SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11170-2013

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

HOWARD VICTOR STONE Respondent

Before:

Mr P.S.L. Housego (in the chair)
Mr K. W. Duncan
Mr M. Palayiwa

Date of Hearing:
28 April 2014 - 1 May 2014

Appearances

Mr Richard Coleman QC, counsel, of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH, instructed by Mr Robin Havard, solicitor, of Morgan Cole LLP, Bradley Court, Park Place, Cardiff, CF10 3DR for the Applicant.

Mr Mark Fenhalls QC, counsel, of 23 Essex Street, London, WC2R 3AA for the Respondent, who was present (until 30 April 2014, after which the Respondent was not present or represented).

JUDGMENT

Allegations

1. The allegations against the Respondent, Howard Victor Stone, contained in a Rule 5 Statement made on 29 July 2013 were:

1.1. The Respondent failed to maintain properly written up and accurate accounting records in breach of Rule 32 of the Solicitors Accounts Rules 1998 ("SAR 1998") and/or, where such conduct relates to a period after 6 October 2011, Rule 29 of the SAR Accounts Rules 2011 ("SAR 2011");

1.2. The Respondent withdrew client funds in excess of monies held leading to a cash shortage contrary to Rule 22 of the SAR 1998 and/or, where such conduct relates to a period after 6 October 2011, Rule 20.06 of the SAR 2011;

1.3. The Respondent actioned and/or permitted improper transfers of money from client account, contrary to Rules 19 and 22 of SAR 1998 and/or, where such conduct relates to a period after 6 October 2011, Rules 17 and 20 of the SAR 2011;

1.4. The Respondent failed to act with integrity, failed to act in the best interests of a client, and failed to act in a way that would maintain the trust the public placed in him and in the provision of legal services, contrary to Rules 1(a), 1(c) and 1(d) of the Solicitors Practice Rules 1990 ("SPR 1990") and/or, where such conduct relates to a period after 1 July 2007, Rules 1.02, 1.04 and 1.06 of the Solicitors' Code of Conduct 2007 ("SCC 2007") and/or, where such conduct relates to a period after 6 October 2011, Principles 2, 4, 6 and 10 of the 2011 Code of Conduct ("2011 Code");

1.5. The Respondent withdrew client monies from a client account in respect of costs when he knew he was not entitled to do so contrary to Rules 1.02, 1.06 and 2.03 of the SCC 2007 and/or, where such conduct relates to a period after 6 October 2011, Principles 2, 6 and 10 and Outcomes 1.1 and 1.13 of the 2011 Code;

1.6. The Respondent claimed costs from a client that he knew could not be justified and thereby knowingly overcharged that client, contrary to Rules 1.02, 1.06 and 2.03 of the SCC 2007 and/or, where such conduct relates to a period after 6 October 2011, Principles 2, 6 and 10 and Outcome 1.1 of the 2011 Code;

1.7. In relation to allegations 1.3, 1.5 and 1.6 it was alleged that the Respondent acted dishonestly although it was not necessary to prove dishonesty to prove the allegations themselves.

Documents

2. The Tribunal reviewed all of the documents submitted by the parties, which included:

Applicant:-

- Application dated 29 July 2013
- Rule 5 Statement, with exhibit "MRH1" (comprising 785 pages), dated 29 July 2013

- Bundle of witness statements
- Supplementary bundle of documents
- Breakdown of fees, deductions from escrow account and time recorded
- Chronology and note of key references
- Schedule of costs dated 1 May 2014

Respondent:-

- Response to Rule 5 Statement dated 24 February 2014
- Further particulars of the Response dated 11 March 2014
- Respondent's witness statement dated 31 March 2014
- Skeleton argument dated 27 April 2014
- Documents received from RTC on 28 April 2014
- Respondent's letter to the Tribunal dated 30 April 2014
- Email from Mark Fenhalls QC dated 1 May 2014 with Respondent's notes on Applicant's costs claim, mitigation costs notes, personal financial statement and schedule of annotations to the personal financial statement

[Note - see paragraphs 100 and 102 for a description of the relevant parties and their names, initials being given elsewhere in this decision.]

Preliminary Matter (1) – Progress of the hearing

3. All timings referred to below are taken from the Tribunal's digital recording system and may be approximately 5 minutes ahead of the time shown on the court room clock.

4. The hearing began at approximately 10.20am on Monday 28 April 2014, the parties wishing to discuss matters between themselves prior to the commencement of the hearing. The Tribunal was aware from reading the Respondent's skeleton argument, which was received shortly before the hearing, that the Respondent intended to apply for an adjournment of this hearing. It was determined, by agreement, that the Tribunal would hear the Applicant's opening of the case before hearing the application to adjourn, in order to understand fully the issues raised by the application and the scope of the dispute between the parties.

5. There being no objection by the Respondent or the Tribunal, the Applicant's Forensic Investigation Officer ("FIO"), Mr Bailey, was permitted to remain in court whilst the case was opened by Mr Coleman. The Tribunal took a short break during the opening, at about 11.55am, until 12.03pm, and adjourned for lunch at approximately 1.07pm. The Tribunal resumed at about 2.09pm. Mr Coleman concluded his opening at approximately 3.05pm, at which point the Tribunal agreed to Mr Fenhalls' request for a short break.

6. The Tribunal resumed at 3.23pm and heard Mr Fenhalls' application, on behalf of the Respondent, to adjourn the hearing and then heard Mr Coleman's response. The

application itself and the Tribunal's determination are set out under "Preliminary Matter (2)" below.

7. The Tribunal rose at 4.25pm. The Tribunal asked the parties to return to court, and the hearing resumed (briefly) at 4.33pm. Mr Fenhalls informed the Tribunal that an email and attachments had been received during the afternoon from RTC. These documents indicated that the Respondent and/or Mr KC may be joined into court proceedings in Switzerland brought by Mr T against RTC. Mr Fenhalls indicated that he would make further enquiries about the position overnight. The Tribunal informed the parties that rather than rush a decision on the application, the Tribunal would deliberate and inform the parties of its preliminary view at 10am on 29 April; the parties may have further information or representations to make on the adjournment application at that point.

8. The hearing resumed at 10.28am on 29 April, again delayed by activity by the parties. Mr Fenhalls informed the Tribunal that the Respondent was in the course of a telephone call to Switzerland and wished to complete that call before joining the hearing. The Respondent then entered court and Mr Fenhalls indicated that he would wish to speak to the Respondent to find out the outcome of his telephone discussion with Mr RA. The Chair asked for information about the proceedings in Switzerland and after hearing from both parties on this rose to allow Mr Fenhalls to take instructions at 10.34am.

9. The hearing resumed at 10.50am. Mr Fenhalls informed the Tribunal that he no longer wished to cross examine Mr Banyard, the costs draftsman instructed by the Applicant, so he could be released. It was anticipated that just Mr Rosen and Mr Bailey would give evidence for the Applicant. It was noted that for personal reasons it would be appropriate for Mr Rosen to give evidence during 29 April, if the hearing were not adjourned. The Tribunal heard further submissions from Mr Fenhalls and Mr Coleman concerning the potential witness Mr RA in relation to the application to adjourn. The Tribunal rose at 11.01am to permit some further enquiries to be made of Mr RA.

10. The Tribunal resumed at 11.25am and heard from the parties on developments during the break. The Tribunal rose again at 11.31am and resumed at 12 noon. The Tribunal delivered its decision on the application to adjourn, which application was refused. It was noted that Mr Rosen had arrived at the Tribunal and the Applicant may wish to consider in what order to call its witnesses. Mr Fenhalls indicated that there were some further matters he wished to consider and asked for a short adjournment to allow for that. The Tribunal rose at 12.03pm.

11. The hearing resumed at 12.44pm. Mr Fenhalls told the Tribunal that he had instructions from the Respondent that the Respondent would now admit a lack of integrity with regard to the establishment of the "escrow" account (explained further below). The details of the admission would be confirmed in writing later. As a result of this admission, the Respondent had no need to cross examine Mr Rosen. Mr Fenhalls confirmed that Mr Rosen's statement was accepted in relation to the matters of fact in that statement but the comments on the Respondent's honesty were not accepted. The remaining issue would be that of the alleged dishonesty. Mr Fenhalls indicated that there may no longer be a need to call Mr Bailey, the FIO. Mr Coleman told the Tribunal that given what Mr Fenhalls had said, there would be no

need to call Mr Rosen, unless the Tribunal had any questions for him. The Tribunal noted that it was for the Applicant to prove its case. It was represented by experienced counsel and the decision about whether or not to call a witness was for the Applicant to make. It was noted that Mr Rosen's statement could be put into evidence on the basis outlined by Mr Fenhalls i.e. that the factual matters stated were accepted but not any opinions expressed. As Mr Coleman did not want to call Mr Rosen, as a result of the Respondent's admission and concession on the evidence, he could be released. Mr Fenhalls told the Tribunal there were no matters he wanted to put to Mr Bailey. It was noted, therefore, that the Applicant did not need to call the FIO. Mr Fenhalls told the Tribunal that in the light of these developments, whilst the Applicant could close its case now he could not resist a later application by the Applicant to re-open, or call the evidence of Mr Bailey out of turn.

12. The Tribunal therefore noted that the Applicant had closed its case, but could apply to re-open it if necessary to deal with the evidence of Mr Bailey. It was noted that it would be appropriate to allow the parties time to consider the position and that the Respondent should commence his evidence from 10am on 30 April. The hearing concluded at 12.50pm, after which the Clerk informed Mr Rosen that he was formally released; he was thanked for attending.

On the morning of 30 April, Mr Fenhalls informed the Clerk that the Respondent had prepared a letter to the Tribunal, which was emailed to the Tribunal at approximately 9.30am. That letter, dated 30 April 2014, read:

> "Sir,
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> In interview in June 2012 during the inspection by Mr Bailey I admitted my shortcomings and said clearly that RA/RTC knew that I was taking payment of my bills and had given permission for me to do so. In March 2013 the Adjudication Committee considered the reports (including what I had said and done since the inspections began and my offer to appear before that Committee) and did not conclude that I was dishonest and found no reason to intervene in my practice. I have been permitted to continue throughout with an unconditional practising certificate.
>
> Up until April 2014 I knew of no witness, nor any complaint from a recognised officer of RTC. ([SG] Was not an officer of RTC and was I understood acting on her own initiative.) No one had made a formal complaint about the bill(s). I knew that RA felt constrained by his relationship with RTC and I did not feel able to demand his assistance.
>
> On 1st April this year, I learned for the first time of [MG's] statement and decided that I could no longer deal with the allegations alone. My attempts to contact RA disclosed that he was prepared to help, but by then he was in Australia and without internet access and he was then prevented by RTC from giving assistance. I regret so much having become embroiled in an affair for which I did not have the forensic ability to see behind the machinations of T, V and above all KC. Without RA's assistance and first-hand knowledge of RTC's dealings with these characters, I am bereft.
>
> I feel that the refusal of the SDT to allow even a short period of time for RA to make a statement let alone give evidence of his agreement on behalf of RTC is

> a travesty of justice. I am left alone and abandoned by the profession which I have always sought to serve and to which I have devoted more than 35 years of my working life at a time when I was already in the early stages of my planned retirement. I thought that at all times I was acting in accordance with my client's instructions.
>
> I would never deliberately have done anything to bring my profession or my good name into disrepute.
>
> The protection of the public is said to be at the heart of the work of the SDT. I represented no threat to the general public, as evidenced by the findings of the SRA.
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> All I ever wanted is to work until my 70th birthday in (redacted) 2015. Even that possibility has been denied me.
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> I have no resources left to defend myself. The outrageous costs claim, which like all the prosecution papers were served as late as possible, whilst I was impliedly criticised for not seeking to call/proof RA until after 1st April is just another example of the unfairness, causing lack of opportunity for a just hearing. It is simply one rule for them and another rule for me. Where in heaven's name is the "public interest" in that?"

13. The hearing resumed at 10.09am on 30 April. Mr Fenhalls attended to explain the position to the Tribunal, as a courtesy. Mr Fenhalls confirmed that he had forwarded the Respondent's letter to the Tribunal by email on the instructions of the Respondent. The Respondent had been seen in the Tribunal building earlier in the morning (including by the Clerk). Although the letter was unsigned, the Respondent had authorised Mr Fenhalls to provide it to the Tribunal. The Respondent stood by the admission he had made on 29 April. That admission had been made in good faith, in the hope that the Applicant would not pursue the allegations further. Mr Fenhalls had been informed by Mr Coleman at about 7pm on 29 April that the Applicant intended to pursue the allegations of dishonesty.

14. The Chair stated, for the record, that the Tribunal had asked that a copy of the Tribunal's Practice Direction number 5 should be provided to Mr Fenhalls, and this had been done. This Practice Direction deals with the drawing of adverse inferences where a solicitor does not give evidence or explain his or her conduct to the Tribunal. Mr Fenhalls stated that he was grateful for the provision of this document. Although he had not specifically discussed the Practice Direction with the Respondent, they were both aware that the proceedings would continue in the absence of the Respondent. The Respondent understood that his absence would not assist his cause; Mr Fenhalls had discussed with him matters consistent with the content of the Practice Direction.

15. Mr Coleman was asked if he needed time to assess the position before matters proceeded, and confirmed that he would like some time as he may wish to make a short closing submission, particularly on the issue of dishonesty. The Chair noted that the Tribunal does not usually allow the Applicant to make closing submissions and asked if Mr Fenhalls was content with what the Applicant had suggested. Mr Fenhalls stated that he could not approve; it was for the Tribunal to decide its own course.

16. It was noted that the Respondent had made admissions, so there should be an opportunity for the Respondent to offer mitigation, as he had suggested he would do in his letter. Mr Fenhalls indicated that the Respondent would want an opportunity to address the Tribunal, perhaps in writing, before sanction was determined. If the Tribunal could indicate its timetable, Mr Fenhalls would pass this on to the Respondent.

17. In response to a question from the Tribunal, Mr Fenhalls told the Tribunal that the Applicant had sent to the Respondent a financial information form, with a schedule of costs, on Friday 25 April despite the Respondent's request at the Case Management Hearing on 3 April 2014 for earlier provision of costs information. The Respondent had begun the process of completing the form, but it was not finalised. Mr Fenhalls would ask the Respondent to provide information on his means before costs were determined.

18. The Tribunal informed Mr Fenhalls that it was normal for the Tribunal to move immediately from determination of its findings to questions of sanction and costs. The Tribunal indicated that it could email Mr Fenhalls (and the Respondent, if it had a current email address for him) with its proposed timetable; it noted that Mr Fenhalls would be withdrawing from the hearing.

19. Mr Coleman submitted that it would be appropriate for the Tribunal to give the Respondent notice of when it would be likely to consider sanction to give him the opportunity to attend of make written submissions. Mr Coleman submitted that the Applicant did not accept what was said in the Respondent's letter about their being a "travesty of justice". The Respondent had available to him the usual remedies (by way of appeal) if he was dissatisfied with the Tribunal's decisions. Further, the Respondent's possible lack of resources was not a reason for him to walk away. In any event, there was no information available to show that the Respondent did not have resources; there was no reason for the Respondent to absent himself. It could simply be noted that the Respondent was not participating further (and in particular would not be giving evidence). The Tribunal's Practice Direction dealt with the inferences which could be drawn when assessing the facts of the case.

20. Mr Fenhalls told the Tribunal that he understood that the Respondent would want to address the Tribunal on the question of costs and would ask the Respondent to provide his means information by 1 May. It may be that the Respondent would ask the Tribunal to order a detailed assessment of the Applicant's costs.

21. The Chair stated that it was for the Respondent to decide if he wanted to attend to offer mitigation and/or to address the Tribunal on costs. The Tribunal would give him an indication of the times at which these matters would be considered. The Chair thanked Mr Fenhalls for his courtesy in attending this session of the Tribunal and for offering to be a conduit for information. Mr Fenhalls was asked to ensure that the Respondent was aware of the Practice Direction No. 5. The Tribunal indicated that it would take a short break to consider whether or not to hear further from Mr Coleman, noting that it normally heard from the Applicant in response to particular issues which had arisen in the Respondent's evidence or submissions. The Tribunal rose at 10.27am.

22. The hearing resumed at 10.57am. The Chair informed Mr Coleman that it had decided not to hear further from him. The question of inferences to be drawn where a

Respondent did not give evidence had been addressed earlier. The Tribunal had studied the documents carefully, as would be clear from the various indications during the hearing so far.

23. The Chair stated that the Tribunal would determine its findings of fact during 30 April and would notify Mr Coleman and Mr Fenhalls (and the Respondent, if it had an up to date email address) of its decisions on each allegation by email. The Tribunal's findings would be formally announced at 10am on 1 May. The Tribunal would consider any mitigation on behalf of the Respondent (either in person, or sent in writing) from 10.15am and would hear submissions/consider representations on costs not before 10.45am. It was noted that the Respondent might ask for more time to deal with the question of costs, in which case that request would be considered and determined on 1 May. It was the Tribunal's current intention to conclude matters on 1 May, but the Respondent may apply to defer matters until 2 May (when the members of this division would be in attendance at the Tribunal to deal with a CMH on a different matter). Mr Coleman indicated that if the Respondent made a well-reasoned application to defer conclusion of matters until Friday 2 May, he would not oppose it. Mr Coleman (and Mr Griffiths of Morgan Cole) were released for the remainder of the day.

24. The hearing on 30 April concluded at 10.59am, after which the Tribunal deliberated on its findings. The Tribunal sent an email to Mr Coleman, Mr Fenhalls and Morgan Cole at 12.20pm to confirm the timings indicated at paragraph 23 above. The Tribunal sent a further email to Mr Fenhalls, Mr Coleman and Morgan Cole at 3.08pm to state its findings on each allegation (but not the full reasons).

At 9.01am on 1 May the Tribunal received an email from Mr Fenhalls. This stated:

> "Sir,
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> I attach the documents that I have been asked to forward.
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> It seems to me to be appropriate to invite you to give as much weight as you feel able to the following factors.
>
> (1) [The Respondent's] financial position appears parlous and the prospects for recovering any significant sums are uncertain.
>
> (2) His age, negligible prospects and professional disgrace will haunt him for the rest of his life without any real opportunity to redeem himself.
>
> (3) The [Applicant's] claim for costs is excessive and should properly be significantly reduced, whether by summary or detailed taxation."

The documents attached to that email were Respondent's notes on Applicant's costs claim, mitigation costs notes, personal financial statement and schedule of annotations to the personal financial statement. It was noted that at the time the Respondent's notes were prepared he may not have seen the Applicant's revised costs schedule, which had been recalculated on the basis that the hearing would not go into a fifth day.

25. The hearing resumed at 10.14am on Thursday 1 May. The Chair announced the Tribunal's findings. It was noted that there had been no submissions in mitigation received from the Respondent but some comments on costs had been received. There was no need for Mr Coleman to address the Tribunal in relation to sanction. The Tribunal was informed that there were no previous findings against the Respondent. The Tribunal retired to consider sanction a 10.17am.

26. The Tribunal resumed the hearing at 11.03am. It was stated that nothing further had been received from or on behalf of the Respondent and that he was not present. The Tribunal had received a certified schedule of costs on behalf of the Applicant earlier in the morning. The Tribunal was then addressed on costs by Mr Coleman until 12.11pm. At 12.45pm the Tribunal announced its decision on sanction and costs and the hearing was concluded about 12.52pm on 1 May.

Preliminary Matter (2) – Respondent's application to adjourn

Respondent's Submissions

27. As noted at paragraph 6 above, an application was made by Mr Fenhalls, on behalf of the Respondent, to adjourn the hearing. References to individuals and events are presented as known to the Tribunal, which had heard the Applicant's opening and read the papers in advance of the hearing. The context of the application may be understood by other readers by reference to the "factual background" section of this document and/or the information given in relation to each allegation.

28. Mr Fenhalls told the Tribunal that the substance of the application had crystallised during the Applicant's opening. Mr Coleman had described in opening the areas where there were no disputes; Mr Fenhalls told the Tribunal that Mr Coleman had fairly indicated where there were no material differences between the parties and the issues which did not need to be resolved by the Tribunal.

29. Mr Fenhalls told the Tribunal that were there were disputes, one returned to the central question of what the Respondent was or was not permitted to do with the funds (i.e. the £276,000 received from RTC and paid into an account with BOS) and what Mr RA may have said to the Respondent about this.

30. The Respondent had acknowledged – as noted in the skeleton argument – that there was ample material on which findings of misconduct could be made, and the Respondent had made admissions. However, the issues of both lack of integrity and dishonesty remained in dispute.

31. Mr Fenhalls noted that the first letter to the Applicant, raising concerns about the Respondent, was from Ms SG in late 2011. Until the statement by Ms MG was received on 1 April 2014 there had been no suggestion of a complaint from the owner (Mr IT) or managers of RTC. On receiving Ms MG's statement, it appeared to the Respondent that the Applicant was seeking to have its cake and eat it. It may be that Ms MG's evidence would not be relevant or of any weight (as it now appeared that she was not be called to give evidence). However, the Applicant had suggested that it should be entitled to rely on Ms MG's evidence RTC was refusing to consent to Mr RA having access to RTC's files or to release him from his obligations of confidentiality. It was submitted that this inequality of approach would not be

tolerated in English litigation. The Respondent had been placed in an all but impossible situation as Mr RA had been absent in Australia from the end of March (at which point there had been no information about the statement from Ms MG) until today; he was returning to Switzerland on the afternoon of 28 April.

32. Mr Fenhalls told the Tribunal that there had been contradictory information from Ms MG about whether she would or would not be able to give evidence, on health grounds or otherwise. The Respondent would say that he had permission from Mr RA to use the funds as he did. The Applicant's position was that the Respondent was dishonest and/or lacked integrity; in these circumstances, the Respondent should have the opportunity to call Mr RA to give evidence.

33. In response to a question from the Chair, concerning how the Tribunal could deal with the position if Mr RA could not or would not give evidence, Mr Fenhalls stated that because Mr RA had been in Australia there had been no opportunity to explore whether he was bound by Swiss civil law and confidentiality obligations such that he would be unable to give evidence. The issues on which Mr RA might be able to give evidence were set out in the skeleton argument as:

- After the BOS account was opened, the Respondent delivered several bills to RTC. Mr RA reported that the company could not meet the bills and gave permission for the funds to be drawn from the BOS account;
- Mr RA was party to several telephone conversations with the Respondent (at which others from RTC attended, they being in Switzerland) and at a meeting in London with the Respondent and Mr KC, and a meeting in London with Ms SG where he continued to approve this process;
- Mr RA would be able to assist with the history of RTC, its ownership and some of the personalities/background unknown first hand by the Respondent. This would include information about Mr IT and Mr V and the position of Mr Rosen and the arguments he was seeking to advance, ostensibly on behalf of Mr T.

