believed that there was sufficient evidence in the FI Report to submit it.

60. In respect of his correspondence with other former partners of the firm, the witness stated that enquiries were properly made to ascertain level of involvement and knowledge. He did not make further enquiries; he agreed that he accepted what the partner who left in October 2004 said at face value. As to the partner who left in 2001, the witness confirmed that the response dated 21 February 2011 was the only contact that the witness had with the individual and he did not return to it.

61. The witness was referred by the Tribunal to the statement in the executive summary to the FI Report:

> "The firm had not held these monies due to the LSC in client bank account. To the contrary, the monies due to the LSC had been transferred from client to office bank account and additional bills had been generated in respect of these additional monies transferred. The original bills would have been generated earlier during the clients' claims at the time of the receipt of the payments on account from the LSC."

The witness confirmed that the monies had first been put into client and then into office account and that this was going on during the period covered by the Report. He could not answer as to who had authorised the money to be moved from client to office account; the process involved the First Respondent and BN. He was not sure if one had to sign. An amount was transferred and the bill was prepared at the same time or a client credit would be created. This indicated something was not quite right. It was suggested that BN in the accounts department would prepare the bill. The witness explained to Mr Coltart that he did not have direct evidence of the mechanics of the transfers but the information he had would indicate that they were undertaken by BN and the First Respondent. Mr Coltart said that he would deal with this through the First Respondent.

Deputy District Judge Ian Pickup

62. The witness (until his retirement a District Judge) appeared as character witness for the Second Respondent**.** The witness confirmed his witness statement dated 8 November 2013 save that he asked that it be amended in the third paragraph to refer to April 2010 instead of 2011. In his witness statement he said in respect of the Second Respondent:

> "…I have found him to be a first-class Judge in both civil and family matters being fully committed to his role but also to the parties who came before him. He has always acted in a completely honest and truthful manner and his behavior and decisions have exhibited the highest integrity. I would say that this is true to such an extent that I would have no hesitation in completely entrusting my problems, my finances and those of my family to [the Second Respondent]…"

The witness stated that he most definitely still held to this view. It was quite easy to give a reference but the witness wanted the Tribunal to know that he meant it. References held some degree of weight but he felt so committed, having sat with a lot of judges, there was no one that he could say it so much about as the Second Respondent. He had had the opportunity to get to know the Second Respondent better when they had been involved in the part closure of a County Court and had to deal with staffing issues. He had not been in the Second Respondent's office when the matters the subject of the hearing were occurring but what he said of the Second Respondent was all absolutely true.

Cross examination by Mr Levey.

63. Mr Levey directed the witness's attention to his having said:

> "I offered myself as a referee/character witness and to attend the Tribunal to speak out on his behalf without having been approached by [the Second Respondent] because I believe what he has told me."

Mr Levey asked whether the witness was suggesting that he had seen any of the case documents. The witness stated that he had read the Rule 5 Statement subsequently to giving his testimonial and he had not changed his mind.

64. Mr Coltart asked that bearing in mind that the Second Respondent was part way through giving his evidence and that this witness was now being asked questions about the facts, the Second Respondent should leave the courtroom which he did.

65. The witness stated that the Second Respondent had not told him in as many words about the bombshell news; he did not know the Second Respondent in 2007. The witness was asked if the Second Respondent had told him that very large sums of money were owed to the LSC which he had failed to put in the firm's accounts, would that change the witness's view about entrusting family money to the Second Respondent. The witness stated that he would want to ask more questions about how it came about because the witness did not think that it was as straightforward as that; he would need to get the full background.

Findings of Fact and Law

66. 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.

The submissions recorded below include those made orally at the hearing and those in the documents. Quotations omit cross references to other documents unless they aid comprehension. Paragraph numbers in quotations have generally been omitted.

Submissions in respect of the allegations are set out together below as they arose out of the same factual situation but the Tribunal's findings are recorded separately below in respect of each of the First and Second Respondents.

67. Allegation 1.1 In breach of Rule 21 (3) of the Solicitors Accounts Rules 1998 ("the SARs") they did not retain sums representing the payments received from third parties in legally aided cases in client account; and

Allegation 1.2 In breach of Rule 7 of the SARs, they failed to remedy breaches of the SARs promptly on discovery; and

Allegation 1.3 By not reporting payments of costs received from third parties to the Legal Services Commission ("the LSC") in legally aided cases and/or not retaining those sums in client account from December 2004 onwards they:

(i) failed to act with integrity, prior to 1 July 2007 contrary to Rule 1(a) of the Solicitors Practice Rules 1990 ("the SPR") and thereafter contrary to Rule 1.02 of the Solicitors Code of Conduct 2007 ("the Code"); and/or

(ii) prior to 1 July 2007 acted in a way which was likely to or did compromise or impair the good repute of the solicitor's profession contrary to Rule 1(d) of the SPR and thereafter acted in a way that was likely to diminish the trust placed by the public in them or the legal profession contrary to Rule 1.06 of the Code.

67.1 For the Applicant, Mr Levey submitted that there was not a great deal of dispute on the facts. The question was whether the facts if proved amounted to failure to act with integrity and diminished public confidence. There appeared to be a significant amount of common ground between the parties: about the nature of POAs, that they constituted a debt to the LSC and how the system operated in both cases of recovery of costs from the other side and failure to do so; that the UPOA problem was identified in the LSC audit of 2004 and that the debt reduced over the following years. The schedules prepared by the First Respondent and BN were not challenged by the Second Respondent; by 2010, 45 matters remained where cost had been recovered and not accounted for to the LSC. It was not disputed that the LSC was dependent on firms to report. If the LSC had known it would not have allowed the situation to continue. It was also not disputed that during the period 2004-2010, the Respondents benefited significantly in financial terms from their position as the only partners in the firm, which was their primary source of income.

67.2 The breaches of the SARs were all admitted. The SARs applied to all partners in the firm and all partners were under an obligation to ensure compliance by the other partners. Under Rule 21, sums of over £1.8 million received in costs from third parties were required to be retained in client account and recorded in the client's ledger account and identified as the LSC's money or recorded in a ledger in the LSC's name and identified by reference to the client or matter. Any balance owing to the firm should then have been paid into an office account but only once the firm had notified the LSC that costs had been recovered from the third party. Furthermore, the notes to Rule 21 stated that solicitors were required by the LSC to report promptly to the LSC on receipt of costs from a third party and that it was advisable to keep a copy of the report on the file as proof of compliance with the LSC's requirement, as well as to demonstrate compliance with the Rule.

67.3 Mr Levey submitted that there was a significant amount of UPOA at all times; in 2004, the firm owed the LSC over £3 million. It was not entirely easy to see what had happened to that figure over the years but by 2010 the debt to the LSC was around £2 million. Not all of the debt represented funds recovered from third parties but around £1.8 million represented sums that the firm had in fact recovered by way of costs and failed to account for to the LSC. The Applicant was looking at the period from December 2004 to 2010 where the firm had significant use of money that ought to have gone back to the LSC. Judgment had been obtained by the LSC against the firm and the First Respondent for £1.8 million and there was some sort of agreement between the LSC and the Second Respondent taking the form of a Tomlin order, the details of which the Applicant was not aware. However for the purposes of professional misconduct, the firm had received £1.8 million. Mr Coltart submitted that there had been some minor discussion about the figures but the First Respondent agreed that at least £1.5 million had been recovered and not reported. The reason the POA figure was not necessarily reliable was because it included third-party disbursements but all parties could work from the figure of £1.5 million.

67.4 Mr Levey submitted that it could not be seriously disputed that since October 2004, the Respondents were the only partners in the firm; they had benefited from the situation because they had made a living out of the firm while the firm owed a fluctuating debt to the LSC. According to the First Respondent, the Second Respondent had bought a Mercedes motor vehicle each for himself and his wife. The Respondents drew quite significant sums; in June 2003 they drew £7,000 and £5,000 a month respectively. Mr Levey did not believe that it was seriously disputed by either Respondent that the firm was not financially viable with a debt of £1.8 million. This was important because the Applicant said that if the Respondents had acted with integrity and in a way not likely to diminish public trust they would have urgently sought to take steps to put money into the firm and sought to reach an agreement with the LSC based on the true facts or more likely, if resolution could not be achieved, they would have closed the firm. There was also evidence of lying to the bank. The firm was running at the full extent of its overdraft. If they had told the bank that they owed £1.8 million to the LSC and showed it in the accounts, the bank would have withdrawn assistance. BN told the LSC investigators that it was not being disclosed to the bank because it would have brought the firm tumbling down. It was the LSC's case that there was a huge debt, that the Respondents had received money that they were not entitled to and were both fully aware throughout the relevant period, did nothing about it and continued to draw income and profit at the expense of the LSC. Mr Levey submitted that there was an overwhelming case against both Respondents.

67.5 In respect of the SAR breaches, Mr Levey took the Tribunal through the background to the matter set out in the Rule 5 Statement including the history of the LSC's and the Applicant's investigations. The Applicant relied on what the Respondents had said in interview with the IOs of the Applicant. The SARs required prompt accounting from firms to the LSC. The unified contract between firms and the LSC required self monitoring and reporting. Clause 7(9) of the Unified Contract provided as follows:

> "**Must you monitor your own performance?**
>
> You must effectively monitor your performance under, and compliance with, this Contract. You must take prompt and effective corrective action if your

monitoring identifies any failure of, or deficiency in, performance or compliance."

Clause 18(5) provided:

"A Payment on Account of Licensed Work made on or after the Contract Start Date is "repayable" to us when any of the following occurs:

(a) three years have elapsed since the date of issue of the Funding Certificate for the case in respect of which the Payment on Account was made;

(b) three months have elapsed since the case ended..."

67.6 At the end of the case the solicitor must submit a Claim 2 where costs had been recovered in part or in full from other parties. In one of the cases which the Applicant relied on, TD, the Claim 2 had been submitted years after the event. The First Respondent said that they were playing catch up. The failure to notify, coupled with the failure to retain the monies in a client account for the benefit of the LSC, effectively resulted in a solicitor being paid twice over for the same work. It also meant that the LSC suffered financially in that it did not receive money to which it was entitled. Mr Levey questioned whether it was good enough for the Second Respondent to trust the First Respondent and for the First Respondent to say that he was doing his best to work the problem out without telling the LSC that they had had the money and spent it. The case was not put as fraud but effectively that's what it was. A black hole in public funds had been replaced by a judgment (in favour of the LSC) and whether it would be repaid was another matter.

67.7 As to lack of integrity it was submitted that it was alleged that the Respondents failed to act with integrity from at the latest December 2004 onwards in that:

- They were aware of the very large debt owed to the LSC and aware that there had been a failure to notify the LSC of costs which had been recovered and to account to the LSC in respect of those costs.

- They were aware that costs recovered from third parties should have been retained in client account but had not been.

- They took no or no adequate steps to remedy the SAR breaches. They did not replace monies belonging to the LSC which had not been retained in client account, they did not repay the monies owed to the LSC and they did not seek to come to an agreement with the LSC about how the monies would be repaid.

- They did not self-report their conduct to the LSC and they did not notify the Applicant of the SAR breaches. They were under a contractual obligation to notify the LSC but, in any event, this was something that they ought to have done as a matter of integrity. Rather than bringing the problem to the LSC's attention which would inevitably have led to the relationship between the firm and the LSC being terminated immediately, they chose not to. Instead the firm

continued to carry out legal aid work and continued to profit from its relationship with the LSC.

67.8 The Applicant relied on the same matters in support of its case that the Respondents failed to act with integrity, to allege that the Respondents' conduct was likely to or did compromise or impair the good repute of the solicitors' profession and likely to diminish the trust public placed in the Respondents and/or the legal profession. Even if, which the Applicant did not accept, the Second Respondent had a genuine but mistaken belief that the problem had been resolved after 2004, the Applicant's case was that he nevertheless acted in breach of Rule 1(d) of the SPR and/or Rule 1.06 of the Code for the reasons set out in the Rule 5 Statement. Regarding integrity, the test was objective; did the solicitor act with integrity by the standards of a competent and honest solicitor.

67.9 As to the detail of the case against the First Respondent, Mr Levey submitted that in summary the First Respondent said yes there was a problem; that they all knew about; that it was a historical problem and because there was a rolling account with the LSC, they could earn their way out over a period of years. The First Respondent was a Deputy Costs Judge and also worked in the Supreme Court Costs Office but the obligation to account to the LSC would be obvious to any legal aid solicitor. The First Respondent was also the person in the firm responsible for submitting Claim 2s. There was direct evidence of cases where he knew that the firm had received monies from third parties and failed to submit Claim 2s and the Applicant's reading of his evidence was that he did not seriously dispute any of it. The First Respondent admitted breaches of the SARs. As to the failure of integrity, on learning of the situation he did not seek to resolve it by talking to the LSC and putting money into the firm. As to diminishing public trust, if a member of the public heard the evidence in the case they would have less confidence in the legal profession at the end of the case than before. In addition there was an allegation of dishonesty against the First Respondent; he was directly and personally involved and Mr Levey submitted that he was plainly dishonest to the objective standard and it was plain that he knew that his conduct was not honest and therefore satisfied the two limbed test in the case of Twinsectra Ltd v Yardley [2002] UKHL 12.

67.10 Mr Levey referred the Tribunal to a schedule prepared by BN and the First Respondent as part of the LSC investigation in 2010 which set out all the cases where costs had been received from third parties; the first case that of client B showed monies received in 2006 whereas the First Respondent said that this was a historic problem. At least 10 cases on the schedule related to 2006 or later. They indicated that the problem had built up over time. The problem went on in 2006, 2007, 2008 and 2009, so it was partly historic and partly current. Mr Levey accepted that the problem must have started in 2001/2002 but the problem was there and then for the partners who had to deal with it at the time the subject of the allegations and act with integrity however and whenever it had begun.

67.11 Mr Levey submitted that the IO and MS of the LSC took away files and analysed them. The First Respondent had been involved in a number of them to a greater or lesser extent in recovery of costs and had failed to disclose to the LSC, hence the Applicant drawing a distinction between dishonesty in respect of the First Respondent and the Second Respondent. Very serious allegations were made against both them;

effectively they had come up with this practice to avoid the problem coming to a head. The First Respondent admitted that he knew of the problem and was trying to solve it; there was more dispute about the state of knowledge of the Second Respondent. Mr Levey invited the Tribunal to find that the Second Respondent knew of the problem full well throughout the period.

67.12 Mr Levey drew the attention of the Tribunal to the fact that the IO had examined a sample of 16 client files from the list prepared by the First Respondent and his findings which were summarised as:

> "Total amount due to the LSC on the 16 files examined £1,108,439.48;
>
> Third-party recovery during the time of:
>
> [Former partner] -1 file
> [Former partner] - 4 files
> [Former partner] - 4 files
>
> [Second Respondent]- 16 files
> [First Respondent] – 16 files
>
> LSC monies incorrectly held in office bank account:
>
> up to 1 year – 2 files
> 1 to 6 years – 10 files
> more than 6 years – 4 files"

Mr Levey submitted that on the first file referred to that of MA there was very little evidence on the client file but on the next case reported in the FI Report that of client M, while it was not necessarily the First Respondent's case, he was involved in recovering money from the third party so his fingerprints were on it directly and in his witness statement he accepted he was involved. He would say that he was trying to put things right but there was a failure to repay. In the cases of O, B, and H there was also evidence that the First Respondent was directly involved in recovery of money.

67.13 Mr Levey submitted that it could not sensibly be denied that the First Respondent's conduct as a whole, taking public money, recovering costs from third parties and not telling the LSC when the LSC was relying on him to tell them, and continuing to take money from the firm although it was technically insolvent amounted to the conduct alleged. The First Respondent acknowledged to the Tribunal that he was aware from 2004/5 that the firm was in an "impossible" position financially in the sense that if the LSC demanded repayment the firm would have been "brought to its knees" and the First Respondent said that he was not willing to allow that to happen. He hoped that over time he could "formulate a plan" to earn out the UPOAs". He accepted that "with hindsight that was misguided" The Tribunal had asked him when the penny had dropped and he said 2004 so throughout the period covered by the allegations he knew the truth. In oral evidence the First Respondent accepted that the LSC was dependent upon the firm's integrity and that realistically there was no way that the LSC could discover that the costs had been recovered and he accepted that the LSC was not made aware of the true position until 2010. During the period the First

Respondent benefited very substantially from his position as one of the only two equity partners in the firm taking drawings of approximately £50,000 per year. His benefit was at the expense of the public purse. In evidence he agreed that the 2010 meeting with the LSC was "cathartic" in the sense of clearing his conscience. He knew what he was doing was wrong. Plainly that constituted a lack of integrity. The First Respondent did not challenge that his conduct would be regarded by ordinary standards as lacking in integrity. Similarly Mr Levey submitted that one could not deny that it was likely to diminish trust and confidence in the profession.

67.14 As to the allegation of dishonesty, in the Rule 5 Statement and in the Second Respondent's witness statement, several cases were referred to where the First Respondent was involved and costs were recovered and not repaid, The First Respondent admitted all these incidences. Mr Levey submitted that the Tribunal should approach the allegation to be decided cumulatively against all that had gone before in respect of the First Respondent. As with integrity, it was relevant that the First Respondent agreed with his suggestion that the meeting with the LSC in March 2010 had been "cathartic" because he was finally able "to clear his conscience" and tell them the truth. Mr Levey did not understand that the quotations he set out from the First Respondent's evidence had not been correctly used. In the circumstances Mr Levey submitted that the First Respondent's conduct was dishonest in accordance with the test laid down in Twinsectra in the sense that it was dishonest by the ordinary standards of reasonable and honest people and the First Respondent himself realised that by those standards his conduct was dishonest.

67.15 In respect of the Second Respondent, Mr Levey submitted that his case was that he was aware of the problem in 2004 and received assurances from the First Respondent that the problem was being dealt with, he believed the assurances and by 2010 he discovered that the problem which he thought the First Respondent was sorting out was not sorted out. The Second Respondent accepted that he was strictly liable under the SARs but not otherwise. Mr Levey submitted that there were two distinct periods in respect of the Second Respondent's knowledge; the first period ran from December 2004 to February 2007 and the second period ran from February 2007 until he retired from the firm in March 2010. In respect of the first period, in March 2004 there was an audit by the LSC showing that £3.1 million was owed through UPOAs. It had been accepted on the Second Respondent's behalf in correspondence with the Applicant that he became aware of the problem in late 2004 upon receipt of the LSC's audit.

67.16 More particularly the Applicant relied on the following in support of its case, the evidence in support for which he then went through in detail:

- The Second Respondent said that he was assured by the First Respondent in late 2004/early 2005 that the problem would be resolved. However, the Second Respondent did not say what the First Respondent told him he was going to do in order to resolve the situation and there was no basis upon which the Second Respondent could genuinely have believed that it had been resolved.

- On 24 January 2005, following the LSC audit of 2004, BN drafted a response to the LSC in which he stated:

> "[The Second Respondent] will shortly be submitting a proposal on how we will report on the current situation of cases with outstanding payments."

The Second Respondent must therefore have known that a proposal for the repayment of sums owed to the LSC was required, but failed to satisfy himself that any such proposal was submitted and agreed between the firm and the LSC.

- BN was the Practice Manager of the firm in 1995 until the firm was closed as a result of the Applicant's intervention. As BN explained in his letter to the Applicant dated 6 April 2011, the Second Respondent was fully aware of the problem regarding UPOAs.

- The Applicant also relied on the evidence of the First Respondent, for example his letter to the Second Respondent dated 4 March 2010. The First Respondent was adamant that the Second Respondent was fully aware of the ongoing nature and extent of the problem.

Furthermore even if, which the Applicant did not accept, the Second Respondent genuinely believed that the problem with the UPOAs identified in late 2004 had been resolved, it was the Applicant's case that he subsequently became aware in February 2007 that that was not in fact the case (see below) and it remained the Applicant's case that he did not act with integrity.

67.17 As to the fact that there was a dispute as to whether the Second Respondent saw the letter which BN wrote to the LSC in January 2005 before it was sent, Mr Levey submitted that that might be so but there had been no response from the Second Respondent to the detail of the allegations set out in the Rule 5 Statement. In support of its case regarding the state of knowledge of the Second Respondent, the Applicant relied on the following:

- Even on his own case, the Second Respondent knew of the serious problem with UPOAs in late 2004 and took at face value the assurance given to him by the First Respondent that the problem would be resolved but he failed to make any proper enquiries about how the First Respondent proposed to deal with the problem.

- Having been given the alleged assurance from the First Respondent in late 2004/early 2005 that the matter would be resolved, this Second Respondent appeared to have taken no proper steps thereafter to satisfy himself that the problem had in fact been resolved in accordance with the assurance allegedly given to him.

- If the Second Respondent had made proper enquiries, even of a very cursory nature, he would immediately have discovered that the problem was continuing and that there remained a very significant debt owed by the firm to the LSC. A review of the files of closed cases would have revealed that, in many instances, costs had been recovered but no Claim 2 had been submitted to the LSC.

- In his capacity as the contract liaison manager with the LSC, it was incumbent upon the Second Respondent to take proper steps to satisfy himself that the issues regarding the UPOAs which had been identified in late 2004 had in fact been resolved, rather than simply relying on a bare assurance from the First Respondent that they would be.

67.18 Furthermore, even if the Tribunal found that the Second Respondent did not act with a lack of integrity in the earlier period, the Applicant would say that the Second Respondent failed to act with integrity in the period after February 2007.

- The Second Respondent stated to the Applicant when interviewed on 16 March 2011 that the letter from the LSC dated 6 February 2007 containing a long list of cases where there had been no activity came as a "bombshell" to him.

- His explanation during that interview as to why he did not at that stage take any steps to resolve the problem was that he was getting on with his non legal aid work and leaving it to the First Respondent whom he trusted to deal with what he understood was the historic debt.

67.19 The Applicant would say that, whatever the position prior to February 2007, once he received the bombshell (namely, that the problem with the UPOAs had not in fact been resolved) the Second Respondent:

- Ought to have taken active steps to ensure that the problem was immediately rectified;

- Ought to have reported the situation to the LSC and to the Applicant;

- Ought not to have relied on any further assurances from the First Respondent that the matter would be dealt with (particularly bearing in mind that, even on his own case, the earlier assurances given to him by the First Respondent in late 2004/early 2005 had not been complied with);

- Ought not to have remained a partner in the firm for so long as the problem remained unresolved;

- Ought not to have continued to benefit personally from his position as an equity partner in the firm in circumstances where he knew that the firm owed very large sums to the LSC which it was unable to repay.

67.20 Mr Levey then referred the Tribunal to the FI Report where the IO set out what the First Respondent told him at meetings during the investigation with BN's comments also shown:

- "there had been a backlog on the reporting of settled cases to the LSC for 10-20 years;

- it was his former partners, based at the Preston office, who were responsible for managing the LSC contract;

- prior to his departure, [former partner] had been responsible for the LSC contract, after which [former partner] was responsible up to the time of his departure after which [the Second Respondent] was the main LSC contact;

- he and [the Second Respondent] only became aware of the backlog of unreported settled cases in 2005/2006 ([BN] said that [the First Respondent] and [the Second Respondent] became aware in 2004);

- he Preston LSC contract had been managed in debit for several years;

- the firm had tried to manage the Preston contract under £500,000 in debit to avoid triggering action by the LSC's Debt Recovery Unit, which in turn meant that settled cases had not always been reported to the LSC ([BN] confirmed this approach);

- some settled cases had not been reported to the LSC in error though others had been deliberately held back;

- there were a significant number of cases with unrecouped payments on account;

- the current debt to the LSC was £1,000,000 to £1,250,000 million and would take three to four years to clear ([BN] said that he had reviewed Unrecouped Payments on Account schedules from the LSC and prepared a list of amounts to be recouped which totalled approximately £1,800,000);

- the final agreed debt to the LSC of approximately £2,150,000 was a shortage and a breach of the Solicitors Accounts Rules"

Mr Levey invited the Tribunal to find that the Respondents were fully aware of the very serious problem in its early stages in 2004 at the very latest.

67.21 The FI Report also referred to the First Respondent's interview on 2 March 2011 with the IO Mr Hair and Senior IO Mr Wallbank and included:

> "following the departure of [former partner in April 2004], [the Second Respondent] was the LSC "auditing and quality partner", that LSC audit reports and unrecouped payment on account schedules went to [the Second Respondent] and that he had no direct contact with the LSC and that the debt on the LSC contract was "undoubtedly" [the Second Respondent's] responsibility.
>
> [the Second Respondent] was aware of the LSC debt after the departure of [former partner] in 2004 but he did not tell him;
>
> he [the First Respondent] became aware of the LSC debt in 2005/2006, however, he only became aware of the scale of the debt in 2008 after which he

> started the process of reporting to the LSC the unrecouped amounts, in respect of historic matters from the 1990s, which put the Preston contract approximately £672,000.00 in debit;
>
> …
>
> the LSC had not been advised of recoupments due and the practice had benefited from the retention of these monies due to the LSC which should have been held in client bank account, and that the Solicitors Accounts Rules had been breached;
>
> he [the First Respondent] had not made a conscious decision not to report the LSC when monies needed to be recouped; however, he was sure that it would have been a conscious decision of the partners involved;
>
> …
>
> he only discovered the full extent of the debt to the LSC after the departure of [the Second Respondent] and, for example, he discovered the November 2004 audit report documentation… in the desk drawer of [the Second Respondent]..."

Mr Levey submitted that it might be that the First Respondent was seeking to correct the position in 2008 but nonetheless there was a practice of continuing to fail to submit Claim 2s. The First Respondent took really old debts and reported them but held back later ones or the firm would have been in a terrible situation. The Applicant did not accept that the First Respondent had not made a conscious decision not to report the LSC when monies needed to be recouped but that was what he told the IO.

67.22 Mr Levey then referred the Tribunal to the e-mailed letter recorded in the FI Report sent by the Second Respondent to the First Respondent on 25 February 2010 quoted in the background to this judgment. This was an important letter.

67.23 Mr Levey then referred the Tribunal to the part of the FI Report which recorded what the Second Respondent had said in an interview at his home on 16 March 2011 including that:

> "he was not aware of the existence of the debt to the LSC prior to 2004;
>
> …
>
> he was the LSC contact for audits though he did not specifically remember the outcome of an audit in November 2004 when unrecouped payments on account of approximately £1,600,000 were reported to him by the LSC;
>
> he first became aware of the scale of the unrecouped payments on account following a meeting with the LSC in February 2007;

> he believed that the issue was historic and that [the First Respondent] was dealing with it, he was not aware that it was a continuing problem, a form of "rolling credit" as described by [the First Respondent];
>
> he only realised the full extent of the continuing problem following a further meeting with the LSC in February 2010 when the debt to the LSC as per their schedules was approximately £2,400,000;
>
> …
>
> he had trusted [the First Respondent] to deal with the situation but with the benefit of hindsight he should have been more proactive as he had been put on notice by the LSC in 2004 and again in 2007;
>
> the additional monies had been used to fund the practice and, as a partner in the firm, he had benefited from the increased profitability;
>
> he had trusted [the First Respondent] implicitly, that he had been deceived by him and that, with the benefit of hindsight, he had been "absolutely stupid"."

Mr Levey rejected the Second Respondent's explanation for the reasons set out above.