34. The Respondent had asked the Applicant to seek permission from RTC to allow Mr RA to give evidence. Mr Fenhalls told the Tribunal that he could not say whether or not Mr RA was bound by confidentiality obligations; this issue still had to be resolved. Mr RA's position was that he could not give evidence unless permitted by RTC or advised by a Swiss lawyer that he could do so. This information was derived second-hand; Mr Fenhalls impression was that Mr RA would be able to assist with the matters noted at paragraph 33 above, but must first be released from general confidentiality obligations and those imposed under a Compromise Agreement when Mr RA left RTC. Mr RA was concerned about whether RTC's position would bind him and/or whether he might face sanctions in Switzerland if he gave evidence. He may be advised by his Swiss lawyer that he could not obtain documents from RTC but that he could answer questions on the documents available in these proceedings. As Mr RA continued to work in Switzerland, in a similar occupation to that he carried out for RTC, he would be slow to do anything which might create problems for him in his career.

35. The Respondent's position was that it was plain that where there was a question about what RTC did the Tribunal should have Mr RA's comments and not just those of

Ms MG, who had made remarks in her statement about what Mr RA did or did not know at various stages. There was a question about whether some fees of Mr RA concerning a personal matter had been paid from the BOS funds. The Respondent's position was that Mr RA gave permission for this, as the CEO of RTC. It was easy for the Applicant to invite the Tribunal to raise an eyebrow about this point, but without Mr RA's evidence the matter may not be explained. The Chair commented that the Tribunal had to be satisfied beyond reasonable doubt in relation to any disputed allegations. Mr Fenhalls submitted that the Respondent would have to deal with the implied criticism by the Applicant.

36. Allegation 1.4 was denied by the Respondent. The Applicant put the allegation on two bases, the second of which related to the abortive sale of S Lodge and the circumstances in which RTC had given permission for the sum of £380,000 to be transferred to Mr V/his company. The Applicant alleged that the Respondent had not advised the relevant person of the risks of transferring the money. Whilst the Tribunal could form the view that the Respondent had been in something of a muddle, and take a dim view of this, the main issue was what the Respondent was permitted to do as a result of conversations with Mr RA and he should be able to proof Mr RA in order to deal with this. There were one or two documents on this point, which the Respondent should have the chance to put to Mr RA.

37. With regard to allegation 1.5, the Respondent's position was that he admitted making the withdrawals but he denied that he was not entitled to do so; this was important to determine the alleged dishonesty attached to this allegation. The Applicant's position was that the withdrawals were improper because D Solicitors were offended. Mr Fenhalls accepted that there was some documentary material from the period August to December 2010 which could lead to criticism of the Respondent, absent any explanation by the Respondent. However, the substantive issue to take into account was that RTC had been the source of the client(s) in the transaction. It was commented by the Chair that it appeared from the papers that Mr KC had been the source of the client(s). Mr Fenhalls accepted this, but told the Tribunal that the money flowed through RTC.

38. Mr Fenhalls told the Tribunal that in opening the Tribunal had been referred to correspondence which, the Applicant suggested, indicated that the first time Mr RA was aware the BOS funds were being used to pay RTC's bills was in September 2011. However, the documents also appeared to show that a personal bill of Mr RA was paid from the BOS funds in February 2011, which might suggest that he knew the position earlier. Without the evidence of Mr RA on the permission he had been given by Mr RA, the Respondent was left in an impossible situation. Further, Mr RA was the only person who could assist in explaining why the tone and atmosphere of the Respondent's dealings with RTC changed in late 2011. There had been no complaint from either the CEO or the owner of RTC. The Chair commented that the complaint to the Applicant appeared to have been made on behalf of RTC. Mr Fenhalls told the Tribunal that he did not know the status of Ms SG, and the letter to the Applicant was sent on unheaded paper. Mr Coleman commented that the email address given on the letter appeared to be a RTC email address.

39. In response to a question about whether RTC had lost any money, Mr Fenhalls explained that RTC had been managing MPL. There had been no complaint made by either Mr V or Mr T, after D Solicitors ceased to be instructed in or about December 2010; it was commented by the Chair that there could be many reasons for that. Mr Fenhalls submitted that any attempt to explain the position would be assisted be learning what Mr RA did or did not know at the relevant times.

40. Mr Fenhalls referred to an email dated 8 April 2010 from Ms MG to the Respondent, copied to Mr RA and a letter from Mr RA to Mr KC dated 21 May 2008 which illustrated an apparent inconsistency between Ms MG and Mr RA in their understanding of the parties with whom they were dealing and where the truth lay as to beneficial ownership of MPL. This demonstrated that it was inappropriate for the Respondent to have to meet allegations of dishonesty without the evidence of Mr RA. Almost everything else had been conceded by the Respondent, but the key issue remained what the Respondent was or was not permitted to do by Mr RA.

41. In response to a comment from the Chair that the submission as put would extend to clear instructions from a client to do something dishonest, which plainly was not correct. Mr Fenhalls submitted that it would be necessary to call Mr RA to give evidence in order to determine if the Respondent's misconduct fell short of dishonesty. Mr Fenhalls submitted that in the light of the concessions made by the Respondent it was not necessary to litigate on the issue of dishonesty; if that point were to be argued, the Respondent would want to call Mr RA to give evidence.

42. Mr Fenhalls told the Tribunal that at the CMH on 3 April (which he attended by telephone) he had indicated that there was a potential problem with regard to the evidence of Mr RA. At that point he had only just seen the statement of Ms MG and had not seen all of the documents referred to in that statement. By that time, Mr RA had travelled to Australia. Mr Fenhalls had tried to contact him, but had only entered into correspondence with Mr RA in the last week or so; he had now received a clear indication from Mr RA of what he may be able to say in evidence. However, RTC refused to consent to release Mr RA from the confidentiality obligations imposed on him, and had refused to hand over any files. Mr Fenhalls submitted that it appeared that Ms MG's conclusions were based on what the Applicant had provided to her; it did not appear that RTC had opened its files to her.

43. In response to a question from the Chair about what could be done if RTC would not hand over its files to Mr RA/the Respondent, Mr Fenhalls told the Tribunal that the Applicant had suggested that the Respondent should ask RTC for permission. If that were not possible, it may be possible to persuade Mr RA to give evidence based on the documents available in these proceedings.

44. Mr Fenhalls referred the Tribunal to a letter from Mr RA to Mr KC dated 25 November 2010 which referred to a meeting which had taken place on 15 November 2010. This letter referred to Mr KC's role and his request to receive formal instructions from RTC to represent the company in negotiations with Mr T and/or Mr V. Mr RA referred to there being a conflict of interest – as Mr KC appeared to be instructed by Mr T and/or Mr V – and that the intention in involving Mr KC in the matter had been that he would "act as a conduit or facilitator" in the dispute. It was submitted that this document – which should be read in full for its meaning and effect – contained a contemporaneous description of the behaviour of those with

whom the Respondent was dealing. This document demonstrated that in considering the material presented in the case, and assessing the Respondent's honesty, the evidence of Mr RA should be central to that consideration. It had been suggested by the Applicant that because of what had gone wrong with the opening of the BOS account the Respondent had then "exploited" the position ruthlessly. However, if Mr RA had permitted the use of the account the Respondent's actions could be considered in a different light; for that reason, the Respondent should be entitled to produce evidence from Mr RA.

45. Having taken instructions from the Respondent, Mr Fenhalls added that he understood that when Mr RA left RTC in summer 2013 he had entered a compromise agreement, on which he had taken advice from a Swiss lawyer and so he knew who to approach for advice and should receive a rapid answer.

46. The Chair asked Mr Fenhalls to address three points. First, it was commented that the application might have more strength if the Tribunal were going to hear from Ms MG. As she was not going to be called (by video link or otherwise), the Tribunal would give her evidence little weight and whilst it might be corroborative, nothing would turn on her evidence. Secondly, it was queried why it had not been apparent to the Respondent from the beginning of the proceedings that the evidence of Mr RA would be needed. Thirdly, all that the Respondent was required to do in his defence was raise reasonable doubts; it was up to the Applicant to prove its case and not to the Respondent to prove anything.

47. Mr Fenhalls told the Tribunal that he had not envisaged persuading Mr RA to give evidence in the context of the compromise agreement, but this position had been revisited when Ms MG's statement was received. Whilst it was, of course, for the Applicant to prove its case, where the Respondent had a witness who could help him to answer the allegations and substantiate his position it would assist him in showing that the standard of proof had not been met by the Applicant. The Respondent would rather have the witness than not have him. In response to a comment that in the absence of Ms MG the Respondent would not suffer any disadvantage, Mr Fenhalls commented that it would a fall-back position to proceed without the supporting witness. The Respondent had indicated throughout that he would deal with matters if RTC raised a complaint. The Respondent had conceded that there had been an element of overcharging and had made a genuine offer to seek to resolve matters. It was submitted that the absence of any proper complaint by RTC should count against the Applicant's case.

48. In response to questions from the Tribunal, Mr Fenhalls stated that Mr RA had always been of interest to the Respondent as a possible witness, but he was aware of Mr RA's obligations in Switzerland and did not think it would be possible to call Mr RA. There had been enquiries to see if RTC would consent to Mr RA giving evidence; it was assumed that RTC had given access to its files to Ms MG and/or the Applicant but it may be that there had been no consent. Mr Fenhalls told the Tribunal that he had last been in contact with Mr RA on or about 23/24 April. Before that, there had been email communications from the time of receipt of Ms MG's statement when the Respondent had endeavoured to locate Mr RA.

49. The Tribunal noted that an allegation of dishonesty was the most serious allegation against a solicitor and it was queried why the Respondent had not moved heaven and earth to obtain Mr RA's help. The Respondent may be aware of the compromise agreement, but Mr RA's assistance could have been sought before that agreement was made. Mr Fenhalls told the Tribunal that he could not answer this point without instructions. However, at every twist and turn one had to meet the case which one faced. There had been an investigation, to which the Respondent had responded and had made submissions, with the outcome that in March 2013 the Adjudication Committee of the Applicant had decided not to intervene into the Respondent's firm. The Respondent began to work for another firm, and there had been no impediments placed on his Practising Certificate. At each stage, he had met the case he faced. However, the case had now been recast by the Rule 5 Statement, issued in July 2013. Mr Fenhalls told the Tribunal that he did not know when the Applicant had first approached Ms MG and did not know if it had approached Mr RA.

Applicant's Submissions

50. Mr Coleman for the Applicant asked the Tribunal to reject the application to adjourn the case.

51. It was submitted that the application did not begin from a promising position. It did not amount to an application to adduce evidence but rather was a request to explore whether it might be possible to produce evidence from Mr RA. In this situation, which was unusual, the Respondent would need to show there were cogent and exceptional reasons and it was submitted that the Respondent had not done so.

52. Mr Coleman submitted that the application had been made far too late. The Respondent had had the opportunity to seek evidence from Mr RA earlier. The Respondent appeared to suggest that the service of the statement of Ms MG had changed the nature of the allegations, but this was not so. The Forensic Investigation Report was produced in July 2012, nearly 2 years ago. At paragraph 115 of that statement it was stated:

> "Mr Bailey was unable to find any documentation, in the client matter file, which would indicate that [the Respondent] had been authorised, either by RTC, MPL or D Solicitors to withdraw any money…"

The Respondent had had chance to comment on this and address it. The point about there being no evidence of consent was stated paragraph 70 of the Rule 5 Statement to be an issue in the case, with regard to RTC as well as MPL and D Solicitors. The date of this hearing had been set by the Tribunal in October 2013 and notified to the parties. There was nothing to justify the late realisation by the Respondent of the nature of the allegations; it was submitted that the application was tactical. Mr Coleman submitted that he could understand that the Respondent would think it a good idea to obtain a statement from Mr RA, having seen the statement of Ms MG, but approaching litigation by waiting until there was a statement one could seek to rebut was not an appropriate approach.

53. Mr Coleman submitted that the Respondent had attempted to show that Mr RA's evidence was important as it would (on the Respondent's case) show that there had been consent to withdrawals from the BOS account. However, there were documents dated September 2011 which indicated that Mr RA was being told for the first time

about the deductions. There was, of course, the slight twist that appeared the BOS funds had been used to fund legal costs in a private matter for Mr RA. It was obviously improper to use the BOS funds for Mr RA's private legal costs so any knowledge by Mr RA (prior to September 2011) about the withdrawals from the account could not be said to be equivalent to the knowledge or consent of RTC; it was submitted that the misuse of the account to pay Mr RA's private costs weakened the Respondent's case. Mr Coleman submitted that in any event, a major part of the Applicant's case was that the withdrawals were made without the knowledge or consent of D Solicitors; Mr RA's evidence could not cover that point.

54. Mr Coleman submitted that the Applicant could not be criticised for the fact that RTC was not prepared to release Mr RA from the obligations of confidentiality to which reference had been made.

55. Mr Coleman told the Tribunal that he did not know why RTC was not consenting to the release of Mr RA from his confidentiality obligations; there could be good reasons for that refusal.

56. Mr Coleman further submitted that if the Tribunal considered that the stance taken by RTC in relation to Ms MG and Mr RA was relevant, it could take this into account in determining the weight, if any, to be given to Ms MG's statement.

57. Mr Coleman submitted that this application, by its nature, would have to be compelling in order to succeed and it fell well short of that standard.

58. Mr Fenhalls, in a brief reply, comment that the accident of timing – whereby Mr RA was returning from holiday only on 28 April – was not of the Respondent's making. Mr RA had not been available in the last few weeks to explore his evidence.

Further submissions on 28 April

59. As noted at paragraph 7 above, after a short adjournment the Tribunal was informed that the Applicant's solicitor and Mr Fenhalls had received an email from Ms VF of RTC, timed at 15.52 on 28 April. This attached a number of documents and stated that RTC had that day been served with an "Order to Pay" from the "Office des Poursuites" in Geneva by Mr T, relating to MPL. It was stated that the claim involved the Respondent and Mr KC and gave notice that they would have to join the proceedings. RTC stated that it was taking legal advice, but would dispute the claim which was for £2 million.

Further submissions on 29 April

60. Mr Fenhalls informed the Tribunal that the Respondent had been engaged in a telephone conversation with Mr RA and he would want to discuss that with the Respondent. Mr Fenhalls told the Tribunal that he understood a civil complaint had been made in Switzerland against RTC by Mr T, for £2 million. It was clear from the email from RTC, enclosing a copy of the proceedings, that RTC intends to join the Respondent into the claim. There were two possible implications from the proceedings in Switzerland. If they were well-founded, against RTC or the Respondent, there could be major financial consequences for the Respondent. It may be that RTC would want the Respondent's assistance in defending the claim by Mr T, and RTC might reconsider giving Mr RA consent to give evidence to the Tribunal.

61. Mr Coleman submitted that the proceedings in Switzerland were completely irrelevant. The claim by Mr T was a logical consequence of the position he had taken in 2010. It was submitted that those proceedings had no bearing on either the Respondent's professional conduct, or on the application to adjourn. It was possible that RTC might want the Respondent's assistance, but the application to adjourn was based on speculation that Mr RA might be able to give evidence for the Respondent.

62. In response to a comment by the Chair that, if there was a Part 20 claim or equivalent in the Swiss proceedings against the Respondent, it was hard to see why RTC would co-operate and release Mr RA from his obligations under the compromise agreement, Mr Fenhalls told the Tribunal that it was not known if RTC would blame the Respondent or would seek to co-operate with him. Mr Fenhalls was given the opportunity to take instructions on the outcome of the Respondent's telephone conversation with Mr RA.

63. As set out at paragraph 9 above, there was discussion concerning the release of witnesses and the timetable for the hearing, if the application were not granted.

64. Mr Fenhalls told the Tribunal that he had spoken to Mr RA but there was as yet no definitive answer as to whether he could or would give evidence. Mr RA had indicated that he was willing in principle to assist if either RTC gave permission/released him from the confidentiality clauses of the compromise agreement or his Swiss lawyer advised that there would be no difficulties or sanctions against him if he gave evidence to the Tribunal. Mr RA would speak to his Swiss lawyer today. Mr RA was very concerned about the risk of civil proceedings against him in Switzerland. It might be that RTC would reconsider their position on consent if they needed Mr RA's assistance in connection with the proceedings brought by Mr T.

65. Mr Fenhalls summarised and renewed the application to adjourn. He submitted that he could understand why Mr Coleman suggested the application was speculative, as there was no witness statement from Mr RA. However, the circumstances were both unusual and not within the Respondent's control. RTC appeared to have adopted varying positions; it appeared RTC had permitted Ms MG to make a statement, but would not permit Mr RA to do so. It was understood by both parties that Ms MG still worked for RTC; Mr Fenhalls submitted that it could therefore be inferred that RTC had given her permission to make a witness statement. It was submitted that this sat uncomfortably with RTC's position with regard to Mr RA. The receipt of the documents from RTC concerning the claim by Mr T gave some cause for hope that RTC might change its view about releasing Mr RA from his obligations. Mr RA was now in Europe and had made his own position clear. Mr Fenhalls asked for the opportunity to take a witness statement from Mr RA; if necessary, the Respondent would travel to Switzerland to do this as he was so serious about obtaining a statement. In response to a question, Mr Fenhalls told the Tribunal that he understood Mr RA left RTC in about July 2013; he did not have the date of the compromise agreement.

66. Mr Coleman submitted that nothing had changed and the application should not be entertained. Even if there was some assurance that Mr RA could attend the Tribunal soon, e.g. next week, there would be considerable disruption. This was a one week case and adjourning it would cause considerable inconvenience to the parties, to the

Tribunal and to other users of the Tribunal. The issue about RTC's knowledge and/or consent to the withdrawal of monies from the BOS fund had been clear since provision of the Forensic Investigation Report and confirmed when the proceedings were issued in July 2013. The issue had therefore been clear to the Respondent for almost two years.

67. Mr Coleman submitted that the Tribunal had set a timetable, which provided for statements to be exchanged on 25 February 2014. The Respondent had had ample opportunity to seek and provide a statement from Mr RA. A solicitor facing allegations does not have to await the Tribunal's directions before seeking information and evidence which would assist but would start gathering evidence as soon as the allegations were known. Given the disruption which adjourning the case would cause, it was submitted that it should not be adjourned without a compelling reasons and that no such compelling reason had been shown. The question of whether or not Mr RA would give evidence remained speculative.

68. At Mr Fenhalls' invitation, the Tribunal retired briefly whilst the Respondent dealt with further telephone conversations with Mr RA. On resuming, Mr Fenhalls told the Tribunal that the Respondent was still on the telephone. It was understood that the Swiss lawyer had told Mr RA that without RTC's permission, he would need a witness summons or court order from the court or Tribunal to require his attendance (or could face civil sanctions in Switzerland if he gave evidence). If the Tribunal agreed to the application to adjourn, the need for a witness summons may or may not arise. Mr Fenhalls understood that the Tribunal did not have the power to issue a witness summons but the High Court could grant one at short notice.

69. The Chair invited comments from Mr Fenhalls about whether the purpose of the arrangement between MPL and RTC, which was stated in one document to include "confidentiality", had any impact on the Respondent's position and whether or not Mr RA might give evidence. Mr Fenhalls stated that his initial reaction was that Mr RA may be protected from sanctions for breaching the Swiss confidentiality laws if he were ordered by a court elsewhere to attend to give evidence. Mr Fenhalls commented that it was possible that Mr T would be further annoyed if RTC gave permission to Mr RA to give evidence, but such speculation should be ignored. Mr Coleman submitted that this speculation had not been prayed in aid of the application. It was noted that it was not yet even a proposal that a witness summons would be sought to compel Mr RA's attendance. Mr Coleman submitted that in any event all of these issues could have been considered and planned some time ago.

The Tribunal's Decision

70. The Tribunal gave careful consideration to the application, having given the Respondent's counsel, Mr Fenhalls, plenty of opportunity to present submissions and provide updates on the position. The Tribunal had also heard the submissions in response from the Applicant's counsel, Mr Coleman. The Respondent, through his counsel, had applied for an adjournment of the substantive hearing.

71. The Respondent had received a witness statement from Ms MG on 1 April 2014. Having read that statement, the Respondent now sought to have the case adjourned in order to establish if he could call Mr RA to give evidence. Mr RA was formerly the

CEO of RTC. He had been on holiday in Australia from late March and had returned to Switzerland, where he lives, on 28 April. The Tribunal had been told that Mr RA was no longer an employee of RTC and that the terms of his departure from RTC, under a compromise agreement, imposed obligations of confidentiality which Mr RA considered may preclude him from giving evidence. There was no dispute about the existence of a compromise agreement, and it was not disputed that the agreement contained a statement of confidentiality obligations.

72. The Respondent and Mr Fenhalls had both spoken to Mr RA during the morning of 29 April. Mr Fenhalls had been told by Mr RA that he was willing to give evidence if RTC agreed, or if his Swiss lawyer advised him he may safely ignore the confidentiality obligations in the compromise agreement in the context of these proceedings. Mr RA wished to take the advice of the Swiss lawyer who had advised him about the compromise agreement before confirming whether or not he would assist the Respondent. It appeared from discussions on 29 April that Mr RA had been advised he may have some protection if he were ordered to attend the Tribunal by way of a witness summons, but this had not been explored in detail and there was no pending application for such a summons.

73. The Tribunal understood that Mr Fenhalls had been invited by the Applicant some time prior to the start of this hearing to contact RTC to see if the company would release Mr RA from his obligations of confidentiality. It was understood that RTC would not so release Mr RA, nor would it release its files of papers for use by Mr RA or the Respondent for this case.

74. Ms MG had provided a witness statement, but was not going to give evidence to the Tribunal; apparently she was unable to travel for medical reasons. There was no evidence that her health precluded her from giving evidence by video link; although such arrangements were possible, and indeed permitted by an earlier direction of the Tribunal in these proceedings, the Applicant had not asked for Ms MG to give evidence in this way. The Tribunal did not know whether Ms MG had seen RTC's file; Mr Fenhalls had made the point that her evidence may be based on partial documentation, perhaps as provided to her by the Applicant. It was common ground that Ms MG was still employed by RTC so it was presumed (but not established) that RTC had agreed to her giving a witness statement. Mr Fenhalls submitted that there may therefore be no objection in principle to giving Mr RA permission to provide evidence to the Tribunal.

75. The Tribunal had sought to make clear during the application that the weight which would be given to Ms MG's evidence was limited. In discussion with counsel, the Chair had remarked that her evidence would be "feather, rather than lead" in the weight it was given. Ms MG's evidence could not be decisive, but might only corroborate other evidence.

76. The Tribunal had read the papers in the case, heard the opening submissions of the Applicant's counsel and heard the application. It was clear to the Tribunal that it had always been obvious that the evidence of Mr RA would be central to the Respondent's defence, in particular, to allegation 1.5 and the issue of whether or not the money was withdrawn from the BOS account with the consent or knowledge of RTC. In making the application, Mr Fenhalls had prayed in aid the assertion that Mr RA's evidence

was indeed central. The Tribunal considered that this begged the question why Mr RA had not been approached earlier. The Rule 5 Statement containing the allegations was made in July 2013. The substance of the allegations was first raised almost two years ago in the Forensic Investigation Report produced in July 2012. The Respondent had known for over a year that this matter would come before the Tribunal. The role of Mr RA was clear to the Respondent at all times; he could have been approached at any time, but the Respondent did not approach him to obtain a statement, seek permission from RTC to do so, clarify any difficulties in procuring the evidence and he did not take any steps to apply for a witness summons. The Tribunal did not know the date of the compromise agreement, but it appeared that Mr RA left RTC in or about July 2013; the Respondent could have approached him before he left RTC.

77. At a Case Management Hearing on 25 February 2014, which was attended by Mr Fenhalls and the Respondent, the Tribunal had ordered the parties to exchange statements by 4pm on 25 March. It was notable that there was to be mutual exchange rather than sequential service of statements. The Respondent could not properly argue that the contents of Ms MG's statement were a surprise such as would justify giving him the opportunity to present evidence in response; all evidence was due to be exchanged at the same time.

78. It was recorded in the Memorandum of the Case Management Hearing on 3 April 2014 that the Applicant had mentioned the possibility of Ms MG giving evidence by video link, and provision was made for this in the Tribunal's directions. Whilst the possibility of calling Mr RA to give evidence had also been raised at that Case Management Hearing, the application to adjourn the case was made only on the first day of the substantive hearing.

79. The application which had been made – which was foreshadowed in the Respondent's skeleton argument, served shortly before the hearing – was to permit the Respondent to make further enquiries as to whether RTC would relent and release Mr RA from his obligation of confidentiality. Although there was a statement from Ms MG, there was no indication from RTC that they might relent so far as Mr RA was concerned. RTC was a Swiss company; the purpose of their business was to enable their clients to conduct their affairs discreetly. This was not a promising context in which to suggest the company may allow its file to be used in public proceedings, where they had a general obligation of confidence and had imposed specific obligations on the potential witness.

80. The Respondent had had competent representation for most if not all of the life of these proceedings. It had always been known and obvious that Mr RA was central to some of the issues in dispute. The only thing which had changed was that a statement made by Ms MG had been served; that statement carried little weight with the Tribunal as its maker was not going to give direct evidence and be subject to cross examination.

81. The Tribunal took into account that, in these proceedings, the Respondent's livelihood and professional reputation were at stake. There was an argument that the Respondent should be given the opportunity to present whatever evidence would assist him in defending the allegations. However, the Tribunal also had to consider the confidence of the public in the Tribunal as the regulatory Tribunal for the solicitors' profession, as

well as the reputation of the profession more generally. It was in the public interest for cases such as this to be progressed with reasonable expedition. There were serious allegations of dishonesty in this case; it was no answer to that point that there had been no restriction to date on the Respondent's practice to date. On the contrary, the Tribunal considered that this supported the proposition that it was the more important to decide on the allegations of dishonesty without delay.

82. The case had been listed for five days, which was a substantial amount of Tribunal time. An adjournment would waste the remaining four days of this hearing and re-listing – which would not be for some months – would delay other cases which could be heard on those later dates.

83. The Tribunal had noted the email of 28 April from Ms VF of RTC with attachments, which showed that a case had been issued on 27 March 2014 in Geneva by Mr T against RTC; those proceedings were not served until 28 April. RTC sent a copy of those proceedings to the Respondent, and to the Applicant's solicitors. The claim was a money claim for over £2 million. The Tribunal determined that it had no bearing on the application to adjourn this case. Whether the proceedings in Switzerland would make it more likely that RTC would agree to Mr RA giving evidence was a matter of speculation, as Mr Fenhalls accepted. The Tribunal had not been told specifically whether RTC were asked to release Mr RA from his obligations after the court papers were served on RTC.

84. The Tribunal determined that the application to adjourn was made far too late. For the reasons set out at paragraphs 72 to 85 above, it must be refused.

Factual Background

85. The Respondent was born in 1945 and was admitted to the Roll of Solicitors in 1978. The Respondent's name remained on the Roll and he held a Practising Certificate at the date of hearing.

86. At all material times the Respondent practised as a registered sole practitioner at Sophia House, 32-35 Featherstone Street, London EC1Y 8TW under the style of Howard Stone, Solicitors ("the Firm").

87. An investigation into the Firm was authorised by the Applicant and was carried out by an Investigation Officer ("IO") of the Applicant, Mr David Bailey. The investigation commenced on 1 March 2012. An interview with the Respondent was conducted on 21 June 2012. At the conclusion of the investigation a Forensic Investigation Report dated 24 July 2012 was produced ("the FI Report"). The Applicant relied on the contents of the FI Report.

<u>Allegation 1.1 – keeping books of account</u>

88. The FI Report stated that the Firm's books of account were not in compliance with the SAR 2011 in a number of respects. Of relevance to allegation 1.1 it was stated that the Firm failed to prepare accurately a listing of all balances shown by the client ledger of all balances due to clients and to compare the total of those balances with the balances on the client cash account, in breach of Rule 29.12 SAR 2011. It was stated that the reconciliations prepared by the Firm were deficient in that they did not properly

identify reconciliation items, shortages were not properly shown and accounting errors were not promptly remedied as required by Rule 7 of the SAR 2011.

89. At the extraction date used by the IO, 31 January 2012, a debit balance existed on the client ledger of R re LB Deceased caused by a transfer of £950 from client bank account to office bank account on 19 January 2012 at a time when insufficient funds were held on behalf of the client to justify the transfer. A bill for £15,250 to RTC dated 25 October 2011 was posted on the ledger in the sum of £17,310 which led to the amount of £2,060 being overdrawn from client account.

Allegation 1.2 – cash shortage

90. The FI Report recorded that Respondent had developed a practice whereby client monies were transferred from client account to office account where there were insufficient funds held on behalf of a particular client to justify the transfer. The IO identified 13 such instances which led to debit balances on the client side of the client ledger. The FI Report exemplified the matter of Mr YA on which ledger there were a series of transfers from client to office account when there was insufficient money on the client account, such that the client account was in debit at various periods during 2011. A number of these transfers were carried out without the delivery of a bill of costs or written notification of costs to the client or, on occasion, the transfers were in excess of the amount of the bill.

91. The FI Report recorded that as at 31 January 2012 there was a cash shortage of £12,362.69; this figure was disputed by the Respondent. The FI Report stated that the main causes of the cash shortage related to the RTC client ledger and in particular the following:

- Credit note dated 20 December 2010 in the sum of £8,000 which was delivered to the client but not posted to the ledger;
- Bill dated 14 January 2011 for £1,352.50 which was not delivered to the client; and
- Although there was a bill dated 25 October 2011 for £15,250, the sum of £17,310 was posted to the ledger.

Allegation 1.3 – improper transfers

92. As noted at paragraph 90 above, on the matter of Mr YA a number of transfers were made from client to office account without the delivery of a bill of costs or written notification of costs and, on occasion, the transfers were in excess of the amount of the bill.

93. The FI Report recorded that on a number of occasions in regard to the RTC account monies were transferred from client to office account without delivery of a bill of costs or written notification of costs. During the period 29 December 2010 to 20 January 2011 funds totalling £18,650 were transferred from the client bank account to the office bank account in respect of that ledger whilst billing for that period amounted to only £1,352.50.

94. In interview on 21 June 2012 the Respondent confirmed that he was indebted to a total of nine finance companies with respect to secured and unsecured loans in the approximate sum of £170,000. The FI Report recorded that in the period 26 September to 17 October 2011 transfers amounting to £16,960 were made from client to office account at a time when regular standing orders and direct debit orders were due which would not have been made had the transfers not taken place or which would have caused the Firm to exceed the overdraft facility of £4,000 provided by HSBC.

Allegation 1.4 – breaches of core duties and principles

Accounts and Billing matters

95. The factual matters set out at paragraphs 92 to 94 above were relied on by the Applicant with regard to this allegation.

96. In addition, the FI Report recorded that the Respondent prepared a bill with respect to RTC for the period 14 October to 25 October 2011 in the sum of £15,250 in which period £60 of billable work was recorded.

97. By 14 November 2011 further over transfers had occurred so that there was a credit in office account in the sum of £5,340. The Respondent's book keeper sent an email to the Respondent on 14 November 2011 regarding the RTC ledger and suggesting that he had transferred sums against a particular bill on two occasions and confirming that £5,340 should be transferred back to client account immediately. No money was transferred to client account in response to the email but on 25 November 2011 the Respondent raised another bill and made two office to client transfers to rectify the balance; there was no apparent justification for raising the further bill or making the two office to client transfers.

Abortive purchase of S Lodge, London

98. The Respondent was instructed to act in what transpired to be the abortive sale of S Lodge, a property in London.

99. There had been some confusion on the part of the Respondent concerning the identity of his client, although it appeared that the Respondent considered that he was mainly acting on behalf of RTC.

100. RTC is a company established in Switzerland which, amongst other things, acts as administrator for other companies. Of relevance to this matter, RTC was the administrator and trustee of MPL, a company registered in the British Virgin Islands. The directors of MPL were LD Ltd and MD Ltd; these were RTC "in house" corporate directors. The directors of LD Ltd and MD Ltd were Mr IT (who was also the owner of RTC) and Mr VA. The shareholders of MPL were SNS SA and ONS SA, which were RTC "in house" nominees. As noted further below, there was subsequently a dispute concerning the beneficial ownership of MPL.

101. The Respondent was instructed by RTC, as trustee acting on behalf of MPL, with regard to the purchase by MPL of S Lodge from R Ltd and that company's beneficial owner, Mr V, in whose name the title of the property was registered, in the sum of

£380,000. Mr V was originally represented in the transaction by Mr JB, who was described as a legal consultant.

102. On 17 May 2007 the sum of £400,000 was paid into the Respondent's client bank account from a Bank of Cyprus account on the instructions of a Mr T. Mr KC, an accountant (whose firm was also the Firm's reporting accountant) represented Mr V; it was Mr KC who informed the Respondent that the monies had been forwarded by Mr T.

103. There was never an exchange of contracts with regard to the proposed purchase. On 21 May 2007 the Respondent transferred £380,000 from the Firm's client account to Mr V personally, on the basis that the funds were to be held to the Firm's order pending exchange and completion.

104. By letter of 22 May 2007 the Respondent wrote to Mr KC, stating:

> "I am required to write to you on behalf of MPL to point out there are risks attended upon such a transaction but these have been explained to you and that you have authorised me to make the transfer."

There was no evidence on the file which showed that the Respondent took his own client's instructions, received their written authority to transfer the money (prior to the transfer of the funds or prior to exchange of contracts) and/or informed his clients of the risks of transferring money directly to the vendor before exchange of contracts. It was not clear from the file why the funds were to be transferred before exchange of contracts.

105. In an email from Mr KC to the Respondent on 13 May 2008 there was reference to Mr V being the beneficial owner of MPL and it was stated that R Ltd had been placed in administration. On 21 May 2008 RTC wrote to Mr KC stating that Mr V was not the beneficial owner of MPL.

106. By letter of 30 May 2007 to Mr V the Respondent indicated that he had instructions from MPL (rather than RTC) to recover the monies which had been transferred. A similar request was made by letter of 13 June 2007 to H Solicitors, who had been instructed by Mr V. On 10 December 2008 the Respondent wrote to the administrators of R Ltd, again seeking repayment of the monies advanced. The monies were not returned to the Respondent or his clients.

<u>Allegation 1.5 – Withdrawals from a client account for costs</u>

Sale of M Lodge, London

107. In or about November 2009 the Respondent was instructed to act on behalf of RTC in the sale of M Lodge, a property in London which was understood to be adjacent to S Lodge (referred to at paragraph 98 et seq above), of which the registered proprietor was MPL.

108. On 7 December 2009 the property was sold for £370,000. On 23 December 2009 the Respondent sent to RTC the sum of £343,312.20, the balance having been retained in settlement of the Respondent's fees and disbursements.

109. On 7 April 2010 D Solicitors wrote to the Respondent stating that they had been instructed by Mr T, the beneficial owner of MPL and asking why the purchase of S Lodge had not been completed and alleging that MPL had not authorised the sale of M Lodge. D Solicitors sought an undertaking that that proceeds of sale would be placed in an escrow account. In the ensuing correspondence between the Respondent and D Solicitors issues of beneficial ownership of MPL, the legitimacy of RTC's authority to effect the sale of M Lodge and entitlement to the sale proceeds were debated.

110. On 8 April 2010 the Respondent wrote to Ms MG of RTC stating that legal proceedings were likely to be instituted against RTC by D Solicitors on behalf of MPL. The Respondent recommended that leading counsel should be instructed and set out the basis of his retainer, for which see further below. On the same day, the Respondent wrote to D Solicitors confirming that his Firm was instructed by RTC and stating:

> "Insofar as your letters are concerned, you have adduced no evidence of our client being the beneficial owner of MPL…
>
> Nevertheless, we are instructed to inform you that the writer's file remains under his control and the funds held by [RTC], on behalf of [MPL] remain in a designated deposit account."

In response on the same date, D Solicitors wrote:

> "We are grateful to you specifically in respect of the final paragraph of your letter that the papers in this matter remain in your control and that the funds remain in a designated deposit account.
>
> Our instructions are therefore not to proceed this afternoon with an application for a freezing injunction."

On 13 April 2010 the Respondent wrote to D Solicitors, enclosing a copy undertaking given by RTC and signed by Mr RA which, so far as relevant, read:

> "We are prepared to offer you an assurance that pending a Court Order, from a Court of competent jurisdiction and agreement for the withdrawal of any claim by your client against [RTC] and/or [MPL], the funds currently held to the order of [MPL] will remain in a Trustee Designated Deposit Account."

111. On 1 July 2010 D Solicitors wrote to the Respondent with suggested wording for an undertaking to transfer the sale proceeds of M Lodge into a joint escrow account in the name of the Respondent and D Solicitors. The terms of the undertaking sought were:

> "I undertake on behalf of [RTC] within the next 7 days to transfer into a joint escrow account (in the names of D Solicitors and Howard Stone Solicitors) within the jurisdiction of England and Wales, the sale proceeds of [M Lodge] and any other monies due to [Mr T], currently held in a designated deposit account.

> I further undertake on behalf of [RTC] not in any way to dispose of such monies, deal with, remove from the jurisdiction in which they currently stand, or diminish the value of those sale proceeds, or other monies due to [Mr T], whether or not they are in the name of [RTC] or held solely or jointly."

In his letter of response to D Solicitors of 5 July 2010 the Respondent wrote,

> "… the funds held in the name of MPL would, pro tem, be placed in a Designated Deposit Account, with the heading "Howard Stone, Solicitors, and D Solicitors Re: MPL"
>
> Irrespective of the above, provision for the costs of both our clients and this firm must be provided for and deducted from any monies prior to them being placed on deposit. At this stage, those costs are assessed in the sum of £22,000."

On 20 July 2010 the Respondent wrote to D Solicitors again making a number of points concerning the dispute and stating,

> "We note that you have ignored our suggestion that the funds be placed in an escrow account to abide the resolution of this unfortunate matter and we repeat that offer in this letter."

112. By letter of 22 July 2010 D Solicitors wrote to the Respondent, stating,

> "It was in fact our suggestion that funds be placed in an escrow account, and since it now seems that you are amenable to this, we are agreeable to those funds being placed in an escrow account pending determination of this matter either by agreement or through the Courts.
>
> To that end, kindly confirm by close of play today that you will arrange for the funds to be returned into your client account and we can then set out a joint account accordingly between our respective firms.
>
> Please confirm that this is acceptable to you and we can then take matters from there."

113. On 27 July 2010 the Respondent sent an email to D Solicitors, stating:

> "Following our recent correspondence, we are instructed that an "escrow" account in the names of our respective firms is acceptable, <u>in principle</u>, to our Clients. This is subject to agreement as to the Bank into which the moneys should be paid and to whom interest should be credited once matters are resolved." (Underlining as in original document).

The email then proposed the account should be with the Bank of Scotland ("BOS"). D Solicitors responded, saying,

> "We have no objection to monies being transferred in to the BOS Professionals Account, as you suggest.

> The interest is not an issue that needs addressing at this stage. It is something to be discussed. It will either be agreed, or will be an issue for the Court to determine at a later stage.
>
> In the meantime, please confirm that you are in receipt of monies, and confirm how much you are holding."

The account in question was subsequently opened with BOS, which was incorrectly referred to as RBS in some of the correspondence concerning the establishment of the account; the correspondence set out below therefore contains references to RBS. At various points in the documents, the account was referred to as an escrow account and/or as a joint account; in this document, it is referred to as the BOS account.

114. On 28 July 2010 the Respondent wrote to BOS,

> "We refer to our telephone call to you yesterday, in connection with the opening of a Designated Deposit Escrow Account in the names of this office and D Solicitors, in respect of funds currently being held by our clients, where there is a claim by a third party, who is represented by D Solicitors.
>
> It has been agreed between Solicitors that the monies be held in an Escrow Account to abide the outcome of the negotiations and/or litigation and we should be grateful if you would forward to us the necessary documentation to give effect to the agreement reached between Solicitors, on the instructions of their clients. The sum involved is approximately £350,000 and it is expected that the funds will remain on deposit for at least two months, possibly longer."

The Bank replied the same day, by email, stating:

> "I would advise that we can open a designated sub-account in this instance. It would be termed by us for the purposes of operation as a "client account" which hopefully would be acceptable to you, as presumably you consider the Limited Company to be your client.
>
> We would ask you to complete and sign the new account form on behalf of the other parties involved.
>
> Where I have opened a similar account in the past, the Solicitors acting for the third party have asked that one of their Partners registered with the Law Society has also been a signatory to the specific account being opened so that they have some control over the funds.
>
> In such an instance they have provided such a written confirmation to our Introducer, together with a sample authority signature. That letter was then forwarded to us with the new account form. The account was thus conducted as "two to sign", with one authorised signature from each firm to conduct withdrawals…"

115. On 29 July 2010 the Respondent wrote to D Solicitors, saying:

> "We enclose a copy of an email received from the Bank of Scotland Professionals Account. You will see that there are no insurmountable

> difficulties to opening the account, save that the account is to be operated on a "two to sign" basis and you will need an authorised signatory of a Partner in your firm, on, presumably, headed notepaper, which we will lodge with the account application form.
>
> We also enclose a draft of the account application form, which we have partially completed. If you wish to make any amendments or raise any queries with regard thereto, please do not hesitate to do so…"

On 4 August 2010 D Solicitors wrote to the Respondent:

> "We enclose the account application form duly completed with a signature by the writer together with his letter to accompany the form to be sent to the Manager at BOS… with a covering letter from you.
>
> Kindly let us know once the account is set out and once the funds are in place."

The letter from D Solicitors, addressed to BOS, read:

> "Please take this letter as my confirmation and authority that I am to be named joint account holder together with [the Respondent] in connection with the opening of a designated deposit escrow account in the names of D and Howard Stone Solicitors concerning funds which are to be transferred from [RTC] in the region of £350,000 in to such an account to be held in escrow pending determination of this matter either by way of negotiations of by Order of Court.
>
> I understand and accept that this joint account is to be operated on a "2 to sign" basis and that therefore please take this letter as my authority as Partner in the firm of D as confirmation of my signature and my authority and approval to open such a joint account.
>
> I have completed and signed my part of the application form, and this letter together with the account application form is being forwarded to you under cover of letter from Howard Stone Solicitors…"

On 9 August 2010 an internal email within D Solicitors, from KL to Mr Rosen, read:

> "RBS called.
>
> You cannot arrange a joint account with [the Respondent] just by writing to RBS. You need to meet with [the Respondent's] relationship manager who will help with authority forms etc etc. His name is TP and his number is …. but if you want to book something into his diary speak to K on ….. The meeting must be with [the Respondent] too."

Internal instructions were then given to arrange a meeting.

116. On 11 August 2010 the Respondent wrote to D Solicitors, saying,

> "Thank you for your letter of the 4th August, enclosing the relevant documents.
>
> The copy letter to BOS is also noted.
>
> The writer, having returned from vacation, we have now asked our clients to forward the funds to us, so they can be transferred to [BOS] as quickly as possible."

On 16 August 2010 the Respondent wrote to D Solicitors, stating:

> "We refer to the telephone call Mr Rosen's secretary with the writer on Wednesday of last week concerning a meeting requested by [Mr TP], the Relationship Manager of BOS Professionals Account. The writer, as you may know, expressed some doubt as to why a meeting should take place. However, the writer made contact with Mr TP who has no knowledge whatsoever of a telephone call being made by him or on his behalf to your firm. Further, he knows nothing of a meeting, although he does know of the proposed account to be opened in our respective names. In this connection, we have pressed our clients for the funds and will let you know as soon as those funds are to hand, so they may be deposited in the Designated Escrow Account.
>
> Further, [Mr TP] knows of no reason why there should be a meeting between BOS Professionals Account and the writer and, thus, regrettably, we like yourselves are left in some degree of uncertainty but this should in no way impact upon the opening of the account and thereafter some discussions with regard to resolving these matters."

On 18 August 2010 the Respondent wrote to D Solicitors, stating:

> "Following upon our recent letter, we have now been informed that the Application for the account has been placed before the relevant Manager. This is because the account is somewhat unusual, by the standards of BOS…
>
> Insofar as the request that was made to your office for the writer to attend a meeting, that has now been addressed and there is no question, at this time, of any meeting taking place, save that which has been referred to in the correspondence between our two firms, relating to the dispute between the parties."

Also on 18 August 2010, D Solicitors wrote to the Respondent, referring to the letters of 11 and 16 August, saying:

> "Can you please confirm that you at least hold the monies in your client account. Furthermore, do you know if the escrow account is now open?..."

The Respondent replied on 23 August 2010, saying:

> "We do not hold the monies in our Client Account. We can confirm that, at this point in time, we have yet to be notified that the account has been opened. In this connection, please see our recent letter. We confirm that as soon as the account has been opened our clients will forward funds to us for onwards transmission to the Designated Deposit Account…"

An attendance note produced by D Solicitors and dated 25 August 2010, read:

> "Having spoken to RBS they told me that they had informed [the Respondent] yesterday of the position of the account and due to security reasons they could not tell me any more.
>
> SP then called [the Respondent] who then confirmed that RBS had spoken to him yesterday – after he chased them – to confirm that the account was now set up.
>
> Having told his client this he was informed that the monies would be transferred to him, and so [the Respondent] said that when the monies arrive – which he expects to be some time this afternoon (from what he was told) – then he will transfer it over to the RBS account."

117. The Respondent's client ledger for RTC showed that the sum of £279,512.19 was received by the Respondent's Firm from RTC on 25 August 2010. The ledger further showed that after deducting £3,500 to pay a bill which was raised on 26 August, the sum of £276,000.19 was transferred to the deposit account ledger.

On 27 August 2010 the Respondent wrote to D Solicitors, stating:

> "We write to confirm that we have today received funds from our Clients and have transferred the sum of £276,000.19 to the Designated Deposit Account at BOS…
>
> We shall provide you with a copy of the account sheet from BOS as soon as practicable after it is received by us…"

118. In fact, the BOS account was not a joint account and it could be operated by the Respondent alone, without reference to D Solicitors.