67.24 Mr Levey referred the Tribunal to the LSC's letter of 8 December 2004 to the Second Respondent quoted in the background to this judgment, in respect of the corrective action required by a routine audit of which action, in interview the Second Respondent claimed he had no specific recollection. The audit report showed that the Second Respondent was actively asking for information so that he could investigate and no proposal was ever put forward. Mr Levey referred to the Second Respondent's memo to BN of 13 December 2004:

> "This is the outcome of the latest Audit with the LSC. Can you please begin to prepare a response and let me know when you are ready for my input (if any). Please note that the LSC require a response within 21 days which is 29th December."

Mr Levey also referred to BN's response to the LSC of 24 January 2005, including:

> "UPOA
>
> [The Second Respondent] will shortly be submitting a proposal on how we will report on the current situation of cases with outstanding payments."

67.25 Mr Levey then referred to the third audit which took place on 27 and 28 November 2006 which described the Second Respondent as the LSC Quality Representative and referred to seven files reviewed on the Blackpool open file list. The corrective action in respect of mental health, clinical negligence and family work was shown as:

> "The auditor discussed with the firm the corrective action required. The firm must undertake an exercise in which every entry on the Blackpool open file

> lists in particular must be reviewed. In addition the firm must put in place a procedure to ensure that this inactivity does not take place again.
>
> The firm should confirm in writing to the auditors that the above required action has taken place by the 19th Jan 2007 and that a procedure is in place by this time to ensure that inactivity in particular to billing does not re-occur."

Mr Levey submitted that there were open files where there had been no billing although no action appeared to have taken place for some time. The 2006 audit did not put UPOA in such stark terms as in 2004 but it could be assumed that the corrective action was discussed with the Second Respondent.

67.26 Then came the February 2007 bombshell letter which the Second Respondent would say was a complete crisis showing that the problem had not been dealt with at all. Mr Levey relied on the witness statement dated 9 January 2013 from MS, a Senior Investigator in the LSC's Counter Fraud and Intelligence team. He set out the nuts and bolts of how the unified contract worked. His statement included:

> "The LSC became concerned in early 2010 that the firm had an excessive outstanding balance of UPOAs. That is to say, the firm had a large number of cases for which they had received POA but which remained unreconciled, as the firm had not advised the LSC they had been settled. The firm's failure to report on all its settled cases and close (sic) matters promptly had been raised previously by LSC auditors during visits to the firm in both 2004 and 2006. In a meeting with the LSC on 8 March 2010, [the First Respondent] accepted that [the firm] were £1.7 million in debt to the LSC. When asked why the firm could not repay the money in full, he explained that it had been spent."

MS summarised what took place when he interviewed the First Respondent on 29 November 2010 which has already been quoted. (He did not interview the Second Respondent; he had left by 20 November 2010.) A sum of £1.6 million was identified as owing to the LSC.

67.27 MS also referred to his interview with BN. Mr Levey submitted that BN was uncomfortable with the Second Respondent blaming the First Respondent and that they were as bad as each other. MS recorded BN as stating the following:

> "a. That he had since 1997 produced monthly management financial reports for the partners.
>
> b. That whilst the individual solicitor dealing with a case might have completed a Claim 2 form it was the sole responsibility of [the First Respondent] to forward them to the LSC. On occasion the Claim 2 forms recorded [the First Respondent's] name as the authorised litigator.
>
> c. When asked if the partners were aware of the UPOA issue said "I'm sure they were aware of the need to pay the money back but hoped the LSC would write it off."

d. That the partners did not want to face the issue and that [the First Respondent] did not want to be notified of the full amount owed.

e. Confirmed that management accounts provided to the firm's bank did not include the indebtedness to the LSC as the bank would not have allowed the business to continue if they had done so.

f. That monies retained by the firm had been used to pay partners drawings, purchase cars for them and to make final payments to partners leaving the practice."

This was important as this was what the Practice Manager was saying. MS investigated mostly the same files as the IO; MS referred to the cases of H, O, M and B. He also referred to the case of McG which was not one of the cases that the IO picked up on but was one of the cases in which the First Respondent was directly implicated. The First Respondent would say that sums were recovered and that he did a Claim 2. However MS stated:

> "In respect of the sample of 5 cases detailed above the firm deliberately withheld £441,864.18 in costs it had received which should have been reported and reimbursed to the LSC. As indicated… above, by the time these files came to light the firm no longer had this money to return to the LSC."

Later in his statement MS said:

> "The LSC revisited the firm on 27-28 November 2006 for a further audit. Again in a meeting with [the Second Respondent] the UPOA position was discussed. The auditors examined 7 files reported as open and found 3, [O'R], [W] and [K] were in fact closed and needed to be billed. This was recorded as corrective action as was the firm's requirement to review their files for any further matters requiring closure and billing."

67.28 Mr Levey drew the attention of the Tribunal to the firm's management accounts for the five months ended 31 August 2010; BN said it was the firm's practice not to tell the bank about the UPOAs. In these accounts it was only recorded that the firm had long-term loans of just over £200,000 at a time when they owed the LSC something less than £3 million and more than £1.8 million.

67.29 Mr Levey also referred to MS's note that he prepared shortly after the 29 November 2010 meeting to record what BN and the First Respondent told him during an on-site visit to the firm with FT and SL the firm's then LSC Relationship Manager. MS recorded that he had asked the First Respondent to explain the procedure once a case was concluded and recorded:

> "When asked who supervised the procedure [the First Respondent] responded that it was [former partner] in the Preston office until 2004 when he left and since then it has been [the First Respondent's] responsibility although he was on occasion assisted by [the Second Respondent] who had done some of this work in the Preston office…"

And

> "…[The First Respondent] stated that the situation had been developing from as early as 2001. Although never formally discussed at partners meetings it was discussed privately and he acknowledged that all partners were aware of the growing amount which should have been reimbursed to the LSC…
>
> [The First Respondent] then produced a list of cases that he and BN had identified as being concluded with costs awarded against the opponent but where no Claim 2 had been submitted. The total costs on this report came to £1,687,415.73."

67.30 Mr Levey also asked the Tribunal to note that MS recorded that he had asked BN how the firm planned on dealing with the situation, to which BN replied that the Second Respondent hoped that if it was left long enough then the LSC would just write it off. There was also FT's note of the interview on 30 November 2010 with BN. She recorded that BN was asked to explain his role within the firm and that:

> "He [BN] confirmed [the First Respondent] had sole financial responsibility for the firm. [BN] had been producing management accounts from when he joined the firm. He would produce a set of management information every month, including management accounts, profit and loss and balance sheets using printouts from the accounts system. [BN] would also produce staff performance records and time recording. He would also produce charts as he thought it would be useful information for the partners to use to manage the firm. The feedback he received from the partners was varied. [The Second Respondent] was the most interested and [the First Respondent] was the least interested. [The First Respondent] was allegedly not interested in any spreadsheets.
>
> The partners received all this management information on a monthly basis but they did not have formal partnership meetings..."

67.31 Mr Levey submitted that FT's note also gave quite a lot of information about Claim 2s and the Second Respondent's involvement in what happened:

> "[BN] thought there were inaccuracies on the UPOA report and he conveyed his concerns back to the partners – usually [the Second Respondent]-so at least one of the partners received a written document. The partners tried to "get to grips with it but the more requests for payments on account that were submitted the more the debit balance grew. The LSC's UPOA team in Leeds were chasing the firm for reasons why the firm was not accounting for payments on account for the past three years and the Debt Recovery Unit became involved in the most recent 12 months."
>
> "We were aware that this was money that had to be reclaimed (by the LSC)" but a number of partners wanted monies out of the partnership. [The Second Respondent] gave the firm three months notice of his intention to leave to become a full-time judge. No monies have been taken out of the partnership yet by him because the formalities have not yet been completed. [The First

Respondent] said that the firm's assets must be split into two but there is negative value. [The Second Respondent] says he is still a partner…"

…

"The partners were aware of the situation all along – although it was hidden from me [BN] by [former partner] and then [the Second Respondent]. [The Second Respondent] told me at one stage that he believed the LSC would write-off the debts. The partners did not want to face the issue. There was a reluctance to face it. [The First Respondent] did not want it mentioned at all. He did not want to know the total amount. Now, in the last year, he has accepted the position and that it has to be sorted. He is frightened.

[Former partner] used the bank to obtain loans to assist the firm's cash flow. When [the Second Respondent] took over responsibility he thought it wasn't good to keep getting loans from the bank and that it would be better to get loans from the LSC instead and this was agreed by the other partners. [Former partner] took over running clinical negligence cases from [former partner]…

[The Second Respondent] was the person I would speak to about legal aid issues even though [former partner] was the clinical negligence supervisor. [The Second Respondent] was based in Preston and became quite isolated. He felt that he was out of the loop. He asked for the firm's bank balance to be e-mailed over to him to monitor the cash flow position. All LSC correspondence for the whole firm would also go over to him."

...

"All new CLAIM 2 submissions are really claw backs by the LSC. It is a question of timing for the firm as to when they are submitted. If all the Preston claims were submitted at once the debt would be visible and the firm could carry on paying off the debt at a certain rate and it would be accepted that there would be no income for the firm from Preston. However if the Blackpool CLAIM 2s had to be submitted as well the firm would be in trouble financially. There would need to be some sort of increase in income from somewhere. [The First Respondent] does not like accounts. I have stopped producing management accounts for the last 12 months."

67.32 Mr Levey also referred to the LSC's notes of the meeting with the firm on 8 March 2010 attended by the First Respondent and two LSC staff including SG the Relationship Manager, quoted in the background to this judgment. A debt to the LSC of £1.7 million was referred to and Mr Levey submitted that golden handshakes of £60,000 and £30,000 for two former partners which were also referred to did not begin to explain where all the money had gone. The First Respondent made a reference to the fact that if he had submitted all the Claim 2s totalling £1.7 million in one go, then the firm would be deemed insolvent. The First Respondent had explained that he was trying to grapple with the problem gradually but the Applicant said that this was not good enough and constituted a breach of integrity.

67.33 Mr Levey referred the Tribunal to MS's official investigation report for the LSC into the firm dated 28 February 2011. He referred the Tribunal to MS's conclusions and his recommendations:

> "My recommendation is for the immediate termination under Unified Contract 2007 standard terms… and the 2010 contract standard terms… of all contracts held by the firm on the following grounds:
>
> a) Fundamental breaches as set out above
>
> b) Dishonesty
>
> c) Breach of SRA Accounting Rule 21.3…"

Shortly after this the Applicant carried out its investigation.

67.34 Mr Levey described the Second Respondent's letter of 25 February 2010 to the First Respondent as a paper trail and not to be taken at face value; its purpose was to say that the Second Respondent had discovered about the UPOAs in 2010. In this letter the Second Respondent said that figures were never mentioned but the Second Respondent received figures in accompanying documents in February 2007. He played down the significance of the February 2007 letter and this represented the unravelling of the Second Respondent's entire case. Mr Levey submitted that the 2007 bombshell letter was the key; it showed that the Second Respondent discovered the truth at that point and whatever he had previously believed, that was when he learned the truth. Mr Levey submitted that the First Respondent's letter of 4 March 2010 to the Second Respondent set out the correct position; they both knew about the problem and the First Respondent was saying that he was not going to be left carrying the can:

> "…The facts, which can be clearly demonstrated, are that we have both been aware of the LSC position from [former partner's] departure and year in year out (including [former partner's] and then [former partner's] retirement) we have bitten the bullet and accepted that we shall have to continue to work on recoupments and reduce the debt over time. Nevertheless you ignore this as well as, it seems, the very substantial benefits you have reaped from the firm from the very beginning and now present me with a cowardly excuse to leave scot-free. I see it in no other light."

67.35 Mr Levey also submitted that the letter from BN to the Applicant dated 6 April 2011 and quoted in the background to this judgment was significant. BN told the IO and MS that both partners were fully aware of the situation and doing what they did because they could not repay the LSC. He independently repeated that in his letter to the Applicant and stated:

> "As a final thought [the Second Respondent] had always remarked to me that the LSC would "write it off" or somehow the old accounts would go away."

The First Respondent had exhibited documents which showed that there was a time (following litigation brought by The Law Society) when the LSC dealt with old

UPOAs by writing them off and the First Respondent found these documents in the Second Respondent's desk. However the LSC was not considering writing off POAs in cases where the firm had received money and failed to pay it back to the LSC. It was writing off POAs in small cases without a recovery.

67.36 Mr Levey concluded that these were all the items of correspondence that he wanted to show to the Tribunal but that he would cross-examine the Second Respondent about Mr Goodwin's letters that the Second Respondent adopted as his evidence.

67.37 Mr Levey referred the Tribunal to further extracts from the transcript of the IOs' interview with the First Respondent on 2 March 2011:

"CB [First Respondent's solicitor]:	Can we just sort of contextualise things a bit, going back, and I think this is probably helpful because um, what stage did you become involved in the Legal Aid work and the reconciliation of the problem?
First Respondent:	Well [former partner] departed in 2001 he was fully involved in this...
…	
SW [IO]:	You are the person who's here now, obviously you're the one who's got to…
First Respondent:	I'm the last man standing of course and you're not interviewing the other partners.
IO:	Can I just say [First Respondent] um, you said there that it was about 3 years ago when you first became aware of this problem.
First Respondent:	Yes
IO:	In conversations with me at Blackpool you did say that you, and I've made a note of these facts, that you became aware around the time that [former partner] and [former partner] was it?
First Respondent:	Um, yes, no [correcting a name]
IO:	[Former partner] sorry left.
First Respondent:	Yes

IO:	Around 2005/2006
First Respondent:	That's right
IO:	And in conversation with the Practice Manager
First Respondent:	[BN]
IO:	[BN] he thought it was around 2004 so this is a lot more recent than those dates that we've got.
First Respondent:	What I'm trying to emphasise that it's all demonstrated in the recoupment, the amounts of recoupments became clearly serious because in 2008 the debit on the Preston account rose to £670,000.
…	
IO:	That's when you realised it was a…
First Respondent:	There were examples of cases where from 2001 um, I've got one example here which I think is very useful that we recouped £117,000 for payments that were being made over 93 to 2001 and we were paid by the third party in March 2001 so these things were coming out in a sort of not piecemeal fashion but certainly they came to the fore and that's where the debit on the Preston account would demonstrate the size of the debt and in fact the Preston account from that date onwards has never been in credit of course, it uh, and so from that date onwards I was addressing this with the [Second Respondent]."

Mr Levey submitted that this was relevant because it could be seen from the schedules that by the time the LSC's and Applicant's investigations took place the debt at Preston was over £1.05 million; it had gone up by over £300,000.

67.38 Mr Levey submitted that the First Respondent was consistent throughout the investigations; he said that the Second Respondent was fully aware of the problem. Again in interview on 2 March 2011, he said:

"First Respondent:	It became clear that we were responsible, both of us were responsible for this together, there was no question about that.
SW:	Did [the Second Respondent] offer any explanations to you as to why?
First Respondent:	He said that the LSC would allow it to earn out over the period that they would be content to, as long as we kept putting in the recoupments, in a proper and measured fashion, they would be acceptable.
SW:	So he was quite relaxed about it then?
First Respondent:	Yeah, well.
IO:	This is SL [of the LSC]
First Respondent:	No, no [the Second Respondent]
SW:	[The Second Respondent]
IO:	[The Second Respondent] sorry"

And:

"IO:	I'm talking about March 2008, [First Respondent]… At that time, did you keep some amounts back because you knew that to crystallise, to use that phrase, to crystallise the whole of the debt would have made it obviously a much larger figure?
First Respondent:	Did I know in 2008 the further extent of the
IO:	Mmh
First Respondent's solicitor:	To deliberately know, you must have known specific incidents
…	
First Respondent:	Well I think I said speculatively that I suppose that the figure, yes, I suppose speculatively that maybe they had a

	figure in mind. I think [the Second Respondent] told me that, that's right, because he was the one dealing. As long as it doesn't go higher than £500,000, or something like that, then possibly there won't be difficulties, but I can't see how really it made a difference because I was also doing debits and recoupments on the Blackpool account.
…	
First Respondent:	If you look at the February statement it's £678 (sic) I believe"

67.39 Mr Levey also referred to exchanges later in the interview:

"IO:	So on these cases that process didn't go through to completion because they weren't being reported
First Respondent:	Correct, correct
IO:	So the question is was it a conscious decision not to report those matters?
First Respondent:	Yes, I'm sure it was a conscious decision
IO:	By who?
First Respondent:	By the partner involved
IO:	Was it a conscious decision by you not to report them?
First Respondent:	No it wasn't
IO:	Not by yourself
First Respondent:	No
…	
SW:	And of course the net effect of that is the practice benefits from this money
First Respondent:	Oh yeah, it benefits
…	

SW: Of course, that's the point I'm trying to get. Ultimately, the practice benefits including staff and in terms of salaries, the partner's drawing, profits

First Respondent: Yes, of course, it can't be any other way. The money hasn't gone elsewhere, it's within effect

…

First Respondent: Yeah, [C] [the firm's accountant?] was alerted. We made that decision from day 1 to the LSC and they've taken that up as has [the Second Respondent] because he, the individual, it's an individual liability so his liability to tax or his refund to tax is appropriate to him and the total amount is going, he's authorised it to go back to the LSC for his liability

SW: So he's done that as well

First Respondent: Oh yes, well we insisted on that and that's the only compliance that we've had at the moment so he's given his authority"

And

"First Respondent: When the report goes in so it's right that you do do a bill but then you credit back the money that should have been recouped

First Respondent's solicitor: That's absolutely right

SW: Has it been systematic?

First Respondent: Yes it has, it has and that's why we've got to that state where we are. I mean it's plainly plain to everyone and to the LSC ultimately because the LSC seem to be comforted by the fact that either [the Second Respondent] said something to them or that we were just one of many accounts where we were just

SW: And is it correct that the practice has benefited from this money?

First Respondent:	The practice has benefited because the practice has continued to provide legal services
SW:	Using money that should have been repaid to the LSC
First Respondent:	Well that's your conclusion [SW] and I can't comment on that but I accept repayment should have been made undisputedly and I've always said that and that's why I presented this list"

67.40 Mr Levey then drew the attention of the Tribunal to what the Second Respondent had said in interview. The key passage regarding the bombshell was as follows:

"Second Respondent:	Looking back and with my best recollection the bombshell was in February 2007 and I use the word bombshell meaning the letter from the Legal Services Commission, sending out a list and it was a huge list of cases that had had no activity on them for some time and they were looking to recoup those payments.
IO:	Did you retain a copy of that list [Second Respondent] February 2007
Second Respondent:	I may be able to find it on a PC
IO:	It's just that it seems to be a date that's you know quite clear in your mind
Second Respondent:	Yes
IO:	Is that because it was such a significant event at the time or you have?
Second Respondent:	Yes it was a significant event to me
IO:	Right. With regard to receipt of UPOA schedules who would have reviewed those at the office? Would that have fallen to yourself or?
Second Respondent:	My recollection is that there was one sent to each office per contract because there was the Preston contract and the Blackpool contract. I was at Preston it

came through the door and I scanned it and sent it to Blackpool and said that's for you to deal with.

IO: So at that point in time, were you aware of the, the state if you like of these unrecouped amounts.

Second Respondent: No because there is no real, yes and no, there was no totalisation of it and I had not added it up and it wasn't until then that I was aware of the scale.

IO: Wasn't until February 2007?

Second Respondent: Yes

IO: I've actually got a copy of an audit report here [Second Respondent] from the LSC it is dated prior to 2007.

Second Respondent: Right

IO: Can I pass it across to you now to have a look. So passing a copy of the management audit report from the LSC to [Second Respondent] sorry dated 8 December 2004. The thing that I would like to point out [Second Respondent] is that it does actually give a figure on here for the unrecouped payments on account of £1.6m at that time. I know time has passed since you were last at the firm sine (sic) February 2007 when you said you first became aware of the scale of it but I just wondered whether you could comment on that report at all.

...

SW: Do you recall seeing that before [Second Respondent]?

Second Respondent: I don't recall seeing the report what I do recall is speaking to [JF] who is one of the audit team who carried out the audit and when I referred earlier to the UPOA being mentioned in the audit report it was [JF] that mentioned it. He didn't give me details of the figures but I recall

he did seem embarrassed to be asking me a question about it and I see from the report that I asked him to let me have the details of it, I can't say from memory whether or not I got a full list in the end of 2004 or in 2005. I see that I must have seen the report because attached to it is a memo from myself to [BN] 13 December 2004 simply letting him have a copy of it and asking him to prepare a response and he's written a letter on 25 January to [NB] at the LSC which says that I will be shortly submitting a proposal on how we will report the current situation of cases with outstanding payments under a subheading UPOA.

IO: It's important [Second Respondent] because it indicates that you have knowledge of the situation in some form we can't be precisely sure exactly but it shows that you had knowledge towards the end of 2004 early 2005 and the reason that I ask you the question now is because you have stated that your best recollection was a (sic) in respect of communications with the LSC in February 2007. Can you explain that? Is it simply just given the passage of time or can you explain that difference in time?

Second Respondent: I can explain it in terms of it being the first formal approach by them in relation to the unrecouped payments on account.

SW: The 2007 letters.

Second Respondent: Yes

SW: So this would have been what just a discussion about the potential problem.

Second Respondent: That's what my account of the recollection of it was.

…

Second Respondent: In February 2007 I would say that the enormity of it struck home when they

approached us to address what was a problem with some speed really

IO: Right. The situation to me appears to be that the LSC and the firm were aware of the situation for some time but did it only become a for want of a better word a crisis situation in February 2007. But it.

Second Respondent: Probably. I thought a lot about it since this meeting was arranged and I don't have any evidence in front of me, I've been gone over a year now so it's all based on recollection and my recollection in terms of the precise dates and things might be wrong.

…

Second Respondent: …Probably the dawning of it was around the time of the audit of 2004, but as I've said in the letter that I wrote to [the First Respondent] on 25 February 2010 the impression that I got was it was something that was historic and the problem that I've got with [the First Respondent] is that having left me with that impression it wasn't correct and he has used a phrase of rolling credit…

…

Second Respondent: …Now what further, why February 2007 is significant to me is that having got the letter from the Legal Services Commission instead of it being a case of not doing it anymore he then carries on regardless. Now if there was a problem with unrecouped payments on account to the Legal Services Commission at the time say of [former partner's] departure. I would have expected it to have stopped there and that would have been the end of the matter because our practices would have changed and that debt would have been paid off because that's now 10 years ago. But that's not what happened and that's what really angers me is that

it's carried on throughout my 10 years as a partner.

SW: OK, in 2007 then when which is the date you realised the severity of it did you discuss this matter with [the First Respondent]

Second Respondent: I sent the letter over discussing anything with [the First Respondent] is (sic) always been problematic.

…

Second Respondent: Never happened to the extent that I thought it would initially there was (sic) some meetings but it was only ever lip service. I had a conversation with [the First Respondent] after, a lot seems to be hinging around this letter of 2007 so I hope my date is right but it certainly embedded on my memory, saying what are we going to do about this. Nothing was ever really discussed about it further, but to then find out in February 2010 when we had a meeting with [SG] our then partnership manager, that he'd carried on the practice I think I referred to them in my letter of February 2010 but my notes are..."

67.41 Mr Levey submitted that the Second Respondent's comments about the 2007 letter being a bombshell might be a sign that he did not see the 2004 audit report but here he said that he did. He also said that the enormity of the problem struck home in February 2007 and that he sent the February 2007 letter to the First Respondent. The Second Respondent also said that he had a conversation with the First Respondent and Mr Levey submitted that he buried his head in the sand and claimed that the problem arose in 2010. This was not believable. In interview he said:

"Second Respondent: Why wasn't I going into the detail of it in 2007, because I was getting on with my practice with the non legal aid work that I was doing and leaving it to someone that I trusted who was telling me that we've got to get over this hump of debt that we've got from somewhere which I was given the impression was historic, and so I was content to leave him to get on with it and deal with it.

IO:	Once again that person being [the First Respondent].
Second Respondent:	[The First Respondent]
SW:	But are you saying now with hindsight that you should have checked it up more then?
Second Respondent:	Absolutely with hindsight I should have yes."

Mr Levey submitted that this attempt to explain why he did nothing in 2007 was not believable. He also rejected the explanation given to Mr Coltart in cross examination that the Second Respondent had been a naive and stupid but trusting partner. The Applicant's position was far from this being a maverick situation of one partner acting.

67.42 As to Mr Goodwin's submission that as the Applicant had alleged dishonesty against the First Respondent, the Applicant could not rely on his evidence; Mr Levey submitted that the point was totally misconceived; the fact that dishonesty had been alleged against the First Respondent and lack of integrity against both Respondents did not mean that once the First Respondent had been brought to task by the Applicant and the LSC, he did not act honestly and cooperated. The First Respondent did not seek to blame others; he put his hands up. He gave honest evidence which was in many respects not helpful to him. If someone lied about one thing it did not mean they lied about everything.

67.43 Mr Levey submitted that the Second Respondent stated emphatically in his oral evidence that he believed that the First Respondent had acted "morally reprehensibly" and with a lack of integrity by failing to disclose the true position to the LSC. Moreover the Second Respondent admitted that if contrary to his evidence, the Tribunal were to find that he himself had been aware of the true position then this would mean that he too had acted in a morally reprehensible manner. It seemed therefore that the only real issue between the Applicant and the Second Respondent was whether as the Applicant contended, the Second Respondent was at all times aware of the nature and extent of the UPOA problem (alternatively was aware of it at least from February 2007 onwards) or whether as the Second Respondent contended, he genuinely believed that the problem was being sorted out by the First Respondent. The Second Respondent appeared to accept that if he had the knowledge which the Applicant said he had he was guilty of professional misconduct; at least that was the effect of his evidence.

67.44 Mr Levey submitted that there was also a subsidiary issue that the Applicant maintained that the allegations of professional misconduct were still made out even if the Tribunal were to accept the Second Respondent's version of events and found that he genuinely did believe that the UPOA problem had been or was being resolved. The Second Respondent said that both in 2004 and 2007 he believed assurances and was entitled to rely on his partner. Nowhere in any of the correspondence or in his witness evidence did the Second Respondent seek to explain the nature of the

assurances that were allegedly given to him even though they were sufficient he said to reassure him that nothing further needed to be done. Given that the firm was not in a position to repay the LSC it was difficult to know what sort of assurances the First Respondent could give to the Second Respondent which would have alleviated his concerns and that was something not explained by the Second Respondent. He did not seek to justify what he had done; he just said that he did not know about the situation. He said that the First Respondent deceived him and the LSC and it was terrible. The Applicant said that the Second Respondent's version was manifestly untruthful and should be rejected.

67.45 There were many reasons why the Applicant submitted that the Second Respondent's evidence about his alleged lack of knowledge of the UPOA problem or his alleged belief that the problem had been sort out should be rejected. The main reasons were:

67.46 First and foremost the Second Respondent's version of events as explained in his oral evidence made no sense at all and was inherently implausible for the following reasons:

- The evidence before the Tribunal was that the Second Respondent was very familiar with the firm's finances and was actively involved in the management of the firm. Accordingly if the Second Respondent had known that the UPOA problem related to instances where monies had been recovered from third parties but not reported to the LSC he would undoubtedly have known that the firm was simply not in a position to repay the monies and so he could not possibly have believed the assurances.

- Absent a suggestion that the true position had been disclosed to the LSC and that a repayment plan had been agreed there were simply no assurances the First Respondent could have given to the Second Respondent such as might have led the Second Respondent to believe that the problem was going to be resolved. The Second Respondent did not suggest that any such repayment plan was agreed with the LSC and it was clear from the evidence that it was not and the Second Respondent did not suggest that that was what the First Respondent told him had happened.