D Solicitors replied on 2 September 2010, referring to the letter of 27 August 2010 and stating:

> "We have received confirmation from the Bank that they are holding £276,000.19 in cleared funds on a joint escrow basis since 27th August 2010…"

On the same day, the Respondent wrote to D Solicitors, enclosing a copy of the Transaction Statement showing the receipt of £276,000.19 into an account which bore the client reference "Howard Stone Solicitors and D Solicitors Re: T/MPL".

119. On 28 September 2010 the Respondent effected the withdrawal of £10,500 from the BOS account. Thereafter, withdrawals were made on approximately 30 occasions in varying sums, ranging from £18,688 to £1,700, such that by 1 April 2012 the balance remaining in the BOS account was £64,090.08. The sums withdrawn from the BOS account were used by the Respondent to settle fees raised and disbursements in relation to the purchase of S Lodge, the sale of M Lodge, the dispute concerning the sale proceeds and £15,769 was applied to the ledger of Mr RA which concerned a personal matter.

120. Correspondence between the Respondent and D Solicitors continued, concerning the dispute over entitlement to the sale proceeds for a number of months. On 28 September 2010 the Respondent wrote to D Solicitors alleging that Mr T had completed the Swiss ADE form in a way which did not comply with the high standard of disclosure required, and provided a copy of a letter which indicated that wilfully entering false information on an ADE form was a criminal offence. On 5 October 2010 D Solicitors wrote to the Respondent, referring to having received counsel's advice and saying:

> "Since you now accept that [Mr T] is the beneficial owner of [MPL], there can be no possible argument whatsoever that funds held in the joint escrow account must be paid forthwith to him.
>
> Please confirm therefore that you will agree with us to transfer the sum of £276,000.19 together with any accrued interest to our client account and for the same to be effected by 4pm on Wednesday 6th October 2010."

The Respondent replied on 6 October 2010 dealing with several points in dispute, and including the paragraph:

> "Lastly, our clients will require that all their costs be paid out of the funds presently held on a full indemnity basis. The fees of our clients from 1st July to 30th September stand at CHF 5,145 (approximately £3,325); the fees of this firm are, of course, in addition."

The letter did not indicate that the BOS account was not a joint escrow account and/or that monies for costs had been deducted by the Respondent on 28 September.

On 5 October 2010 the Respondent sent an email to Mr RA, copied to Ms MG saying:

> "I think we are close to you reporting this to the Swiss AML Authority."

121. Further correspondence followed; D Solicitors rejected the suggestion that the fees of RTC/the Respondent should be paid from the sums held in a letter of 11 October 2010. In the same letter, D Solicitors stated that Mr V had been a "second screen" to protect the identity of Mr T. On 2 December 2010 the Respondent wrote to D Solicitors stating, amongst other points, that he had advised his clients to seek a declaration as to the propriety of their actions and expressing scepticism concerning the whole transaction. There was no mention of the BOS account or the fact that £35,000 had been withdrawn from it by that date. The last correspondence between D Solicitors and the Respondent about this matter was dated June 2011. No proceedings were issued by any party prior to the commencement of these proceedings.

122. The Respondent instructed counsel, who on 23 February 2011 raised with the Respondent a number of queries and concerns. An Advice, dated 18 May 2011, was amended on 20 June 2011, together with a Second Advice of the same date as counsel was concerned that there was a conflict of interest in the Respondent acting for both RTC and MPL.

123. On 7 November 2011 Ms VF of RTC emailed the Respondent and asked him to send the funds he was holding on behalf of MPL to a bank account in Guernsey and to confirm the amount to be received. The Respondent replied:

> "Thank you for your email. I will arrange to close the account tomorrow. The funds will be transferred to you on Wednesday."

On 8 November 2011 the Respondent sent a further email to Ms VF, stating:

> "I refer to our exchange of emails yesterday. I regret I did not check the terms of reference regarding these moneys. They are to be held to the order of RTC and [Mr T], subject to the payment of our costs incurred by RTC and this office.
>
> There is no authority for me to remit any funds to you or to [Mr T] until the dispute has been resolved."

At that point, the balance on the account was £107,910.69.

124. On 9 November 2011 Ms VF sent an email to the Respondent asking for a statement confirming the balance held. This was followed by a meeting on 15 November 2011 between the Respondent and representatives of RTC, being Mr RA and Ms SG. In a letter of 17 November 2011 to Mr RA the Respondent set out the steps to be taken, which included provision of statements of account from BOS and information about the Respondent's billing, including provision of timesheets.

125. On 15 December 2011 Mr RA sent an email to the Respondent, reminding him that RTC was still awaiting information and requesting the breakdown within the next few days. On the same day the Respondent wrote to Mr RA,

> "My bookkeeper has informed me that due to pressure of work, it is not going to be possible for her to complete her audit of the bills before the Christmas/New Year holiday. I very much regret this but there is no point in my producing false information to you. Unfortunately, the analysis has been delayed by the fact that the files, being part of my SRA audit, as carried out by my accountants, and this took much longer than anticipated."

On 22 December 2011 the Respondent wrote to Ms SG at RTC stating:

> "As you know, it will not be possible for me to provide you with an audited Statement in respect of this account. However, there is no difficulty in providing you with invoices and these are enclosed. I must make it absolutely clear that these are not audited invoices and are subject to internal audit, which is currently in progress. This, as you know, will not be completed until after the Christmas/New Year holiday. These invoices are sent to you only by way of information."

126. By letters of 28 December 2011 and 31 January 2012 Ms SG of RTC lodged a complaint with the Applicant. The investigation commenced on 1 March 2012, on which date the final withdrawal from the BOS account was made, in the sum of £9,000.

Allegation 1.6 – overcharging

127. The Applicant relied on the report of Mr Marc Banyard ("Mr Banyard"), costs lawyer, of The John M Hayes Partnership Ltd ("the costs report"), which was appended to the FI Report. It further relied on an addendum report, and referred to a memorandum of the parties' costs lawyers' areas of agreement and disagreement.

128. The costs report stated that whilst the invoices issued by the Respondent to RTC were sent to RTC, none were approved or paid by RTC save for £5,000 paid on account of counsel's fees for advice and an invoice presented in March 2011 for £2,350. These sums were not paid into the BOS account. The total of the invoices raised in relation to the M Lodge matter was £196,832.50.

129. The Respondent's charge out rate of £275 per hour, as set out in a letter to Ms MG of RTC on 8 April 2010 was not contentious. That letter also forwarded the Respondent's terms of business. In or about December 2010 the rate was changed to £300 per hour but there was no documentation on the file to indicate that RTC was notified of the increase. The Respondent's bills were calculated at the rate of £900 per hour under bill number 09/11/2996 dated 1 September 2011 which was for £11,050. There was no indication on the file that RTC was informed that it would be charged triple time for work done by the Respondent whilst he was on holiday.

130. There was no reference to a "value element" being added to the Respondent's charges in his terms of business document.

131. Mr Banyard's report identified that there were overlapping periods covered by a number of the bills rendered in the RTC matter. The Respondent raised bills for £2,500 on 1 October 2010, £4,750 on 11 October 2010, £12,000 on 25 October 2010, all of which concerned the matter of MPL/Mr T and a further bill for £3,415 on 15 November 2010, which was stated to be for work done in the period 25 August to 10 November 2010. A bill dated 25 October 2011 for £15,250 was posted to the ledger as £17,310.

Mr Banyard concluded in his report that on the basis of the Respondent's hourly rate of £275 per hour a reasonable and appropriate sum by way of costs in the period 7 April 2010 to 1 March 2012 was £29,014.50. The Respondent's time recording system indicated that work to value of £31,930 had been undertaken.

Allegation 1.7 – dishonesty

132. The factual matters on which the allegation of dishonesty was based are set out at paragraphs 92 to 94, 107 to 126 and 127 to 131 above.

Correspondence with the SRA

133. By letter of 13 September 2012 the Applicant wrote to the Respondent, asking him for his observations on the FI Report and accompanying documents.

134. On 18 September 2012, Mr KC's accountancy firm, indicated its intention to resign as the Firm's reporting accountants.

135. The Respondent responded to the Applicant's letter of 13 September 2012 on 28 September 2012 by way of a letter and enclosures. The response included a table, prepared by Mr KC's accountancy firm, setting out a response to various matters raised in the FI Report.

136. Under cover of a letter dated 9 November 2012 the Respondent sent to the Applicant a signed statement. The Respondent sent further documents to the Applicant on 12 November 2012 and made further representations by letter of 15 February 2013.

Witnesses

137. No witnesses were called to give evidence.

138. The forensic investigation officer, Mr Bailey, was present at the Tribunal and available to give evidence. However, the Respondent's counsel told the Tribunal that he did not have any points to put to Mr Bailey. The Applicant did not need to call Mr Bailey to give evidence, and invited the Tribunal to give the FI Report such weight as was appropriate.

139. Mr Rosen, of D Solicitors, attended the Tribunal to give evidence. However, the Respondent then admitted a lack of integrity with regard to the BOS account and as a result Mr Fenhalls had no need to cross examine Mr Rosen. Mr Fenhalls told the Tribunal that the matters of fact in Mr Rosen's statement were accepted, but not the comments or opinion on the Respondent's honesty.

140. Ms MG was not present or called to give evidence by video link; her statement was within the witness bundle.

141. Mr Banyard was not called to give evidence, as Mr Fenhalls told the Tribunal that there was no need to do so; Mr Fenhalls further told the Tribunal that there was no point in him calling Mr Webb (for the Respondent) as Mr Webb reproduced what the Respondent had told him and could cover those points in his own evidence.

142. On the morning of 30 April, the Respondent withdrew from further participation in the proceedings, prior to giving evidence. A copy of the Tribunal's Practice Direction Number 5 – on inferences which could be drawn when a Respondent did not give evidence – was provided to Mr Fenhalls; some time was then allowed before resuming, in case the Respondent changed his mind, but he did not attend again.

Findings of Fact and Law

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

144. The Tribunal noted that the allegations fell into three categories: breaches of the Accounts Rules; misconduct in relation to the operation of an account with BOS, which account had been solely operated by the Respondent and from which he had been paid costs of almost £200,000; and alleged overcharging for work purportedly done for RTC (and paid from the BOS account). For the most part, the allegations arose from the abortive purchase of S Lodge and the sale of M Lodge. In both matters, the Respondent was instructed by RTC which was an asset and/or company management organisation based in Switzerland acting, apparently, as trustee and/or administrator of MPL which was a company incorporated in the British Virgin Islands.

145. The Tribunal further noted that all of the allegations were said to span the periods in which the SAR 1998 and SAR 2011 applied, and the periods in which the SCC 2007 and 2011 Code applied. In each matter, the Tribunal was satisfied that the conduct complained of had indeed spanned both periods (i.e. before and after 6 October 2011) and that where an allegation was proved it was proved in relation to both regulatory codes.

146. The Tribunal had read and considered the documentation in the case, including the witness statements, prior to the commencement of the hearing. It had the benefit of hearing from the Applicant's counsel in opening. It had also heard from the Respondent's counsel in relation to the application to adjourn and in relation to various points of clarification of the Respondent's position. However, it did not have the benefit of closing submissions from Mr Fenhalls as the Respondent chose to withdraw from the proceedings and to cease to instruct Mr Fenhalls. Where there is reference to submissions by the Respondent's counsel, these submissions were advanced during the Applicant's opening and/or the application to adjourn and/or in relation to the provision of evidence rather than in formal submissions. The Tribunal took into account the various matters raised by the Respondent's counsel, including in the skeleton argument, in reaching its decisions.

147. The Tribunal did not have the benefit of hearing from any witnesses, and had to consider the weight which could be given to the reports or witness statements of each.

148. The Tribunal noted that Mr Bailey and Mr Rosen had attended at the Tribunal and had been available to give evidence. The Respondent's counsel had confirmed that he did not wish to cross examine them or put any points to them, and it was for this reason they did not give evidence. The Tribunal noted that Mr Fenhalls had confirmed that the matters of fact in Mr Rosen's statements were accepted, but not any matters of opinion contained in the statements. The Tribunal was therefore able to give significant weight to the matters of fact contained in Mr Rosen's statements of 26 November 2013 and 25 March 2014. The Tribunal noted that the Respondent had admitted most of the factual matters in the FI Report, although he denied in particular dishonesty, and he disputed some matters of quantum. The Tribunal noted that Mr Fenhalls had stated that there were no matters he wanted to put to Mr Bailey. The Tribunal was therefore satisfied that it could give significant weight to the facts stated in the FI Report and the documents appended to the report.

149. Ms MG was not called and it appeared that either for health or other reasons she was not willing or able to give evidence. The Tribunal made clear in the context of the application to adjourn the hearing that in these circumstances it would give very little

weight to the matters in Ms MG's witness statement. The contents of that statement might corroborate other evidence, but would not be decisive on any point.

150. The parties had indicated that they would each call their expert witnesses on costs, Mr Banyard for the Applicant and Mr Webb for the Respondent and as at the afternoon of 28 April this was understood to be the position. Mr Fenhalls told the Tribunal on the morning of 29 April that Mr Banyard could be "released". Although not explicitly stated by Mr Fenhalls, the Tribunal was satisfied that it could accept Mr Banyard's evidence as being unchallenged and could give it significant weight. With regard to the Schedule of Costs prepared by Mr Webb, the Tribunal was told by Mr Fenhalls that it was based on information provided by the Respondent. The Tribunal understood from Mr Fenhalls' submissions that Mr Webb's Schedule would be incorporated into the Respondent's evidence and adopted by him. It would therefore be accorded the weight which would be given the Respondent's other statements and evidence.

151. The Tribunal noted that the Respondent chose to withdraw from the proceedings immediately before he was due to begin giving evidence, on the morning of 30 April. It also noted the reasons he gave, as set out at paragraph 12 above. The Tribunal took into account its own Practice Direction No. 5, dated 4 February 2013, a copy of which had been provided to Mr Fenhalls shortly after the Tribunal learned of the Respondent's decision to withdraw. That Practice Direction reads:

> "The Tribunal has taken careful not of the obiter dicta of the President of the Queen's Bench Division (Sir John Thomas) at paragraphs 25 and 26 of the Judgment in Muhammed Iqbal v Solicitors Regulation Authority [2012] EWHC 3251 (Admin). In the words of the President, "ordinarily the public would expect a professional man to give an account of his actions." The Tribunal directs for the avoidance of doubt that, in appropriate cases, where a Respondent denies some or all of the allegations against him (regardless of whether it is alleged that he has been dishonest), and/or disputes material facts, and does not give evidence or submit himself to cross-examination, the Tribunal shall be entitled to take into account the position that the Respondent has chosen to adopt as regards the giving of evidence when reaching its decision in respect of its findings. This direction applies regardless of the fact that the Respondent may have provided a written signed statement to the Tribunal."

The Tribunal determined that in the circumstances of this case, where the Respondent had chosen to absent himself on the third day of the five allocated to the case, it was entitled to and should draw adverse inferences if and insofar as this was necessary to determine any points in dispute. The Tribunal was concerned that the Respondent had appeared determined to dispute the allegations of dishonesty and yet chose not to give evidence to explain his actions. Further, it appeared that he had hoped that the Applicant would withdraw those allegations after the Respondent's admission of a lack of integrity; he had chosen to withdraw when it became clear that the Applicant intended to persist with the dishonesty allegations. Although the Tribunal could note the explanations given by the Respondent to the investigating officer and in his witness statements it could accord those explanations very limited weight.

152. The Tribunal was satisfied that the weight it could give to the unchallenged evidence of Mr Bailey, Mr Rosen and Mr Banyard was such that it would be possible to make findings to the required standard, provided the evidence was cogent and relevant to the issues. The Tribunal could make appropriate inferences where the evidence was sufficiently compelling e.g. with regard to what the Respondent knew at any given time. Unless noted otherwise below, the Tribunal accepted the unchallenged evidence of Mr Bailey, Mr Rosen and Mr Banyard and accepted the Applicant's characterisation and submissions concerning the various allegations, which submissions were compelling.

153. It was common ground between the parties that the transactions involving MPL were unusual and suspicious, although the Respondent's position was that the latter only emerged as the matters progressed. The Tribunal did not have to make any findings with regard to the precise nature of the transaction, but accepted that the background was cloaked in mystery, involving as it did a Swiss company which apparently administered MPL, a company registered in the British Virgin Islands, where there was an apparent dispute between Mr T and Mr V as to the beneficial ownership of that company and yet neither had sought to resolve that dispute by way of court proceedings, for example, to obtain a declaration as to their respective entitlements. The background was further complicated by the recent issue and service of proceedings in Switzerland by Mr T against RTC, which proceedings might in due course involve the Respondent. Again, the Tribunal did not have to make any findings in relation to those matters, but noted the coincidence that the proceedings had been served during the first day of the Tribunal hearing against the Respondent. The Tribunal did not make any findings of any wrongdoing by any individual or entity, save for the Respondent, as there were no allegations in the proceedings about the conduct of any other persons.

Chronology

154. There was no substantial dispute between the parties concerning the chronology of events which formed the background to this matter. Further, there was no dispute concerning the factual background set out at paragraphs 85 to 136, which should be regarded as incorporated into the Tribunal's findings of fact. The Tribunal was satisfied to the required standard that the matters of fact, set out at paragraphs 155 to 191 were proved on the documents presented and on the evidence of Mr Bailey, Mr Rosen and Mr Banyard. These are set out to ensure that the facts on which the Tribunal's findings were based are clear. Not every letter, telephone call or event is set out; those which are noted below were deemed to be the most significant. Some of the documents referred to in this section were appended to the statement of Ms MG. The existence of the documents and their content was not disputed by the Respondent. Although the statement to which they were appended had very little weight, some of the documents were useful in setting out the context and background and, in some instances, illustrating the Respondent's billing. Accordingly, the Tribunal was satisfied that it could and should refer to those documents.

155. As set out in the Respondent's witness statement, in April 2007 Mr KC asked the Respondent if he would act for RTC and its managed company, MPL, in the purchase of S Lodge from Mr V. Mr KC was a longstanding acquaintance, possibly a friend, of the Respondent and his accountancy firm was the Firm's reporting accountant. Mr KC also acted for Mr V, for whom the Respondent had acted in unrelated matters in about

2005/6. S Lodge was registered in Mr V's name. MPL was a company registered in the British Virgin Islands in 2001; it had been removed from the register of companies sometime thereafter. The company had been reinstated in about 2007, but it was unclear who had given the instructions to reinstate MPL, and the present beneficial ownership of MPL was similarly uncertain. Its directors were also limited companies that were subsidiaries of RTC, whose own directors were people connected with RTC. Shareholdings appeared to be held under declarations of trust, but the position was far from clear.

156. On 17 May 2007 the Respondent received £400,000 into his client account from Mr T's Cyprus bank account, in connection with the purchase of S Lodge. At that point the Respondent understood that Mr V was the beneficial owner of MPL. It was unclear why Mr T had provided the money, if he were not the beneficial owner of MPL, but RTC gave assurances to the Respondent that appropriate checks had been carried out and he could receive the money.

157. On 21 May 2007, on the headed paper of R Ltd, Mr V wrote to the Respondent:

> "This letter is to confirm that this company will hold the £380,000 that you will remit to us to your order pending exchange and completion of the property known as [S Lodge] which should take place imminently."

158. On 22 May 2007 the Respondent transferred £380,000 to Mr V/R Ltd; the Respondent stated in his witness statement that this was on the instructions of Mr RA. On the same day, the Respondent wrote to Mr KC, confirming receipt of a fax from Mr V and that the funds had been transferred earlier that day. The letter went on to say,

> "I have spoken with the Law Society concerning these transfers and I am required to write to you on behalf of MPL to point out that there are risks attended upon such a transaction but these have been explained to you and that you have authorised me to make the transfer."

The Applicant's position was that there was no need to advise Mr KC, who was not the client of the Firm, but RTC should have been advised. On the same day the Respondent wrote to Mr V saying,

> "Following receipt of your fax of yesterday we confirm that we have transferred the aforementioned £380,000 to your bank subject to the terms of your fax to us of yesterday being 21st May and that monies are to be held to our order pending exchange and completion of the sale value to our clients MPL of S Lodge…" [It was Mr V/R Ltd that received the money.]

159. On 23 May 2007 the Respondent wrote to Ms MG at RTC:

> "Following upon your email of yesterday and our subsequent helpful telephone conversation I write to report upon the situation as regard to the proposed purchase.
>
> I first confirm that having received instructions to transfer the sum of £380,000 received in my Firm's client account to R Ltd that was done subject to having received a letter from Mr V of R Ltd confirming that he will hold the money to my order…"

The Applicant accepted that RTC had some knowledge of the payment to Mr V/R Ltd and may well have given instructions to make that transfer.

160. On 29 May 2007 the Respondent sent an email to Ms MG of RTC saying,

> "I have not received a reply to the letter I faxed to Mr V on Friday.
>
> Subject to your instructions, I would consider advising you to instruct me to request the return of the £380,000 paid to R Ltd…"

On 30 May 2007 the Respondent wrote to Mr KC:

> "I have not heard from Mr V. I have and am seeking the instructions of MPL as requiring Mr V to return the £380,000…
>
> Perhaps I could prevail upon you to speak with Mr V and explain to him [the] consequences of ignoring my letters as it would be unlikely to be [to] his benefit."

The Applicant's position was that this was an unusual correspondence; within days of paying the money over, it appeared that a dispute was developing and that there were problems with the transaction.

161. On 13 June 2007 the Respondent wrote to H Solicitors, who were then instructed by Mr V and/or R Ltd. Mr V had previously sought to involve Mr B in acting for him, but Mr B was a struck off solicitor and the Respondent, rightly, would not deal with Mr B. The letter dealt with a number of aspects of the proposed transaction.

162. On 21 June 2007 a corporate director of MPL, LD Ltd, wrote to the Respondent:

> "This letter is to confirm that, as our solicitors, we accept that your payment to the vendor directly is approved by us and you do not need to seek him to return it to you for forwarding to the vendor's solicitors."

163. On 5 July 2007, Ms MG of RTC wrote to the Respondent,

> "Further to your letter of 2 July, I return the Contract duly signed on behalf of our above clients [MPL] and left undated.
>
> I will contact [Mr KC] again concerning the adjoining property at M Lane.
>
> Following my holiday in Cyprus … I confirm that all due diligence documents relating to the beneficial owner are now in order."

From this, it appeared that Ms MG considered that Mr T was the beneficial owner of MPL as he was resident in Cyprus whereas Mr V was based in London; the Respondent considered that Mr V was the beneficial owner.

Over the following months, there was some concern about the failure to exchange and complete the purchase of S Lodge. On 10 October 2007 the Respondent wrote to Ms MG:

> "… I have expressed hitherto, my grave concerns as to the failure of the Seller to exchange contracts, let alone to complete and, worse still, to comply with his undertaking, given in unequivocal terms, to repay the sum of £380,000 should it be required. I have had instructions to request payment on at least two occasions and in respect of both of which, those instructions having been subsequently countermanded…"

164. On 24 October 2007 the Respondent sent an email to Ms MG of RTC:

> "I had Mr V in my office on a separate matter on Friday. He voluntarily raised this problem with me, saying that [Mr KC] had dealt with it.
>
> I told him I had no knowledge of such, to which he said he would contact [Mr KC] on Monday. I was in Warsaw on Monday, but spoke with [Mr KC] that afternoon. [Mr KC] did not mention Mr V…"

On the same day, Ms MG sent an email to the Respondent instructing him to seek recovery of the money:

> "Further to your email of 10 October, [Mr IT] has reviewed the file and notes that there is an Undertaking dated 21 May given by R Ltd (the Seller) that they will hold the funds to your order pending exchange and completion. Is it possible for you on behalf of our clients, MPL, to enforce this Undertaking (copy attached)? Please advise."

165. There was further correspondence in the following months, but no exchange of contracts. An attendance note of the Respondent, dated 13 March 2008, recorded a conversation with Mr KC which stated:

> "He was not entirely clear as to what he was saying, save that he was most unhappy that this matter had not completed. He told me that [Mr V] was equally unhappy and that this was in fact money going round in a circle…"

166. On 2 May 2008 on order was made, the effect of which was to "freeze" S Lodge, although it did not appear from the documents that the Respondent had been aware of this or had advised RTC on the point until October 2008.

167. On 13 May 2008 Mr KC emailed the Respondent, stating:

> "I have had [M - initial of V's first name], the beneficial owner of MPL, in the office today telling me a story of woe…"

The reference to M, combined with references to his business interests, showed that Mr KC was referring to Mr V as the beneficial owner of MPL. The email went on to complain about the fees of RTC and the Respondent.

168. On 21 May 2008, Mr RA of RTC wrote to Mr KC, stating, inter alia:

> "[Mr V] is not the beneficial owner of [MPL]. The beneficial owner of [MPL] is [Mr T]. Please note that [Ms MG] obtained full due diligence of [Mr T] last year, while on a visit to Cyprus and [Mr T] signed our ADE form for

> conforming (sic) he is the beneficial owner. An ADE form is the equivalent of a Form A with a Swiss Bank and the signing of an incorrect ADE form is a serious offence in Switzerland…
>
> … If it now transpired that those arrangements were not bona fide arrangements and that Mr T was only acting as a "nominee" to [Mr V] then we are faced with very serious issues as set out… above."

169. On 29 September 2008 the Respondent wrote to Mr RA, referring to a meeting they had had the previous Friday, and advising that proceedings should be taken against Mr V, on the basis of the undertaking.

170. On 16 December 2008, Ms MG of RTC sent an email to the Respondent, saying:

> "I just had a phone call with [Mr T], Cyprus, who asked me whether we have completed the transaction!!! I had to laugh… it is a big joke. I quietly told him that I am aware that he is the "front" man and not the real beneficial owner. He did not know what to say but I "reassured" him that we have not completed and will not complete due to many unforeseen matters, including payment of yours and our fees…"

171. On 5 January 2009 the Respondent wrote to Mr V demanding repayment of £380,000 (plus interest and costs).

172. By this stage, the purchase of S Lodge had been abortive, there was developing uncertainty about the identity of the beneficial owner of MPL and there was a developing dispute about the fees of the Respondent and/or RTC and who should pay those fees; this appeared to be one of the stumbling blocks to completion of the purchase. There was in any event a freezing order in place, such that completion could not take place. The purchase of S Lodge was never completed by MPL.

173. On 22 September 2009, the Respondent informed RTC that MPL owned M Lodge, which adjoined S Lodge. He stated, "Having delved into the matter a little more, I believe I acted for [MPL] when it bought the property from [Mr V] for £372,500."

174. On 11 November 2009, MPL (through RTC, subsidiaries of which were the corporate directors of MPL) appointed the Respondent as its attorney to sell M Lodge; the power of attorney document was signed by authorised signatories of the two corporate directors. The purpose of the sale was to enable RTC to recover its costs in relation to MPL. The chronology and correspondence concerning the sale of M Lodge and the dealings with the sale proceeds, including the establishment of the BOS account, are set out in some detail at paragraphs 107 to 126 above and are not repeated here but should be read as incorporated into these findings. The following paragraphs set out matters which are not included within those paragraphs.

175. On 20 November 2009 RTC wrote to Mr KC informing him that M Lodge would be sold at auction unless Mr V were to make realistic proposals for the discharge of his liabilities to RTC, including management fees and recovery of the £380,000 advanced to Mr V in 2007. On 26 November 2009 Mr KC sent an email to RTC conveying an offer from Mr V to pay £5,000 to pay the sums due to RTC. That offer was not accepted.

176. On 4 December 2009 the Respondent wrote to Mr KC, querying a number of points made in Mr KC's email of 26 November and saying,

> "When [Mr V] wanted monies to save his companies, that request had to be made to [RTC] and [RTC] procured funds from a [Mr T]. You said in your telephone conversation to me that those funds were, in fact, those of [Mr V]. If that is the case, then the entirety of the transaction is fraudulent and I am under an immediate duty to inform the SOCA. I assume that your recollection, and for that matter your file, are incorrect in that regard. If you are correct, [RTC] will have to inform the Swiss equivalent of SOCA."

Shortly thereafter, on 7 December, M Lodge was sold for £370,000 and the sale proceeds, less the Respondent's costs and disbursements, were sent to RTC to hold for MPL.

177. On 7 April 2010, the same date D Solicitors first wrote to the Respondent, the Respondent emailed Ms MG and Mr RA of RTC saying,

> "I have drafted a reply to this letter. I have no problem as I'm fairly sure Mr T and Mr V will be shown up as being in collusion for tax or other avoidance purposes."

On the same day, Ms MG provided the Respondent with a copy declaration of trust dated 2001 in respect of the shares in MPL being held for the benefit of Mr V. However, the form completed by Mr T in April 2007 contained a declaration that he was the beneficial owner of MPL. In the meantime MPL had been struck off and reinstated in 2007, but by whom was unclear.

An email from Ms MG to the Respondent on 8 April 2010 stated:

> "The name of [Mr T] has never been mentioned by [Mr V] or even [Mr KC] – am sure they completely forgot about him (being the front man in place for a fraudulent transaction…"

178. On 12 April 2010 Ms MG of RTC provided a report on the beneficial ownership of MPL which outlined the confusion which had occurred but appeared to conclude that Mr V was the true beneficial owner of MPL. On 28 April 2010 Ms MG sent an email to the Respondent referring to the beneficial ownership issue and including the comment,

> "This proves more that it is a fraudulent transaction…"

179. On 5 May 2010 a meeting took place at Mr KC's office, which was attended by Mr RA, the Respondent and Mr KC; this was recorded in a Memorandum apparently prepared by Mr RA.. It was recorded that in the course of the meeting Mr KC informed Mr RA and the Respondent that the beneficial ownership of MPL had been transferred from Mr V to Mr T.

180. There followed the correspondence set out at paragraphs 107 et seq concerning the establishment of the BOS account. The schedule of costs produced by Mr Webb for the Respondent stated that from 26 August 2010,

> "… the difficult and extremely sensitive nature of the issues involved, not to mention the quick response and continuous availability expected of [the Respondent] by RTC had increased to a point where the service level he was now providing was considered to warrant enhanced fees by way of an uplift for special care and attention. Client bills rendered from this point forward were therefore considered by [the Respondent] to incorporate an uplift of 100%".

The Respondent's position was that this uplift was agreed orally by Mr RA of RTC.

181. During September 2010 D Solicitors proposed an agenda for a meeting to resolve the dispute about beneficial ownership, which proposal was chased up on two occasions but no meeting took place. The money was deposited in the account on 26 August 2010. On 28 September 2010 the Respondent made the first withdrawal for his costs from the BOS account. On the same day, he wrote to D Solicitors enclosing a document which suggested that Mr T had committed a criminal offence by providing false information on RTC's ADE form. Further correspondence, as noted above, occurred concerning the beneficial ownership of MPL. There was no reference in any correspondence from the Respondent to D Solicitors to withdrawals made from the BOS account in respect of his costs. The account was headed in the name of both firms so that it appeared to be a joint account on cursory inspection. No notification was given to D that this was in fact a deposit account in the sole name of the Respondent's firm. An internal RTC note dated 19 October 2010 to Mr RA from Ms MG included the comment, "[Mr KC] knowingly created a sham beneficiary." The note also referred to disinstructing the Respondent and instead instructing Swiss counsel. The note had been produced within the case papers by the Respondent; it was not clear how he came to have it. An attendance note of the Respondent dated 21 October 2010 referred to a telephone conversation with Mr KC. Part of the note read:

> "We discussed what connection if any or difficulties there were and at one point [Mr KC] conceded there was a relationship between [Mr V] and [Mr T] and there may well have been some impropriety in relation thereto. He was frankly suspicious of the relationship between them. He did not elaborate."

182. The Respondent's timesheets showed that his hourly rate increased to £300 per hour from 9 December 2010; there was no indication on the file that RTC were notified of this. As noted above, a 100% uplift was applied from 26 August 2010, with a 200% uplift for work done in March, April and August 2011 when the Respondent was on holiday.

183. On 23 February 2011, counsel instructed by the Respondent sent a detailed email to the Respondent with the expressed purpose of clarifying a) on whose behalf counsel was instructed and b) what he was asked to advise on or do. On 8 June 2011 the Respondent wrote to counsel, referring to the Advice which had been given and setting out a number of points arising from that Advice. Counsel provided an amended Advice, and a second Advice, on 20 June 2011.

184. On 20 June 2011 the Respondent wrote to Mr RA:

> "I am preparing an account of the monies which are due and owing to this office, and in respect of which transfers have been made from the fund. If we are to compromise these claims with [Mr V] and [Mr T], then those costs, which are substantial, together with your own costs, need to be addressed."

On 27 June 2011 the Respondent wrote to Mr RA:

> "I attach a bundle of bills which have to a very large extent been unpaid.
>
> These bills will need to be taken into account in any discussions with [Mr E]. They total £96,846.23."

185. On 2 September 2011 the Respondent wrote to Mr RA:

> "I think it is important for you to realise that anticipating the advice of Counsel my fees, which are very substantial in this matter have been deducted from funds which I hold at the Royal Bank of Scotland. I sent to you, some weeks ago, a Schedule showing those payments and those payments must be factored into any settlement with [Mr T], if there is to be such, bearing in mind [Ms MG's] observations of last week."

This letter referred to the Royal Bank of Scotland; the account in issue in these proceedings was held with BOS. On 6 September 2011, Mr RA sent an email to the Respondent which said,

> "I see from your letter of the 2nd September that you have deducted your fees from the funds you are holding at the Royal Bank of Scotland. Presumably you mean the Escrow account please confirm that this (is) correct."

The Respondent replied by email on the same day,

> "Correct. You will recall, Counsel advised this."

On the same day, the Respondent wrote to Mr RA,

> "… I thought it would be helpful if you were to have an updated statement of account in respect of funds which have been utilised in respect of this matter."

186. On 27 September 2011 the Respondent issued a bill to RTC concerning MPL/Mr T, the narrative for which read:

> "To our further and ongoing professional charges in relation to this matter, taking into account the value, complexity and considering with you various issues concerning approaches by [Mr E] etc., the sum of £9,500."

On 6 October 2011 Ms MG emailed the Respondent, copied to Mr RA, stating:

> "We have some problems with your invoices since the dates are not really correct. Please see the attached invoices together with your Schedule and the Credit Notes that are not really understandable…"

187. On 14 October 2011 the Respondent prepared a further bill to RTC which read:

> "To our further and ongoing professional charges in relation to this matter taking into account the value, complexity and considering with you various issues concerning approaches by [Mr E] etc., the sum of £14,800."

On 17 October 2011 Ms MG of RTC sent an email to the Respondent, which said:

> "As in the past, please provide us with your time-sheets for all invoices and inform us of your hourly rate since some invoices are pretty high."

188. On 25 October 2011 the Respondent prepared a further bill in this matter, which read:

> "To our further and ongoing professional charges in connection with this matter in the sum of £15,250."

The total of the bills issued in October 2011 was £30,050 and £29,500 was deducted from the BOS account; the value of time recorded in that month was £317.50. On 1 November 2011 a bill rendered which read:

> "To our further and ongoing professional charges in connection with this matter in the sum of £8,750."

189. The Respondent met with Mr RA and Ms SG, who was understood to be a barrister, on 15 November 2011. From the Respondent's letter of 17 November 2011 it was clear that the Respondent's bills were being questioned by RTC. Correspondence followed concerning the provision of bills and information. On 23 December 2011 the Respondent raised a bill to RTC which read:

> "To our further and ongoing professional charges in connection with the above in the sum of £5,500."

The complaint to the Applicant was made by Ms SG on 28 December 2011. On 28 December 2011 the Respondent issued a bill which read:

> "To our further and ongoing professional charges in connection with the investigation of the above matter. To perusing the file, considering the value to you, the value to [Mr T] and noting nothing had been heard, liaising with [Mr RA] etc., special fee of £12,250."

190. The Respondent rendered a further bill to RTC on 17 February 2012, which read:

> "To our further and ongoing professional charges in acting on your behalf in relation to a claim by/on behalf of [Mr T] in respect of the sale of [M Lodge]. Including attending upon you, Mr DH, [D Solicitors] and attendance upon [Mr RA] and [Ms MG]. Inclusive of all attendance upon you throughout in the sum of £9,750."

On 1 March 2012 the Respondent rendered the final bill in this matter to RTC, which read:

> "To our further and ongoing charges relating to the claims of [Mr T]/ [Mr V] in these moneys. To perusing the extensive files and noting the silence from any representative of the potential claimants. £9,000."

191. As noted above, the Tribunal should not be considered to have made any findings of wrongdoing, of any kind, against any individual or entity other than the Respondent.

192. **Allegation 1.1 - The Respondent failed to maintain properly written up and accurate accounting records in breach of Rule 32 of the Solicitors Accounts Rules 1998 ("SAR 1998") and/or, where such conduct relates to a period after 6 October 2011, Rule 29 of the SAR Accounts Rules 2011 ("SAR 2011")**

192.1 This allegation was admitted by the Respondent, although he disputed the extent of the breaches and the quantum involved.

192.2 The factual background to this allegation is set out at paragraphs 88 to 89 above.

Applicant's Submissions

192.3 The Applicant submitted that the quantum involved was immaterial. The FI Report suggested that the amount of the shortage was over £12,362 at the extraction date, whereas the Respondent's witness statement suggested that it was £3,010; the difference was explained by a credit note which had been sent to the client but had not been entered on the ledger. The Applicant's position was that the failure to produce and review proper reconciliation statements every 5 weeks was itself a significant breach, and the amount of the shortfall at any given time was not something the Tribunal had to resolve. Further, the Tribunal was not asked to resolve some issues described by the Applicant as "peripheral" which related to the issuing of credit notes on several occasions.

192.4 As at 31 January 2012, a debit balance existed on the client ledger of R re LB Deceased caused by a transfer of £950 from client bank account to office bank account on 19 January 2012 at a time when insufficient funds were held on behalf of the client to justify the transfer. This was in breach of the SAR 2011.

192.5 On the matter of RTC a bill was raised in the sum of £15,250 on 25 October 2011 but was posted on the ledger in the sum of £17,310 which led to the amount of £2,060 being overdrawn from client account.

192.6 It was submitted that the example reconciliation statement included as an appendix to the FI Report was inadequate and did not comply with the SAR 1998 and/or SAR 2011. The books of account had not been properly maintained in that it was clear that a bill to RTC had been incorrectly posted, such that the ledger showed the bill was £2,060 more than appeared on the face of the bill.

Respondent's Position

192.7 In relation to the books of account, the Respondent stated in his witness statement, at paragraph 12, that he had never managed his own accounts and he described the arrangements made and the accounting package in use. The Respondent did not specifically address the issue of reconciliation statements in his witness statement and did not appear to have done so in any of his earlier responses to the FI Report.

Tribunal's Findings

192.8 The Tribunal was satisfied that there was no material dispute between the parties which it needed to resolve. It was satisfied on the evidence contained in the FI Report, and on the Respondent's admission, that this allegation had been proved.

192.9 The Tribunal was satisfied that the example reconciliation statement included as an appendix to the FI Report was inadequate and did not comply with the SAR 1998 and/or SAR 2011. It was further satisfied that the books of account had not been properly maintained in that it was clear that a bill to RTC had been incorrectly posted, such that the ledger showed the bill was £2,060 more than appeared on the face of the bill.

192.10 The Respondent's general position with regard to his accounts was that the accounts had been in a muddle. He had responsibility as principal in the Firm to ensure that proper reconciliation statements were prepared, checked and appropriate action was taken if any problems were noted. The Respondent's system had failed to note shortages on client account although, somewhat alarmingly, in his witness statement at paragraph 11 the Respondent had stated:

> "I accept that the client account would sometimes be overdrawn. This was undesirable and when it happened I always took steps to remedy it as soon as I could."

This appeared to show a lack of appreciation of the seriousness of any breach of the SAR, in particular any breach which led to a shortage on client account, and that the Respondent was aware that this was not an isolated example of such a breach.

192.11 The Tribunal was satisfied that there was no material dispute between the parties which it needed to resolve. It was satisfied to the required standard on the evidence contained in the FI Report, and on the Respondent's admission, that this allegation had been proved.

193. **Allegation 1.2 - The Respondent withdrew client funds in excess of monies held leading to a cash shortage contrary to Rule 22 of the SAR 1998 and/or, where such conduct relates to a period after 6 October 2011, Rule 20.06 of the SAR 2011**

193.1 This allegation was admitted by the Respondent, although he disputed the extent of the breaches and the quantum involved.

193.2 The factual background to this allegation is set out at paragraphs 90 to 91 above.

193.3 The Tribunal noted the example contained in the FI Report of the ledger of Mr YA in which monies were transferred from client to office account in excess of the sums held on that client ledger. It also noted the shortages which had occurred in relation to the matter of RTC.

193.4 The Tribunal also noted the Respondent's response to the FI Report dated 28 September 2012. With regard to the matter of Mr YA, the Respondent stated:

> "It appears that [the Respondent] was not using the most recent ledger printouts when reviewing this client ledger prior to making transfers to office account."

As noted above, in paragraph 11 of his witness statement, the Respondent had stated:

> "I accept that the client account would sometimes be overdrawn. This was undesirable and when it happened I always took steps to remedy it as soon as I could."

At paragraph 21 of the statement, in response to this specific allegation, the Respondent said,

> "I accept that there were occasions where erroneous withdrawals resulted in the client account being overdrawn. This was not a regular practice and resulted from mistakes due to poor book keeping rather than anything else. I emphatically deny acting dishonestly at any stage."

Applicant's Submissions

193.5 There was no allegation of dishonesty made in relation to the cash shortages. The Applicant's position was that if there were shortages on client account then the allegation had been proved. The Applicant did not seek a determination of the size or frequency of the breaches but it was submitted that the scope of default was clearly significant, given the Respondent's admissions; these clearly showed that the problem was not in the nature of a "one-off" failing but occurred with some regularity.

Respondent's Position

193.6 As noted above, it was the Respondent's position that shortages on client account occurred from time to time. He admitted that transfers were made from client to office account in excess of the amounts held on the relevant client ledger.

Tribunal's Findings

193.7 The Tribunal was satisfied to the required standard on the evidence and on the admissions by the Respondent that this allegation had been proved. It noted in particular the Respondent's responses, as set out at paragraph 193.4 above. The effect of making transfers in excess of the sums available on a ledger was that money belonging to other clients was used. The Tribunal was satisfied that the breaches as set out in the FI Report had occurred and, further, that the Respondent had accepted that his system was flawed such that similar breaches occurred with some regularity;

the breaches identified in the FI Report could not be regarded as one-off aberrations. Indeed, the breaches were systematic and consistent.

194. **Allegation 1.3 - The Respondent actioned and/or permitted improper transfers of money from client account, contrary to Rules 19 and 22 of SAR 1998 and/or, where such conduct relates to a period after 6 October 2011, Rules 17 and 20 of the SAR 2011**

194.1 This allegation was admitted by the Respondent, although he disputed the extent of the breaches and the quantum involved.

194.2 The factual background to this allegation is set out at paragraphs 92 to 94 above.

Applicant's Submissions

194.3 The Applicant's case was that this allegation had two principal limbs, the second of which was the more serious.

194.4 The first limb concerned the Respondent's practice of transferring monies from client to office account without delivery of a bill. The Respondent did not dispute that this was his practice. In the interview with the IO on 21 June 2012 it was put to the Respondent that he had transferred monies from the client to office account without any justification, to which he responded:

> "I can't give you an answer, it's a mess. I wish I could. I accept it's a breach of the rules."

In his response to the FI Report dated 28 September 2012 the Respondent stated that he rendered a bill at the end of the month to cover withdrawals. In response to a reference at paragraph 29 of the FI Report concerning over transfers, it was stated,

> "The balance referred to is confirmed but we refer to [the Respondent's] method of billing."

Later in the response document, the Respondent stated:

> "Furthermore, I accept Mr Banyard's observation that my billing did at various times during the period under scrutiny (7 April 2010 to 1 March 2012) become very muddled."

194.5 The Applicant's submission was that there was no material dispute between the Applicant and Respondent concerning the extent of the breaches. The Respondent had accepted that his method of billing was to transfer money first and prepare bills later; it was submitted that this was a serious matter and the precise figures involved was not something which should trouble the Tribunal.

194.6 The second limb of the allegation was one over which there was a material dispute between the parties. The Applicant's submission was that the improper transfers had been made to fund the Respondent's heavily indebted Firm; it was in respect of the purpose for which the transfers had been made that the Applicant alleged the

Respondent had been dishonest. The Applicant's case was that this was not a matter in which the Respondent had been careless but, rather, he had a deliberate policy of using client monies to fund his practice. This aspect of the allegation overlapped with allegation 1.4. The Applicant submitted that but for the over-transfers of money from the RTC client ledger of £14,760 in the period 26 September to 17 October 2011 the Firm's cash outflows of £39,303.47 could not have been met. The Tribunal was invited to infer that as the Respondent could only meet his Firm's outgoings, including liabilities to lenders (the firms accounts at the time showing that over £70,000 fell due in a 12 month period at this time), by making the inappropriate transfers the transfers were being made for the purpose of funding the Firm's outgoings.

Respondent's Position

194.7 As noted at paragraph 194.4 the Respondent accepted that he had a practice of transferring money for costs from client account prior to the delivery of a bill of costs, or written intimation of the costs. With regard to the alleged purpose of the transfers, the Respondent's position was that he had not made the transfers in order to finance his Firm; he accepted that he was generally disorganised with regard to the Firm's accounts, as had admitted in relation to other allegations.