- There was therefore an obvious if not insurmountable difficulty with the Second Respondent's version of events; if the Second Respondent knew that the UPOA problem, of which on his own evidence he became aware in late 2004, related to cases where monies had already been recovered from third parties, then the suggestion by the Second Respondent that he had been assured by the First Respondent that the problem was being dealt with, and that he believed those assurances could not be true. Mr Levey submitted that all the Second Respondent's correspondence proceeded on the basis that it was a Claim 2 problem and historical. He accepted he knew of a problem in 2004; he saw the LSC report.

67.47 Faced with this difficulty Mr Levey submitted that the Second Respondent literally invented a new story which was completely inconsistent with what he had said before. It was not foreshadowed anywhere; not in Mr Goodwin's long letter and his lengthy submissions to the Applicant about why the Second Respondent should not be

referred to the Tribunal. It was not in any of the correspondence including what Mr Levey termed the Second Respondent's completely self serving letter to the First Respondent of 25 February 2010. There was not a hint in that letter that the problem was what he said it was in the witness box. His story was fanciful; he said that far from being a Claim 2 problem it was a problem either - and it was unclear which he wanted the Tribunal to believe - of a whole lot of cases where the clients had lost and the firm did not ask for a legal aid assessment but just closed files; or alternatively and equally fanciful there had been a legal aid assessment but then a failure to submit a Claim 1 form. If a case was lost a legal aid assessment was the means by which the firm was paid for work done. The Second Respondent had said in evidence that happened in the real world; there would always be a legal aid assessment at the conclusion of the case (unless the other side had been ordered to pay the costs). The firm might have received 75% by way of POA already but that would not cover the period between the last POA to the completion of the case. Equally lacking in reality was the suggestion that if the firm had gone to the bother of getting a legal aid assessment for example at £20,000 and had received POAs of £14,000 that it would not bother to submit a Claim 1. There was no documentary evidence of widespread failure to submit Claim 1s. It would be a horrifying situation for a partner to find out that it was a Claim 2 situation where £1.5 million was owed but a happy situation if it arose out of failure to submit Claim 1s as the firm would recover money in all but exceptional cases as the Second Respondent accepted in evidence. If the £1.5 million was owed on Claim 1s, the firm stood to be paid £2 million. The Second Respondent's explanation was plainly untrue.

67.48 Mr Levey also submitted that it was impossible to understand how the Second Respondent might have formed such a mistaken and factually incorrect view about the nature of the historic UPOA problem. The First Respondent and BN knew the real reason for the problem. The Second Respondent was unable to explain how he managed to reach such a fundamentally incorrect understanding about the nature of the problem.

67.49 If the UPOA problem was a result of a Claim 1 problem, there would have been a reasonably straightforward solution; to go through the old files and where there had been no legal aid assessment to apply to the Court for one and where there had been an assessment, to submit a Claim 1 to the LSC and if the Second Respondent knew it was a Claim 1 problem he would have asked how they were doing with catching up. However no such process was ever undertaken because the cause of the problem was not as the Second Respondent claimed to have understood it and he must have known that that process was not being undertaken.

67.50 The second reason why the Second Respondent's evidence should also be rejected was because it proceeded on the basis that the First Respondent hid the truth from him and gave him false assurances but the Second Respondent gave no explanation as to why the First Respondent should have done that. There was every reason to suppose that the First Respondent would have wanted his fellow partner to understand the true position assuming for the sake of argument that the Second Respondent did not know it already.

67.51 The third reason to reject the Second Respondent's evidence was because it was contradicted by the evidence of the First Respondent and BN, both of whom said the

Second Respondent was aware at all times of the nature and extent of the UPOA problem. Additionally it was inherently unlikely that the Second Respondent, one of the two equity partners in the firm and the person who at all times was the liaison between the LSC and the firm was unaware of the true position. Whilst the Tribunal did not hear from BN, the Second Respondent was not able to offer any explanation as to why BN should have consistently told the LSC and the Applicant that the Second Respondent was aware of the nature and extent of the problem if that was not the case. BN's hearsay evidence was to the effect that the Second Respondent was actively involved in the financial management of the firm and knew about the nature and extent of the UPOA problem and hoped that the LSC might one day write it off. The Applicant invited the Tribunal to find accordingly. There was no suggestion by the Second Respondent when cross examined about this, that BN would have any reason to lie to the Applicant or the LSC about the Second Respondent's knowledge and to tell such a huge lie. Similarly the First Respondent had consistently maintained to the LSC and the Applicant that the Second Respondent knew all about the nature and extent of the problem. Mr Levey submitted that the First Respondent gave truthful and honest evidence and there was no reason to believe that his evidence on this point was anything other than reliable and truthful. The First Respondent said that the suggestion that he had given any assurances to the Second Respondent that the problem would be sorted out was "absurd" and the Applicant invited the Tribunal to accept that evidence, not least because the idea that any such assurances had been given was indeed absurd. When cross examined by the Second Respondent's solicitor it was not put to the First Respondent that he would have had any particular reason to lie about the Second Respondent's knowledge and nor was it put to the First Respondent that there was any particular reason that he should deny giving the assurances which the Second Respondent claimed he gave him.

67.52 The fourth reason for rejecting the Second Respondent's evidence was that there was now evidence before the Tribunal that the Second Respondent himself was directly involved in one matter where costs were recovered by the firm but not reported to the LSC – the case of SN. Similarly the Applicant also relied on the letter dated 7 February 2003 to the LSC and in particular what was said in that letter about the TD case. In the letter the Second Respondent said that costs in relation to the TD matter were "being recovered" whereas they had been recovered a long time earlier. The Second Respondent must have known the true position when he wrote that letter.

67.53 The fifth reason for rejecting the Second Respondent's evidence was because of the events of January 2005 following the LSC audit. As the Second Respondent was aware, BN wrote to the LSC stating that the Second Respondent would shortly put forward a proposal as to how the UPOA problem was going to be resolved. However the Second Respondent was also aware that he did not in fact make any such proposal to the LSC. If which the Applicant did not accept, the Second Respondent genuinely believed that the UPOA was caused by a Claim 1 problem he would simply have written to the LSC explaining how the problem had arisen and he would have explained what was going to be done about it. The fact was that no such letter was written and the reason why was because the Second Respondent knew the real cause of the UPOA problem and he also knew that the firm was simply not in a position to put forward a proposal to deal with the problem. If he had not known the true position he would have ensured that a proposal was made to the LSC as BN suggested was going to happen.

67.54 The Second Respondent did not "come clean" to the LSC after receiving the bombshell letter of February 2007 and this was further evidence that he knew about the nature and extent of the problem all along.

67.55 To conclude regarding the period up to February 2007, the Applicant submitted that the Second Respondent must have known and did know the true origin of the UPOA problem and so there were no assurances the First Respondent could give him that would have led or did lead him to believe that the problem was being or had been resolved. The overwhelming likelihood was that the First Respondent and the Second Respondent expressly or tacitly agreed that, rather than disclosing the truth to the LSC, they would keep quiet about it and would do their best to pay off the debt slowly over time. The Tribunal would recall that the Second Respondent said in evidence that the UPOA was a problem which "I believed we could deal with by working through it over time" which the Applicant suggested was entirely consistent with him knowing all about the nature and extent of the problem. By contrast that evidence was inconsistent with the Second Respondent believing the Claim 1 explanation. If it was a Claim 1 problem the firm would have got in a cost draftsman to go through the files in six to eight weeks, get cases assessed and recover money. There was a ring of truth if it was a Claim 2 problem.

67.56 As to the period after February 2007, Mr Levey submitted that even if the Second Respondent's evidence were to be accepted in relation to the period prior to February 2007, he knew the truth then and yet he did not report the position to the LSC and continued to profit substantially from the firm in the knowledge that it was technically insolvent. In the Applicant's submission, the Second Respondent had no credible or sensible response to this aspect of the case. Indeed this part of the case was not addressed in any of the pre-action correspondence and nor was it dealt with in the Second Respondent's written evidence.

67.57 The Second Respondent's case seemed to be that once again he was given assurances from the First Respondent early in 2007 and that he relied on them in believing that the problem was being dealt with. Mr Levey relied on Mr Goodwin's 11 July 2011 letter regarding this. This explanation faced the same difficulties as those relating to the earlier period in that no assurances were possible if this was a Claim 2 problem. Moreover the story was scarcely credible in circumstances where on the Second Respondent's case, the First Respondent had previously failed to deliver on the assurances given to him in late 2004/early 2005 and had then proceeded to keep the position a secret from him for the next two years. If that were true which the Applicant did not accept, it was impossible to believe that the Second Respondent would have accepted yet further assurances from the First Respondent in February 2007 and would have been willing to proceed on the strength of those assurances.

67.58 Mr Levey also submitted that the Second Respondent's evidence was highly unsatisfactory when he was cross examined about what he did on receipt of the bombshell letter. In his oral evidence he said that he tried unsuccessfully on a number of occasions to discuss the problem with the First Respondent. The idea that the Second Respondent was not able to speak to his fellow partner about the problem, whether in person or over the telephone was inherently implausible and there was no documentary evidence to support it, e.g. no emails letters or attendance notes expressing the Second Respondent's frustration at not being able to contact the First

Respondent to discuss the position. Furthermore that oral evidence was inconsistent with what was said in Mr Goodwin's letter of July 2011:

> "2007 – following the LSC's letter, but upon which [the Second Respondent] again relied upon the assurances provided by [the First Respondent]."

There was no suggestion in that letter that he had difficulty contacting the First Respondent and the impression given in that letter was that the Second Respondent's concerns were allayed once again by the First Respondent's fresh assurances. As for the former assuming that the Second Respondent wanted to discuss this vitally important matter with the First Respondent he was not able to explain why given his alleged inability to do so, he then did nothing whatsoever about the UPOA problem; he continued in partnership with the First Respondent and he did not report the matter to the LSC. Mr Levey submitted that the latter version was inherently unlikely for the reasons already given. Mr Levey submitted that it was extremely difficult to know which version of events the Second Respondent wanted the Tribunal to believe in relation to the situation post the February 2007 letter.

67.59 Assuming for the sake of argument that the Second Respondent was not already aware of the problem, it was inconceivable that upon receipt of the bombshell letter he did not at that stage investigate the position particularly given that the First Respondent had failed to deliver on the assurances allegedly given to him in late 2004/early 2005. If he had done so he would have immediately discovered that there was a large number of cases dating back many years where costs had been recovered but not reported to the LSC. Notwithstanding the knowledge he would have gained from carrying out those enquiries he still did nothing.

67.60 Mr Levey also made detailed submissions regarding the stance the Second Respondent had adopted in respect of the allegations; the Second Respondent, who sat as a District Judge, saw fit to file a two paragraph witness statement that referred to correspondence that predated the charges and the Applicant needed to know the position regarding the Rule 5 Statement. Mr Levey submitted that the Tribunal should draw inferences from what he described as the obstructive and evasive way that the Second Respondent chose to deal with the proceedings. The Applicant and the First Respondent said that he was deliberately evasive, unwilling to deal properly or fully and head on with the Rule 5 Statement; there were certain aspects of the Rule 5 Statement which the Second Respondent had never engaged with. The only sensible inference to be drawn from his conduct was that he knew that he did not have any credible response to the Applicant's central allegations and that was why he chose not to file a defence in accordance with the Tribunal's order. Mr Levey also submitted that the Second Respondent's evidence was so unsatisfactory and untruthful that Mr Levey doubted that the Tribunal would reach its conclusions based on inferences. The Second Respondent had indicated in evidence how he would deal with someone in his court who failed to file an answer when ordered.

67.61 Mr Levey submitted that if the Tribunal found, as the Applicant invited it to do, that the Second Respondent had knowledge of the nature and extent of the UPOA problem whether from late 2004 onwards or alternatively from February 2007 onwards the inescapable conclusion was that the Second Respondent acted without integrity, probity and trustworthiness in precisely the same way that the First Respondent acted;

that is that he acted in a way that was likely to diminish the trust placed by the public in him or the legal profession; and acted with a reckless disregard of his professional obligations. Mr Levey submitted that this was very serious professional misconduct falling well below the standards to be expected of a solicitor and that it should be treated accordingly regardless of the absence of an allegation of dishonesty. Mr Levey submitted that while it was for the Applicant to prove its case, the case against the Second Respondent was overwhelming; he did not give truthful evidence and he needed to explain the inconsistencies in his evidence.

Submissions for the First Respondent

67.62 Mr Coltart referred the Tribunal to his written submissions dated 12 December 2013 served in accordance with the Tribunal's directions made on 15 November 2013. He submitted that he could adopt a lot of what Mr Levey said. There was a lot of common ground between the First Respondent and the Applicant regarding the Second Respondent and what had happened at the time and subsequently. Mr Coltart adopted the Applicant's criticisms of the Second Respondent made at the hearing.

67.63 Mr Coltart submitted that it was not disputed that integrity was a wider concept than dishonesty. Regarding the test to be applied the parties had failed to find any express authority. Some guidance was to be found in the case of Mark Anthony Financial Management, Mark Anthony Hurst Ainley v The Financial Services Authority 2012 WL 3062369 in a different forum adopting the formulation in the case of Hoodless and Blackwell v FSA (2003):

> "In our view "integrity" promotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate)."

This test had been adopted in the Tribunal case of Saunders No 10972-2012. It seemed to establish that the legal test for the allegation relating to integrity was different from that for dishonesty; the former was an objective test and an important point flowed from that; it did not automatically follow that if the Tribunal found lack of integrity it would also find dishonesty, leaving aside any factual differences. Even if the First Respondent could not get over the objective element in the case of Twinsectra which Mr Coltart suggested he could, there was still the subjective test.

67.64 Mr Coltart submitted that the allegations in the Rule 5 Statement made bleak reading looked at in isolation, for example the failure to inform the LSC but he submitted that the case needed a holistic approach. The firm, that was the First Respondent, the Second Respondent and BN devised a strategy designed to put right what had previously and not under their stewardship, gone wrong. Every individual part of the strategy, which was plainly inappropriate, was a necessary component if it was to be successful. In respect of the concept of integrity, on a simplistic definition of trying to do the right thing and acting decently, inheriting a problem not of their own making; it was not challenged by anyone that that was what had happened.

67.65 Mr Coltart looked at the conflicting cases advanced by the two Respondents. The First Respondent's case had been consistent since the moment the LSC was first apprised of the position which had evolved at the firm at the meeting with Ms SG of the LSC on 4 February 2010. His case was that this was a problem which had its genesis in the firm's Clinical Negligence Department, where former partners had made excessive claims for POAs and hardship payments and failed to report on the recovery of third-party costs for example in the case of TD. This was the situation inherited by the First Respondent, an assertion not challenged by the Applicant when the First Respondent gave evidence to the Tribunal. The First Respondent further asserted that whilst it might have fallen to him to delay the submission of Claim 2s this was a policy which had been adopted with the full knowledge and consent of the Second Respondent.

67.66 Mr Coltart submitted that the First Respondent had already admitted the breaches of the SARs. The Second Respondent admitted them on a strict liability basis as a partner of the firm under Rule 6 but without knowledge or culpability which it was claimed was consistent with the position he adopted in correspondence as set out in Mr Goodwin's Outline Note of Closing. Mr Coltart did not understand how this position could continue to be advanced and submitted that it had always been flawed but in the light of the evidence in the case of SN and even in the face of documentation suggesting to the contrary, the Second Respondent said that he was not in breach of the SARs but finally after everyone had looked at the SARs he accepted that he had been involved in improper transfers from client account to office account prior to notification to the LSC in that case.

67.67 Mr Coltart went on to make observations on the submissions of the Second Respondent who claimed he was deceived by the First Respondent and others at the firm most notably BN. The Second Respondent mentioned having a "Eureka" moment in the witness box as the first time he appreciated that there was a breach. Mr Coltart urged the Tribunal to reject that based on his written submissions where Mr Coltart had cited the Second Respondent's letter to the First Respondent of 25 February 2010, the transcript of the Second Respondent's interview with the Applicant on 16 March 2011, the letter written on his behalf by Mr Goodwin of 11 July 2011, a further letter from Mr Goodwin dated 24 August 2011, the document headed Reply to Case Statement dated 25 April 2012 prepared by Mr Goodwin and the Second Respondent's witness statement dated 23 September 2013. Mr Coltart submitted that read as a whole there was only one sensible way of considering the defence set out in this material namely that while Second Respondent appreciated from an early stage that the UPOA issue arose from a failure to report on third-party recoveries, he had relied on assurances from the First Respondent that the resulting debt would be eliminated.

67.68 Mr Coltart submitted that the Second Respondent's account underwent a metamorphosis in the witness box when the Second Respondent claimed that up until late 2009 he had always thought that the UPOA issue arose out of a failure by the firm to reclaim monies owed to it by the LSC (by way of the Claim 1 process), rather than out of a debt from the firm to the LSC. Mr Coltart submitted that the change of direction was initially prompted by his questions put in cross examination on behalf of the First Respondent. The Second Respondent was asked why he had had not self-reported to the LSC as soon as he became aware of the UPOA debt and it was suggested that struggling to provide an answer, he contended for the very first time

that he had not been aware of the nature of the debt until sometime in late 2009. Mr Levey then took up the issue and the Second Respondent agreed that in relation to dead files of which Mr Coltart submitted there were a considerable number according to the LSC audit report of November 2004, a UPOA could realistically only arise in one of two ways: because third-party costs had been recovered but not reported to the LSC or because following an unsuccessful action, the Claim 1 had not been submitted to the LSC with the final assessed bill of costs. As a result the firm did not get paid and the POAs previously advanced were not recouped. In respect of the latter explanation, Mr Coltart submitted that the Second Respondent further accepted that the failure to submit the Claim 1 would mean that a potentially significant sum remained outstanding to the firm, partly because prior POAs represented only 75% of the value of work undertaken and partly because further work was often carried out between the date of the final POA and the closure of the file. When pressed by Mr Levey on whether he thought that the debt owing to the LSC was of the first or second type, the Second Respondent claimed that from November 2004 when he first became aware of it, until late 2009 when he discovered the truth, he had always thought that it was the second type. He further claimed that the rationale for this belief was that it was inconceivable that his former partners would have incurred debt of the first type although he had made no enquiries to ascertain if this was in fact so.

67.69 Mr Coltart submitted that for the following reasons the Second Respondent's account was palpably untrue and should be rejected by the Tribunal:

- If the Second Respondent believed for one moment that he might be owed a significant sum of money by the LSC he would immediately have made enquiries as to how much was involved and set about claiming it. His assertion in evidence that it did not occur to him to do either defied belief, particularly given the cash flow problems suffered by the firm throughout this period and the daily attention the Second Respondent paid to that issue.

- The suggestion that the Second Respondent later tried to engage with the First Respondent in relation to this matter but was met by refusal was equally incredible. If there was an ounce of truth in that allegation, which was a serious one, there would be a raft of paperwork to support it, e.g. e-mails, memos or formal letters of complaint. No such evidence existed nor did the Second Respondent report this lack of cooperation to the Applicant.

- At no stage was it put to the First Respondent on behalf of the Second Respondent that the UPOA issue arose out of the firm's failure to submit Claim 1s. That was no doubt because this aspect of the Second Respondent's account had yet to come into being. The First Respondent denied that the UPOA issue had anything to do with Claim 1s or that the Second Respondent ever believed this to be so.

- The accounts now given by the Second Respondent represented a striking departure from his pleaded case in the correspondence which contained references to "bombshells", "problems" and the constant need for reassurance. If the Second Respondent had truly believed that the debt had arisen through a failure to submit Claim 1s then far from having had a bombshell land in his lap, he was looking at a large windfall instead. The reality was that he had had

to tailor his account in evidence in order to explain away the failure to self-report to the LSC.

- The Second Respondent's own involvement with the problem files illustrated that he was all too aware of the issue at the time and indeed playing an active part in it. This was illustrated by the case of SN. The Second Respondent eventually accepted in evidence that he had improperly transferred the third-party costs in that case from client to office account before notification had been made to the LSC. His claim from the witness box that he had misunderstood Rule 21(3) of the SARs was again incapable of belief, being inconsistent with his initial account in interview with the Applicant, his position as a prosecutor for the Applicant (in which he must frequently have encountered breaches of the Rules) and his status as a senior legal aid practitioner.

- Finally the suggestion that the Second Respondent was uninterested in or at least disengaged from the UPOA issue was contradicted by the evidence of his role throughout the relevant period, in particular: his position on the LSC's Regional Committee; his position as the LSC representative for the firm; his endorsement of the printout from the LSC dated 25 January 2001 which must have been made contemporaneously, there being no reason for an historic analysis of that document; his involvement in the 2004 and 2006 audits which went well beyond "meeting and greeting" as he tried to claim in interview with the Applicant; his involvement in the 2008 negotiations with the LSC following the settlement of the judicial review proceedings brought by the Law Society and his correspondence with the LSC's DRU in September 2008 after the Preston account had gone into debit. Mr Coltart submitted that this final point also gave the lie to the Second Respondent's claim in evidence not to have appreciated the nature of the debt until late 2009. Under cross-examination, he was forced to acknowledge that he knew in 2008 why the Preston account had gone into debit, namely because in February of that year the First Respondent had submitted a raft of outstanding Claim 2 forms to the LSC.

67.70 Mr Coltart submitted that the Tribunal should have no hesitation in finding that the evidence given by the Second Respondent on this issue was evasive, self-serving and dishonest in stark contrast to the evidence given by the First Respondent. Mr Coltart submitted that the Second Respondent did know and there was compelling evidence that he was involved in the strategy devised by the First Respondent and BN to row the firm out of difficulty.

67.71 Mr Coltart addressed the inaccuracy in the First Respondent's statement where he made reference to the LSC generated list of cases dated 25 January 2001 (a list of "Outstanding Cases, POA's and interim bills report – UPOA"). In Mr Goodwin's Outline Note of Closing, he asserted that the First Respondent had attempted to discredit the Second Respondent and that these were examples of his lack of integrity and dishonesty. Mr Goodwin went on to assert that it was only during the First Respondent's oral evidence that the First Respondent conceded that the handwriting on the document save for one very small table on the last page was not the handwriting of the Second Respondent but that of BN. Mr Coltart submitted that

Mr Goodwin had been told by Mr Coltart if not at the end of the week before the hearing started, on Monday morning and before the Second Respondent gave evidence that they accepted that the First Respondent had been wrong about the handwriting save for the final table.

67.72 Mr Coltart also attacked the consistency of the Second Respondent's evidence. It was touched on in Mr Goodwin's Outline Note of Closing when he said that the explanations provided by the Second Respondent in correspondence attached to his witness statement dated 23 September 2013 were entirely consistent with the evidence he gave to the Tribunal. Mr Goodwin had also stated that it was within the discretion of the Second Respondent as to whether or not he gave oral evidence to the Tribunal and he chose to do so and gave evidence in a straightforward, compelling and truthful way. Mr Coltart submitted that he thought he had been in a different hearing to the one which Mr Goodwin had attended where the Second Respondent gave evidence. Only in a parallel universe could his evidence be called straightforward, compelling and truthful. It had been evasive uncooperative and patently untrue for the most part.

67.73 Mr Coltart also addressed that part of Mr Goodwin's note dealing with the consequences said to flow from the First Respondent being charged with dishonesty while the Second Respondent was not. Mr Goodwin had quoted the Rule 5 Statement which was summarised in Capsticks letter of 26 July 2013:

> "Unlike the First Respondent, the Second Respondent was not the individual in the firm who was responsible for submitting "Claim 2" Forms. Nor was he directly involved (on the basis of the evidence currently available) in any of the matters where there was a failure to notify the LSC of costs recovered from third parties..."

Mr Coltart submitted that it was not true that the Second Respondent was not involved in any matters the subject of proceedings. He did know but was not responsible for signing off the paperwork which was or was not submitted to the LSC and on that basis dishonesty was pursued against the First Respondent. Mr Coltart compared this to a case of burglary where one was the burglar and one was the lookout; to say that they were not both guilty was flawed. If the allegation of dishonesty was to be brought it should have been brought jointly if the Second Respondent knew and tacitly agreed, as the Applicant and Mr Coltart said that he did. Mr Coltart submitted that it was grossly unfair to the First Respondent that the allegation was only brought against him. Mr Coltart submitted that the issue of strict liability was irrelevant because the Second Respondent did know and that was the Applicant's case and in any event his evidential position had changed because the SN file was now before the Tribunal and it had not been before the Tribunal when the charges were framed by the Applicant. Mr Coltart submitted that the matter was now tinged with irony in the light of how each Respondent had conducted himself in compliance with orders made by the Tribunal and the way in which each had given evidence from the witness box.

67.74 Mr Coltart reminded the Tribunal of the two limbed test for dishonesty in the case of Twinsectra. He submitted that the reasons why dishonesty was not pursued against the Second Respondent were flawed but that the situation was as it was. Integrity might be the central focus of enquiry for the Tribunal but allegations of dishonesty should not be lightly made and were taken very seriously by the First Respondent who

disputed them with the utmost vigour. Mr Coltart referred to the Applicant's efforts to prove the allegations and submitted that it was significant that some 20 pages of the Applicant's closing submissions which were lengthy, detailed and cogent were devoted to the allegations other than dishonesty while only two paragraphs in the document were dedicated to how the case for dishonesty was to be established. Mr Levey submissions on dishonesty were:

> "[The First Respondent] admits that he was personally involved in a number of cases where costs were recovered from third parties but that fact was not reported to the LSC as it should have been, with the result that the firm was effectively paid twice for the same work.
>
> In the circumstances, [the Applicant] submits that [the First Respondent's] conduct was dishonest in accordance with the tests laid down by the House of Lords in Twinsectra in the sense that it was dishonest by the ordinary standards of reasonable and honest people and [the First Respondent] himself realised that by those standards his conduct was dishonest."

Mr Coltart submitted that there were no submissions about why the objective or subjective test was established in this case. Mr Levey had sought to expand on this a little; he said that the First Respondent was dishonest because he took in money and failed to report to the LSC but this account only told half the story; it was accepted that money was recovered from third party costs orders and the LSC was not notified but there was a reason under the First Respondent's watch at least because the LSC would have terminated the contract and it was never suggested at any stage that the failure to report to the LSC was because the Respondents wanted to live a high life and not repay any of the money. Mr Coltart accepted that failure to notify was not the right way to go about it but it had been pursued for the right reasons. Mr Levey had taken Mr Goodwin to task for failing to tackle the difficult part of the case but the same could be said of the Applicant. Mr Coltart queried why the Applicant took such a startlingly different view of BN as against its view of the First Respondent. Mr Coltart reminded the Tribunal of what he said was the heavy reliance which the Applicant placed on BN's evidence and referred to Mr Levey's closing submissions on behalf the Applicant where one of his reasons for rejecting the Second Respondent's evidence was because it was contradicted by the evidence of the First Respondent and BN, both of whom said that the Second Respondent was at all times aware of the nature and extent of the UPOA problem.