Tribunal's Findings

194.8 The Tribunal noted in particular the Respondent's response to the FI Report, dated 28 September 2012, in which he had admitted that he regularly transferred money from client account prior to the delivery of a bill. This showed a systematic breach of the relevant accounts rules, which were in place to protect the public and, in particular, clients' money. The allegation was proved to the required standard.

194.9 The Respondent's motivation for the transfers is considered further below, in relation to the allegation of dishonesty. However, the Tribunal noted and accepted the contents of paragraphs 17 to 32 of the FI Report which set out the transfers made and the monies owed by the Firm. The Tribunal was satisfied that but for the improper transfers, the Respondent would not have been able to fund certain payments he was due to make to finance his loans and other outgoings. The Tribunal noted that the particular examples given related to the period around October 2011. The Respondent had chosen not to give evidence to explain the circumstances of the transfers, and in this circumstance the Tribunal was entitled, and in addition to the weight of the evidence the Tribunal did, draw an inference adverse to the Applicant's evidence and submissions.

195. **Allegation 1.4 - The Respondent failed to act with integrity, failed to act in the best interests of a client, and failed to act in a way that would maintain the trust the public placed in him and in the provision of legal services, contrary to Rules 1(a), 1(c) and 1(d) of the Solicitors Practice Rules 1990 ("SPR 1990") and/or, where such conduct relates to a period after 1 July 2007, Rules 1.02, 1.04 and 1.06 of the Solicitors' Code of Conduct 2007 ("SCC 2007") and/or, where such conduct relates to a period after 6 October 2011, Principles 2, 4, 6 and 10 of the 2011 Code of Conduct ("2011 Code")**

195.1 This allegation was denied by the Respondent.

195.2 The Applicant submitted that there were two limbs to this allegation. The factual background to the first limb is set out at paragraphs 107 to 126. The factual background to the second limb is set out at paragraphs 98 to 106.

Applicant's Submissions

195.3 It was alleged that the Respondent had carried out improper transfers from client to office account in order to fund his Firm's operation and that in so doing he had failed to act with integrity, had failed to act in the best interests of clients and had failed to act in way that would maintain the trust the public placed in the Respondent and in the provision of legal services.

195.4 The Applicant's case was that as the Respondent had failed properly to advise RTC of the risks, any consent the Respondent received was not properly informed consent. The payment was highly risky – and, indeed, was never recovered. The Applicant alleged that in transferring £380,000 directly to the vendor before exchange of contracts had taken place, without advising the client of the risks in doing so and without there being any evidence to confirm that the Respondent had written instructions from the client to do so, the Respondent failed to act in the best interests of his clients and acted in a way likely to diminish the trust the public placed in him and the legal profession.

195.5 It was possible that Mr KC was acting for the purchaser as well as for the vendor, Mr V. The Applicant submitted that if this were so, there was an even greater need for the Respondent to ensure that those from whom he was taking instructions (RTC/MPL) were advised of the risks involved in transferring the purchase money directly to Mr V before exchange.

Respondent's Position

195.6 The Respondent had admitted that it was unusual to transfer purchase monies to a vendor directly before exchange of contracts. The Respondent's position was that he had advised RTC about the risks, although he agreed there was no record of such advice, and that RTC had given instructions to make the transfer. Indeed, there was a letter from the corporate directors of MPL confirming approval of the transfer, albeit this was written on 21 June 2007, about a month after the money had been sent to Mr V.

Tribunal's Findings

195.7 It was clear on the documents presented that the Respondent had written to Mr KC concerning the risks of transferring money to Mr V before exchange, albeit that letter was sent on the same day as the money was sent to Mr V.

195.8 It was common ground between the parties that the transactions involving MPL were unusual and suspicious, although the Respondent's position was that the latter only emerged as the matters progressed. The Applicant's position was that the abortive purchase of S Lodge, the sale of M Lodge and the apparent dispute between the possible beneficial owners of MPL (which neither sought to resolve by way of court

proceedings) was part of the context of the Respondent's conduct, in particular with regard to his fees.

195.9 As noted at paragraphs 194.8 and 194.9 above, the Tribunal had found that the Respondent had improperly transferred money from client account, for the purpose of funding his Firm. This limb of allegation 1.4 had therefore already been determined, and indeed would be considered further in relation to allegation 1.7. The Tribunal was not satisfied that the further matters alleged in relation to these facts had been proved to the required standard. At the time of the transfer, it appeared to RTC that Mr V was the beneficial owner of MPL, and so the effect of the transfer was to advance to Mr V money from Mr V's company MPL in order to assist Mr V with difficulties with Mr V's other company R. This was how it appeared to the Respondent also, as this is what he was led to believe by his client RTC and by Mr KC, who was the initiator of instructions. These are not usual circumstances, as it appeared to the Respondent, based on what he was told by those involved in the transaction, that all the parties to the transaction were controlled by Mr V, so that the money's direction of travel was circular.

195.10 It was clear to the Tribunal that sending money to a prospective vendor of property directly, prior to exchange of contracts (let alone completion) was highly unusual and was a matter on which a client should be advised carefully. There was no record of detailed advice being given to RTC/MPL prior to sending the money to Mr V/R Ltd. The position was further complicated by the fact that there appeared to be some confusion about whether the Respondent was acting for RTC and/or MPL, at a time when he was transferring significant sums of money in relation to a proposed transaction. At that point, Ms MG of RTC appeared to believe that Mr T, who provided the money, was the beneficial owner of MPL although others, in particular Mr KC and the Respondent, appeared to believe that the beneficial owner was Mr V. It was not clear that the Respondent knew that (if it were the case) that Ms MG believed T to be the beneficial owner of MPL.

195.11 What was also clear was that there were letters from RTC and MPL confirming that they were aware of and approved the transfer of money to Mr V/R Ltd. There was therefore consent by the client(s) to what had happened. The Applicant had argued that any such consent was not fully informed, in the absence of proper advice from the Respondent who had, instead, recorded advice on the risks of the transaction to Mr KC. Nevertheless, it was clear that RTC and/or MPL were sophisticated clients, operating as they did in the world of overseas registered companies and trusts. Against that background, the Tribunal could not be sure that the Respondent had failed to advise his client(s). The evidence supported the view that he had done as his clients instructed him, even if that course of action had been risky; the sum of £380,000 had never been recovered and MPL had failed to acquire S Lodge. The problem arose only when Mr T asserted beneficial ownership of MPL. In the circumstances of this unusual transaction, the Tribunal was not satisfied that the allegation had been proved to the required standard.

196. **Allegation 1.5 - The Respondent withdrew client monies from a client account in respect of costs when he knew he was not entitled to do so contrary to Rules 1.02, 1.06 and 2.03 of the SCC 2007 and/or, where such conduct relates to a period after 6 October 2011, Principles 2, 6 and 10 and Outcomes 1.1 and 1.13 of the 2011 Code**

196.1 This allegation was denied by the Respondent in that, whilst he admitted the withdrawals from client account, he denied knowing that he was not permitted to make those withdrawals. However, in the course of the hearing the Respondent admitted that he had acted with a lack of integrity in relation to the BOS account. The Respondent withdrew from the proceedings before it was clarified whether that admission related to the establishment of the account and/or its operation.

196.2 The factual background to this allegation is set out at paragraphs 107 to 126 above.

Applicant's Submissions

196.3 The Applicant's position was that the Respondent had withdrawn money from the BOS account for costs when he was not entitled to do so. The BOS account had been intended to be a joint, escrow account in which the proceeds of sale of M Lodge should be held pending resolution of the dispute as to who was entitled to those funds. The Tribunal noted that dishonesty was alleged in relation to this matter, under allegation 1.7 below.

196.4 Mr Coleman told the Tribunal that the background to the transaction was complex, unusual and suspicious but the complex background should not obscure the essential points which, it was submitted, were straightforward.

196.5 The proposed sale of S Lodge in 2007 was never completed, nor was the purchase price recovered from Mr V/R Ltd. The ostensible vendor and his company did not engage meaningfully with the proposed sale after receiving £380,000. It appeared that in 2008 there was a freezing order against Mr V, in respect of divorce proceedings. By that time, there was a dispute between RTC/Mr KC's client (Mr V) about the administration charges being raised by RTC. RTC claimed to be entitled to sell assets of MPL in order to recover its fees and instructed the Respondent to sell M Lodge, which was owned by MPL. RTC's position appeared to be that its entitlement to sell the property to recoup its fees arose from its contractual rights. The sale raised £370,000, of which £343,312.20 was sent to RTC by the Respondent on 23 December 2009, the balance having been used to meet the Respondent's costs and disbursements. In April 2010 D Solicitors wrote to the Respondent on behalf of Mr T, who claimed to be the beneficial owner of MPL. The correspondence between D Solicitors and the Respondent is set out in some detail at paragraphs 110 to 121 above and is not repeated in full here.

196.6 There appeared to be a dispute between Mr V and Mr T as to the beneficial ownership of MPL. It was unclear why, in April 2010, the Respondent had suggested that litigation involving RTC would be likely; the usual method of resolving such an issue would be for there to be proceedings between the competing claimants for the beneficial ownership. It would also be normal for the disputed sum to be paid into court, pending resolution of such a dispute, but a reasonable and acceptable alternative was often for the fund to be held "in escrow" or under the joint control of the parties. The trustee or manager, in this case RTC, would usually remain on the sidelines until the dispute was resolved. Mr Coleman submitted that there was a clear agreement between the Respondent and D Solicitors that the proceeds of sale of M Lodge should be held in a joint account, under joint control. The Respondent gave D Solicitors to understand that a joint account had been set up. For reasons which were

not entirely clear, the account was not in fact subject to joint control and the Respondent was the sole signatory and could give instructions concerning the account without reference to D Solicitors.

196.7 The Applicant's position was that the Respondent exploited the failure to implement the establishment of a joint account by withdrawing over £200,000 in the course of about 18 months to pay his alleged fees; the amount of the fees was in issue in relation to allegation 1.6. Of the (approximately) £276,000 lodged in the BOS account in August 2010, only just over £64,000 remained by the time of the Applicant's investigation and report. The intention in paying the sum of just over £276,000 into the BOS account, which account had the client reference "Howard Stone Solicitors and D Solicitors re: T/MPL", was to preserve that money pending resolution of the dispute about who was entitled to the money.

196.8 The Applicant referred to the series of withdrawals from the account, which were shown on the BOS statement and the uses to which those monies were put, as shown on client ledgers for RTC and Mr RA. Over £213,000 had been withdrawn from the BOS account and transferred to other accounts of the Respondent. The money had been used, for the most part, to pay the Respondent's costs in relation to the abortive purchase of S Lodge, the sale of M Lodge and the dispute. In addition, £15,769 had been transferred to the ledger of another client, Mr RA, to pay his legal costs in a personal matter. The Applicant submitted that the Respondent had not offered an explanation about why he had used money provided by RTC, and which was intended to be held pending resolution of a dispute, for the benefit of another client.

196.9 The Applicant's case was that the Respondent's actions were dishonest and/or grossly improper from two perspectives. Firstly, it was submitted that in relation to D Solicitors the Respondent had acted contrary to the agreement he had made with that firm. The Respondent had made clear representations to D Solicitors that the BOS account would be under joint control and would be preserved pending resolution of the dispute. The Respondent's position was that he acted with the full knowledge of RTC but did not address the issue of what was known or agreed to by D Solicitors. It appeared that the Respondent blamed D Solicitors for the failure to establish a joint account, as (he said) they did not comply with the bank's money laundering requirements, but in any event there was no excuse for the exploitation of the account.

196.10 Mr Coleman submitted that the second perspective from which the Respondent's conduct should be considered was that of RTC, the Respondent's client. This issue was contentious. The Respondent's position was that RTC were aware of the use of the account whilst the Applicant contended that it did not know. There was no evidence from Mr RA, from whom the Respondent said he had received consent. The statement of Ms MG indicated that RTC did not give consent to the use of the account to pay the Respondent's bills. The Applicant's position was that even if there was consent it was not full and informed consent. Mr Coleman referred to correspondence in September 2011 which, he submitted, indicated that the Respondent informed Mr RA of the use of the account for the first time. A letter from the Respondent of 2 September 2011 stated:

> "I think it is important for you to realise that anticipating the advice of Counsel my fees, which are very substantial in this matter have been deducted

> from funds which I hold at the Royal Bank of Scotland. I sent to you, some weeks ago, a Schedule showing those payments and those payments must be factored into any settlement with [Mr T], if there is to be such, bearing in mind [Ms MG's] observations of last week."

On 6 September 2011 Mr RA sent an email to the Respondent, which read:

> "I see from your letter of the 2nd September that you have deducted your fees from the funds you are holding at the RBS. Presumably you mean the Escrow account please confirm that this is correct."

The Respondent replied on the same date:

> "Correct. You will recall, counsel advised this."

196.11 The transfers of money to Mr RA's ledger occurred on 1 and 28 February 2011. Mr Coleman submitted that it was therefore possible that Mr RA was aware of deductions from the BOS account as early as February 2011, but any such knowledge would not constitute consent by RTC; given the wrongdoing involved in using the money for Mr RA's personal matters, the consent of the RTC board would have been required. In any event, it did not appear that Mr RA was aware of the scale of the deductions; when this came to light, RTC strongly objected to what the Respondent had done. Whether Mr RA knew that money had been taken from the account to meet his own legal expenses was not established to the required standard. This is dealt with at 196.25 below.

196.12 It was noted that it could be argued that the account opened by the Respondent with BOS in August 2010 was not strictly an escrow account as, for whatever reason, the bank did not give D Solicitors the status of joint signatories. However, the Applicant alleged that it was clearly understood and agreed by the Respondent that the funds in dispute were to remain in that account to abide the outcome of the dispute as to the entitlement to those funds as between the respective clients of the Respondent and D Solicitors.

196.13 On the client file, nothing was found by the investigating officer to suggest that the substantial and regular withdrawals had been authorised by RTC, MPL or D Solicitors, nor that D Solicitors were informed that the Respondent was taking funds out of the account to meet the Firm's costs and disbursements, the reasonableness of which is considered in relation to allegation 1.6.

196.14 The Applicant alleged that the Respondent was fully aware of the agreement that the disputed funds in relation to the sale proceeds of M Lodge should remain in the designated deposit account to abide the outcome of the dispute regarding the entitlement to such funds. It was alleged that the Respondent knew that by making such substantial withdrawals over a protracted period to satisfy costs and disbursements rendered by the Respondent's Firm, this was in direct contravention of the agreement. In conducting himself in way which was entirely for his own benefit/the benefit of the Firm of which he was the sole principal, it was alleged that the Respondent's conduct was dishonest by the standards of reasonable and honest

people and that the Respondent knew that by those standards he was acting dishonestly.

Respondent's Position

196.15 Mr Fenhalls submitted that, whilst he did not want to overstate the Respondent's position, he contended that D Solicitors were aware that the BOS account was under the sole control of the Respondent as that firm must have realised they had not presented the documents necessary to put the account under joint control.

196.16 The Respondent's general position, as set out in his witness statement and other documents, was that he had the consent of RTC to make the deductions from the BOS account for costs. It was for this reason that the Respondent had been particularly keen to try to obtain the evidence of Mr RA.

Tribunal's Findings

196.17 The Tribunal noted carefully the factual background to this allegation, the submissions of the Applicant and the Respondent's position. Those matters are not repeated in detail here, but were considered by the Tribunal in reaching its findings.

196.18 It was clear from all of the correspondence passing between the Respondent and D Solicitors that the account which was established with BOS was intended to be a jointly controlled account and that the funds in that account would be preserved pending resolution of the dispute about entitlement to those funds. Indeed, this was clearly agreed. The Tribunal noted in particular that on 8 April 2010 D Solicitors stated that they would not seek a freezing injunction as they had had an assurance that the funds were held in a designated deposit account and a few days later, on 13 April 2010, they received an undertaking or assurance from RTC in these terms:

> "We are prepared to offer you an assurance that pending a Court Order, from a Court of competent jurisdiction and agreement for the withdrawal of any claim by your client against [RTC] and/or [MPL], the funds currently held to the order of [MPL] will remain in a Trustee Designated Deposit Account."

196.19 There could be no doubt, therefore, that D Solicitors and RTC understood that the disputed funds would be preserved pending a court order or agreement between the parties. The undertaking given by RTC did not provide for deduction of costs or any other deductions. It was clear and beyond doubt from the correspondence which followed that the funds which were returned to the Respondent were to be held in a joint, escrow account, as agreed between the Respondent and D Solicitors. It was correct that D Solicitors did not raise any objection to the deduction of approximately £96,000 from the sale proceeds by RTC and the Respondent before the account was set up. However, there was no agreement that any further costs or sums could be deducted.

196.20 It appeared that for some reason, which was not entirely clear, the BOS account was established as a designated deposit account under the sole control of the Respondent. What appeared to have happened was that the form which was partly completed by the Respondent and sent to D Solicitors simply named the Respondent's Firm as the

account holder, whilst the account title referred to both firms of solicitors and the matter in dispute. The letter from D Solicitors to the bank was sent to the Respondent for onward transmission; the Tribunal did not see a covering letter from the Respondent to the bank forwarding this item. Indeed, it may have been inappropriate for the bank to permit withdrawals by the Respondent if it was aware of the letter from D Solicitors dated 4 August 2010 without further enquiry. The Respondent had informed D Solicitors that it was not necessary for them to meet with the bank, despite the bank's contact with D Solicitors. The account was actually set up on 25 August 2010, less than a month after the Respondent had written to D Solicitors (on 29 July 2010) stating:

> "You will see that there are no insurmountable difficulties to opening the account, save that the account is to be operated on a "two to sign" basis…"

This was a clear representation that this was the way the account would be operated. It was the whole basis on which D Solicitors did not seek an injunction to freeze that asset.

196.21 The Respondent's position was that D Solicitors must or should have known that the account was not a joint account, as they had not completed all of the necessary documents to set up the account or complied with the bank's requirements, e.g. with regard to money laundering. The Tribunal rejected this proposition. It could be argued that D Solicitors could have noted on the application form that the applicant for the account was named only as the Respondent's firm and/or on receipt of the opening statement from BOS (on or about 2 September 2010) that they were named under the "client reference" but were not specifically named as an account holder. However, it was clear to the Respondent that a) the account was one over which he had control and b) that D Solicitors did not know this as, on 2 September D Solicitors wrote:

> "We have received confirmation from the Bank that they are holding £276,000.19 in cleared funds on a joint escrow basis since 27th August 2010."

The Tribunal accepted the Applicant's submission that a solicitor acting properly, on receipt of such a letter, would have corrected the misunderstanding about the account. Sending to D Solicitors the account opening statement reinforced the impression that the money was held securely and in accordance with the agreement made by the solicitors. Whatever the formalities of the account, it was money that was intended not to be released without the consent of both solicitors.

196.22 The Respondent made deductions from the account from 28 September 2010 onwards and at no time did he inform D Solicitors that he had done so. In all, the Respondent withdrew over £200,000 of the funds which D Solicitors believed, with good reason, to be safe and preserved. It would be highly improbable that D Solicitors would have consented to the Respondent making withdrawals, over which they had no control and the Tribunal was satisfied that D Solicitors did not give any such consent, nor that they would have allowed the situation to endure had they known that there was any attempt to resile from what was in effect an undertaking to preserve the money. The Tribunal was satisfied that even if the costs withdrawn by the Respondent had been entirely reasonable in amount it was improper to take those costs from this account.

As noted further below, there was an allegation that the costs taken were in any event excessive. The Tribunal was satisfied that a solicitor acting in good conscience should not have withdrawn any money from the account and certainly should not have done so without notice to the other party. The Respondent remained in correspondence with D Solicitors and had ample opportunity to tell them that he had deducted his costs, but did not do so.

196.23 The Respondent's position in relation to this allegation was that he did not know he was not entitled to take his costs from the account as RTC had agreed that he could do so. In particular, the Respondent indicated that Mr RA had agreed this.

196.24 There was nothing in writing between the Respondent and Mr RA concerning this alleged agreement and, of course, the Tribunal did not have the benefit of hearing from Mr RA or the Respondent. The Respondent's witness statement did not refer specifically to the alleged agreement but it was asserted in the Respondent's skeleton argument that:

> "After the BOS account was opened [the Respondent] delivered several bills to RTC. [Mr RA] reported that the company could not meet the bills and gave permission for the funds to be drawn from the BOS account."

The Tribunal noted that RTC had been sent at least some of the bills, in particular with a letter in June 2011, but did not appear to take much notice. RTC appeared from the documents to understand that M Lodge had been the only asset of MPL. If this were the case, the only fund from which MPL could pay RTC's fees was the BOS account (or its own funds, if any). This supported the Respondent's contention that RTC must have known that the Respondent's costs were or would be paid from the BOS account.

196.25 The correspondence between the Respondent and Mr RA on and after 2 September 2011 clearly referred to the deductions from the account to pay the Respondent's bills. The Applicant's position was that the tone of this correspondence suggested that this was the first time that the issue had been raised with Mr RA and the Tribunal noted that this was one possible explanation; indeed, the correspondence did not refer back to any earlier agreement. The Tribunal noted that Mr RA's personal costs had been paid from the BOS account in February 2011. It was unclear if Mr RA had received the bill and/or knew at that time how his costs were being paid and/or if the board of RTC knew that Mr RA's personal costs were being paid from the account. An email from the Respondent of 6 September 2011 suggested that the fees were deducted from the BOS account on the advice of counsel. The Tribunal did not see any reference in counsel's two advices to this being appropriate and, indeed, if counsel had been instructed properly as to the intention of establishing the account it would be extraordinary for counsel to advise that the money could be used for costs. This was particularly so where counsel clearly expressed some reservations about the terms of his instructions and sought clarity about which party or parties he was supposed to advise.

196.26 The Tribunal considered carefully the evidence on this point. Whilst it was clearly reasonable for the Applicant to allege that there had been no agreement with RTC about deduction of costs from the BOS account there was no positive evidence on this

issue, as Ms MG's statement could not be decisive in her absence. Accordingly, the Tribunal was not satisfied that the Respondent knew, so far as RTC was concerned, that he should not have made any deductions for costs from the BOS account.

196.27 However, the issue of consent or knowledge on the part of RTC was not decisive. In truth it was irrelevant. The key point was that the agreement with D Solicitors meant that the Respondent knew that he should not deduct any money from the account in the absence of a court order or agreement between the parties. In breach of the clear understanding and agreement made by the Respondent with fellow solicitors, the Respondent had extracted over £200,000 for his (alleged) costs. The Respondent had rightly, albeit at a late stage, admitted a lack of integrity in relation to the account. The Tribunal found that that lack of integrity related to the failure to inform D Solicitors that the account was not as they understood it to be and, even more significantly, to the prolonged exploitation of that account to pay the Respondent's costs without the knowledge of D Solicitors. This conduct further amount to conduct which would diminish the trust the public would place in the Respondent and in the provision of legal services. The Tribunal was satisfied to the highest standard that on all of the facts of the case the allegation had been proved in all respects. The only point on which the Tribunal could not be sure was whether or not RTC had given permission for the account to be used to pay the Respondent's bills but, as noted above, RTC's consent was not relevant to whether or not the Respondent had any entitlement to use the BOS account as he did.