67.75 Mr Coltart also submitted that the IO and FT although not in their witness statements, had been invited by Mr Levey to give a view of BN, of how he came across and what sort of person he was. FT said that she formed the impression that he was honest and open in his dealings with the LSC; the IO said that he was a competent bookkeeper with a degree of loyalty to the First Respondent because the latter was responsible for paying his wages but he believed the information which BN provided was accurate and fair and the IO formed the view that BN was an honourable and reliable person. Mr Coltart submitted that BN was fully conversant with the UPOA issue at the firm and had been for many years. He knew of the ongoing failure to submit Claim 2s promptly and he was the person responsible for compiling the accounts which made no reference to it. In other words he played an integral part in the strategy which had been devised by the firm for re-paying the LSC debt. It had been open to the

Applicant to bring proceedings against BN but it did not do so; instead it relied very heavily on him and adduced evidence from the Applicant's visit of their view of how he conducted himself. Mr Coltart submitted that counsel often found themselves conjuring someone who could be a yardstick for acting honestly or dishonestly but there was no need to do so in this case because there was a real witness in the form of BN who was in exactly the same position as the First Respondent in respect of knowledge and participation in the strategy; he thought that there was nothing dishonest about the strategy which had been devised no matter how misguided it was. Mr Coltart submitted that he could not see how the Tribunal could form a contrary view concerning the First Respondent and be sure about it. He accepted that there was no dispute that the test for dishonesty to be applied was the criminal test which was an incredibly important point for the First Respondent's defence. Mr Coltart submitted that it was an irreconcilable aspect of the Applicant's case that it had proceeded against the First Respondent and not BN.

67.76 Mr Coltart also submitted that the Tribunal should have regard to how the picture of the First Respondent had changed between when the allegations were made and the date of the hearing; it was difficult to improve on the observations of the First Respondent's evidence that Mr Levey had made in his closing submissions where he said:

> "The [Applicant] submits that, to his credit, [the First Respondent] has cooperated with the [Applicant], both during the course of its investigation and as part of these disciplinary proceedings, as he did when the matter was being investigated by the LSC. He gave oral and written evidence which was essentially truthful. Under cross-examination he gave clear and direct answers to questions, even where his answers were not helpful to his position. He accepted responsibility for what had taken place and he did not seek to blame others."

It was highly unusual for a Respondent facing a dishonesty allegation to find himself in this position after two days of giving evidence. Mr Coltart submitted that it was a striking feature of this case and gave insight into the First Respondent. Dishonesty was an alien concept for him and the supporting evidence for this contention was to be found on the face of the Applicant's own papers and it went back to the meeting in February 2010 between the First Respondent and SG of the LSC. In considering the allegation of dishonesty, the Tribunal could take into account and give very significant weight to the way the First Respondent conducted himself during the hearing.

67.77 Mr Coltart asked the Tribunal to take into account the glowing character references that the First Respondent had received which were highly relevant to his defence on the basis of Donkin v The Law Society [2007] EWHC 414 (Admin); he could have submitted more. The First Respondent was held in high regard by those who knew him in a personal and professional capacity and they set great store by his integrity and his honesty.

67.78 Mr Coltart submitted that the situation inherited by the First Respondent which was not of his own making had serious ramifications for both the firm and the public purse. Faced with that dilemma the First Respondent devised a strategy which he

believed represented the best chance of repaying the sums owed to the LSC, namely keeping the firm alive so that monies could be repaid from future earnings. The alternative where the firm ended up was the LSC being owed around £2 million or whatever sum would have been agreed with the LSC and the bank being owed £190,000 (which Mr Coltart submitted was partly because of the way the bank went about things). The Respondents realised that would be the inevitable outcome if the LSC was told the true position; they perceived it to be the decent thing to do to repay the significant sums of money which were outstanding. Mr Coltart submitted that it was very difficult to prove dishonesty when someone did wrong for all the right reasons. The two concepts were closely aligned although there was a legal distinction. He had tried to do the decent thing and it was very difficult if not insurmountable to prove dishonesty especially if the First Respondent was not responsible for the mess in the first place. Mr Coltart submitted that the Applicant did not get over the objective test for that reason and because of the stance which it had adopted regarding BN. If the Applicant did get over the objective test, Mr Coltart submitted that it could not get over the subjective element. The First Respondent wished that he had gone about things in a different way but that did not mean that he was dishonest; the opposite applied. Mr Coltart ask Tribunal to bear in mind the very high standard of proof which was required to establish dishonesty and submitted that it could not be sustained here.

67.79 Mr Coltart clarified the First Respondent's comments about the "cathartic" experience of discussing matters with the LSC in February 2010 and that he recognised that what he had been doing before that time was wrong; no doubt the First Respondent appreciated that it was not best practice to transfer monies from client to office account or submit accounts not referring to the UPOA issue but he thought it was the right thing to do at the time in the light of the end objective. Whilst non-reporting to the LSC and transfers from client to office account etc were taking place he would not have chosen to be in that position so there was no doubt that it was cathartic and a relief in some ways when it all came to an end but it did not mean that the First Respondent considered the experience cathartic because he knew that he was acting dishonestly beforehand; that was to make two and two add to five.

67.80 In respect of the firm's accounts an issue was raised by the Tribunal with Mr Coltart that the accountants stated that the accounts presented a true and fair view when they clearly did not and they had been signed off by the partners. The accounts could only be fraudulent if they were both inaccurate i.e. the actus reus and also prepared with dishonest intent i.e. mens rea. The accounts were not prepared for that purpose; they were an integral part of the strategy to keep the firm alive in order to repay the debt.

67.81 Mr Coltart accepted that the First Respondent had benefited from the strategy because he had been taken drawings from the firm for some eight years but the firm needed someone in place to ensure that there was some prospect of money being repaid. There was no evidence of an intention permanently to deprive and the case was not put on that basis. Mr Coltart was a little concerned about the reference to personal benefit in the Rule 5 Statement (which Mr Levey stated he relied on for dishonesty and lack of integrity.) On the contrary, the First Respondent was engaged throughout the relevant period in submitting late Claim 2s in order to make repayments to the LSC. This process extended to submitting very old forms once he became aware of an earlier failure by others to do so e.g. in the case of client TD.

67.82 Mr Coltart submitted that there had been no attempt to conceal incriminating evidence, again on the contrary the First Respondent not only preserved the problem files but highlighted their existence to the LSC. No client monies other than those owing to the LSC were ever compromised. Indeed following intervention, the Applicant confirmed that all the client balances were intact (and the First Respondent in evidence stated that the Applicant raised no objection to his drawing from the statutory account after the intervention). Over and above this, the evidence confirmed that the firm provided a first-class service to its clients. Prior to these proceedings the First Respondent had enjoyed an unblemished 35 years in practice and never in all that time encountered any issues with the Law Society or the Applicant.

67.83 Mr Coltart submitted that it was against the background of doing the wrong thing for the right reasons that the Tribunal must decide whether or not the First Respondent had acted without integrity and in the way likely to diminish trust in the profession. On one view, he had done quite the reverse, seeking to make good a dreadful situation which was not originally of his own making. In considering particularly the question of integrity, Mr Coltart asked the Tribunal to take into account the way the First Respondent had conducted himself since the LSC was first informed of the situation despite being abandoned by the Second Respondent halfway through the seminal meeting on 4 February 2010; the First Respondent battled on in an attempt to repay what was owed both by continuing to trade in his own right and by offering up the firm's assets as security. The fact that in the end he came up short was perhaps inevitable once his contract with the LSC had been terminated albeit that no criticism attached to that decision. The same could not be said of the Applicant's decision to intervene in the firm four days before it was due to close. The intervention, which was in part based on a flawed understanding of the costs regime as now accepted by the Applicant, was unwarranted. It had a profound effect on the First Respondent's ability to repay. In evidence, the First Respondent denied that his desire to maintain the reputation of the firm and its continuity took precedence in his mind over acting properly. He agreed that he could have made a self report and did not and that this was because he wanted to maintain the reputation of the firm and continue it but he asserted that his integrity was never in question; he was doing what he could to continue the firm and repay the debt.

67.84 The Tribunal was asked to take into account the way in which the First Respondent had conducted himself in the proceedings. Whilst the witness statement served on his behalf was marginally out of time primarily because of funding difficulties, it set out a comprehensive answer to each of the allegations made against him. In addition he was cooperative throughout the process for example by providing the schedules attached to the letter of 6 February 2007; he had been honest and frank in his evidence from the witness box and ensured that the disputed evidence given by other parties had been fully and fairly challenged. Mr Coltart submitted that this was very much to his credit. Mr Coltart submitted that the contrasts between the two Respondents were so great that the Tribunal would be justified in arriving at differing conclusions in relation to the allegations they both faced. Mr Coltart invited the Tribunal for the reasons he had given and bearing in mind the very high standard of proof required, to find the allegations had not been proven insofar as the First Respondent was concerned. This was a highly unusual case and given that the First Respondent had tried to do the decent thing all along, it would be excessively harsh now to make such findings against him in respect of integrity and diminishing public trust.

Evidence of the First Respondent

67.85 In evidence, the First Respondent accepted that the LSC relied on the integrity of the firm to tell it when funds were recovered from third parties and that without the firm telling LSC, realistically there was no prospect of the LSC finding out. He agreed that he knew at all times that if he revealed the true position to the LSC they would immediately terminate the contract. It was put to him that the only conceivable reason for his failure to tell the LSC of the true position was that he was seeking to mislead the LSC in order to continue the contract. The First Respondent said that "mislead" was something he would not accept. They were intending to repay the debt by submitting Claim 2s. As to whether he accepted that he had deliberately withheld the truth, the First Respondent stated that he never considered the matter of truth or otherwise, but accepted that if all the Claim 2s were submitted, the legal aid debt would be such that the firm would not be viable from then on and agreed that this was because legal aid was 70% of the firm's business. He also accepted that it was foolish and misguided and that he should have told the LSC the true position and sat down with them to see if the problem could be resolved and tried to agree a repayment plan acceptable to the LSC; he had not done so and neither had the Second Respondent. As to whether he looked at the position and was genuinely trying to resolve it, wait it out and decided to continue as he had done, the First Respondent stated that he continued to make every effort and obviously a decision had been made in his own mind. He agreed that the decision had been taken jointly with the Second Respondent and there was no doubt that the Second Respondent agreed to go along with the strategy.

67.86 The official investigation report of MS of the LSC compiled on 28 February 2011 was the first time in the First Respondent's professional career or private life that there been an allegation of dishonesty; he was absolutely devastated by MS's conclusion. He agreed that he had replied immediately by way of letter of 6 March 2011, picking up the erroneous points about the cost draftsman's fees, one of the reasons for the allegation of dishonesty relied on by MS. He did not think that the allegation was fair; he was astounded; he thought he had shown his intentions and enough information to acknowledge the impropriety of what happened. However he accepted impropriety in the way the matter had been dealt with. The First Respondent was asked where in the letter of 6 March 2011 to the Applicant, he refuted and denied the allegation of dishonesty and replied that it appeared that he did not refute it at all. This was a blatant omission which had come back to haunt him. Mr Levey put it to him that in the letter he said he would respond fully but he did not. The First Respondent agreed; there was a maelstrom of activity with the firm but he had taken the position in meetings and the fact it was not covered in a letter was not to be deemed as an admission. The allegation of dishonesty was never away from his thoughts or protestations to the Applicant's people but he did not put in writing. He had not in any way attempted to conceal things. Things could have been done differently but how differently could he have dealt with the level of staff and the reputation of the firm particularly relating to its past members and after the departure of the Second Respondent the situation was impossible. He had no intention of being dishonest; he tried the best he could to do the recoupment, unlike his partner who abdicated all responsibility. Sadly he was in this position now; his professional career at an end and in financial ruin.

67.87 In respect of the exchange of letters between the Respondents in February/March 2010, the First Respondent stated that he had never asked for an indemnity from the Second Respondent but for his proposals to repay the overdraft and his proposals generally. An indemnity would not have done the First Respondent any good in the position that they were in.

67.88 As to the Second Respondent's references to payments to the LSC in his 25 February 2010 letter, it was unclear what this meant other than the fact that they were making repayments to the LSC. What he said flew in the face of what they were doing. From 2008 onwards there was no legal aid income from the Preston office because the level of UPOAs was so high but it did not detract from the First Respondent's determination to get the legal aid lawyers to continue working to reduce it. The Second Respondent seemed to resent that. He drew money over the Christmas period leaving the account overdrawn and the First Respondent with problems with the bank.

67.89 The First Respondent stated he had made efforts to bring the Second Respondent to the table prior to his departure but they were unable to communicate and the Second Respondent had not communicated with him since his letter of 25 February 2010. The First Respondent absolutely refuted that the Second Respondent had been deceived by him; his saying that was very hurtful and the First Respondent referred the Tribunal to his own letter of 4 March 2010. He did not accept that the Second Respondent had no part in the transfer of funds from client to office account.

67.90 As to BN's purpose in going through the LSC schedule dated 25 January 2001 and other reports and annotating them; the First Respondent stated that BN was tasked by the Second Respondent on a regular basis to provide information to him about the current state of the LSC debt.

67.91 In his witness statements dated 21 October 2013 and 11 November 2011 (in error for 2013) the First Respondent referred to the case of TD as an insight into the firm's practice regarding UPOAs which he said his investigations showed were the root of the firm's difficulties. In the TD matter between 1993 and 2000, POAs totalling £117,225.33 had been applied for of which £81,523.11 was on account of profit costs. There were two receipts in respect of third party payments, on 6 December 2000 in the amount of £75,000 and on 15 March 2001, the sum of £62,303.46. Neither of the counsel involved in the case had applied for payments on account and fees totalling £24,733.75 were outstanding. There were then the following transactions:

- On 7 December 2000, profit costs of £75,000 were billed and that sum was transferred from client to office account the following day;

- On 15 March 2001, a cheque for £35,250 was correctly banked into client account. On 26 March 2001, a bill was delivered against the monies received on account and those monies transferred from client to office account;

- On 25 May 2001, an internal bill was raised and entered onto the ledger on 25 May 2001. The ledger reflected a bill of £10,500 plus VAT;

- On 31 May 2001 funds were improperly transferred from client to office account to settle the bill. [A former partner] was responsible for the file, [another former partner] having left the firm;

- A further bill was raised on 26 July 2001 in the amount of £3,000 plus VAT. Further funds were improperly transferred from client to office account the next day;

- A further bill was generated on 1 August 2001 for £5,000 plus VAT and funds were improperly transferred from client to office account;

- On 7 August 2001, further bill was raised for £3,500 plus VAT and that amount was improperly transferred from client to office account on the same day;

- On 9 August 2001, a further bill for £1,000 plus VAT was raised and funds transferred from client to office account.

67.92 The First Respondent stated that on 21 January 2008, having discovered the file and established the position he prepared and sent to the LSC a Claim 2 and recoupment took place. He also paid counsel on the basis of reduced fees he negotiated. Payments were made from the firm's nominal ledger account and therefore did not appear on the client ledger. It was a reminder note from Leading Counsel's clerk in January 2008 which prompted the First Respondent to deal with this matter. There was a letter showing the Second Respondent and his secretary's initials dated 7 February 2003 to the LSC headed "UPOA" referring to a telephone conversation that day and the LSC's letter of 6 January 2003 which had enclosed 14 sample cases on a UPOA report. The 7 February letter reported to the LSC on the present position on each case including the case of TD which was shown as "Concluded Costs being recovered". The First Respondent confirmed that (according to the ledger) this update was given even though costs had already been recovered two years previously and the entirety of costs had been transferred from client account to office account. This was one of the documents on which the First Respondent relied in stating that Second Respondent was not truthful when he said he knew nothing of UPOAs before at this time.

67.93 The First Respondent had first become aware of the extent of the UPOA situation when BN had the information from the Second Respondent following the 2004 audit. The First Respondent was not an expert but was aware that there was an underlying problem regarding UPOAs. He was aware of the SN case; things came out with the passage of time. The TD case was later. In respect of the letter of 8 December 2004 from the LSC addressed to the Second Respondent following the audit, the First Respondent had not played any part in it and had never seen anyone from the LSC until the visit by SG in February 2010. The LSC visits were to the Second Respondent, and BN was there on some occasions. The First Respondent never saw correspondence until the Second Respondent's departure although he agreed that he tried to see any incoming post to the Blackpool office. The Second Respondent had not told him about the issues raised by the LSC in the 2004 audit letter; it had been brought to his attention by BN if not around that time then early in January 2005. BN made it clear to the First Respondent that something had to be done.

67.94 The First Respondent denied that he had given the Second Respondent any assurances whatsoever; it was put to him that the Second Respondent said that this was the first he knew of the problem i.e. that after the meeting with the LSC in 2004 and that the First Respondent had assured him that this was a historic problem and he was resolving it and the Second Respondent did not need to concern himself. The First Respondent stated there had been very little discussion about UPOAs; the First Respondent was taking it on with BN.

67.95 On 4 February 2010 there was a meeting with SG of the LSC at the First Respondent's office in Blackpool, also attended by BN and the Second Respondent. The Second Respondent was shortly to leave the practice and their relationship had completely come to an end. There were a number of issues; he could not be specific because he was not aware of the background to the meeting being called although SG seemed to be aware that the Second Respondent was leaving. There had been no discussion about the dissolution of the practice and it was important to the First Respondent to see the LSC representative and bottom matters out. A schedule detailing around 43 cases had been prepared by BN at the First Respondent's request; these were client files where there were UPOAs which they could identify, where third-party costs had been received and there had been no accounting to the LSC and no Claim 2. The First Respondent stated that he wanted to present full disclosure to the LSC at the meeting. These were not third-party receipts alone but payments including disbursements and profit costs. SG had been presented with a draft at the meeting and then it was sent to SG in correspondence shortly after the meeting. The First Respondent thought the LSC would allow the firm to earn out the UPOAs. The Second Respondent was present when the meeting started but he dropped out halfway through; he said he had to see a client and left; the First Respondent thought that he said in his submissions that he had to see a client. He never came back; the First Respondent never saw him again.

67.96 The First Respondent accepted that in terms of years qualified he had the greater experience than the Second Respondent but disputed that he was the more senior; there was complete parity in everything in the firm between them. He accepted that the Second Respondent was entitled to trust him but as a partner and as a solicitor, as he the First Respondent would trust the Second Respondent. Also in respect of the issue of seniority, the First Respondent asked that a letter dated 4 February 2003 from the LSC's North Western Region to which the Second Respondent had responded be admitted into evidence; the First Respondent realised that it was missing from his witness statement. It was addressed to "The Senior Partner" at the Preston office and a former partner sent it to the Second Respondent for reply, so there was no question of any surprise to the Second Respondent in introducing it and it had been used in the LSC litigation where the Second Respondent had been represented. The letter was received on 6 February 2003 and faxed to the Second Respondent on 7 February 2003 marked for his urgent attention. Mr Coltart submitted that it was plainly envisaged in the firm that it fell within the remit of the Second Respondent. It referred to a letter of 6 January 2003 which was not before the Tribunal. A reply had been sent within a further two weeks to the 6 January 2003 letter. The First Respondent stated that the point was that the Second Respondent replied on the same date that he received the letter, 7 February 2003 stating:

"UPOA

I write further to our telephone conversation today and your letter of the 6 January enclosing fourteen sample cases on the UPOA 2 Report.

…present position in each of the cases is as follows:"

67.97 In respect of the letter sent by a former partner to the IO dated 14 February 2011, responding to the IO's questions, the First Respondent agreed that the former partner was not responsible in any way for the management of the firm's civil contract with the LSC. He could not check whether it was true when it stated that the former partner had not seen UPOA schedules. It was not correct that "In any event as it related to an accounting matter, any such schedule as received at Preston, would have been sent straight to [the First Respondent] at Blackpool." The former partner was not involved in UPOAs. He also rejected the assertion that "[The First Respondent] was responsible for all costs matters as he was the senior partner and also a Deputy Costs Judge. He dealt with all the firm's cash flow." In respect of the letter to the IO dated 21 February 2011 from another former partner, the First Respondent rejected its contents.

67.98 It was put to the First Respondent that he delayed sending out a cheque to which he replied that it was question of paying Leading Counsel in a matter of days; this was Christmas Eve 2009. It was an appropriate way to deal with the finances of the practice. He did not accept that he had put the reputation of the firm before complying with the rules and maintained that this was not a breach of the SARs; there was no delay.

67.99 The First Respondent confirmed the first paragraph of his letter to the Second Respondent of 4 March 2010 as absolutely correct including that they had both been aware of the LSC position from the first former partner's departure and accepted that they would have to continue to work on recoupments and reduce the debt over time; he stood by the statement that their cash flow had been a constant problem.

67.100 The First Respondent was directed to the LSC Notes of meeting with him on 8 March 2010 at the Liverpool Regional Office. The First Respondent stated that the Second Respondent was fully aware of the policy that he had adopted and pursued with vigour. It was not possible to keep it secret; he would have liked to share more with the Second Respondent but he could not. The Second Respondent had the cash position from the bank every morning and insisted that at 9 am they should know the balances and the overdraft facility and what money was needed to bring it down within its limits. The overdraft had been at its limits for seven or eight years and overtopped it at times. The First Respondent had discussed the recapitalisation of the practice with the bank and had injected £50,000 at one point; the bank had been pretty fair. In more recent years, the limit of their credit was £150,000.

67.101 In respect of the management information that BN provided, the First Respondent thought that BN's comments had been taken slightly out of context. The First Respondent had said he was interested in cash flow and bills not regarding how much time a staff member spent working on a particular thing.

67.102 As to BN having been recorded as saying that he, the First Respondent did not want the problem mentioned or to know the total amount and was frightened at one point, the First Respondent stated that he was not frightened; he was keen to address the problem and he did not know where FT's comment about BN saying that he was frightened came from. He had all the bank statements showing recoupments and repayments being made between 2004 and 2009, many thousands of pounds.

67.103 It was put to the First Respondent that he talked of reducing the debt but this was "a burgeoning problem" as he said in an interview and used the word "escalate". The First Respondent stated that he did not perceive it to be getting worse and that he was demonstrating that the debts were being earned out but the LSC took a different view in their accounting exercise. It was burgeoning regarding the earlier days; in the interview he was trying to explain the historical problem. He was very stressed at the meeting (with SG).

Submissions for the Second Respondent

67.104 Mr Goodwin submitted that the absence of an allegation of dishonesty against the Second Respondent was an important feature but the Applicant said that no distinction should be drawn between the Respondents. Mr Goodwin pointed out that that if allegation 1.3(i) and 1.3(ii) was proved against the Second Respondent, the exceptional cases provision in the case of Sharma in respect of the sanction of striking off would not apply for the benefit of the Second Respondent even though the full range of sanctions would be available to the Tribunal. Mr Goodwin asked the Tribunal to have regard to the totality of the letter from Capsticks of 26 July 2013 in respect of the distinctions in its case against the Respondents and asked that it have particular regard to the statement:

> "In particular, the First Respondent was responsible for submitting "Claim 2" Forms on behalf of the firm and he was personally involved in a number of cases where costs were received from third parties but not notified to the LSC..."

and in respect of the Applicant's case against the Second Respondent:

> "Unlike the First Respondent, the Second Respondent was not the individual in the firm who was responsible for submitting "Claim 2" Forms. Nor was he directly involved (on the basis of the evidence currently available) in any of the matters where there was a failure to notify the LSC of costs recovered from third parties…"

Mr Goodwin submitted that this was an important distinction. Strict liability did not apply to breaches of the SPR and/or the Code and it was necessary for the Applicant to prove culpability on the part of the Second Respondent. It was not disputed that there was strict liability under the SARs for principals. Mr Goodwin submitted that the Applicant had to satisfy the Tribunal to the criminal standard that the Second Respondent had knowledge of the failure to report to the LSC. Capsticks conceded that the Second Respondent was not the person responsible for reporting to the LSC and so it was difficult to see how allegation 1.3 could be made out to the required standard. The Second Respondent did not need to prove anything; this was relevant

when the Second Respondent was criticised for the way he gave his oral evidence. The Second Respondent took a fair and reasonable view that he would give oral evidence and expose himself to cross-examination. The Tribunal would form its own view about how he gave evidence. It was put to him that he was not truthful; he gave evidence in the main in a clear and consistent way and did his best to assist the Tribunal. Mr Goodwin emphasised the importance of the Tribunal considering and analysing in terms of the required standard of proof what the word "sure" meant. Mr Goodwin also reminded the Tribunal that the Second Respondent had pointed out the deficiencies in the Rule 5 Statement and not objected to its correction.

67.105 In respect of the evidence in support of allegation 1.3, Mr Goodwin submitted that other than the case of SN, which was not part of the presented case of the Applicant, the Second Respondent did his best to deal with it. The First Respondent filed a witness statement dated 21 October 2013 with 300 pages of documents days before the hearing. Save for that Mr Goodwin submitted that there was no recent documentary evidence to support the Applicant's case regarding evidence against the Second Respondent. If the Applicant had discovered the case of SN and sought to introduce it at a late stage the Second Respondent might well have objected to its introduction. In his Outline Note of Closing Mr Goodwin had drawn attention to what he described as two periods of delay within the chronology of the proceedings (relating to the period between the commencement of the forensic investigation on 13 December 2010 and the Second Respondent's interview on 16 March 2011 and between the decision to refer the Second Respondent to the Tribunal in June 2012 and the lodgement of proceedings with the Tribunal in January 2013) and he submitted that the Second Respondent would have good reason to have objected. Mr Goodwin asked the Tribunal to regard the case of SN with caution. He submitted that there was no independent evidence regarding the case.

67.106 The Tribunal was being invited to find the Second Respondent guilty of allegation 1.3 based on an explanation advanced by the First Respondent. Mr Goodwin submitted that the concession made by Mr Levey to the First Respondent immediately prior to the start of the First Respondent cross-examination that he did not challenge the honesty or truth of the bulk of his evidence was enlightening if not surprising. The assertions made by the First Respondent as to Second Respondent's knowledge were heavily relied upon by the Applicant as part of its case against the Second Respondent. Mr Goodwin submitted that the Tribunal should disregard the First Respondent's evidence in full. In addition to the assertion of dishonesty made against him he submitted that there were further aspects of his evidence which were of concern:

- The Applicant said that the First Respondent failed to report on cases to the LSC following receipt of payments from third parties. The Second Respondent agreed and went further and said that the First Respondent misled him as to the position.

- The First Respondent's own concession in his letter of 4 March 2010 that he had taken the conscious decision to draw a cheque in payment of counsel's fees from office account but to hold it back until such time as the overdraft was below its enforced limit was inappropriate and in breach of the SARs.

- The First Respondent's acceptance that he was the "last man standing" and that his legal career was over and that he was financially ruined was to his credit but provided motive for wrongly implicating the Second Respondent.

- The First Respondent had sought to implicate the Second Respondent and others .

- The First Respondent asserted that he did not deal with legally aided cases, but when questioned, he conceded (because he had to) that he had.

67.107 Mr Goodwin accepted Mr Coltart's submission that he had mentioned to him the error in the First Respondent's statement about the handwriting on the January 2001 spreadsheet but Mr Goodwin submitted that this did not detract from the inaccuracy in his witness statement which the First Respondent would have known about because the document in question had been submitted to the Applicant for the Second Respondent in 2011. Mr Goodwin's letter to the Applicant dated 11 July 2011 made clear that the handwriting on the schedule was that of BN.

67.108 Mr Goodwin submitted that there was no evidence to support the First Respondent's assertions of the Second Respondent's knowledge of his inappropriate actions. What evidence was left regarding the Second Respondent's knowledge and alleged failure to report to the LSC was the hearsay evidence of BN. The IO and FT referred to his loyalty to the First Respondent and to the firm. Mr Goodwin submitted that it was to be noted that the interview with BN was nine months after the Second Respondent ceased to be a partner and eight months after he had left in acrimonious circumstances. BN was not available for cross-examination. BN's letters and assertions had not been verified on oath, nor had he been tested by cross examination.