197. **Allegation 1.6 - The Respondent claimed costs from a client that he knew could not be justified and thereby knowingly overcharged that client, contrary to Rules 1.02, 1.06 and 2.03 of the SCC 2007 and/or, where such conduct relates to a period after 6 October 2011, Principles 2, 6 and 10 and Outcome 1.1 of the 2011 Code**

197.1 This allegation was admitted by the Respondent, in that he admitted there was some overcharging, but the extent of the breaches and quantum were disputed. The Respondent further denied knowing that the costs could not be justified at the relevant time. Indeed, the Respondent had asserted that in some respects he had undercharged, although this point was not clarified before the Respondent withdrew from the hearing.

197.2 Mr Fenhalls for the Respondent helpfully indicated that a table which set out a breakdown of fees, deductions from the BOS account and time recorded was correct, so far as the arithmetic was concerned.

Applicant's Submissions

197.3 The Applicant submitted that the Respondent's conduct in withdrawing sums from the BOS account was aggravated by the fees charged being grossly inflated and bearing no relation to the work done. Mr Coleman told the Tribunal that the value of time recorded by the Respondent was about £32,000 and invoices for over £196,000 had been rendered, being over six times the value of the time recorded. The Applicant's concern was that neither the files examined by Mr Banyard nor the timesheets remotely justified anything like the total of £196,832.50 charged in respect of the dispute relating to M Lodge. Indeed, Mr Banyard had concluded that a fair charge for

the work done by the Respondent was around £29,000. It was submitted that the most egregious period of overcharging was from October 2011 when it appeared that all that the Respondent had done was respond to requests by RTC for information, mainly about costs. The sums charged were round sum figures with no attempt made to set out the method of calculation (if any). The amount of costs in relation to other RTC matters and Mr RA's personal matter were not in dispute.

197.4 The Respondent's terms of business referred to charges being based on an hourly rate; there was no mention of a "value element" being added. The Applicant's case was that in billing RTC the Respondent was constrained by his terms of business to charge on the basis of an hourly rate, which rate had been notified to RTC as £275 per hour in a letter of 8 April 2010. The Respondent's terms of business, relied on by the Applicant, included the following provisions (underlined as in the Respondent's terms of business letter):

> "2.1 Our charges are based upon an hourly rate, of which you have been notified in the attached letter. Every time we telephone you, you telephone us, we write a letter to you, then when we send or receive an email or send a fax, you will be charged appropriately. In addition, consideration of documents which we receive from you, from your opponent, from any other party in the proceedings or the matter in question, or from anyone else, is charged at the same rate. (This is not an entire list of factors which affect the charge, but these are the most important).
>
> 2.2 Please note, such estimates and/or indications of fees and costs are NOT binding upon us. You will be advised of any material factors affecting the costs of your case as soon as practicable after such can be determined.
>
> 2.3 Such may be by either letter or by delivering you bills at regular intervals. There are statutory requirements which take into account a number of factors including time spent, the size and complexity of the matter, the degree of urgency, the specialised knowledge and responsibility involved, which are taken into account in preparation of our bills of costs…
>
> 3. THE INITIAL HOURLY CHARGING RATE IS SET OUT IN THE LETTER WHICH ACCOMPANIES THESE TERMS. THIS RATE MAY BE VARIED FROM TIME TO TIME AT OUR ENTIRE DISCRETION. YOU WILL BE GIVEN A REASONABLE PERIOD OF NOTICE OF THE INTENTION TO VARY SUCH CHARGING RATE."

197.5 The Applicant submitted that nowhere in the terms of business was there provision for an uplift of "value" billing. Mr Fenhalls submitted that there was provision for variation of the charging rate on giving a reasonable period of notice of the changed rate.

197.6 There was no documentary evidence that RTC was informed it would be charged triple time for work done whilst the Respondent was on holiday and it was submitted that the amount of the bill dated 1 September 2011 (£11,050) bore no resemblance to the value of work actually done whilst the Respondent had been on holiday.

197.7 In response to the report of Mr Banyard, the Respondent obtained a Schedule of Costs prepared by Mr Webb of Waterlow Costs Draftsman ("Mr Webb"). In the course of the hearing, Mr Fenhalls for the Respondent confirmed that Mr Webb's Schedule was based on information given to him by the Respondent. There had been detailed discussions between Mr Webb and the Respondent, who had explained to Mr Webb the work he had carried out and the time spent. The Schedule was based on the assumption, or information from the Respondent, that very substantial amounts of work had been done by the Respondent but had not been recorded on a timesheet or on the file. Further, uplifts of 100% or 200% had been applied to amounts of time estimated on a basic charging rate of £275 per hour and subsequently £300 per hour; this led to effective hourly rates shown on the Schedule of £550, £500 and £900 per hour for some work. The Applicant maintained that the uplifts were unmerited and unjustified but even if they were accepted, the costs considered reasonable by Mr Webb were £168,015, which was significantly less than the fees actually taken, which amounted to £196,832.50. The uplift, which Mr Banyard described as unclaimable and demonstrably unreasonable, appeared to be the only way the Respondent could come close to justifying the costs he had taken.

197.8 It was noted that the Respondent had said in his witness statement, at paragraph 61:

> "It is clear to me now that the bills I submitted were a substantial underestimate."

In response to a question from the Tribunal, Mr Fenhalls stated that he would clarify later what the Respondent meant by this, but the Respondent withdrew from the proceedings before this point was clarified.

197.9 Mr Coleman submitted that even if the Tribunal accepted Mr Webb's schedule of costs, there was still a substantial difference between the £168,000 he had set out and the actual costs taken of £196,000 on this ledger. In any event, it was submitted, Mr Webb's schedule was based on three false premises:

197.9.1 That in August 2010 RTC agreed to a 100% uplift, i.e. a doubling of the charging rate. There was no document showing this, nor was there provision in the Firm's terms and conditions for such an uplift. The Respondent's case was that Mr RA had consented to this uplift. The Applicant's position was that this was inherently unlikely and implausible, given the extreme result which would occur i.e. that the charge out rate would be £550 per hour;

197.9.2 That RTC agreed to a 200% uplift for work done by the Respondent whilst he was on holiday, which had the effect of trebling the charge out rate for work in March and April 2011. Again, the Respondent asserted that this had been agreed with Mr RA. There was no document showing this and the Applicant asserted that it was

inherently unlikely and implausible that such an uplift would have been agreed;

197.9.3 That notwithstanding the detailed time recording on the ledger, the Respondent had failed to time record most the work he had done on this matter, such that he had failed to record over £130,000 worth of work. There was a paradox that the Respondent had taken the trouble to record small items of work but not more significant matters.

197.10 Mr Banyard had produced a response to Mr Webb's costs schedule which, it was submitted, showed that Mr Webb's analysis was not credible. It was anticipated that these issues would be dealt with in the cross examination of Mr Webb but, as noted above, neither Mr Banyard nor Mr Webb were called to give evidence. It was further submitted that in the joint report prepared by the costs experts, the views expressed were not those of Mr Webb; rather, he stated what the Respondent had told him. For example, in relation to the issue of the 100% uplift, it was stated:

> "Mr Webb states that [the Respondent] believed the enhancement percentage to be reasonable in all the circumstances."

197.11 The Applicant stated in the Rule 5 Statement that if the total percentage uplift (£79,947) was deducted, the level by which the Respondent overcharged was huge. In addition, there was no evidence by way of time recording or documents on the file to evidence the vast majority of the work allegedly carried out.

197.12 Mr Webb's Schedule applied an uplift of 200% to work allegedly done whilst the Respondent was on holiday, which was equivalent to an hourly rate of £900 per hour; the Applicant did not accept the amount of time the Respondent claimed to have spent working on RTC's matter whilst he was on holiday. Mr Banyard had indicated that on the basis of the amount in dispute concerning the sale proceeds of M Lodge, a value element charge (if justified) would be in the region of 0.5%, or about £1,900 plus VAT.

197.13 Mr Coleman submitted that a number of the bills in the case were for quite substantial sums but only the most general description of the work allegedly done had been given. Many of the bills did not specify the period to which they related and there had been overlaps in the charges (for example as set out at paragraphs 131 and 186 to 188 above). It was submitted that the worst period of overcharging was from 26 October 2011 to March 2012 as all that happened was that the Respondent dealt with RTC's requests for information about his costs. Mr Banyard's report stated that:

> "(the) most egregious period of overcharging … from the start of January 2012 to date, there is nothing whatsoever on the file other than bills and correspondence with the BOS in respect of transferring monies."

197.14 The Applicant's position was that the Respondent had exploited the failure to establish the BOS account as a joint account by levying unjustified fees. It was submitted that taking money, ostensibly for fees, particularly after it became clear those fees were in dispute (from autumn 2011) from a fund which it had been agreed would be preserved pending resolution of the dispute was very serious. The

Respondent had withdrawn money from the BOS account for his fees without the knowledge or consent of D Solicitors. The Respondent should not have taken his fees from the account and the fees he took were grossly inflated and not supported by the work actually done. There was no complaint with regard to the Respondent's fees before August 2010 or to the deduction of approximately £96,000 from the sale proceeds by RTC and the Respondent before the BOS account was created.

Respondent's Position

197.15 The Respondent's position in relation to this allegation was substantially contained within the draft bill prepared by Mr Webb and the joint memorandum which, the Tribunal was told, were based on information provided to Mr Webb by the Respondent.

197.16 The bill prepared by Mr Webb, on the Respondent's instructions, calculated the appropriate costs at approximately £168,000. Although on the basis of this figure the Respondent had apparently overcharged by 11%, he stated in his witness statement that the bills he had submitted were a substantial underestimate.

Tribunal's Findings

197.17 The Tribunal reviewed all of the evidence and submissions of the parties.

197.18 The Tribunal accepted the facts stated in the reports of Mr Banyard, and the criticisms of the Respondent's billing which he had expressed. Mr Banyard had not been called to give evidence because the Respondent chose not to challenge his evidence. Mr Webb's schedule was, in effect, part of the Respondent's evidence; as the Respondent chose not to give evidence, it could be given no independent weight. In any event, the Tribunal accepted that Mr Webb's schedule was based on three false assumptions, as set out at paragraph 197.9 above. It was inherently unlikely that RTC and the Respondent would have agreed substantial uplifts without recording this, and it was even more unlikely that the Respondent would have failed to record (on either the file or his time ledger) the vast majority of the work he allegedly carried out. The Tribunal noted in this context that the Respondent had taken the trouble to record his work on the time ledger; it was incredible that he would have failed to record the overwhelming majority of the time he allegedly spent on work for RTC. The Tribunal specifically rejected the Respondent's contention that he had carried out substantial amounts of work which had not been recorded. The Respondent's position generally was that he had been disorganised, for example with regard to his accounts. However, it was implausible that the Respondent had carried out substantial work without making and retaining notes; his contention in his statement of 9 November 2012 that "I appear to have thrown out many handwritten notes in this case having wrongly assumed at the time that I had billed properly" was rejected by the Tribunal. It was inherently implausible that file notes would be destroyed in this manner, with no rational explanation.

197.19 Further, in this context, the Tribunal noted that the dispute about the entitlement to the proceeds of sale of M Lodge was a dispute in which nothing actually happened; it was not resolved, and there were no court proceedings. It was unclear why the money was not paid into court, to await the outcome of proceedings between Mr V and Mr T as to

the beneficial ownership of MPL; it appeared to the Tribunal that there was no need for any substantial work to be done by or on behalf of RTC, which should probably have been advised simply to abide the outcome of the competing claims for entitlement to the sale proceeds of M Lodge. At one period it appeared from Mr Webb's schedule that the Respondent was spending 2.5 hours per week considering the issues around Mr KC and freezing the money in dispute; there were no contemporary documents to support that work and the Applicant did not have the opportunity to explore this, or other points, with the Respondent in evidence. In all of the circumstances, there was no good reason for the Respondent to carry out work in this matter to the alleged value of £196,000.

197.20 The Tribunal noted in particular that the Respondent had made round sum transfers, which were not in all cases connected to the amount of a bill. The bills in question did not indicate the periods to which the bills related (with one or two exceptions) and there was undoubtedly some overlap and double charging. The issue of various "credit notes" in the period had created some confusion. The Respondent had been asked in November/December 2011 for information about his bills; it was unclear why something as simple as providing information about costs took the Respondent as long as it did. It was odd that the Respondent had referred to providing "audited" invoices in his correspondence with RTC. There was nothing to audit. He was simply asked to provide copies of accounts he had paid from the funds in the account. That is not a matter that requires any audit. It was further rather unusual that the Respondent had said in his statement, at paragraph 61:

> "In the ordinary course of events fees at the end of a matter like this would have been the subject of negotiation."

This was of concern as it appeared to show that the Respondent did not appreciate that the bills he rendered were supposed to be accurate and final, a point of particular relevance as he was actually taking payment for these bills.

197.21 The Tribunal further took into account that there was no provision in the Respondent's terms of business for there to be an uplift on his basic hourly rate. There was, however, provision for the rate to be varied on giving reasonable notice to the client. There was no evidence that the Respondent had notified RTC of any increased rate, let alone that this was agreed. Indeed, the Respondent did not make any positive assertion in either his statement of 9 November 2012 or his statement in response to the allegations that the uplift had been agreed by RTC or any of its representatives. The Tribunal noted from Mr Webb's schedule of costs that the Respondent's claimed entitlement to a 100% uplift coincided with the establishment of the BOS account. With regard to the further uplift for work allegedly done whilst the Respondent was on holiday, he had asserted that his clients should pay more for that work, but there was no evidence that RTC knew he was on holiday and/or that they would be charged at 200% more than the Respondent's standard rate.

197.22 Even on the Respondent's case, there was an overcharge of 11% although he had asserted elsewhere that he had undercharged. The Tribunal noted that the value of the time recorded was around £32,000 and that Mr Banyard had concluded that a reasonable charge for the work done, at the Respondent's hourly rate, would have been in the region of £29,000. The Tribunal was satisfied that Mr Banyard's

assessment was about right; it did not need to conduct a detailed analysis of every item but could see that the assumptions and allowances made in Mr Banyard's report were reasonable. There had been an overcharge of something in the region of £167,000 or 85%. Even if Mr Banyard had been wrong to the extent of 100%, the Respondent had overcharged by £138,000; the Tribunal was satisfied, however, that Mr Banyard's analysis was correct. Even on his own account there was an overcharge by the Respondent of about £20,000.

197.23 The Tribunal took into account that in the period August to October 2011 the Respondent had billed £50,600. In the same period the value of the time recorded was a little over £1,400. In any event, there was no evidence of any substantial work being done in relation to the dispute. From November 2011 it was clear that RTC were querying the Respondent's bills. No substantive work was done in relation to the dispute and yet, after the meeting between the Respondent and representatives of RTC on 15 November 2011, the Respondent issued bills to the value of just over £40,000.

197.24 It was noted that to prove the allegation it was not sufficient to show that there had been overcharging but also to show that that the Respondent knew the costs could not be justified and thereby knowingly overcharged that client. With regard to this point, the Respondent had relied on being in something of a muddle with regard to his accounting and billing systems in the relevant period. He had also sought to suggest that whilst on one analysis there had been an overcharge, at the same time he would have been entitled to charge more.

197.25 As noted above, the Tribunal did not have the benefit of hearing from the Respondent in evidence. It was satisfied that it could therefore draw the inference that, on the basis of the evidence which it had seen and accepted, the Respondent was unable or unwilling to account for his actions and that he was aware that he was overcharging. In support of this, the Tribunal noted that: the Respondent had increased his charges, or "uplift" without proper notice in writing to RTC; the 100% uplift was applied routinely from the time the monies were lodged in the BOS account (at which point the Respondent had sole control over that fund); multiple bills had been issued without any clarity about the work allegedly done or the periods covered; various credit notes had been issued (which indicated that the Respondent must have turned his mind to billing this matter); the Respondent had delayed in providing information to RTC, using as an excuse that the bills had not been "audited" when there was no need for a bill issued to a client to be "audited."

197.26 Taking into account all of the circumstances, the Tribunal was satisfied to the required standard that this allegation had been proved in all its respects.

198. **Allegation 1.7 - In relation to allegations 1.3, 1.5 and 1.6 it was alleged that the Respondent acted dishonestly although it was not necessary to prove dishonesty to prove the allegations themselves.**

198.1 The Respondent denied this allegation in its entirety. The factual matters on which this allegation were based are set out at paragraphs 92 to 94, 107 to 126 and 127 to 131 and the Tribunal's specific findings on each allegation are set out at paragraphs 194, 196 and 197.

198.2 The Tribunal was aware that the test to be applied in considering alleged dishonesty was the combined test set out in Twinsectra v Yardley and others [2002] UKHL 12.

198.3 With regard to allegation 1.3, the Tribunal had found not only that the Respondent had transferred monies improperly from client to office account, before delivery of a bill of costs, but that he had done so in order to fund payments his Firm was due to make.

198.4 The Respondent had asserted in his witness statement that he had no need to use client money to fund his practice, as he could have borrowed against his home. After making its findings of fact, the Tribunal noted this assertion with regard to the allegation and with regard to the Respondent's submissions about his means, set out below in the section on costs, where he stated he did not have a beneficial interest in his home. It would be difficult, in general, to borrow against a property which one did not own. The Respondent did not provide any evidence in the substantive case to show that he could raise money to pay his debts when they fell due.

198.5 There had been no proper explanation by the Respondent about his systematic transfers from client to office account referred to in the FI Report. The Tribunal was satisfied that regularly transferring money belonging to clients when no bill had been delivered and there was no other proper reason for the transfer, in circumstances where the transfers allowed the Respondent to pay his debts and outgoings, would be regarded as dishonest by reasonable and honest people. Further, the Tribunal was satisfied that the Respondent knew that what he was doing was dishonest by those same standards.

198.6 With regard to allegation 1.5, the Tribunal had found that the Respondent had set up an account, which it was agreed would be a joint account, under his sole control. Whilst the reasons for this were not entirely clear, the Respondent was aware that the account had not been set up as a joint account on a "two to sign" basis as was agreed with D Solicitors. He took no steps to inform D Solicitors. In his witness statement, the Respondent said:

> "It was to be held in a joint account, to be held by [D Solicitors] and myself. In fact it was not possible to open a joint account because for reasons best known to themselves [D Solicitors] declined to provide the AML information required by the bank. I regret not having changed the name of the account but stress there was no reason other than an oversight on my part."

198.7 The Tribunal had seen no evidence that D Solicitors had failed to provide anything required by the bank. The more likely explanation was that the Respondent had failed to provide to the bank the letter of instruction written by D Solicitors on 4 August 2010, but the Tribunal did not make a specific finding on this point. The Tribunal noted that the Respondent had dissuaded D Solicitors from meeting with the bank. Mr Rosen had made clear in his statement that he had not been informed that there had been problems in setting up the account as a joint, escrow account; the Respondent had gone ahead and established it under his sole control. The account title named D Solicitors, which camouflaged the reality that the account was a sole account. In the interview between the Respondent and the investigation officer on 21 June 2012 the Respondent had agreed that the intention of the parties with regard

to the account, "didn't change at that time." It was unclear from the Respondent's evidence at what point after the account was opened he felt there was now a reason why he might withdraw money contrary to that intention. The Tribunal rejected the Respondent's criticism of D Solicitors, for which there was no supporting evidence and instead accepted Mr Rosen's account of the dealings between the parties and between D Solicitors and the bank.

198.8 The Tribunal determined that the Respondent had set up a sole account, contrary to the agreement with D Solicitors. It was highly likely that he had done so deliberately, but even if the establishment of the account in this way had not been planned by the Respondent, it was a simple fact that he had failed to inform D Solicitors that he had sole control over it. Instead, the Respondent had suggested that D Solicitors should have known that this was not a joint account. On reviewing the correspondence, the Tribunal found that the Respondent had intentionally misled D Solicitors and had failed to take any steps to correct D Solicitors' misunderstanding of the nature of the account. In his witness statement, Mr Rosen stated:

> "39. I understand that [the Respondent] has suggested that, notwithstanding the correspondence to the contrary, the account opened was not a joint account and [the Respondent] opened the account in his own name.
>
> 40. If that is the case then [the Respondent] deliberately misled me.
>
> 41. That was certainly not what was agreed as evidenced from the correspondence passing between us. There cannot be any confusion as to what [the Respondent] understood the agreement to be, as demonstrated by the reference to the account being operated on a "two to sign" basis. I was not aware that the account actually opened was not on those terms and would not have agreed to proceeding on that basis. I repeat that I was also not aware that any funds had been transferred out of the [BOS account] and did no consent to such withdrawals."

The Tribunal had no hesitation in accepting this evidence.

198.9 The Respondent had, rightly, admitted a lack of integrity with regard to the BOS account, but it was unclear whether this admission related to the establishment of the account, its operation or both. The failure to inform D Solicitors of the true nature of the account and/or the withdrawals from the account clearly showed a lack of integrity. The Tribunal had not been satisfied with regard to the part of the allegation that RTC did not know of or consent to the use of the account to pay the Respondent's bills. Whatever the knowledge and/or consent of RTC had been, it was clear from the evidence of Mr Rosen that D Solicitors had not consented to any withdrawals from the account. Indeed, it would have been extraordinary for a solicitor to consent to uncontrolled withdrawals from an account set up to protect those funds on behalf of its client for the costs of another solicitor.

198.10 From late September 2010 until March 2012 the Respondent had withdrawn significant sums for his costs from the account. The Tribunal was satisfied that even if the costs had been entirely reasonable and justified, it was improper to take them

from the BOS account. In the event, the Respondent had milked the account, for his own benefit. This negated the whole point of the BOS account, which had in effect been set up as an alternative to preserving the funds in court. It was further of note that not only did the Respondent take costs billed to RTC from the account but also costs billed to Mr RA in his private capacity.

198.11 The Tribunal determined that in a) establishing the BOS account as a sole account without informing D Solicitors; and b) withdrawing over £200,000 over an 18 month period without informing D Solicitors or seeking their consent, thus depriving D Solicitors' client of the security which the BOS account was supposed to provide the Respondent had been dishonest by the standards of reasonable and honest people. Further, the Tribunal was satisfied that the Respondent knew that his actions were dishonest by those same standards. He was fully aware of the basis of the agreement made with D Solicitors and that the money was to be preserved pending resolution of the dispute about beneficial ownership. The Respondent knew that using the account the pay the costs of an individual unconnected with the account, Mr RA, was wrong. The Respondent knew from the correspondence that D Solicitors did not know either that the account was not a joint account or that deductions had been made from it; he took no steps to inform them of the true position. He did not wish to try to explain these actions to the Tribunal, and the Tribunal considered that it was appropriate to draw an adverse inference from that decision. For the avoidance of doubt the Tribunal would have so decided even absent such an adverse inference.