67.109 In respect of the Second Respondent's evidence, he was a man of exemplary character and standing. He was employed as a District Judge and was previously on the Applicant's panel for prosecution work before the Tribunal. Mr Goodwin submitted that he was entitled to and should be believed. He gave evidence to the Tribunal in a straightforward, compelling and consistent way. Despite the best efforts of counsel for the Applicant and the First Respondent to undermine his credibility, they failed.

67.110 The Second Respondent accepted that he had knowledge of the UPOAs. The Applicant accepted that the mere fact of the existence of UPOAs was not itself a matter of concern. The Tribunal would recall the evidence of FT that POAs and UPOAs were part of the way in which the scheme operated. The Applicant also accepted that delay in reporting settlement of cases after receipt of third-party payment was not the only cause of the existence of UPOAs. Whilst the Second Respondent accepted that he had knowledge of the UPOAs that was not the allegation raised against him. The allegation was that he acted with a lack of integrity by not reporting payment of costs received from third parties to the LSC. The Second Respondent had been consistent in his written and oral evidence that he had no knowledge that the First Respondent was failing to report payment of costs received from third parties to the LSC. The First Respondent admitted in evidence that he deliberately failed to report on settled cases to the LSC following receipt of third-party payments and he withheld that information from the firm's accountant. When the Second Respondent asserted in his letter dated 25 February 2010 to the First

Respondent that he believed they had a great business as did the accountants, that was true. The First Respondent admitted that there were no formal partners' meetings and nothing was recorded. At no point did the First Respondent either in his written representations, statements or oral evidence make reference to any conversation with the Second Respondent to the effect that the level of UPOAs was high and that he had been recovering money from third parties and failing to report it to the LSC. The First Respondent made no such assertion because no conversation along those lines ever took place.

67.111 On the basis of the case of Donkin, notwithstanding that there was no dishonesty allegation against the Second Respondent, Mr Goodwin asked that the Tribunal have regard to a small number of character references and the oral evidence of Judge Pickup before it made its decision. In respect of the test to be applied to allegation 3.1(i) relating to integrity, Mr Goodwin submitted that it had been clarified by the authorities that the test for integrity was an objective one.; the question was did the Second Respondent have knowledge or was he assured by the First Respondent that he was dealing with the matter and was entitled to rely on that assurance. The Tribunal asked Mr Goodwin to clarify how the references would assist in assessing the Respondent's integrity as the test to be applied was an objective one. Mr Goodwin responded that it might be that the testimonials would not assist; he could not argue against that but submitted that the Tribunal could not say that because the test was objective he must have known; the Tribunal must find whether he knew or not. The Tribunal pointed out that it considered this to be a different issue.

67.112 Mr Goodwin referred to his authorities in respect of why the Second Respondent did not ask questions of the First Respondent. Mr Goodwin submitted that the Second Respondent was entitled to rely upon the assurances of his then partner, in whom, at the time he had complete trust. The fact that the trust had proved to be misplaced was a matter of considerable sadness and regret to the Second Respondent but did not form the basis of evidence against him as to wrongdoing. He was not required to monitor or supervise the work of the First Respondent and could not be guilty of misconduct merely because he was partner of a solicitor who was guilty of misconduct. Mr Goodwin cited Tribunal case number 9339-2005 Ali and Shabir, where it was stated:

> "The position of Ms Ali was very different. She had relied on her partner who undertook management and recruitment. She played no part in that and had not been made aware of the conditions on Mr Bhatti's Practising Certificate. The Tribunal is of the view that Ms Ali was entitled to rely on her partner to deal properly with such matters and could not be held responsible for his personal failure to do so."

Tribunal case number 10002-2008 Ross and Others:

> "... The Tribunal was not satisfied that sufficient evidence had been presented to show that all the Respondents were equally responsible or culpable for each of the allegations…"

and

> "... the subject of the matters referred to in allegation 2, and the Tribunal was not satisfied that they knew of the alleged breaches being committed in other offices or by other practitioners of the firm, or were culpable therefore.
>
> In relation to Mr Watson, the Tribunal found allegation 2 to have been proved on the basis that as a Senior and Managing Partner of the practice, he had responsibility for the different offices and what was going on at each office. He was in charge of overall supervision of the firm's business practices and the partners in the various offices would have been entitled to rely on his exercise of this supervisory role..."

and

> "... The Tribunal had found Mr Watson was in overall control of the firm and all three allegations had been proved against him, however, it was submitted that he was in a unique situation in that he was entitled to assume the other partners were complying with the Rules and Regulations and he could rely upon them…"

Tribunal case number 10229-2009 Bagri and Others:

> ".... The Tribunal did not consider that the Third and Fourth Respondents had been shutting their eyes to these matters. While they had some knowledge, it was reasonable to rely on the partner who was directly involved and had most knowledge. The Tribunal accepted the submission on behalf of the Third and Fourth Respondents that allegations (c) to (g) were not matters of strict liability."

Mr Goodwin pointed out that the Bagri case dealt with SPR breaches and it supported the view that strict liability did not apply to SPR and Code breaches.

Akodu v Solicitors Regulation Authority [2009] EWHC 3588 (Admin)

> "In those circumstances, there is no other reasonable conclusion that can be reached other than that the basis upon which he had been found guilty was merely on the basis that he was a partner of the firm. If that was the only basis, then there had been no argument advanced on behalf of the Law Society to suggest that that was a lawful basis upon which any solicitor can be found guilty of conduct unbefitting his profession… Some degree of personal fault is required."

67.113 Mr Goodwin submitted that the Tribunal might think that the approach he invited it to take was simplistic but it was fundamental to the Tribunal's jurisdiction for the Applicant to prove the allegations to the criminal standard. He referred to the case of The Solicitors Regulation Authority v Waddingham, Smith and Parsonage [2012] EWHC 1519 (Admin). The High Court's conclusions in the case included:

> "...it was right to attach importance to the criminal standard of proof throughout the proceedings.… It would be impermissible in my view in a case

> to which the criminal standard of proof applied to infer that the person accused had acted dishonesty without being sure that he had done so."

and

> "I conclude that both Mr Smith and Mr Parsonage probably did act dishonestly, both parts of the Twinsectra test being met to that standard. However, I have also taken into account the counterbalancing factors on which Messrs Smith and Parsonage rely… I am not able to be sure that either Mr Smith or Mr Parsonage acted dishonestly. Having regard to the criminal standard of proof, I conclude, as indeed did the Tribunal, that the allegations of dishonesty have not been made out."

67.114 Turning to the evidence in respect of the Claim 1 position, Mr Goodwin reminded the Tribunal that Mr Levey had asked Second Respondent to identify examples of Claim 1 type cases. In the executive summary to the FI Report dated 18 March 2011 the IO had said:

> "The firm had not consistently reported to the LSC following recovery of costs and disbursements from third-party insurers…"

This related to Claim 2s. In 2004, there was a debt to the LSC of over £3 million which was reduced by over £1 million by 2010 so that £1.8 million or £1.5 million or thereabouts was still owing, showing that matters had been dealt with between 2004 and 2010. This was not something which the Second Respondent invented in evidence.

67.115 Mr Goodwin also referred to the Second Respondent's letter of 25 February 2010 to the First Respondent, particularly:

> "Just some of the consequences to me are that I have unnecessarily paid tax on inflated profits, I have had to pay VAT on inflated profits, I have been unaware of the extent of your actions; the management figures wouldn't and didn't show what was going on, and you weren't going to tell me. [MH] our accountant thought we had a terrific business from the figures we were posting, so did I."

67.116 In considering the Second Respondent's evidence and knowledge, Mr Goodwin reminded the Tribunal he was on the Applicant's prosecuting panel. If he had had knowledge he would have an obligation to report it and as a panel solicitor even more so. He was also sitting as a Deputy District Judge prior to his appointment as a full-time judge. The implications for a solicitor found guilty were often very significant.

67.117 Mr Goodwin also made submissions relating to procedural matters. He submitted that:

- In respect of the second limb of allegation 1.3 "and/or not retaining those sums in client accounts from December 2004 onwards…" this was a duplication of allegation 1.1; breach of Rule 21 (3) of the SARs and should be dismissed.

- The Applicant had invited the Tribunal to draw an adverse inference by reference to the Tribunal's Practice Direction No 6 on Case Management; this applied to cases certified after 25 October 2013 and was not relevant to these proceedings.

- The Second Respondent had attracted criticism for what the Applicant said was a failure to comply with the direction of the Tribunal dated 16 September 2013 in relation to filing a witness statement; the Second Respondent filed a witness statement dated 23 September 2013 within the required time period. The explanations provided by the Second Respondent in the correspondence attached to his witness statement were entirely consistent with the evidence he gave to the Tribunal. The Rule 5 Statement (issued after the correspondence took place) did not in any way alter the facts relevant to the case. Mr Goodwin invited the Tribunal not to draw any adverse inference in respect of the witness statement; what was important was that the Second Respondent had provided an explanation for what was alleged against him.

- Whilst the Applicant attacked the Second Respondent for what were described as procedural irregularities both the Applicant and the First Respondent had failed to comply with directions and/or procedural issues:

    - the First Respondent served his witness statement to which he attached over 300 pages of documentation, late by 21 days and then served a second witness statement after the commencement of the hearing with further documents. He also wanted to introduce a further document during the course of his oral evidence. The Applicant had made no adverse criticism of the First Respondent on this account.

    - The Applicant attempted to introduce further documentary evidence during the course of the Second Respondent's cross-examination in the form of the accountant's reports on the firm. While accepting that this arose out of the question raised by a member of the Panel and that the Respondents agreed to the documents being admitted as a courtesy to the Tribunal, Mr Goodwin submitted that this was unfair and inappropriate attempt to introduce evidence in breach of the Tribunal's direction number 24.2 made on 10 September 2013 which provided that:

        > "By no later than 4 pm on 1 October 2013 the Respondents do provide to the Applicant and the Applicant to the Respondents disclosure of such documents upon which they intend to rely;"

    - The way in which the enclosures to the LSC's 6 February 2007 letter were introduced was unsatisfactory. The Second Respondent made reference to the letter during the course of the interview on 16 March 2011 and subsequently the Second Respondent provided a copy of the letter to the IO and the IO conceded in evidence that he did not seek to or obtain copies of the enclosures to the letter, nor did he exhibit the 6 February 2007 letter to his FI Report. Mr Goodwin submitted that it was surprising that the Applicant failed to obtain copies of the

enclosures prior to the commencement of proceedings, or at all, given the importance the Applicant attached to the letter. It was only during the course of the First Respondent's evidence that he made reference to the enclosures being available within other litigation and which prompted the Tribunal to make a direction that the Second Respondent use his best endeavours to obtain copies of them. As it happened, the First Respondent provided copies of the enclosures.

67.118 Mr Goodwin submitted that the time spent by Mr Levey in cross-examining the Second Respondent on what he asserted was a failure to provide a detailed witness statement was because there was little else that he could cross-examine him on given the lack of evidence against him.

67.119 Mr Goodwin also addressed various points raised by the Tribunal. In respect of the accounts which made no reference to the UPOAs, the Second Respondent accepted with hindsight that as presented the accounts could not represent a true and fair view of the financial position of the firm but he did not realise this at the time and he was entitled to believe what he did. The Second Respondent had said in his 25 February 2010 letter to the First Respondent that the accountant did not know of the UPOA problem. In respect of management accounts sent to the bank, Mr Goodwin pointed out that the Applicant had not raised any allegation about this. Mr Coltart asked the Tribunal to exercise a degree of caution regarding the accounting evidence; it would have been open to the Applicant to ask the bank what reliance it placed on that information, what the bank might have done differently and to get a statement from the firm's accountants but there was no such first-hand evidence, as Mr Coltart noted. The Tribunal was clearly troubled about the subject but Mr Goodwin submitted that the Tribunal should not rely upon it.

Evidence of the Second Respondent

67.120 In cross examination by Mr Coltart, as to his date of knowledge of the retention of costs recovered from third parties, and the list dated 25 January 2001, the Second Respondent stated that it could not have been in his knowledge in 2001 because on 30 April 2001, a former partner retired from the practice and between then and his giving notice of his departure to the First and Second Respondents in February there were several meetings about his departure from the practice and part of the discussion was about the amount of money he would receive as a departing partner. The amount owed £896,059.94 was not known to the Second Respondent or it would have played a part in the negotiations about the former partner's departure. It was put to him that there was no point in looking at a 2001 list in 2004 as the latter figure would bear no relation to the former. The Second Respondent stated that the figure had gone up from £800,000 in 2001 to £1.6 million in 2004 and it would be necessary to ask BN. As to the table on the final page of the January 2001 list he agreed it was his handwriting. In terms of the amount shown as owed on the list where the columns in the table were headed "Money owed to LSC" and "Money owed by the LSC", the Second Respondent refuted the suggestion that "Money owed to the LSC" related to third party costs, rather it related to POAs and UPOAs and he denied that he knew as far back as January 2001 about the problem of money owing to the LSC.

67.121 The Second Respondent was referred to the fax sent to him by a former partner on 7 February 2003 enclosing an LSC letter dated 4 February 2003 addressed to The Senior Partner at the Preston office. He agreed that it had been sent to him but not because he was the person dealing with the issue of UPOAs. It was because he was the liaison manager with the LSC. Ms CH the LSC partnership manager who sent the letter had called him that day and said that the LSC had not had a reply (to an earlier letter). The Second Respondent called the former partner who faxed it over and the Second Respondent replied, all on the same day. He would ask people to give him information on the files referred to in the letter; he could not possibly do the work along with the other work he was doing. He would have spoken to other fee earners and to BN, but he did not remember; it was over 10 years ago.

67.122 Mr Levey cross examined the Second Respondent about the size of the debt to the LSC on the basis, which the Applicant did not accept, that his account of his state of knowledge was correct; that the first time the Second Respondent knew of the amount of the debt as being over £3 million was from the LSC's letter of 8 December 2004. He disputed that this was a very significant amount of money; it was not in the context of this firm however it was a "shocking" amount; in 2006, the firm took £1 million from the legal aid fund. Even in the context of the profits of the firm being the total of the two Respondents' drawings, it sounded huge but when he subsequently considered the business that the firm was doing with the LSC, it was all relative.

67.123 The Second Respondent agreed that the December 2004 audit report stated that corrective action was required and that he had requested a list which the LSC gave him. Mr Levey put to him that there were two possible outcomes of going through the list; the firm would make money or would find that money had come in and the case has never been reported. The Second Respondent stated that there was a third option and that was that there was ongoing work if it was a live case. He agreed that in Mr Goodwin's letter of July 2011 it was said:

> "Whilst the Second Respondent was, of course, anxious about the UPOAs, he was reassured by [the First Respondent] that he would work through it…"

The Second Respondent denied that this anxiety was because he realized that on dead cases there was a real risk that the UPOAs were referable to money that the firm had recovered. It was inconceivable that they would be in the position of retaining money due to the LSC; they got money in and reported to the LSC. He was anxious because there were hundreds of files in the cellar that needed to be looked at; his anxiety was at the size of the list. It was put to him that if the situation was that Claim 1s had to be put in, there was nothing to worry about and he would be anxious to get the money in. The Second Respondent stated that he was anxious to clear the lists up. It was put to him that he had said that in the real world the last thing was to get legal aid assessment, to which the Second Respondent replied that the real world was not the firm's world. He disputed that the money had been thrown away if the files had been closed because they were not dead; the files were still in drawers. The Second Respondent also referred to the LSC initiative to write off payments on account in historic cases which had not been billed. (The firm had received a two page schedule of historic cases from the LSC with outstanding POAs totalling £137,902.49, including counsel's fees.) The Second Respondent rejected the suggestion that he would be anxious to see in each case whether there was a good or bad outcome i.e.

whether monies were due to the firm or third party costs had been retained. In connection with anxiety relating to the 2004 audit, he referred to the LSC's threat to recoup funds but Mr Levey pointed out that that was in 2008. The Second Respondent said that he could not accept the good/bad scenario in 2004 because he did not anticipate the possibility that third party costs have been retained. When asked by the Tribunal if it had not entered his mind he replied "Why would it?" As to how he knew it was inconceivable, the Second Respondent stated that he expected it to be done properly but he did nothing to check; also it was not within the remit of junior staff to do the work at the conclusion of the case; the First Respondent did this, and by 2008 a lot of the fee earners had gone. The First Respondent was working as a costs judge and in 2004 was responsible for the finances of the firm while the Second Respondent was out of the office a lot. When a case was successfully concluded the file was sent to the First Respondent to undertake negotiations regarding costs.

67.124 The Second Respondent was asked about the note which he had sent to BN on 13 December 2004 about responding to the LSC audit and BN's telling the LSC the Second Respondent would submit a proposal on how the firm would report on the current situation of cases with outstanding payments. The Second Respondent stated that BN only told him two days after he had told the LSC and no such proposals were put in. He had not asked BN what the proposals were and why he was suggesting it. The First Respondent said that he took over in 2005 and this was the time. It probably was a concern to him that BN said he would make proposals but he did not recall.

67.125 In respect of the list of Claim 2 cases (43 cases) it was put to the Second Respondent that it was the unchallenged evidence of the First Respondent that the 2010 schedule prepared for the LSC showed cases where recoveries from third parties had not been accounted for, with which the Second Respondent agreed. He also agreed that there were numerous cases on the list which predated January 2005. He rejected the suggestion that if he had investigated in 2005 he would have discovered to his horror that the UPOAs related to third party recoveries. He was not involved in 2004 in any way that Mr Levey suggested; he left it to the First Respondent. It took from 2005 to 2007 and they cleared around £1.8M. He rejected the suggestion that Mr Goodwin's letter of July 2011 showed that he would have learnt about the problem in the 2004 audit closing meeting with JF from the LSC. The Second Respondent confirmed that it was his understanding that where there was a debt the firm was owed money by the LSC and stated that the historic cases list issued by the LSC as part of the compromise of litigation brought by the Law Society in 2008 showed that it was true. The Second Respondent stated that he had discussions with the First Respondent; he was taking matters over in 2005. The list came to the Blackpool office to the Second Respondent and he returned it to the First Respondent.

67.126 The Second Respondent rejected the suggestion that the fact as set out in Mr Goodwin's letter, that he regarded UPOAs as a problem which could be addressed over time, could only mean one thing; that it was a debt owed because of failure to account. The Second Respondent stated that it could not be the only thing because the LSC wrote off £136,000 (under its new approach to historic cases in 2008). He rejected the suggestion that all the (outstanding) Claim 1s could have been cleared up in six weeks; it was not done in that way and when it was re-addressed in 2007 he saw that it had not been done. Where would one get the resources to do it; there was a schedule of over 200 pages? The First Respondent said that he couldn't even get to

the bottom of the total figure in 2012 because it was impossible to do. The Second Respondent wished that he had taken control himself; he could have identified the problem and done something about it. As a judge, he frequently saw cases coming back to court for assessment years after the event; he and his brother judges would write back and ask for the reason for the delay. It was put to him that there was no evidence before the Tribunal of that happening and he said he was giving it now.

67.127 The Tribunal asked why he had not brought in a costs draftsman to sort everything out and why they were using an expensive fee earner and he replied that he had a practice manager who should be doing it. It would be a fantastic way to deal with it to bring in a cost draftsman but he had a partner and they agreed that was what they would do; they could have brought in a cost draftsman but they did not think of doing it.

67.128 The Second Respondent was referred to his letter of 25 February 2010 to the First Respondent in which he had said:

> "It is also a fact that the overdraft is at its limit is (sic) because a significant amount of income each month is diverted to make payments to the LSC in respect of unrecouped payments on account. Again this is in my view directly as a result of your conduct. I therefore have no proposals towards repaying half of the overdraft when I am not responsible for its making."

It was put to him that he knew that the debt repayment was not made by resurrecting dead cases and having legal aid assessments done but by using the overdraft slowly but surely to repay money. The Second Respondent stated that the First Respondent had put the BACS statement into debit and the LSC would recover that debt over time. In August 2008 he the Second Respondent wrote to the DRU about that.

67.129 In respect of the assurances which the Second Respondent stated that he had received from the First Respondent and which the First Respondent denied giving, it was put to him that on his version it was the First Respondent's assurance that he would take up the historical cases and apply to the court for a legal aid assessment. The Second Respondent stated that the First Respondent did not spell it out. They both knew that if that had to be done that's what would be done.

67.130 The Second Respondent stated that if the First Respondent had disclosed the problem, if his hands were as clean as those of the Second Respondent they could have resolved it. The Second Respondent stated that save regarding the case of SN, Mr Levey could not show him evidence that would fit a different scenario. The Second Respondent confirmed that in Mr Goodwin's letter of 11 July 2011 references to his relying on assurances in 2007 meant that he understood the First Respondent would begin the process of recovering monies owed to the firm by working through the UPOA list and this also applied to references in the letter to his relying on assurances in 2004. The First Respondent had not discussed it with him and the First Respondent did not dispute that in his letter to the Second Respondent of March 2010. As to why the First Respondent would lie it was because he was doing it and he knew it was wrong. The Second Respondent went on to make an allegation that the First Respondent was involved in delaying payments before 2004 and stated that it seemed to be the way the case was put that another named person and the First Respondent conspired to do it. He was not saying that it was a fraud; it was a practice. When it

was put to him that this was a very serious allegation to make against the First Respondent, the Second Respondent stated that this was the First Respondent whom the Applicant believed was dishonest. The Second Respondent had not seen fit to have his legal representative put this to the First Respondent. He rejected the suggestion that these were wild allegations put in the witness box to cover what was going on. It would be improper to ask Mr Goodwin to put this to the First Respondent because the Second Respondent could not support his belief with evidence.

67.131 The Second Respondent denied BN's reported statement in interview with the LSC that he hoped that if the situation was left long enough the LSC would write it off; BN was putting words into his mouth; he misunderstood the Second Respondent's monitoring of the Law Society's judicial review proceedings against the LSC. The LSC would not write anything off; if they were entitled to recover public money they would take steps; the LSC had obtained judgment against the First Respondent for £1.8 million. The Second Respondent also denied the report that BN had told FT:

> "When [the Second Respondent] took over responsibility he thought it wasn't good to keep getting loans from the bank and that it would be better to get loans from the LSC instead and this was agreed by the other partners"

The Second Respondent said that the comment about loans from the LSC was absolute rubbish; one could not borrow from the LSC. And as to whether one could if one drew down and did not repay, that was what the First Respondent did and there was no evidence that he (the Second Respondent) did it.

67.132 The Second Respondent agreed with the following quote from the attendance note:

> "[The Second Respondent] was the person I would speak to about legal aid issues even though [a former partner] was the clinical negligence supervisor. [The Second Respondent] was based in Preston and became quite isolated. He felt he was left out of the loop. He asked for the firm's bank balance to be e-mailed over to him to monitor the cash flow position. All LSC correspondence for the whole firm would also go over to him."

67.133 The Second Respondent rejected the suggestion that while working with BN through 2008 he would have discovered the true situation if he didn't know it already. He stated that he had not seen [the First Respondent's] schedule of the 43 cases where there was the Claim 2 problem going back to 2001; the first time he saw it was in December 2009, when BN referred to it and the Second Respondent asked for it to be sent to the Preston office. It was put to him that he had the schedule that was attached to the February 2007 bombshell letter but he responded that because of the sheer volume and the fact there was no bottom line on it, each case was listed individually and there was no total, to this day he did not know the total on the 2007 list. It was put to him that in the letter which Mr Goodwin had sent for him in July 2011 the Second Respondent had done his best to gloss over the February 2007 bombshell and the Second Respondent replied that the issues were the same as in 2004. The bombshell was the sheer volume of cases and the realisation that nothing had been done since 2004. The dictionary definition of a bombshell was put to him, "an unexplained and surprising event especially an unpleasant one". He responded that perhaps he had over egged it; he meant (in Mr Goodwin's letter) that the February 2007 letter was the next

step from the LSC; he could not detract from the word bombshell it was a bombshell and he was not trying to defuse the bomb. It was put to him that in interview he sought to make out that it was just another letter and that was why the Applicant had pushed for an answer to the Rule 5 Statement and that in interview he had used the word bombshell in the sense of the dictionary definition and that's what he meant but the Second Respondent said that what he meant was what was stated in Mr Goodwin's letter:

> "However, he did receive a letter from the LSC dated 6th February 2007, but which did not raise concerns over and above that which (sic) had become aware of in 2004."

As to when he said he realised the size of the problem and the monies owing to the LSC which had been improperly retained, the Second Respondent stated that he had referred to the February 2007 letter as a bombshell but it had been creeping from then. He rejected the suggestion that the enormity of it came home to him in February 2007 as he had said in interview:

> "In February 2007 I would say that the enormity of it struck home when they approached us to address what was a problem with some speed really."

Later in the interview he said in respect of partners' meetings:

> "Never happened to the extent that I thought it would initially there was (sic) some meetings but it was only ever lip service. I had a conversation with [the First Respondent] after, a lot seems to be hinging around this letter of 2007 so I hope my date is right but it certainly embedded on my memory, saying what are we going to do about this. Nothing was ever really discussed about it further, but to then find out in February 2010 when we had a meeting with [SG] our then partnership manager, that he'd carried on the practice I think I referred to them in my letter of February 2010 but my notes are..."

67.134 The Second Respondent agreed he had proceeded on the basis that the matter was resolved and that he did not check and stated that this was because he did not have to supervise a partner. "Cordery on Solicitors" was clear on that. He rejected the suggestion that it was a matter of integrity to check. He did not have much of a relationship with the First Respondent; they spoke on occasion but not much. Matters moved on and the LSC was not pressing. The Second Respondent testified that he had trusted the First Respondent in 2007 because he was his partner and he trusted that he had integrity although he was sometimes disappointed that the First Respondent did not do what he said he would. The Second Respondent wished that he had looked at the whole thing and dealt with it in 2004. He had not gone back to the First Respondent in 2007 and he regretted that. It was put to him that it was not credible that when he been let down so badly by the First Respondent between 2004 and 2007 that when he came to realise that, he believed that the First Respondent would just deal with the problem. The Second Respondent stated that that was his evidence.

67.135 As to precisely when the Second Respondent came to know that the UPOA problem was a Claim 2 problem, it was a creeping process; he had a letter in August 2009 from the accountants and then a list from the LSC of October 2009 which he only became

aware of in December 2009 and he had started to look at the cases and then sent his letter to the First Respondent of 25 February 2010. He was asked why on his version if he realised in August 2009 that the firm had taken in funds which they had not reported and if he was acting with integrity, honesty and doing the right thing, he did not immediately call a crisis meeting with the First Respondent and tell him that they must confess to the LSC what had happened. He replied that there was a meeting in August 2009 with the accountants and the First Respondent when the First Respondent introduced the concept of cutting profit and introducing UPOAs into the balance sheet and the Second Respondent had started to ask when all the UPOAs would be repaid. He stated that there was not a moment when he discovered that it was not a case of the LSC owing the firm but that the firm had a debt to the LSC and no source of money; he did not understand it in that way. As to when he realised that the first time that the UPOA problem related to significant sums not accounted for to the LSC, it was definitively December 2009 to February 2010 he realized that there was a problem created by his partner.

67.136 As his creeping realisation of the problem and when it had started, the Second Respondent stated to Mr Coltart that this was probably about 2008 when the LSC's Leeds office became involved and started asking for reports on cases. It was pointed out to him that the previous day in evidence he had said he began to realise in 2007 and the Second Respondent said that he had muddled the dates. It was not when he received the bombshell letter in 2007. He was working 60 to 70 hours a week, and working on weekends. There was a practice manager to run the practice and he was relying on other people. The matter was being dealt with and he could not give a particular day. Mr Coltart asked, in the light of the Second Respondent saying that it was not until August 2009 that he appreciated that the debt to the LSC arose out of third-party costs recoveries which had not been notified, how could it be that it took him five years to reach that point. He replied that it was a gradual process; there was no Eureka moment. His partner was held in high regard; he trusted him implicitly and expected him to treat the Second Respondent as fairly as the Second Respondent treated him and he concealed more than 30 and then 45 cases. The First Respondent told him it would take a long time (to resolve).

67.137 The Second Respondent stated that he had e-mailed the 6 February 2007 letter to the IO after the interview; he had e-mailed it to himself at home while at the office. It was an important letter and he e-mailed a lot of important letters to himself at home. As to why he needed the letter when the First Respondent and BN were dealing with it, he was a partner in the firm and he was entitled to management information.

67.138 As to why the Second Respondent did not write to the LSC in 2007, he stated that he withdrew from the partnership and was applying for judicial appointment. He applied for the second time in December 2008 and was notified of his success in October 2009. He agreed that it was his case that he had already applied for and been granted the judicial appointment before discovering the problem. He went a month before he was going anyway because he could not be in partnership with the First Respondent any longer although this seemed a token. He denied that he was trying to mislead the Tribunal. The Second Respondent stated that he had been let down by BN; the management accounts and the statutory accounts had never showed the hole. At meetings with the accountants, the Second Respondent said that the firm had punched

above its weight and the accountant was amazed by their profits; he had no idea that it was because of the retention of the third-party funds.

67.139 As to when he was first fixed with the knowledge that money had not been repaid to the LSC where it should have been, Mr Coltart referred the Second Respondent to Mr Goodwin's letter to the Applicant dated 11 July 2011 where it was said in answer to point 3 in the Applicant's letter of 26 May 2011:

> "Do you agree with the view that the failure to report unsettled claims was due to there being insufficient profitability in the practice to process the recoupment during 2004 – 2 March 2010?"
>
> "No. The firm demonstrated a profit. [The Second Respondent] had no knowledge of the failure to report to the LSC, other than in relation to that which he discovered in late 2004, and in relation to which he was informed that they were historical matters, which [the First Respondent] was seeking to resolve. [The Second Respondent] believed that the process of failing to report to the LSC ended at that point. Unbeknown to him and of great concern, was the discovery that the failure to report continued under the direction of [the First Respondent]."

The letter also stated:

> "LSC audit November 2004
>
> It was this audit report in late 2004 that alerted [the Second Respondent] to the historical debt. He made enquiry of [the First Respondent] and was reassured. He was entitled to rely upon [the First Respondent's] assurances as the senior partner, and the person in whom [the Second Respondent] trusted."

The Second Respondent agreed that he had said that if the First Respondent had involved him in the situation of the issue which had been inherited, they could have made a joint approach to the LSC and the Second Respondent added, "and more importantly self reported". As to why he had not self reported in any event, the Second Respondent stated that he did not know the cause of the debt; the First Respondent told him it was the historical legacy of two former partners; he knew it was a mess that needed to be dealt with. It was put to the Second Respondent that earlier in Mr Goodwin's letter it was stated:

> "[The Second Respondent] accepts that he became aware of historical unrecouped payments on account ("UPOA"). The identified shortage arose due to the failure to retain monies due back to the LSC in client account."

The Second Respondent stated that he knew that in 2011 when the letter was written and confirmed that it was not until then that he knew the debt to the LSC arose out of UPOAs. The Second Respondent stated that he knew in 2004 that there was a large list of UPOAs from the two former partners that had not been completed properly. He was asked if when the First Respondent told him they had inherited an enormous debt which former partners were responsible for, had he made no enquiries regarding how

the debt arose. The Second Respondent replied that he did not remember a conversation in those terms.

67.140 Mr Coltart pointed out that Mr Goodwin's July 2011 letter written for the Second Respondent did not refer to the events of 2008 at all. Mr Coltart asked the Second Respondent why in Mr Goodwin's letters there was no mention of events in 2008 and he agreed that he continued to play an active part at the firm regarding UPOAs. The Second Respondent stated that he left in March 2010 and the letters were written more than 12 months later; he had not taken papers with him about these matters. He denied that the absence of a reference to these events was because they did not fit the theory he was weaving regarding 2004 to 2010. He agreed that the letter from the LSC caseworker of 4 March 2008 was a further significant review; it was about the time the LSC set up a dedicated UPOA unit at its Leeds office. As to the prompt reply dated 26 March 2008 from BN to the letter, the Second Respondent said that he had written to the caseworker asking him to direct everything to BN. In respect of his own letter of 15 April 2008 sending the firm's reports on list 3 and 4 which were attached to the 2007 LSC letter to the caseworker, he had obtained information from BN; he had not asked about the large debt hanging over the firm. He could not recall specifically what efforts he had made to contact the First Respondent about this development, he had not sent copies of the letters to the First Respondent because they came to his office. He was not in a joint-venture with the First Respondent; his contribution was to respond to the caseworker and work with BN about the 200-case list and the 2008 letter which the First Respondent would not address.

67.141 Mr Coltart asked the Second Respondent about his role as LSC liaison officer. He stated that he took the role seriously. He stated that he instigated all quality standards in the firm, it had the Specialist Quality Mark ("SQM") from the LSC, Investors in People and Lexcel accreditation; he and BN had done all that.

67.142 As to what steps he had taken when he received the bombshell letter in February 2007 showing that the problem identified in 2004 had not been resolved and seemed to be getting worse when the 200 page schedule landed on his desk, the Second Respondent was asked if he had spoken to other members of the LSC Regional Committee or otherwise self-reported. The Second Respondent stated that he did not talk to his colleagues on the committee about it; he spoke to Contract Managers at the LSC when they contacted him which was rare. He had offered to send proposals at the meeting in 2004 but there was no follow-up from the LSC. The next audit took place because it had been a long time since the last one and UPOAs were again discussed but there was no follow-up until the LSC started writing in 2008, as exhibited to the First Respondent's statement. The Second Respondent was asked when the LSC came back in 2006, what efforts he made to include the First Respondent and he replied that the First Respondent had no involvement. As to what he had done after receiving the November 2006 report which referred to the auditor discussing the UPOA issue with the firm whilst at the audit and continued:

> "The firm have agreed to undertake a piece of work to review any bills that need to be submitted for payment. The auditor explained that this could have a significant impact on reducing their overall UPOA position and actually generate revenue."

The Second Respondent stated that he started to look at what could be billed. As to what efforts he had made between 2007 and 2010 to check that matters were being handled properly by the First Respondent, the Second Respondent stated "sadly none" he did not find it necessary to check on the First Respondent; he was his partner. The First Respondent always said they were in it together but he was not a party to the retention of monies and the 38 files which were a breach of the rules regarding public funding.

67.143 The Second Respondent was asked when the bombshell letter of 6 February 2007 with the 200 page schedule was received, a formal letter demanding information from the firm, what further attempts had he made to discuss the situation with the First Respondent. He stated that he had immediately scanned to the end and he had sent the list in tranches to the First Respondent and to BN. He had not copied the list to himself at home, just the letter. The First Respondent could not face it, so he and BN started to look at the reports and it became a concern. He had spoken to BN but had no recollection of the meeting per se. He had no further communication with the First Respondent about this letter; the First Respondent could not receive e-mails direct but only via his secretary as he had no computer terminal on his desk. The Second Respondent was sure that he had received the letter and had made several attempts to discuss it with him. He e-mailed the letter to the First Respondent the day he received it but there was no response. He could not say with certainty when he would have tried to discuss the letter with the First Respondent; he was sure he had made follow-up calls but he could not remember specifically. The First Respondent had refused to engage about reporting matters to the LSC; the February 2007 letter asked for three reports. The Second Respondent engaged with BN. He had spoken to the First Respondent over the course of the year but he didn't keep a record and could not remember when. As to why he had made no note about his attempts to contact the First Respondent, it was not something he would do; he regretted it now. He had no recollection of discussing the content of the February 2007 letter with the First Respondent. He confirmed that he recollected sending it by e-mail and tried to discuss it but the First Respondent was unwilling or unable to discuss with him and he did not think to report to the Applicant or the LSC. He stated that he had no discussion with BN about how the debt arose and he did not recall ever raising what had been reported in 2004.

67.144 The Second Respondent refused to accept that it was a desperate situation; he denied that his concerns must have been at fever pitch rather that he was able to start cleansing the list. There had been the audit meeting in 2004 and no follow-up for two years to 2006 and then in February 2007 three months after the 2006 audit came the letter. BN and the Second Respondent dealt with reports 1 and 2 attached to the letter and told others to deal with number 3. He received 200 pages but it transpired that only 45 files were responsible for the third party sums which had been retained. The Second Respondent took some comfort from the fact that it would have the effect of reducing the overall bill. In terms of action he had sent a memorandum to fee earners about files where there was no activity. He didn't particularly scrutinise his partner's list. He did not supervise him. He subsequently discovered that it was possible to time record (to prevent a file showing as inactive) and he wished to introduce a document to show that but as this had not been put to the First Respondent when he was giving evidence, the Tribunal was not prepared to allow it. He drew comfort from the fact that negative balances appeared on the fortnightly bank statements which reported the

"cheque run" from the LSC. He did not think the historic debt was an issue that needed to be reported.

67.145 As to the amount of time that he was in the office, the Second Respondent stated that he spent 50 to 60 days a year as a Deputy District Judge and was at the Tribunal at least twice a month; his mental health work took him to medium secure units in Manchester, Barrow in Furness and at Ashworth hospital to see detained clients. On any given day of the week he would not be there; he had a cashier and practice manager and instructed them. Mr Coltart did not dispute that he was a very busy and able lawyer but reflected on how short a time it would take him to find out about how the debt arose by asking the First Respondent and the Second Respondent replied that this was one question he regretted not asking; it never crossed his mind to ask; it did not occur to him that his partner was improperly retaining third party money.

67.146 As to his interest in the LSC's new approach to historic cases in 2008, the Second Respondent said he took an interest in what was going on with the LSC but not an intense one; it was beneficial to him as he had pre-2002 cases because of the historic legacy left by the partners. As to the press release which the First Respondent had testified was found among his papers after he left the firm, the Second Respondent stated that he cleared his desk, the drawers were empty. He took several boxes to his car and predominantly they were his accounts. He disputed that it had been found in his desk drawers. He rejected the suggestion that the receipt of May 2008 letter would have been an ideal opportunity to quiz BN or the First Respondent about the debt; it was inconceivable that there was any impropriety.

67.147 The Second Respondent stated, in respect of his letter to the LSC's DRU dated 26 September 2008 which said:

> "The sum referred to is being discharged against our continuing claims on the fund."

that the Preston BACS statements had gone into debit and the DRU was asking how the firm would repay it. It was accepted practice where sums were recouped that they were set off against future credit. He spoke to the First Respondent because he had done a large number Claim 2s. The Second Respondent agreed that this submission of a batch of historic Claim 2s to the LSC had triggered late recoupment and put Preston into debit. It was put to him that therefore he knew by the middle of 2008 that the Claim 2s were being held back and now being submitted in batches. He responded that the penny was starting to drop and it had totally dropped in 2009.

67.148 The Second Respondent referred the Tribunal to the reference on BN's letter of 6 April 2011 "PRACTICE/DM/BN/JN" and stated that there was no doubt the First Respondent was the author of the letter although it was signed by BN. Mr Coltart pointed out that this was the first time this allegation had been made to which the Second Respondent replied that he had put this to the First Respondent in one of the letters. He stated that BN was more "IT savvy" than anyone in the courtroom and he would not have put that reference right at the top of the letter. It was put to the Second Respondent that he was alleging that the First Respondent had forged BN's signature but he denied this stating that BN had adopted the letter. As to whether he wished to

find where he had previously made the allegation he declined saying that if it was not there, it was not there.

67.149 As to the absence of any reference to the UPOA problem in the firm's accounts the Second Respondent stated that as bills were posted and monies received on each individual case, UPOAs would not be reflected in the accounts. It was never discussed with the auditors; they did not raise it. The auditors prepared the accounts and he approved them; he had to take responsibility as a partner. He did not understand the intricacies of accounting to that extent. He denied that the accounts were fraudulent but admitted that there was a major item not reflected in them.

67.150 In respect of the case of SN, the Second Respondent agreed that in July 2003 he would have had conduct of the file; that the ledger showed that on 4 July 2003, £16,000 was received from the NHS Litigation Authority; and that these were third-party costs recovered; costs had been agreed at £16,000. The Second Respondent also agreed that of the sum, £10,937.64 was debited three days later and credited to office account. He also agreed that a sum of £10,399.49 related to a bill which he raised on the file. Initially he did not agree that he had undertaken this transaction in breach of the SARs on the basis that he had retained sums due back to the LSC in client account and was entitled to transfer the rest; this was a mixed receipt and he was entitled to make a transfer by way of costs because it was his money, the firm's money. He agreed that there was a second bill of £5,062.36 but when it was put to him that by 6 August 2003 all money received by way of third-party costs had been transferred to office, he stated that he had not seen the bill and so did not agree that there had been a client to office transfer on 8 August 2008. He asked to be taken to evidence of breach by him and was provided with a copy of the SARs during an adjournment, after which he was taken to the ledger for the file of SN which showed that the first bill of £10,399.49 was transferred to office from the £16,000 balance on 7 July 2003. Rule 21(3)(c) stated;

> "Any balance belonging to the *solicitor* must be transferred to an *office* account within 14 days of the *solicitor* sending a report to the Commission containing details of the third party payment."

Having considered Rule 21(3)(c), the Second Respondent agreed that the sum of £10,399.49 should not have been transferred to office account until after the LSC had been notified and that the Applicant's assertion that to have done so was in breach of the Rule was correct. However he denied that he knew that at the time and asserted that could be seen from his reaction today. He considered it to have been the job of the subsequent firm S Solicitors to complete the Claim 2, however he stated that he was not saying that it was wrong for the First Respondent to have submitted a Claim 2 later; he was being asked to recollect events in 2003. Having admitted the breach of Rule 21(3)(c), it was put to the Second Respondent that when he said repeatedly in correspondence from Mr Goodwin that he admitted liability only on a strict liability basis this was plainly incorrect. The Second Respondent agreed regarding this matter but not in reference to retention of third-party money.

67.151 The Second Respondent stated, in respect of his letter on the same file to S Solicitors dated 7 July 2003, including:

> "We confirm that we have now settled our costs with the Defendant and have been paid. There is no claim on the Legal Aid Fund and so you can report on case to them and confirm we have retained out payments on account in readiness for the claw back by them."

that he had no idea who S Solicitors were, they had the file, they took case over right at the end and they were to do the Report on Case.

67.152 In respect of his memorandum to his secretary of 11 July 2003, stating that the balances were zero and that the SN file could go dead, the Second Respondent agreed that the amount of around £5,000 remaining after that date had been transferred to office and that on his analysis that was a breach but he rejected the suggestion that he had made the arrangements, as to do that would be a breach. He agreed that he was responsible for the file and stated that he had not seen any indication that the First Respondent had any dealing with the file. He had not made the transfer and his secretary did not have authority to. He rejected the suggestion that he was lying; he was on oath. The Second Respondent stated that no one could have transferred the money other than himself or the First Respondent and explained the mechanics of transfers in the firm involving the cashier asking him to sign to confirm. As to the fact that both he and the First Respondent denied having done so, he was asked why he had not instructed Mr Goodwin to challenge the First Respondent about it. He stated that the First Respondent had every opportunity to explain the process. He could not say that it was the First Respondent because he did not have the evidence to say that, whatever inference might be drawn.

67.153 In respect of the case of TD raised by the First Respondent and the statement in his letter of 7 February 2003 to the LSC that it was "Concluded Costs being recovered", the Second Respondent did not accept that a particular former partner had dealt with it after an earlier former partner's departure. It was his understanding of the First Respondent's evidence that the earlier former partner had dealt with it. As to the transfer of the second tranche to office, £62,000 in March 2001 (£75,000 having been transferred in January 2001) it was put to him that the unchallenged evidence was that the later former partner took over the file and was responsible for the transfer to office but the Second Respondent stated that there was no evidence and he had not seen a bill and so he was not accepting it. He refuted the suggestion that he was saying he was misled; he was relying on information given to him and he had only found out when the First Respondent's witness statement was served.

67.154 Other than the SN case for which he said he had given a credible explanation, the Second Respondent testified that he was not involved in the retention of third-party funds. What they should have done in November 2004 if the reality was as the First Respondent was trying to put it, that previous partners had been retaining third-party funds, was to tell the Law Society that the Respondents had done nothing wrong and the whole matter would have been "washed out, cleaned out" and if there had been dishonesty or impropriety by the other partners, the insurance would have indemnified the Respondents.

Tribunal's Findings of Fact and Law in respect of each Respondent

67.155 The First Respondent and the Second Respondent both admitted allegations 1.1 and allegation 1.2 relating to the breaches of the SARs. They both denied allegation 1.3(i) relating to integrity and allegation 1.3(ii) relating to the good repute of the solicitors' profession/diminishing trust of the public and the First Respondent denied the additional allegation that he had acted dishonestly, alternatively recklessly and the Second Respondent denied the additional allegation against him that he had acted recklessly.

67.156 There was a direct conflict of evidence between the First Respondent and the Second Respondent about the Second Respondent's state and time of knowledge of the nature of the UPOA problem but they were in agreement that they had inherited a financial problem relating to UPOAs when they became the two remaining equity partners in the firm. The Applicant's allegations related to the period 2004 to 2010. No former member of the firm apart from the First and Second Respondents was called to give oral evidence or to make any witness statement and it was not for the Tribunal to express any view about how the firm had conducted its relationship with the LSC before the time the subject of the allegations or in respect of any evidence given by the Respondents in respect of the earlier period. It was relevant only insofar as it formed the context for what had occurred subsequently.

67.157 There was an issue about the admission of accounting documents into evidence and the Tribunal had decided not to admit it. The absence of any reference in the firm's management and annual accounts to the UPOA problem was not the subject of any of the allegations and the Tribunal wished to make it clear that nothing hinged on the issue in its decision making.

67.158 During the hearing there were frequent references to BN, the Practice Manager of the firm at the material time. The Tribunal did not have the benefit of hearing from him; the First Respondent mentioned in evidence that he had recently been seriously ill. The Tribunal was conscious that some of the evidence relied on from him was hearsay and attached weight to it accordingly.

Findings of the Tribunal Allegations against the First Respondent

68. The allegations against the First Respondent, Denis Francis McKay on behalf of the Solicitors Regulation Authority as amended with the consent of the Tribunal were that:

Allegation 1.1 In breach of Rule 21(3) of the Solicitors Accounts Rules 1998 ("the SARs") they did not retain sums representing the payments received from third parties in legally aided cases in client account; and

68.1 The Tribunal had regard to the submissions for the Applicant and for the First Respondent and the Second Respondent, and the evidence including the oral evidence of the First Respondent, the Second Respondent, the IO and Ms FT of the LSC.

68.2 Although there was some confusion about his date of knowledge of the financial situation between what the First Respondent described as his somewhat rambling

interview with the IOs in 2011 when he agreed it was around 2005/2006, and in cross examination by Mr Goodwin when he said it was pretty apparent after the LSC audit in 2004 although he believed it had arisen earlier, the First Respondent frankly admitted the position regarding recovery and retention of costs from third parties in evidence and in his witness statements and the strategy to resolve it. He agreed with the statement in the executive summary of the FI Report:

> "The firm had not consistently reported to the LSC following recovery of costs and disbursements from third-party insurers…
>
> The firm had not held these monies due to the LSC in client bank account. To the contrary, the monies due to the LSC had been transferred from client to office bank account and additional bills had been generated in respect of these additional monies transferred. The original bills would have been generated earlier during the clients' claims at the time of the receipt of the payments on account from the LSC."

However the First Respondent disputed the statement in the FI Report that the firm was effectively paid twice as a direct result; he stated that there were monies which had been paid by the LSC which were (also) paid by a third-party. The Tribunal accepted that the debt of £3 million to the LSC referred to in the 2004 audit must have included some Claim 1 cases such as any legal aid practice would have in its case mix. In interview with MS of the LSC on 29 November 2010, the First Respondent admitted that he had sole responsibility for submitting Claim 2s from 2006 onwards. The First Respondent further admitted his personal involvement when taken through various individual cases, M, O, B and H where he admitted that he was actively involved in the recovery of funds and did not submit Claim 2s. In cross examination by Mr Goodwin, the First Respondent was referred to the transcript of his interview with the IO and a senior IO SW in 2011 and confirmed his admissions of his personal involvement in the billing process and that he personally, as opposed to the fee earner or the partner dealing with legal aid had initiated a bill on a recoupment where the money should have gone back to the LSC. The First Respondent agreed with the contents of this extract of the interview and accepted that he was a responsible partner. On the basis of the evidence and of his admissions, the Tribunal found allegation 1.1 proved on the evidence in respect of the First Respondent to the required standard; indeed it was admitted.

69. Allegation 1.2 In breach of Rule 7 of the SARs, they failed to remedy breaches of the SARs promptly on discovery;

69.1 The Tribunal had regard to the submissions for the Applicant and for the First Respondent and the Second Respondent, and the evidence including the oral evidence of the First Respondent, the Second Respondent, the IO and Ms FT of the LSC. It was inherent in the strategy of delaying submission of Claim 2s that breaches of the SARs were not remedied promptly upon discovery. The Tribunal agreed with the Applicant's submissions in the Rule 5 Statement that no or no adequate steps were taken to remedy the SAR breaches. Monies belonging to the LSC which had not been retained in the client account were not replaced or repaid and there was no attempt before 2010 to come to an agreement with the LSC about how the monies should be

repaid. The Tribunal found allegation 1.2 proved on the evidence in respect of the First Respondent to the required standard; indeed it was admitted.

70. Allegation 1.3 By not reporting payments of costs received from third parties to the Legal Services Commission ("the LSC") in legally aided cases and/or not retaining those sums in client account from December 2004 onwards they:

(i) failed to act with integrity, prior to 1 July 2007 contrary to Rule 1(a) of the Solicitors Practice Rules 1990 ("the SPR") and thereafter contrary to Rule 1.02 of the Solicitors Code of Conduct 2007 ("the Code"); and/or

(ii) prior to 1 July 2007 acted in a way which was likely to or did compromise or impair the good repute of the solicitor's profession contrary to Rule 1(d) of the SPR and thereafter acted in a way that was likely to diminish the trust placed by the public in them or the legal profession contrary to Rule 1.06 of the Code.

70.1 The Tribunal had regard to the submissions for the Applicant and for the First Respondent and the Second Respondent, and the evidence including the oral evidence of the First Respondent, the Second Respondent, the IO and Ms FT of the LSC. The Tribunal agreed with the submissions for the Applicant that on his own evidence the First Respondent was fully aware of the significant UPOA problem at the end of 2004/beginning of 2005 following the LSC's 2004 audit. In particular, he knew by that time the firm had received very significant sums of money from third parties which sums the firm had failed to report to the LSC as it ought to have done. He admitted in interview with MS of the LSC on 29 November 2010 that he had sole responsibility for submitting the Claim 2s from 2006 onwards. His letter to the Second Respondent dated 4 March 2010 included:

> "The facts, which can be clearly demonstrated are that we have both been aware of the LSC position from [former partner's] departure and year in year out… we have bitten the bullet and accepted which will have to continue to work on recoupments and reduce the debt over time…"

There was also his letter to the Applicant of 3 May 2011 when he admitted that after a former partner's departure from the firm in 2001:" the size of the problem… would eventually become evident to… [the Second Respondent] and me..." The First Respondent also accepted in his oral evidence that the LSC was reliant upon the firm's integrity (and contractual obligations) to report when costs were being recovered from third parties. FT of the LSC also testified to that effect. The First Respondent was also under a contractual obligation to notify the LSC but, in any event, the Tribunal agreed with Mr Levey's submissions this was something that he ought to have done as a matter of integrity. Rather than bringing the problem to the attention of the LSC which would inevitably have led to the relationship between the firm and the LSC being terminated immediately, he chose not to do so. Instead the firm continued to carry out legal aid work and continue to profit from its relationship with the LSC. The Tribunal considered that it was also relevant in determining the issues of integrity and public trust that the First Respondent benefited personally from the breaches. More than £1.5 million should have been retained to the client account

and held to the account of the LSC and at the appropriate time accounted for; instead those monies enured to the benefit of the firm as a whole and in particular the Respondents who were the only partners in the firm and who shared in the purported profits of the firm. In fact it was to be inferred that the firm ought not to have been trading at all given the scale of the debt owed to the LSC and the firm's inability to repay that debt.

70.2 The Tribunal considered that in the circumstances in which the First Respondent was placed, a solicitor who was fulfilling his obligations both under the SPR and the Code had no alternative but to report the true position to the Applicant and to the LSC as soon as it became apparent to him even if this meant the collapse of the firm. In adopting the strategy of keeping the firm afloat by failing to inform the LSC of this significant amount of public money which was owed to it and attempting to discharge the liability over a period of time however misguidedly that plan was adopted, the Tribunal found by employing an objective standard which all the parties agreed was appropriate in respect of determining a solicitor's integrity, that the First Respondent, had fallen short of the standard set out in the case of Bolton v The Law Society [1994] 1 WLR 512 and had not acted with integrity, probity and trustworthiness. The Tribunal found allegation 1.3(i) proved on the evidence to the required standard.

70.3 The Tribunal also considered that in acting as he had, particularly by his strategy of deception by not coming clean which continued to leave at risk a very large amount of public money of around £1.5 million and an unknown amount of that having been lost, the First Respondent's conduct was likely to or did compromise or impair the good repute of the solicitor's profession under the SPR prior to 1 July 2007 and thereafter was likely to diminish the trust the public placed in the First Respondent or the legal profession contrary to the Code. Accordingly the Tribunal found allegation 1.3(ii) proved on the evidence in respect of the First Respondent to the required standard.

71. It was also alleged that the First Respondent acted dishonestly (alternatively, recklessly i.e. that he acted with a reckless disregard of his professional obligations) from 2004 onwards. However it was open to the Tribunal to make a finding that the Respondents acted dishonestly or recklessly (as the case may be) only from a later period.

71.1 The Tribunal had regard to the submissions for the Applicant and for the First Respondent and the Second Respondent, and the evidence including the oral evidence of the First Respondent, the Second Respondent, the IO and Ms FT of the LSC. The Tribunal employed the two limbed test in Twinsectra in order to determine the allegation of dishonesty against the First Respondent:

> "… there is a standard which combines an objective and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest."

The Tribunal accepted that the evidence presented by the Applicant in the Rule 5 Statement and the admissions of the First Respondent showed that the First Respondent knew for many years what was going on and developed a strategy in respect of managing the submission of Claim 2s including withholding them on occasion and in some cases he personally negotiated the costs which were not reported to the LSC. The Tribunal had no doubt that by the standards of reasonable and honest people this strategy of withholding information and payment from the LSC was dishonest.

71.2 The Tribunal went on to consider the First Respondent's state of mind in respect of the subjective test in Twinsectra. The Tribunal had regard to the many hours of testimony that it had heard from the First Respondent. The Tribunal found the First Respondent to be a compelling witness; he presented as someone who had inherited a bad situation and disastrously mishandled it. The Tribunal had to determine whether in doing so he had acted dishonestly. The First Respondent gave evidence that the firm's financial situation had become unbalanced in that it had expanded its legal aid work and related staffing in an area with which he had not been personally involved and had drawn down POAs, both to such an extent that there was not sufficient cash flow to meet any necessary repayments to the LSC at the conclusion of a case. In interview with the IO, he explained that monies coming into the firm's two legal aid contracts which were substantially in debit were not actually coming into the office account:

> "They're simply going in to reduce the debit."
>
> …
>
> And what happens there, and what has happened there, is that, I'm in an unenviable position of having to pay the salaries, the expenses which rather farcically are being asked for to pay a report for a doctor or a report for a specialist that is still coming into the Legal Aid credit but it's not actually been there for me to draw, I have to draw on it and I have to use my own money to do so. So that's something which is very concerning."

The Tribunal found that the evidence supported this analysis from 2004 onwards. The Tribunal also found that the First Respondent was immensely proud of and committed to the firm of which he was a partner and to its staff and that he was in thrall to what he perceived to be its high reputation; he described it as a "flagship" practice in clinical negligence, such that he completely lost sight of his overriding obligations as a solicitor because risking closure of the firm by informing the LSC of the true position when he discovered it, was unthinkable to him; in his words a disaster that he could not contemplate. The Tribunal found that the First Respondent had mixed motives; he wanted both to save the firm and to repay the LSC the significant amount of money which it was owed. He had a pious hope that he could pay the LSC off over a period of time, he said hopefully in four or five years. His admitted conduct had involved a clear strategy to delay reporting successful case outcomes to the LSC and holding onto monies due to the LSC which had the effect of enabling the firm to continue in existence and the partners to continue to take their drawings. Once the true position was exposed there was convincing evidence that the First Respondent made strenuous efforts to close the practice in an orderly way until intervened into in

order to raise the maximum amount of money to repay the LSC. In a letter to SG of the LSC of 30 March 2010, the First Respondent said:

> "You will appreciate how vitally important this aspect of the practice is to us as we are committed to reduce the LSC debit as I have previously demonstrated, particularly by our Preston account in the short term…"

71.3 The First Respondent gave evidence that he did not consider himself to be a legal aid practitioner (in terms of clinical negligence and family work) but admitted that he undertook legal aid work when his own commercial area was involved. The First Respondent stated that he was never involved personally with the LSC audits which the Second Respondent did not challenge; he dealt with costs recoveries but he had no contact with legal aid staff until the visits of SG and then FT and others from the LSC in 2010 when he presented them with the schedule of 43 outstanding cases where costs had been recovered but not accounted for to the LSC totalling over £1.5m. The Tribunal was satisfied that whoever was responsible initially, the First Respondent had not created the situation the he found himself in at the end of 2004.

71.4 The Tribunal took into account the testimonials which had been provided for the First Respondent and noted what they said about his honesty and probity. The Tribunal had the benefit of hearing the First Respondent give evidence for many hours in the witness box; its view of him as a witness is set out under allegation 1.3 above. The Tribunal had noted Mr Coltart's submission that while his efforts to save the firm and maximise the money available to repay the LSC occurred after the material period 2004-2010, the Tribunal needed to take into account whether the First Respondent believed that he would ever be in a position to repay the LSC before "the balloon went up" in February 2010. Mr Levey had referred the Tribunal to the First Respondent agreeing with him that his experience of the February 2010 meeting with SG of the LSC had been a "cathartic" experience and interpreted that as meaning that his withholding of information from the LSC before that had been knowingly dishonest. Mr Coltart had argued against that. The Tribunal found this exchange between Mr Levey and the First Respondent was the only direct evidence it had as to the First Respondent's state of mind at the material time. The Tribunal considered having seen the First Respondent give evidence on that point that the First Respondent was just as likely to have been experiencing relief that his unprofessional conduct in the breach of the SARS and his behaviour as a solicitor was now out in the open. Whether the First Respondent's belief in the strategy was reasonable or as the Tribunal considered it to be a pious hope, the Tribunal did not consider that there was any documentary evidence to support subjective dishonesty rather that he had acted in an extremely misguided way but nevertheless with the best of intentions. The Tribunal considered that there was considerable resonance between this case and the Waddingham case; it found that the First Respondent may probably have been subjectively dishonest but it could not be sure based on the oral evidence, the testimonials as to his probity and the absence of documentary evidence showing subjective dishonesty. Accordingly the Tribunal did not find that the allegation of dishonesty had been proved against the First Respondent to the required standard.

71.5 However, the Tribunal considered that the First Respondent had ignored his professional obligations in order to attempt to achieve what he believed to be the best solution for the firm, the LSC and for himself. The Tribunal considered that in

behaving as he did the First Respondent had indeed showed a reckless disregard for his professional obligations particularly regarding public money and had preferred to save his firm in preference to his duties as a solicitor. Accordingly the Tribunal found the allegation that the First Respondent had behaved recklessly from 2004 onwards proved to the required standard.

Allegations against the Second Respondent

72. The allegations against the Second Respondent, Stuart Roger Turner, on behalf of the Solicitors Regulation Authority as amended with the consent of the Tribunal were that:

Allegation 1.1 In breach of Rule 21(3) of the Solicitors Accounts Rules 1998 ("the SARs") they did not retain sums representing the payments received from third parties in legally aided cases in client account; and

72.1 The Tribunal had regard to the submissions for the Applicant and the First Respondent and the Second Respondent, and the evidence including the oral evidence of the First Respondent, the Second Respondent, the IO and Ms FT of the LSC. The Second Respondent had initially admitted this allegation on a strict liability basis only as a principal in the firm. The Tribunal had noted the exchange between Mr Coltart and the Second Respondent in cross examination. In respect of his admission while giving evidence that in the case of SN he had breached Rule 23(1)(c), Mr Coltart referred the Second Respondent to what he had said in an interview:

"IO:	…If this backlog didn't exist and monies weren't being retained at what point should of these, should these amounts have been reported to the LSC? Amounts due to the LSC on settled cases where there have been inter-parties or equivalent. At what point should they have been reported?
Second Respondent:	Oh sorry are you referring to the Solicitors Accounts Rules? Is it 14 or 21 days I can't remember exactly?
IO:	I think it's
Second Respondent:	21.3
IO:	21.3 yes. So
Second Respondent:	I am aware of 21.3
IO:	Would the answer just been (sic) that they should have been reported in accordance with Rule 21.3

Second Respondent: No the answer is that the money recovered should have been placed in client account until the matter is reported and recoupment shows on your account and then you transfer the money across."

The Second Respondent denied that it was always his understanding as set out in the interview. However during the course of cross examination he had ultimately admitted that he had made improper transfers in the case of the client SN and on that basis and on the basis of the evidence adduced in respect of that client, the Tribunal found allegation 1.1 proved against the Second Respondent generally and in the case of SN beyond strict liability to the required standard.

73. Allegation 1.2 In breach of Rule 7 of the SARs, they failed to remedy breaches of the SARs promptly on discovery; and

73.1 The Tribunal had regard to the submissions for the Applicant and the First Respondent and the Second Respondent, and the evidence including the oral evidence of the First Respondent, the Second Respondent, the IO and Ms FT of the LSC. The Second Respondent admitted this allegation on the basis of strict liability and the Tribunal found allegation 1.2 proved on the evidence in respect of the Second Respondent to the required standard; indeed it was admitted.

74. Allegation 1.3 By not reporting payments of costs received from third parties to the Legal Services Commission ("the LSC") in legally aided cases and/or not retaining those sums in client account from December 2004 onwards they:

(i) failed to act with integrity, prior to 1 July 2007 contrary to Rule 1(a) of the Solicitors Practice Rules 1990 ("the SPR") and thereafter contrary to Rule 1.02 of the Solicitors Code of Conduct 2007 ("the Code"); and/or

(ii) prior to 1 July 2007 acted in a way which was likely to or did compromise or impair the good repute of the solicitor's profession contrary to Rule 1(d) of the SPR and thereafter acted in a way that was likely to diminish the trust placed by the public in them or the legal profession contrary to Rule 1.06 of the Code.

74.1 The Tribunal had regard to the submissions for the Applicant and for the First Respondent and the Second Respondent, and the evidence including the oral evidence of the First Respondent, the Second Respondent, the IO and Ms FT of the LSC. No allegation of dishonesty was brought against the Second Respondent. The Tribunal had to consider allegations relating to his integrity and affecting the good repute of the profession and after July 2007 diminishing public trust.

74.2 The Tribunal considered the Second Respondent's state of knowledge which was crucial to determining these allegations. The Tribunal noted the definition in the firm's contract with the LSC of the role of Liaison Manager:

> ""Liaison Manager" means the member of your personnel nominated by you to liaise with us on matters concerning this Contract;"

In that role the Tribunal found that the LSC addressed key communications personally to the Second Respondent and he was referred to in the audit documentation in a way that showed he was personally engaged. The Tribunal did not find credible his explanation in evidence that he just had a "meet and greet at the door" role when the LSC came to visit the firm. On 4 December 2004, the LSC sent personally addressed to him an audit report in which he was described as "Quality Rep", referring to "a significant amount owed under UPOA of £1.6 million" and stating:

> "The figures owed under UPOA were discussed with [the Second Respondent] for both offices. As there were a large number of cases involved, a report of the oldest "dead" cases was provided to the firm. Due to the extent of UPOA outstanding, [the Second Respondent] requested a full list of cases involved."

The Tribunal found that by 2004 it was clear and that the Second Respondent knew at least that UPOAs were running very high, that the LSC was expressing concern about the sheer level of the firm's UPOAs and he knew that the firm was expected to do something about it as the audit report went on to refer to:

> "Corrective Action -The firm have been sent a full report of all cases with outstanding payments on account. They will submit a proposal on how they will report the current situation of these cases to us."

When the Second Respondent received the report he e-mailed it to BN on 13 December 2004 and BN began to prepare a report. He said in his e-mail to BN on 13 December 2004:

> "This is the outcome of the latest Audit with the LSC. Can you please begin to prepare a response and let me know when you are ready for my input (if any). Please note that the LSC require a response within 21 days which is 29th December. Many thanks."

On 26 January 2005, BN e-mailed in response, forwarding the message that BN had sent to the LSC on 24 January 2005 in which he said that the Second Respondent:

> "will shortly be submitting a proposal on how we will report on the current situation of cases with outstanding payments."

Therefore the Tribunal found that from 26 January 2005, the Second Respondent knew that the LSC expected a response. He was the firm's legal aid representative and he did not contact BN and ask what he was doing nor did he reply to the LSC and on his evidence he did nothing else. His attitude was that the initiative lay with the LSC and that its interest came and went.

74.3 The Second Respondent's case was that he then received assurances from the First Respondent. Mr Goodwin's letter of 11 July 2011 to the Applicant indicated that the

Second Respondent became aware of historical UPOAs and stated that "The identified shortage arose due to the failure to retain monies due back to the LSC in client account." It was disputed when he became aware but later on in the letter there was a reference to the November 2004 legal aid audit and it was stated:

> "[The Second Respondent] was also alerted to a high number of unrecouped payments on account. This came as a surprise to [the Second Respondent] as he had no knowledge. [The Second Respondent] asked Mr [JF] [LSC who attended the closing meeting] to provide him with full details, which he did in December 2004."

There was no explanation in the 11 July 2011 letter as to why the Second Respondent did not respond to the LSC; he said he sent the LSC's report to BN as the person best placed to deal with a response. The Tribunal studied Mr Goodwin's letter in detail and noted as to the Second Respondent's state of knowledge that it said:

> "...[The Second Respondent] spoke to [the First Respondent] about the UPOAs. The impression [the Second Respondent] formed following his conversation with [the First Respondent] was that these were historical problems caused by [former partner] and [former partner] who had by now left the firm ([...] having left the partnership in April 2001 and [...] in April 2004).
>
> Whilst [the Second Respondent] was, of course, anxious about the UPOAs, he was reassured by [the First Respondent] that he would work through it and that it was an area that could be resolved satisfactorily. [The Second Respondent] viewed the firm as a successful law firm, and the issue of the UPOAs could be addressed over time."

The Tribunal considered that there was other evidence to support the level of the Second Respondent's knowledge particularly of the workings of the firm's strategy. In Mr Goodwin's 11 July 2011 letter, it was stated:

> "The First Respondent and Mr [BN] are wrong to suggest that [the Second Respondent's] level of involvement and/or knowledge is greater than suggested by [the Second Respondent]. The BACS statements that [the Second Respondent] received identified monies being received from the LSC, but also monies being recouped by them. He had no reason to believe that matters were not being conducted in a satisfactory way, and that [the First Respondent] was dealing with the historical UPOAs, of which he [the Second Respondent] first became aware in late 2004."

On his evidence despite the fact that he was the legal aid partner for the LSC, the Second Respondent left the matter entirely in the hands of the First Respondent while as legal aid partner he received all the BACS statements identifying legal aid payments and recoupments. The Tribunal found from the evidence, including that of the Second Respondent himself, that he kept a very close, indeed daily, eye on the firm's finances. This meant that he was by no means in a state of ignorance: if the problem was a matter mainly of Claim 2s, he would expect to see recoupment in the BACS statements because that was what the First Respondent was doing and if the problem had arisen from failure to submit Claim 1s, he would expect to see monies

coming in as the cases were finalised. Either way he would have knowledge. The idea that somehow through no fault of his own he was isolated from the true position the firm was in, the Tribunal viewed as simply implausible. The Tribunal therefore concluded that the Second Respondent was not kept in the dark; he did know what monies were being received and recouped from the BACS statements; so he saw what was actually happening. Furthermore the Tribunal considered that it was again simply not credible that the legal aid partner made no enquiry as to the extent and the nature of the problem although he was supposedly "anxious" about it or that he was just content to accept at face value that it was a historic problem that could be addressed over time. In reaching its conclusions the Tribunal has had to take into account the credibility of the Second Respondent: regrettably and especially having seen him in the witness box the Tribunal has concluded that he was not a credible witness at all. Indeed implausibility and lack of credibility was a thread that ran through much of his evidence and is referred below to at paragraph 74.13.

74.4 As to the assurances which the Second Respondent maintained that he had received in 2004 from the First Respondent, the Tribunal considered what assurances the Second Respondent could have been given by reference to what the First Respondent knew to be the nature and extent of the UPOA problem and how it could be resolved. The Tribunal agreed with Mr Levey that the problem involved Claim 2s and the only way that the First Respondent could properly sort the problem out was by contacting the LSC and making an arrangement to repay over time or submitting all the outstanding Claim 2s and waiting for the crash. An assurance by the First Respondent that this was the approach to be adopted was the only proper assurance that the Second Respondent could rely on. It was known that all the outstanding Claim 2s were not submitted at once and there was no reference in the evidence including from FT the witness from the LSC to any repayment arrangements being made with the LSC; indeed ultimately the LSC had to sue both Respondents in an attempt to recoup its money. Alternatively if the Second Respondent relied on an assurance that the problem was to be addressed by the strategy of delaying the submission of Claim 2s then he knew that that was an improper approach.

74.5 If as the Second Respondent asserted in giving evidence, the problem involved Claim 1s, it was obvious that the firm would have expected to derive a huge benefit from clearing them bearing in mind its admitted cash flow problems. The statement in Mr Goodwin's letter that the Second Respondent was "anxious" about the UPOAs, was therefore plainly inconsistent with such a positive expected outcome. The Tribunal also noted and attached considerable significance to the fact that the issue of Claim 1s as an explanation was, despite the provision of witness statements, not even raised by the Second Respondent expressly until he gave evidence in the witness box under cross examination.

74.6 There was a further important problem with the alleged assurances; what was significant in the Tribunal's view was the inability of the Second Respondent to state properly and clearly just what assurances he allegedly received from the First Respondent, even under cross examination. The account he gave of his state of knowledge of the true position facing the firm was strikingly vague and lacking in specifics and again simply unbelievable. Had the 2004 assurances amounted to no more than general assurances on the lines that the First Respondent would sort matters out over time the Tribunal considered that it would have been plainly untenable for

the Second Respondent to have relied on them because the firm was in no position to repay the debt as he well knew.

74.7 The First Respondent denied giving any assurances. The Tribunal had to consider the matter to the criminal standard; taken in isolation and despite the credibility difficulties characterising the Second Respondent's evidence it was just possible that some assurance might have been given in 2004; but the Tribunal did not know what it was and the Tribunal therefore considered that the likelihood of any assurances having been given needed to be considered in the light of what subsequently happened as the Second Respondent alleged he received further assurances from the First Respondent. On 21 November 2006, SG of the LSC sent a letter to the Second Respondent heralding an audit visit on 27 and 28 November 2006. Two months after that, the LSC wrote on 6 February 2007 to the Second Respondent what he described in interview as the "bombshell" letter which he emailed to himself at home, (he stated in evidence that he emailed important letters home and that as a partner he was entitled to management information). Mr Goodwin's letter of 11 July 2011 described the letter rather differently:

> "The next significant event in the chronology was when the Second Respondent received a letter from the LSC dated 6th February 2007 which related to the outstanding payments on account. I attach a copy of the letter for your consideration. It asks for specific information regarding cases and bearing in mind [the First Respondent] and Mr [BN] worked out of the Blackpool office, [the Second Respondent] sent the letter on to them to be dealt with."

74.8 It was the Second Respondent's case that he had again relied on assurances from the First Respondent in 2007. Later in Mr Goodwin's letter it was stated:

> "... 2007 following the LSC's letter, but upon which [the Second Respondent] again relied upon the assurances provided by [the First Respondent]."

74.9 As Mr Levey pointed out in his closing submissions, this explanation faced precisely the same difficulties as had the earlier one; if this was a Claim 2 problem there were no assurances that the First Respondent could have given the Second Respondent which would have led the Second Respondent to believe that the problem was being properly sorted out because the firm was not in a position to repay the debt.

74.10 Additionally, the First Respondent had clearly failed to deliver on any earlier assurances and if the Second Respondent was to be believed had kept the position secret from the Second Respondent for two more years from 2004. As Mr Levey pointed out, the Second Respondent gave inconsistent accounts in oral evidence of what he did in respect of the 2007 letter; he said that he had attempted unsuccessfully to contact the First Respondent, but in Mr Goodwin's July 2011 letter his case was that he had received and relied on assurances. In the light of what the Second Respondent said about 2007 his account of what happened in 2004 now became utterly implausible. The Tribunal was again not told what the assurances were in 2007 and there was no supporting evidence that they had been given. If 2004 assurances had been given and relied on they had not been delivered on and it was not plausible that the Second Respondent would rely on a second set of assurances when he stated

in oral evidence that he could not make contact with the First Respondent and there was no e-mail trail of any attempts to do so. Taken overall the whole thing did not make sense. The Tribunal found on the basis of the evidence of the First Respondent which it found to be wholly credible (see paragraph 74.14 below) and on the implausibility of the account given in evidence of the Second Respondent that the First Respondent had given no assurances either in 2004 or 2007 to the Second Respondent that the UPOA problem had been sorted out and the Tribunal further found that the Second Respondent did not believe that the problem had in fact been sorted out. Also based on this evidence, supported by (the Tribunal giving due allowance as to weight so as not to rely on hearsay in isolation) the evidence derived from BN the Tribunal considered and found that the Second Respondent knew that the LSC was not aware of the true position but rather than telling the truth he continued to hope that the problem would be earned out over time or that the LSC might one day write off the debt.

74.11 Then in 2008 the legal aid account for the Preston office went into debit; this was because the First Respondent was putting Claim 2s through (in evidence the Second Respondent attributed this to a drive by the LSC to get counsel to clear their UPOAs, which the First Respondent also referred to). The debit situation in Preston did not seem to raise any alarm bells with the Second Respondent even though he was working in that office and he was the legal aid partner. He relied on it being inconceivable that colleagues would retain monies recovered from third parties. The Tribunal found that the sheer scale of the recoupment showed that it could not have been inconceivable that people had been holding back Claim 2s. It was in contrast entirely conceivable. It was an absurd position for the Second Respondent to adopt as Mr Levey submitted and indeed the Second Respondent's position was cumulatively absurd. In this connection the Tribunal noted the inconsistency in the Second Respondent's letter to the First Respondent of 25 February 2010 as against his reliance on the Claim 1 explanation. Mr Levey referred him his letter of 25 February 2010 to the First Respondent in which he had said:

> "It is also a fact that the overdraft is at its limit is (sic) because a significant amount of income each month is diverted to make payments to the LSC in respect of unrecouped payments on account. Again this is in my view directly as a result of your conduct. I therefore have no proposals towards repaying half of the overdraft when I am not responsible for its making."

It was put to him that he knew that the debt repayment was not made by resurrecting dead cases and having belated legal aid assessments done but by using the overdraft slowly but surely to repay money. The Second Respondent stated that the First Respondent had put the BACS statement into debit and the LSC would recover that debt over time. In August 2008 he, the Second Respondent, wrote to the DRU about that. The Tribunal did not find the Second Respondent's reply to Mr Levey convincing but yet another indicator that he knew that the problem was one of Claim 2s.

74.12 The Tribunal also noted the explanation of his position which the Second Respondent gave in respect of leaving the firm. Mr Coltart referred the Second Respondent to his interview with the IO and senior IO which included:

"SW:	With hindsight you said you would do things differently.
Second Respondent:	So, when you don't know that your partner is carrying out the practice that he is, you don't know to look for it. My wife suggested to me, you can't be expected to go in … and start going through all of his books and she's right to the extent that a partnership has to work on trust and I trusted him to run.
SW:	He does.
Second Respondent:	The business properly.
SW:	Put it another way, you were certainly, you can say that you were put on notice that there was a potential problem back in 2004 from what we've seen today.
Second Respondent:	Yes
SW:	There was a letter of 2007.
Second Respondent:	Yes
SW:	You didn't depart till nearly three years after that, 2010 you went didn't you?
Second Respondent:	Yes I departed in 2010.
SW:	Yes alright two and half years after that then.
Second Respondent:	Yes
SW:	umm
Second Respondent:	But I'm looking for a way out.
SW:	Yes
Second Respondent:	I'm looking for a way out, I am frightened to death of going on my own or trying to find another firm to bolt myself on to because of my own overheads and my own, yes my own needs in terms of income and so I am not in a position to just depart in the way that

seems an easy thing to do by the three of us sat round.

SW: No no I'm more thinking along the lines that you were put on notice that there may be a problem should you have really taken more of a proactive stance.

Second Respondent: Yes

SW: Have you been naive in a way?

Second Respondent: I have been absolutely stupid.

SW: OK

Second Respondent: And it's my it's the nature of me, I thought you were going to ask me why I'd not taken steps to report the matter and that is because I'm, my answer I'm asking the question for you, my answer is that I'm not a malicious person, and I was frightened of the consequences of doing that, I was feeding twenty mouths per month in terms of staff members and I didn't want all of that to …

SW: But as a panel solicitor you knew the rules didn't you? You knew the.

Second Respondent: I think it's clear that I know what the rules are in terms of me quoting the rules to you this morning and I'm just absolutely terrified of rocking the boat so that it would have an effect on other people's lives for which I would feel responsible for and I'm not a malicious person and I didn't want that to happen."

74.13 While it was for the Applicant to prove the allegations to the required standard, the Second Respondent's credibility was crucial to his defence of the allegations. The Second Respondent was a man of considerable achievement in the legal profession, a District Judge and had held very senior positions including on an LSC committee; he had prosecuted cases for the Applicant at the Tribunal and the Tribunal had heard from a fellow Judge who had taken the trouble to come and give character evidence on his behalf and who could not have spoken of him in more glowing terms. In such circumstances the Tribunal should be slow to disbelieve him but the Tribunal had not found him to be a particularly credible witness for the following reasons:

- His attitude in the witness box had been unhelpful and almost obstructive. The Second Respondent's evidence was long-winded and he made speeches which the Tribunal considered were designed to confuse the Tribunal and his cross examiner. The Tribunal found troubling the Second Respondent's assertions of serious misconduct against other, such as his allegation that the First Respondent had written the letter that BN sent to the Applicant which was made in such a way that it could not be tested in cross examination of the person concerned and also his justification of the approach by saying that he had no evidence to back up the allegation so that cross examination would not be appropriate. The Tribunal considered it was a deliberate attempt to smear the First Respondent in the eyes of the Tribunal in circumstances where he would not have the opportunity to respond. The Second Respondent was a District Judge and former prosecutor at the Tribunal and he knew well how its procedure operated.

- The Tribunal noted that the Second Respondent displayed a very sharp memory for particular matters some years before but an unconvincing vagueness both about the crucial issue of the assurances and the earliest date or dates when he was prepared to accept he knew the truth which he attempted to stretch out to late 2009 as the inexplicable gulf between receipt of the bombshell letter and his leaving the firm opened up in cross examination.

- He had showed a keen and impressive understanding in giving evidence of the civil legal aid process and of legal aid costs which was to be expected of a District Judge and experienced former legal aid practitioner but then asserted that when his firm of which he was the legal aid partner and one of only two equity partners at the material time, encountered a major legal aid costs problem, he had asked no questions about it but had relied totally on his partner to sort it out because he was a busy practitioner and out of the office a lot. He and his partner trusted each other although they did not get on very well. He was very keen on the firm's finances and was aware that it had cash flow problems but he said that he had made no investigations. If taken in isolation this was an extraordinary act of naivety but with the other factors simply beggared belief as to his credibility.

- The Second Respondent had advanced a positive case, the last element of which was all about Claim 1s. Mr Goodwin had approached his defence on the basis that the problem was caused by failure to submit Claim 2 forms and then the Second Respondent introduced a completely new defence from the witness box to the effect that the problem was all caused by the non-submission of Claim 1s. This defence had never been foreshadowed and was sprung from the witness box in cross examination. The Tribunal acknowledged that some firms did get into administrative difficulties in dealing with legal aid; fee earners did not always finalise cases and worked instead on the basis of keeping POAs in unsuccessful cases instead of submitting Claim 1s and balancing their legal aid account however unacceptable that might be, but the Tribunal found that the evidence did not indicate that was a significant problem that existed within this firm.

- The Second Respondent's overall credibility was also seriously undermined by his explanation of the Rule 21(3) matter in the case of SN. It was recorded in the notes of his interview with the IO that he knew and understood the rule and even commented on the particular time limit for a report to the LSC mentioning that it might be 14 or 21 days. The Tribunal found that he knew what he was doing at the time and only persistence and making him go through the details of the rule caused a true picture to emerge.

- The Tribunal had also had regard to the submissions made in respect of the degree of the Second Respondent's compliance with the directions which the Tribunal had made in September 2013. The Tribunal considered that it went too far to draw an adverse inference although the Second Respondent's approach had not been helpful. The Tribunal noted in terms of the directions made by the Tribunal by which it was intended to address the allegations that he did not comply but merely repeated information which was already available.

74.14 In support of his own credibility, the Second Respondent had attacked the credibility of the First Respondent based on the allegation made by the Applicant that the First Respondent was dishonest. The Tribunal had found the First Respondent not to be dishonest, although on the basis that it was not sure, but the Tribunal otherwise found the First Respondent's evidence to be wholly credible. The First Respondent stated that the Second Respondent knew of the Claim 2 problem all along. The Tribunal found that there was nothing inconsistent in the First Respondent's evidence in contrast to that of the Second Respondent. The Tribunal also found that there was no real reason for the First Respondent not to tell the Second Respondent about the costs retention problem. The evidence of BN also supported the First Respondent's. BN's letter to the Applicant was quite clear. The only factor undermining BN's evidence was that he was loyal to the First Respondent and that his wife was the First Respondent's secretary but he had also been described as loyal to the firm. While BN's evidence was hearsay, the IO gave evidence that he had met BN as had FT of the LSC and both formed a favourable view of his honesty and straightforwardness.

74.15 The Tribunal considered it appropriate to record its findings in respect of the case of the client TD where costs had already been recovered from a third-party when the Second Respondent wrote to the LSC regarding this case as one of several on a list indicating that recoupment had not yet taken place. The Second Respondent had stated that a former partner had been dealing with this matter and he had only found out the true position when he had been shown the First Respondent's statement. The Tribunal considered that on the evidence before it, it could not be sure that when he wrote the letter the Second Respondent knew the true position. This finding did not, however, undermine its view of the Second Respondent's knowledge of the overall strategy regarding costs recovered from third parties and retained.

74.16 The Second Respondent asserted that he could not be held responsible as a partner for the professional misconduct of the First Respondent and Mr Goodwin cited several authorities on the point as set out under his submissions above. However the Second Respondent was not just the "other" partner in the practice. At all material times he was the legal aid partner. He attended and represented the firm in legal aid audits at which the high level of UPOAs was discussed, and under the legal aid contact he was

the firm's point of liaison for the LSC. Therefore, if anybody could be expected to be a "whistle blower" as to breaches of the legal aid contract for the LSC, he was that person. He plainly failed in this regard.

74.17 Although the Second Respondent's personal practice was mainly in mental health and in prosecuting for the Applicant, he was nevertheless at the heart of the firm's legal aid practice because of his status as legal aid partner, and responsible to the LSC on behalf of the firm as its spokesman for the firm's conduct of the legal aid contract. He was not able therefore to distance, and thereby immunise himself (something which in the judgment of the Tribunal he had sought to do) by blaming his partner, from the position facing the firm, and its strategy of accounting to the LSC in third party payment cases over a protracted period of time, and from the professional consequences that followed from this improper practice. This was especially so given the Tribunal's findings as to his knowledge of the cause of the extraordinary high level of UPOAs and of the practice adopted by the firm of failing to account in third party costs' cases, his own personal involvement in at least one instance in this improper practice in the SN case, and in the light of the obvious, albeit dilatorily pursued, concerns of the LSC over the high level of UPOAs.

74.18 The Second Respondent's failure to communicate further with the LSC following his receipt of BN's letter to them of 24 January 2005 was significant and extraordinary. There was no evidence before the Tribunal that the LSC ever received the further information that BN informed them they would receive from the Second Respondent, or at all. No doubt this was because to do so would have revealed the firm's improper practice. The Tribunal considered that this was a conscious and deliberate decision on the Second Respondent's part and that it showed a lamentable and deliberate abdication by him of his firm's responsibilities to the LSC. Further given this context even if the Second Respondent had received vague assurances from the First Respondent of the existence of a historic problem that he would resolve without specifying how, something which the Tribunal has in any case rejected, for him to have remained without satisfying himself of the propriety of the firm's position, given his knowledge of the cause of the UPOA problem and of his position as legal aid partner, was in itself reprehensible. The option, which in the Tribunal's judgment he sought to pursue, of trying to isolate himself, and of deliberately looking the other way, was simply not an option that was open to him. This amounted to primary culpability on his part, not vicarious responsibility for the misconduct of a partner. Any partner had a duty to consider the rules where they were fundamental to the operation of the practice as would be the case in a 70 per cent plus legal aid practice and this was an a fortiori case when one was the designated legal aid partner.

74.19 The Tribunal had been invited by Mr Levey to make certain findings of fact and on that basis to reject the Second Respondent's version of events as manifestly untruthful. The Tribunal found as follows:

- Relying on the evidence of the First Respondent and that of BN the Tribunal found that the Second Respondent did know of the problem relating to UPOAs in late 2004 following the LSC audit.

- Relying on the evidence of the First Respondent and BN and an analysis of the evidence the Tribunal found that the Second Respondent knew that a

significant part of the problem arose out of cases where costs had been recovered from third parties but had not been reported to the LSC.

- The Tribunal also found from the evidence that the Second Respondent knew that the firm owed very significant sums of money to the LSC as a result of the failure to submit Claim 2s but that the firm was not in a position to repay those monies.

- The Tribunal also found on the basis of the evidence of the First Respondent which it found to be wholly credible that he had given no assurances either in 2004 or 2007 to the Second Respondent that the UPOA problem had been sorted out and nor did the Second Respondent believe that the problem had in fact been sorted out.

- Also based on the evidence of the Tribunal found that the Second Respondent knew that the LSC was not aware of the true position but rather than telling the truth he hoped that the problem would be earned out over time or that the LSC might one day write off the debt.

- The Tribunal also found that as with the First Respondent and as they admitted throughout the relevant period the Second Respondent benefitted very substantially from his position as one of the only two equity partners in the firm, also taking drawings of approximately £50,000 per year, which money he used to pay for his comfortable lifestyle.

74.20 In respect of the allegation 1.3(i) concerning the Second Respondent's integrity the Tribunal had close regard to the testimonials which had been submitted on his behalf, the oral evidence of Judge Pickup and appraisal reports which the Second Respondent had submitted in respect of his judicial role. Having found the facts including about the Second Respondent's state of knowledge, the Tribunal had to apply an objective test in respect of integrity. Although the references and supporting oral evidence indicated that generally the Second Respondent was a person of integrity that did not mean that he lacked integrity regarding the recoupment of the legal aid payments and in the context of his obligations to ensure that refunds were made to the LSC. In evidence the Second Respondent had accepted and stated that if he had been aware of the true position regarding the strategy employed in an attempt to earn out the debt to the LSC over time then this would mean that he too had acted in a morally reprehensible manner and that he would lack integrity. The First Respondent was also under a contractual obligation to notify the LSC but, in any event, the Tribunal agreed with Mr Levey's submissions this was something that he ought to have done as a matter of integrity. Rather than bringing the problem to the attention of the LSC which would inevitably have led to the relationship between the firm and the LSC being terminated immediately, he chose not to do so. Instead the firm continued to carry out legal aid work and continue to profit from its relationship with the LSC. The Tribunal considered that it was also relevant in determining the issues of integrity and public trust that the First Respondent benefited personally from the breaches. More than £1.5 million should have been retained to the client account and held to the account of the LSC and at the appropriate time accounted for; instead those monies enured to the benefit of the firm as a whole and in particular the Respondents who were the only partners in the firm and who shared in the purported profits of the firm.

In fact it was to be inferred that the firm ought not to have been trading at all given the scale of the debt owed the LSC and the firm's inability to repay that debt.

74.21 Having determined that the Second Respondent's state of knowledge and collusion in the strategy of deception of the LSC and improper retention of funds which it was entitled to recoup, the Tribunal considered that the Second Respondent was in the same circumstances as those in which the First Respondent was placed, those of a solicitor who if he was fulfilling his obligations both under the SPR and the Code had no alternative but to report the true position to the Applicant and to the LSC as soon as it became apparent to him even if this meant the collapse of the firm. Again the Tribunal found by employing an objective standard that the Second Respondent, had fallen short of the standard set out in the case of Bolton v The Law Society [1994] 1 WLR 512 and had not acted with integrity, probity and trustworthiness. The Tribunal found allegation 1.3(i) proved on the evidence in respect of the Second Respondent to the required standard.

74.22 The Tribunal also considered that in acting as he had, particularly by his strategy of deception by not coming clean which continued to leave at risk a very large amount of public money of around £1.5 million and an unknown amount of that having been lost, the First Respondent's conduct was likely to or did compromise or impair the good repute of the solicitor's profession under the SPR prior to 1 July 2007 and thereafter was likely to diminish the trust the public placed in the First Respondent or the legal profession contrary to the Code. Accordingly upon the basis of all the evidence which it had heard including the oral evidence of the Second Respondent, the Tribunal found allegation 1.3 (i) proved to the required standard against the Second Respondent.

74.23 As a consequence and having regard to the scale and extent of his conduct the Tribunal also found as it had with the First Respondent that allegation 1.3 (ii) was also proved. The Tribunal also found that the Second Respondent had acted recklessly; ignoring his professional obligations as a solicitor in favour of his own interests until he could secure his exit from the firm.

Previous Disciplinary Matters

75. None in respect of either the First Respondent or Second Respondent.

Mitigation

First Respondent

76. Mr Coltart submitted that having regard to the Tribunal's Guidance Note on Sanctions, and in the light of its findings, the Tribunal could dispose of the matter regarding the First Respondent by way of a period of fixed term suspension coupled, if it was thought necessary, with a written undertaking that he would give to the Tribunal that he would not seek to practice again as a solicitor and would apply to come off the Roll at the date when his suspension would otherwise end. Alternatively the Tribunal could impose an indefinite period of suspension in respect of the First Respondent but in either case the Tribunal could and Mr Coltart submitted that it should, stop short of striking him off.

77. For the purpose of determining sanction in assessing the seriousness of the First Respondent's conduct, Mr Coltart submitted that as an influencing factor on his culpability, his motivation for his conduct was extremely important; the First Respondent admitted and the Tribunal had found that he went about things in a totally unacceptable way but he did it for what he considered to be the right reasons. In terms of determining harm, the Tribunal was asked to take into account that while the LSC had suffered financially no other client money was ever compromised and as the Applicant found during the investigation in 2011, all client balances were intact. As to any aggravating features, the First Respondent could rely on the fact that the allegation of dishonesty brought against him had not been found proved; there was no suggestion of any criminal offence and he had no previous disciplinary matters. As to factors which mitigated the seriousness of the misconduct, Mr Coltart submitted that the First Respondent had shown genuine insight and made early and frank admissions including in the witness box and he cooperated with the investigation. The Applicant made no criticism of the way he gave evidence, quite the contrary. He had settled with the LSC. As to the possibility of an indefinite suspension if a fixed term were found to be insufficient, Mr Coltart submitted that the First Respondent came within the Guidance because there was truly compelling and exceptional personal mitigation such as would make striking off inappropriate for the following reasons:

- The way in which the First Respondent had conducted himself in the proceedings; he had made prompt admissions and demonstrated full cooperation with the regulator.

- The length of his period of unblemished service, 35 years.

- The length of time he had to battle with the issues; from 2004 onwards, even accepting that he did not go about it in the right way. This had been enormously stressful and difficult and no doubt led to his experiencing a catharsis at the meeting in February 2010 with the LSC.

- The number of legal battles which the First Respondent had to fight; the proceedings brought by the LSC had not been straightforward and the litigation was ongoing with former partners; who had been joined in respect of a claim for contribution to the losses. There were also proceedings brought by creditors, not all of which Mr Coltart submitted were meritorious, two trials in the County Court and an employee claim for unfair dismissal as well as all the problems with the bank involving the sale of the business premises at what looked like a gross undervalue which the First Respondent felt very strongly about. The First Respondent had to deal with all this on his own with no support from the Second Respondent; he had carried the can for his former partners.

- The Applicant's decision to intervene into the firm was regrettable and flawed, based in part on a misunderstanding and it had been an enormously expensive exercise.

78. As to the First Respondent's personal circumstances, Mr Coltart submitted that he was 63 years of age and his wife who had retired after a long and distinguished career in the NHS had had to go back to work and the family had suffered stigma in the

small town in which they lived, all of which put significant strain on their personal and social lives. There were also some issues regarding the First Respondent's health at around the time the Second Respondent left the firm and more recently and while Mr Coltart did not rely on any medical evidence in respect of the allegations, the First Respondent was prepared to give evidence on oath about his condition. Mr Coltart submitted that if the Tribunal took all of the individual elements together the cumulative effect arrived at a level of mitigation which would make a finding of indefinite suspension appropriate if the Tribunal was not minded to impose a fixed term suspension,. Mr Coltart submitted in conclusion that whatever happened there was no need for the First Respondent to be subjected to the final ignominy of being struck off.

Mitigation for the Second Respondent

79. Mr Goodwin offered the Second Respondent's apologies to the Tribunal for his appearance before it. It was a matter of huge embarrassment and regret and disappointment. Mr Goodwin did not know the detail of the Tribunal's reasons for its findings in respect of allegation 1.3 and notwithstanding that the findings seem to be the same in respect of both Respondents; the case had been advanced differently for each of them. The First Respondent was responsible for reporting to the LSC while the Second Respondent was not and the Tribunal was asked to take that into account in arriving at sanction. Mr Goodwin reminded the Tribunal that no allegation of dishonesty had been brought against the Second Respondent. If there had been a successful allegation of dishonesty against him, the Second Respondent would have had the benefit of the precedent of the case of Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin) and exceptional circumstances militating against strike off. Mr Goodwin submitted that the circumstances of the case argued against strike off or suspension. The Second Respondent had admitted allegations 1.1 and 1.2 and he had been entitled to contest allegation 1.3. The Tribunal had unlimited powers to fine regarding the matters which had been proved and Mr Goodwin found it difficult to address the subject of mitigation without knowing the Tribunal's reasons for its findings in respect of allegation 1.3. He asked that bearing in mind the Second Respondent's testimonials which he described as impeccable and the testimony of Judge Pickup, the trouble which was to come to the Second Respondent and his unblemished career to date, including that he never had any allegation of lack of integrity brought against him until these proceedings, there was no doubt that whatever sanction was imposed would have an immediate impact on his future; it appeared likely that his judicial career was at an end. He had become a District Judge some three years ago and he very much enjoyed the role and felt he had a great deal to offer; that must now be in very great jeopardy. Mr Goodwin submitted that the starting point in determining sanction was at the bottom of the range and he would not say that a reprimand would not be appropriate. There was also the option of a financial penalty and Mr Goodwin asked that if that were the Tribunal's decision that it should deal with him by a financial penalty appropriate to his ability to pay. Mr Goodwin submitted that his conduct did not justify suspension or strike off. The Second Respondent would accept and respect the Tribunal's decision while maintaining his position.

80. Mr Goodwin referred the Tribunal to the Second Respondent's statement regarding his finances and pointed out that the information in it relating to his income as a

District Judge could now change. His income had been significantly eroded by his liabilities and he might soon be unemployed and Mr Goodwin asked the Tribunal to take that into account especially regarding costs.

Sanction

81. The Tribunal had regard to its Guidance Note on Sanctions in considering sanction against each of the First and Second Respondents. It also had regard to the submissions which had been made for each of them, the testimonials submitted and in the case of the Second Respondent, his character witness.

First Respondent

82. In assessing the culpability of the First Respondent, the Tribunal bore in mind that it was he who had carried personal responsibility for putting the strategy of deceiving the LSC into effect. A considerable amount of harm had resulted in terms of a loss of public money, the exact amount which was disputed but which was accepted by all parties to be in the region of £1.5 million. The issue of the considerable damage to the reputation of the profession had also to be weighed in the calculation; the greater the departure from the standards to be observed as set out in the case of Bolton "complete integrity, probity and trustworthiness" the greater the harm to the reputation of the profession. In terms of aggravating factors, no dishonesty had been found proved but the First Respondent's misconduct was deliberate and calculated and repeated over a period of years and it was also misconduct where he knew or ought reasonably to have known that the conduct complained of was in material breach of obligations to protect the public and the reputation of the profession. As to mitigating factors relevant to assessing seriousness, the First Respondent now showed genuine insight and had made open and frank admissions. His personal mitigation was not relevant to the seriousness of the misconduct. The Tribunal considered that the First Respondent's conduct even though narrowly found not to be dishonest came at the very top end of the range of seriousness. He had been found to have acted with reckless disregard for his professional obligations and a large amount of public money had been lost. The Tribunal considered whether an indefinite suspension rather than striking off would be appropriate. In terms of personal mitigation the Tribunal noted that even when closure of the firm became inevitable, he attempted to avoid the appointment of an LPA receiver to the firm's commercial property and to sell both the practice and the buildings in the open market. He had also fought unsuccessfully to preserve from the intervention his share of the tax refund that he and the Second Respondent obtained resulting from having earlier overstated the firm's income, so that it might go to the LSC. He gave evidence that right up to the date of the hearing he was continuing to collect costs due to the firm and therefore to the LSC under the judgment it had obtained against him, from firms which had taken on its legal aid caseload. The Tribunal in arriving at its decision also bore in mind that the First Respondent co-operated throughout the enquiry and throughout the hearing and it gave credit to him for that. However the Tribunal also had to consider as Lord Bingham pointed out in Weston v Law Society [1998] Times 15th July, the importance attached to affording the public protection against improper and unauthorised use of their money which was the reason why an onerous obligation was placed on solicitors to ensure those rules were observed. In its Guidance Note the Tribunal had set out the striking off could be appropriate in the absence of dishonesty

where the seriousness of the misconduct was itself very high and the departure by the Respondent from the required standards of integrity probity and trustworthiness was very serious. In such cases Tribunal would have regard the overall impact of the misconduct and in particular the effect that allowing the First Respondent's name to remain upon the Roll would have on public confidence in the reputation of the profession. The case of Solicitors Regulation Authority v Emeana, Ijewere and Ajanaku [2013] EWHC 2130 (Admin.) was the relevant authority. The Tribunal did not consider that the public would understand any failure to strike off in the case of an individual who even if he was not the cause of the initial problem covered it up quite deliberately for many years, where the money in issue had belonged to the legal aid fund which had a judgment against the First Respondent for over £2 million and where there were issues of public protection. The Tribunal had regard to the First Respondent's personal circumstances but did not consider that these true were so truly compelling and exceptional as to make striking off inappropriate. In all the circumstances the Tribunal considered that the only appropriate sanction having regard to the fact that the impact on the public was so great was to strike off the First Respondent.

Second Respondent

83. The Tribunal had some similar considerations in mind in considering sanction in respect of the Second Respondent as it did for the First Respondent. The Tribunal had found as a fact that while the First Respondent effected the strategy, the Second Respondent accepted and was responsible for maintaining the strategy just as much as he did and the Second Respondent dealt with the LSC and did not disclose it to them. In addition the Second Respondent's attitude had been less co-operative than that of the First Respondent and the Tribunal considered it significant that he did the self-same act in the case of SN as underlay the allegations and brought about the downfall of the firm. It was also significant given the Tribunal's findings of knowledge on his part and his status as legal aid partner that he sought to avoid liability in the way he did right up to the end and unloaded it all onto his partner, The Tribunal considered that to be quite reprehensible and likely to exacerbate matters in terms of the reputation of the profession. In his letter to the Second Respondent, the First Respondent described it as cowardly which was probably what members of the public might think. The Second Respondent maintained his defence of strict liability only on oath in the witness box. The Tribunal rejected what he said which was a serious situation for a solicitor and judge. The Tribunal therefore determined that the Second Respondent should also be struck off, no lessor sanction being appropriate given the potential damage to the reputation of the profession and the very serious departure from the standards to be observed.

Costs

84. For the Applicant, Mr Levey applied for costs in the amount of £137,558.35 in accordance with the schedule which had been served. He submitted that serious misconduct had been proved and the Applicant should be entitled to all its costs. This had been a long and difficult case. The Applicant had been in correspondence for some time with both Respondents and Mr Levey that submitted if it was intended that either should pray in aid lack of financial means, they must provide a statement of their means as required by the case of The Solicitors Regulation Authority v Davis

and McGlinchey [2011] EWHC 232 (Admin). Mr Levey submitted that typically, the First Respondent had done so but nothing had been seen from the Second Respondent; apparently a witness statement about his means existed but he had not seen fit to tell the Applicant.

85. Mr Levey had no submissions to make in respect of the First Respondent's ability to pay and left it to the Tribunal to form whatever view it saw fit; he was not in a position to challenge the information which the First Respondent had provided about his situation. There was an issue as to whether the Tribunal should order a fixed sum in the light of his means or fix a larger sum and order that it should not be enforced without the Tribunal's leave. Mr Levey submitted that the former was the correct approach in the light of Davis and McGlinchey. He submitted that the Applicant should have the opportunity to obtain a proper amount in respect of its costs which would otherwise be borne by the profession. He submitted that it must be right that the Applicant should be awarded its costs unless points were raised on the quantum of those costs or the financial means of the Respondents.

86. At that point in the hearing a financial statement dated 14 December 2013 was handed up for the Second Respondent. Mr Levey submitted that there was not a large amount he could say; he had not had the benefit of the Tribunal's reasons but submitted that the Second Respondent had steadfastly and on oath denied all knowledge of the matter and the Tribunal had found that his evidence was not truthful. He therefore submitted that the Tribunal should treat whatever the Second Respondent said on oath with considerable caution. In respect of the statement, Mr Levey had no idea of what amount the Second Respondent had agreed to pay to the LSC; he referred in his statement to the balance of the equity of his home forming part of the settlement offered to the LSC and that he therefore regarded himself as having no equity in it. The Second Respondent had said in evidence that the amount agreed with the LSC was confidential but it was always open to the parties to an action to waive confidentiality and he could have sought the permission of the LSC to do so. Mr Levey did not believe that the LSC would have objected. Mr Levey simply did not know what the terms of agreement were or over what period. Again he submitted the Tribunal had been ambushed by the Second Respondent; correspondence had been sent at least twice to Second Respondent's solicitors in respect of providing financial evidence and there should be no difficulty into providing it before 5:30 pm on this day of the hearing which was extremely late. He submitted that the evidence was not detailed and invited the Tribunal not to accept it. Mr Levey directed the attention of the Tribunal to a letter dated 31 January 2013 from Capsticks to Mr Goodwin which included a copy of the case of Davis and McGlinchey and invited the Second Respondent to provide in sufficient time before the hearing sworn evidence as to his financial position. Mr Levey also mentioned that on 7 November 2013, a week before the substantive hearing began a letter had been written to Mr Goodwin and Mr Coltart on the basis that it was assumed no points would be taken regarding means and again providing copies of the case. There had been no response from the Second Respondent.

87. Mr Levey asked that if the Tribunal was minded to undertake a summary assessment of costs that it should order a payment on account and offered to make submissions if the Tribunal wished to hear them.

88. Mr Coltart submitted for the First Respondent referring to his earlier submissions that it would be utterly pointless for a costs order to be made against him. In principle, the Applicant was entitled to costs although there might be a small discount with regard to its failure to prove dishonesty against the First Respondent. The First Respondent had employed no secrecy regarding his settlement with the LSC in that judgment in the region of £2 million had been entered against him by consent. There was also a costs order in a significant amount in favour of the LSC and all his assets were frozen by an injunction the LSC had obtained. Mr Coltart referred the Tribunal to the First Respondent's most recent statement that dated 12 December 2013 which gave details of his outstanding liabilities including those following the intervention in the firm. He detailed bank accounts which had been frozen and their contents and also referred to an Interim Third Party Debt Order obtained on 9 December 2013 by the LSC against his solicitors' client account where there were funds held for him subject to a lien for costs incurred to the full extent of those funds. In his statement the First Respondent said that he presumed that the LSC has similarly obtained an order against his personal accounts and also the funds held by the Applicant following the intervention in the firm. He also owed the bank some £200,000 (for the shortfall on its loans to the firm after the commercial properties had been sold). What little money there was, was frozen and ought to go to the LSC and not for the costs of Applicant as it was because of matters relating to the LSC these proceedings had been brought. Mr Coltart submitted that if the Tribunal was not prepared to make no order for costs against the First Respondent, it would not be appropriate for it to try to identify a notional sum on the basis that it appeared he might be able to pay it; any such sum should also go to the LSC. If an order were to be made bearing in mind the Applicant accepted his financial position Mr Coltart submitted that it should not be enforceable without leave of the Tribunal but he urged the Tribunal not to make any order for costs at all against the First Respondent.

89. For the Second Respondent, Mr Goodwin submitted that the Second Respondent had made full admissions in respect of allegation 1.1 and 1.2 and had been occupied with defending the most important allegation 1.3. He had provided a statement of his current financial position and Mr Goodwin submitted that there was nothing to suggest that the Second Respondent's statement was anything other than the true position. His situation might now undergo a marked change and as early as the next day he might no longer be employed. He had been of impeccable character to date and Mr Goodwin submitted that no criticism had been made of the First Respondent who served his statement the previous week and Mr Goodwin asked the Tribunal to take into account the Second Respondent's statement. He referred to what he described as the well-known authorities Merrick v The Law Society [2007] EWHC 2997 (Admin) and D'Souza v The Law Society [2009] EWHC 2193 (Admin) and asked that the Tribunal take the Second Respondent's financial means into account. Mr Goodwin submitted that £137,000 was a huge amount of money and that it was extremely difficult to undertake detailed assessment regarding items in such a large bill. He echoed the arguments of Mr Coltart that if the Tribunal felt it appropriate to make an order it should take into account the Respondents' ability to meet it and if that was an appropriate course in respect of the First Respondent it was also appropriate the Second Respondent. If the Tribunal saw fit to make an order he echoed Mr Coltart in that it could make one for a fixed amount of costs to be apportioned between the parties. He submitted that it was difficult for him to address the Tribunal without knowing the detail of its reasons for coming to its conclusions but if it made a fixed

order he asked that it should not be enforced and that that seemed not to be opposed by the Applicant and then it would be open to the Applicant to apply to the Tribunal to enforce the order. Mr Goodwin also asked that if the Tribunal was minded to make an order for costs it should do so on the basis that costs were to be assessed if not agreed as a fallback position. Mr Goodwin emphasised that he did not invite a joint and several order to be made but rather that there should be a percentage apportionment even if the matter would be sent for detailed assessment.

90. The Tribunal determined that in what had been a long and complex case where all the allegations had been properly brought and all save for the allegation of dishonesty against First Respondent had been admitted and/or found proved, it was entirely proper that the Applicant should have an order for costs. However having regard to the size of the bill and the complexity of the matter the Tribunal did not consider that summary assessment would be appropriate and that the matter should be remitted for detailed assessment if not earlier agreed between the parties. The Tribunal also considered that it would be appropriate for there to be an apportionment as to the liability for costs between the First and Second Respondents and that this should be on the basis of their respective culpability and the findings made against them. It determined that costs should be awarded against both Respondents subject to an apportionment as to payment of fifty per cent of the costs by each Respondent. Having regard to the authorities which were well known to the Tribunal, the cases of Merrick and D'Souza, the Tribunal bore in mind that by its decision it had removed the livelihoods of both Respondents. It also took into account the information provided by the Respondents about their financial means and on that basis ordered that any costs made against them should not be enforceable without leave of the Tribunal.

Statement of Full Order

91. The Tribunal Ordered that the Respondent, DENIS FRANCIS MCKAY 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 to be subject to a detailed assessment unless agreed between the parties, subject also to an apportionment as to payment of fifty per cent of the costs by each Respondent, such costs not to be enforced without leave of the Tribunal.

92. The Tribunal Ordered that the Respondent, STUART ROGER TURNER 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 to be subject to a detailed assessment unless agreed between the parties, subject also to an apportionment as to payment of fifty per cent of the costs by each Respondent, such costs not to be enforced without leave of the Tribunal.

Dated this 28th day of February 2014
On behalf of the Tribunal

D. Green
Chairman