198.12 The Tribunal was satisfied to the highest standard that the Respondent had been thoroughly dishonest in misleading another solicitor and in taking money to which he had no entitlement under the terms of the agreement between the solicitors.

198.13 With regard to allegation 1.6, the Applicant's case was that the Respondent knew that there was no basis or justification for raising the numerous invoices he raised and that he had grossly, unjustifiably and deliberately overcharged his client, RTC by the difference between the amount billed (£196,832.50) and the amount assessed by the expert as being reasonable (£29,014.50), namely £167,818. Such a level of overcharging would be considered by any ordinary and reasonable person to be dishonest conduct. It was alleged that in the Respondent knew that he had not done anything like the amount of work which would justify such costs; in doing so, he knew that by the standards of reasonable and honest people his conduct was dishonest.

198.14 The Tribunal rejected the Respondent's suggestion that he had undercharged. There was no possible justification for the amount of costs he had claimed, in particular the level of costs taken from the BOS account after August 2010. This was a matter in which there had been no real activity. There may have been some meetings, telephone conversations and correspondence but there were no court proceedings in which the Respondent's client was involved. There was no real work to be done; where there is a dispute between those claiming beneficial ownership the normal course would be for the trustee to hold the funds securely pending resolution of that dispute, in which the trustee would have minimal involvement.

198.15 The Tribunal was satisfied that the Respondent had fabricated bills, in order to make transfers from the BOS account to his office account. As set out above, the amount of

the bills could not be justified, the periods to which they related were not specified (in most cases) and the description of work done was vague. The Tribunal noted in particular a bill for £12,250 dated 31 January 2012 (after the complaint to the Applicant had been made) in which the narrative stated:

> "To our further and ongoing professional charges in connection with the investigation of the above matter. To perusing the file, considering the value to you, the value to [Mr T] and noting that nothing had been heard, liaising with [Mr RA] etc., special fee £12,250".

It was implausible and incredible that a fee of over £12,000 could be justified where "nothing had been heard."

198.16 The Tribunal further found that the Respondent had made round sum transfers which were not always connected to the bill dates or their amounts. There was no proper explanation of the credit notes which had been issued. There were overlapping bill periods. There was no justification for charging an "uplift" of either 100% or 200%; the explanation for this set out in Mr Webb's draft bill, based on the Respondent's instructions, was rejected. The Tribunal also took into account that the Respondent had clearly time recorded small items of time in this matter but, on his case, had not recorded the bulk of the time spent. It was implausible that the Respondent would have failed to either time record or make notes on the file (and then preserve those notes). The Tribunal was satisfied that the Respondent could not justify fees of above around £29,000 in a situation in which he had taken costs of £196,000. The Tribunal accepted that Applicant's submission that the Respondent's billing was motivated by the need to fund his practice and pay his debts.

198.17 The Tribunal determined that in systematically and regularly billing costs which could not be justified the Respondent had been dishonest by the standards of reasonable and honest people. Further, the Tribunal was satisfied to the highest standard that the Respondent knew that he could not justify the costs which he was taking from the BOS account and therefore knew that he was dishonest by the standards of reasonable and honest people.

198.18 This was a case of sustain and intentional defalcation to a significant degree. The Respondent had not simply taken costs in advance of the delivery of a bill (which would in itself be serious) and nor had he overcharged on the basis of a mistaken recollection of the time he had spent. The claimed entitlement to uplifts was implausible and was rejected by the Tribunal. This was a very serious case of overcharging, for which there could be no justification. The overcharging had been a means to milk what was supposed to have been a deposit account that was supposed to have been inviolate. The Tribunal was satisfied to the highest standard that this allegation had been proved in all its aspects.

Previous Disciplinary Matters

199. There were no previous matters in which findings had been made against the Respondent.

Mitigation

200. The Respondent did not submit specific mitigation in relation to the allegations and findings but the Tribunal noted the Respondent's explanations for various matters, as set out in documents before the Tribunal including the Respondent's witness statement, the representations made on his behalf by Mr Fenhalls and the Respondent's letter to the Tribunal dated 30 April 2014.

Sanction

201. The Tribunal had regard to its Guidance Note on Sanctions (September 2013). It reviewed all of the facts and the findings which had been made against the Respondent.

202. The Tribunal found that this was a case involving calculated deception by the Respondent of another solicitor so as to enable the systematic defalcation of about £200,000 from what was supposed to have been a deposit account held to await the resolution of a dispute. The level of charging by the Respondent was fabricated; there were charges with no time recorded, without periods of time being given for those charges, obfuscation by credit notes and recharging, and ultimately bills headed, for example, "special fee" with no justification for such charge. The Respondent's approach to the case had been to try to stave it off so as to allow him to work for another 12 months before retiring from practice; this was clear from his letter to the Tribunal reproduced at paragraph 12 above. When that approach failed the Respondent absented himself from the proceedings immediately before he was to give evidence.

203. The Respondent had run his Firm in a way that was not compliant with the Solicitors Accounts Rules in force at the relevant times, such that there were regular debit balances on client account. This in itself was serious; the accounts rules existed to protect the public and in particular to protect clients' money. Any breach was likely to be serious, but was particularly serious where, as in this case, the breaches were systematic over a significant period of time. The Respondent's breaches, as set out in relation to allegations 1.1 to 1.3 above were not isolated or aberrant but instead were indicative of the non-compliant way in which his Firm had operated.

204. This became an even more serious case when overcharging at an unconscionable level was taken into account, and would have justified a most severe sanction even without a finding of dishonesty. Further, the matter of the deception of the other solicitor, where lack of integrity was admitted, was so serious that for that alone the Tribunal would have struck him from the Roll of Solicitors, even if dishonesty had not been proved.

205. Having also found that the Respondent had been thoroughly dishonest the sanction of striking from the Roll was inevitable. There were no exceptional circumstances which suggested any other sanction should be considered.

Costs

206. The Tribunal received a schedule of costs, certified by Mr Havard, a partner at Morgan Cole LLP, who had conduct of the case, during the morning of Thursday 1 May. The Tribunal also received from the Respondent, via Mr Fenhalls, some notes on the Applicant's costs claim, a document headed "draft mitigation costs notes", a personal financial statement and a schedule of annotations to the personal financial statement.

207. The Applicant's application for costs was heard after 10.45am, the time which had been indicated to the Respondent as the earliest time at which costs would be considered. The Tribunal was informed that the Clerk had checked shortly before this part of the hearing and nothing additional to the items noted above had been received from the Respondent or Mr Fenhalls; the Respondent did not attend.

208. The Tribunal noted that as the schedule of costs, which totalled £84,028.23, had been certified by Mr Havard it was satisfied that the time claimed had actually been spent, but the Tribunal would need to be addressed on the reasonableness of the time spent and the costs claimed; in particular, Mr Coleman would need to address the issues raised by the Respondent in his submissions on costs.

209. Mr Coleman applied for summary assessment of the costs of the proceedings in the full amount set out in the schedule. It was noted that the Tribunal would then need to address whether any reduction in costs should be made in the light of the Respondent's means.

210. Mr Coleman told the Tribunal that a schedule of costs prepared in the previous week had totalled £93,763.22 but the amount claimed had been reduced as the hearing had been shorter than estimated.

211. Mr Coleman referred to the Respondent's notes on the schedule of costs, which were based on the previous schedule and figure of £93,763.22. The Respondent had asserted that as the various disbursements, e.g. counsel's fees, had not been vouched they should be disallowed in their entirety. On the basis of his calculations, the Respondent had suggested that costs of £33,086.69 would be reasonable (after taking out all of the disbursements and certain elements of profit costs). Mr Coleman submitted that if the disbursements of £40,095.20 were added back on to the Respondent's proposed figure, one would reach a total of £73,181.89 which was about £11,000 less than the amount claimed by the Applicant. It was submitted that the point about vouchers had been addressed by the certification by Mr Havard.

212. The Respondent had submitted that "In general terms even a "full indemnity" claim, such as this, would be reduced at the end by 15%". Mr Coleman submitted that this was plainly wrong in principle. If one were to add back in the 15% the Respondent had assumed would automatically be deducted (£6,745.93), the amount the Respondent did not appear to be disputing rose to £79,927.82. Overall, therefore, the scope of the dispute was fairly narrow.

213. Mr Coleman submitted that the case had been complex; indeed, it had been more complex than the volume of papers submitted to the Tribunal suggested. The

commercial transaction(s) which formed the background to the allegations were not normal commercial transactions and understanding the events had taken a long time. The Tribunal noted that the members had spent considerable time reading into the case in order fully to understand it.

214. Mr Coleman submitted that the Respondent had disputed all of the most serious allegations, and his admissions to other matters had been limited. The Respondent had made a further admission, in relation to the BOS account, on the second day of the hearing after his application to adjourn the case had failed. This was followed by what Mr Coleman described as the Respondent's intemperate letter – set out in full at paragraph 12 above – and his refusal to take part in the proceedings any further. Mr Coleman submitted that this raised a question as to whether the Respondent had really intended to defend the proceedings or whether he had simply hoped to delay the hearing. The Respondent could not now complain of the costs consequences of the Applicant preparing the case fully, including obtaining statements. Proving the case was a matter of some complexity. One of the witnesses (Ms MG) was out of the jurisdiction; that she did not, in the event, give evidence for whatever reason did not undermine the reasonableness of obtaining her statement. The medical evidence she had produced concerning her inability to travel to the hearing was outside the control of the Applicant.

215. Mr Coleman submitted that marshalling all of the documents and evidence, in the particular circumstances of this case, had been complex. A further layer of complexity was added by the need to obtain expert costs evidence, then respond to what Mr Coleman described as the Respondent's absurd position with regard to his costs. Overall, with the way the case had been prosecuted and the complexity of the matter, the Respondent should not be surprised that costs of the order of £84,000 were being sought by the Applicant.

216. Mr Coleman told the Tribunal that the charge out rate claimed was the same for both the partner, Mr Havard, and his assistant Mr Griffiths who was also a Grade A fee earner (i.e. he was a solicitor with 8 years or more experience). Despite the difference in seniority between Mr Havard and Mr Griffiths, the rate agreed and payable by the Applicant was a "blended rate". The rates charged (£166.25 per hour for one period and £175 per hour otherwise) were plainly reasonable rates for a Grade A solicitor and the Tribunal was invited to reject the Respondent's challenge to the charge out rate, which had suggested that Mr Griffith's time should be charged at £50 per hour less than Mr Havard's rate, and that both rates should be reduced for the time allowed for attendance at the hearing with counsel.

217. The Respondent had submitted that only the time actually spent at the hearing should be allowed. It was confirmed by Mr Coleman that the present schedule showed a lower figure that the first version as the case length had been reduced from the estimated time, both in the number of days and the number of hours spent on a number of those days.

218. The Schedule of Costs set out the work done in three periods, plus the estimated costs of the hearing. The first period, 13 June to 17 September 2013, including the drafting and issue of these proceedings, including the preparation of the Rule 5 Statement and compilation of the supporting documents. Solicitors' costs of £7,000 for that work

should not be surprising. The work done included the initial consideration, provision of advice, discussions and obtaining approval of the proceedings to be issued, contact with witnesses and obtaining consent from Mr T's present solicitors to access files, together with consent from them to permit the Respondent to give evidence on relevant matters. The Respondent had submitted that instead of the 281 units claimed for drafting, 150 units would be reasonable. Mr Coleman submitted that the time was actually spent and was reasonable, so there were no grounds to reduce the costs in the first period.

219. The Tribunal noted that the Respondent may not be aware that Mr Griffiths was a Grade A fee earner. It was queried whether there had been any duplication of work. Mr Coleman took instructions and reported to the Tribunal that Mr Griffiths had worked under the usual and proper level of supervision, but there was no unnecessary duplication at any stage. Mr Coleman submitted that in the first period, the costs claimed were, on their face, reasonable.

220. The second period in which costs were claimed was 18 September to 5 December 2013; the solicitors' costs for that period were £5,502.89. The Tribunal was told that the time spent included three hours of telephone conferences with RTC including work on the statement of Ms MG and collating the necessary documents. Some time had been spent in preparing the breakdown of fees, deductions from the BOS account and time recorded; over 15 hours had been spent in gathering and collating the evidence concerning RTC. A further 9 hours had been spent in taking and preparing Mr Rosen's statement. In addition, there had been attendances on the costs expert, the Respondent, the Tribunal and witnesses. The Tribunal was told that the time ledger was available for inspection if required.

221. The Respondent had submitted that the time spent on telephone calls was too high, and proposed that 20 units rather than 37 units should be allowed; that proposal suggested that two hours' of telephone calls was reasonable for the whole period of almost three months. Further, the Respondent submitted that the time spent by Mr Griffiths in drafting was excessive and 100 units rather than the 261 units claimed should be allowed.

222. The third period of work was from 6 December 2013 to 30 April 2014, i.e. the third day of the hearing. The sum claimed for solicitors' costs was £12,565 which, Mr Coleman submitted, was reasonable. The work done included attendances on the Respondent, the costs expert and other witnesses and two case management hearings. There had been further attendances on D Solicitors to prepare the second statement of Mr Rosen which exhibited a number of documents which it had been necessary to review at the offices of D Solicitors, a process which took 7 hours. The Tribunal had directed the preparation of a joint document by the costs experts, and work was done in arranging this. A further 3.5 hours had been spent in finalising Ms MG's statement. In addition, counsel had been instructed. All necessary practical steps had been taken including arranging for witnesses to attend, translation of the medical evidence concerning Ms MG, arranging a video link preparation of the supplementary bundle and the initial costs schedule. Overall, it was submitted, the time and costs claimed were reasonable.

223. The Respondent had submitted that the time spent on telephone calls was excessive and the time allowed should be reduced to 20 units (from what the Respondent referred to as 42 units but which appeared on the up to date schedule as 57 units). Mr Coleman submitted that the time had been spent and there were no grounds to think the time spent was unreasonable. The Respondent had objected that the time claimed for drafting, revision, preparation, perusal and meetings by Mr Griffiths (317 units) was excessive and unparticularised and so nothing should be allowed for that item. Mr Coleman told the Tribunal that this item included the bulk of the activity in the period prior to the hearing including attending on D Solicitors and finalising Ms MG's statement as well as instructing counsel and preparation of bundles. The Tribunal was invited to conclude that the time spent, in a four month period, in preparing this case for hearing was reasonable and no deductions should be made.

224. The costs set out in the schedule as estimated costs of 1 May had now crystallised, and the schedule had been signed and lodged by Mr Havard.

225. With regard to the attendance of the instructing solicitors at the hearing, the Respondent had submitted that the time spent was excessive and "would not be tolerated by a Costs Judge." The Tribunal noted that the Respondent had been commenting on the initial costs schedule, which had included estimated costs of attending the hearing, rather than the costs as crystallised. The Respondent appeared to suggest that nothing should be allowed for Mr Havard's time in attending the hearing. Mr Coleman told the Tribunal that whilst both Mr Havard and Mr Griffiths had been in attendance on the morning of Monday, 28 April, for that session only Mr Havard's time had been claimed and nothing had been claimed for Mr Griffiths. Mr Havard had attended also on another morning, whilst at the Tribunal to deal with a different matter, but his time had not been charged. The attendance of only one solicitor had been claimed for at any given session during the hearing.

226. Mr Coleman told the Tribunal that the claim for the costs of the investigation by Mr Bailey was £13,116.66. The Respondent had submitted that this must include an element of duplication, as there had been a number of visits to the Firm; the Respondent had suggested that the figure of £9,500 would be more reasonable. Mr Coleman submitted that Mr Bailey had spent 105 hours in the investigation and preparation of the FI Report. It would be possible that the travel time (and perhaps expenses) would have been lower if there had been just one visit but it was submitted that in a case of this nature it was normal to visit more than once as the first visit and information obtained on that occasion would lead to further questions after an initial review. It was submitted that the time spent was reasonable for a complex case such as this, with what Mr Coleman submitted was a "bizarre" transaction as part of the context. The Tribunal noted that Mr Bailey was an experienced investigator for the Applicant. Mr Coleman submitted that as the Respondent had only asked for a deduction of 10 hours it was clear that the Respondent had conceded that much of the work done was reasonable.

227. Mr Coleman submitted that the Tribunal should summarily assess costs and make either no deduction or only a small deduction from the amount claimed.

228. The Tribunal noted that the question of the reasonableness of the disbursements, including counsel's fees, needed to be addressed. Mr Coleman submitted that the

Respondent had not made any submissions on the reasonableness of the disbursements but the Tribunal noted that the Respondent had submitted he would not make any observations on this point until the disbursements were vouched. It was further noted that the Respondent was a litigator and so would have some familiarity with the level of counsel's fees and the fees of experts; Mr Coleman submitted that the Respondent had instructed his own counsel and costs expert and so would have some comparison figures on which he could comment, but the Applicant had not pressed the Respondent for provision of his own costs schedule.

229. Mr Coleman told the Tribunal that there was one point of detail on the schedule which needed to be corrected. The travel costs had been stated as £580.40 but should be £418 as the original figure included an element which should have been apportioned to another matter; it was noted that Mr Havard had attended the Tribunal during the week in connection with this case and one other. Mr Coleman apologised for the error and the Chair asked for an amended schedule to be filed.

230. The Tribunal noted that if there was only a time charge for attendance at the hearing of one solicitor it could be queried whether both Mr Havard's travel and that of Mr Griffiths should be allowed. Mr Coleman submitted that it was appropriate for Mr Havard, as a partner of Morgan Cole, to be present at the start of the hearing. It was noted that part of the claim for Mr Havard's travel costs related to the Case Management Hearings. Mr Coleman indicated that if Mr Havard's travel for this hearing were to be disallowed, a further £66.67 should be deducted from the costs. It was queried whether it would be right, in these circumstances, to allow a claim for Mr Havard's accommodation costs for 27/28 April. Mr Coleman indicated that the figure for this could be worked out and it was agreed that the figure would be passed to the Clerk after the Tribunal retired, to avoid taking further time in the hearing itself.

231. The Chair noted that Mr Fenhalls had stated that the Respondent's financial situation appeared "parlous" in his email to the Tribunal on the morning of 1 May, which raised the need to consider making what was sometimes called a "football pools" order but which, more properly, was an order for costs not to be enforced without the permission of the Tribunal.

232. Mr Coleman submitted that the burden of proving, on the balance of probabilities, that he could not pay the costs (or that payment would lead to financial hardship) rested on the Respondent. It was for the Respondent to present the Tribunal with cogent evidence on this matter. The Tribunal would need evidence not only about assets in his own name but other assets and means of support available to him. Mr Coleman proposed to highlight some questions which arose from the information provided by the Respondent, in order to demonstrate that the Respondent could not satisfy the Tribunal, on the balance of probabilities, that he was unable to pay without hardship. Mr Coleman told the Tribunal that he had available information about the Respondent's means and companies in which he had an interest about which he would want to cross examine the Respondent if he were present. In response to questions from the Tribunal, Mr Coleman told the Tribunal that the information which had been found in the last week had not been sent to the Respondent. Until the morning of 1 May the Respondent had not provided any disclosure about his means and so it was not known that he would not refer to all of the matters about which the Applicant had information. Mr Coleman told the Tribunal that the Respondent had been informed in

September that he would need to provide information about his means if he wanted his financial position to be taken into account in determining costs, in the light of Solicitors Regulation Authority v Davis and McGlinchey [2011] EWHC 232 (Admin). Mr Coleman submitted that the Respondent should have provided information in good time. It was noted that the Tribunal's letter to the Respondent of 9 October 2013, which was in a form sent routinely to Respondents, also set out the requirement to provide information about means if a Respondent wanted to rely on means in relation to costs orders. Mr Coleman submitted that the Respondent had had the benefit of leading counsel in these proceedings and had had no good reason not to provide information in a timely way.

233. The Tribunal considered whether it should hear or consider the information about the Respondent's means which the Applicant intended to adduce. Although the Respondent had chosen voluntarily to absent himself from this stage of the proceedings, and could have given proper disclosure about his means earlier, the Tribunal did not consider it appropriate to receive the information referred to by Mr Coleman. If Mr Coleman considered that the information would make a material difference, he could make an application to admit that evidence but at the moment it had not been provided to the Respondent and he had not had the opportunity to comment on it and so should not form part of the Tribunal's consideration.

234. It was noted that the Respondent's statement of financial information, and his annotations to it, had been provided at the beginning of the day and all of the information in it was new to the Tribunal and the Applicant.

235. The Respondent had noted that he had been working as a consultant with a firm of solicitors in London for the previous 10 months, but that employment would cease on the pronouncement of the Tribunal's decision. It appeared that the Respondent lived with his wife in a property owned by her. He had also referred to a property in France; he stated he had no beneficial interest in it. Mr Coleman submitted that this was the sort of point which the Applicant would want to investigate: it was for the Respondent to explain who owned the property, the circumstances in which the property was or might be available to him etc. It was noted that there were no documents supporting any of the statements made by the Respondent. Mr Coleman submitted that if the Respondent had no beneficial interest in the property in France, it was unclear why he had mentioned it without then giving an explanation of the position.

236. It was noted that the Respondent appeared to have a debit balance in an account in England, but there was a sum in a joint account held with his wife in France.

237. The Respondent had provided a list of other assets including a PEP/ISA, stocks and shares and monies owed to the Firm as well as an interest in a property. Mr Coleman queried the accuracy of the information provided. The total of these other assets was £135,000. Mr Coleman submitted that the monies owed to the Firm, of which the Respondent had been the sole principal, had been set out as £128,000 but the Respondent had asserted that only 50% would be recovered, i.e. £64,000. It was noted that recovery of money for the Firm may be difficult, particularly as at least one of the clients was understood to reside in the USA. However, Mr Coleman submitted that the Respondent had not set out the basis on which he estimated he would recover 50%

of the sums owed to him. It was for the Respondent to produce cogent evidence to satisfy the Tribunal about his financial situation. It was submitted that the consequences for the profession were serious if the Tribunal accepted the Respondent's information about his means, as the profession rather than the individual would have to bear the costs of the proceedings taken against him.

238. The Respondent had stated that he lived with his wife in her property, which indicated that the Respondent's home was not an asset. It was submitted that the Respondent had not provided sufficient explanation of the position and how it was that he had no interest in his home, particularly given that it was understood that the Respondent was not recently married. This would be an issue on which the Applicant would want further information. It was noted that the Respondent had not indicated that mortgage payments were an outgoing, but he had referred to payment of Council Tax. It was also noted that the schedule of outgoings referred to pension contributions, which the Respondent stated would now cease, but there was no indication of the value of the pension amongst the Respondent's assets. It was noted that because of the Respondent's age, his pension should normally be fully realisable next year.

239. Mr Coleman submitted that the information the Respondent had put forward was not sufficient to show that he could not pay costs or that payment would cause undue hardship in the light of the assets available to him. The Respondent had had ample opportunity to provide evidence of his means, having been invited to do so by the Applicant in September 2013 and informed by the Tribunal in October 2013 of this expectation. It was therefore just to proceed on the basis that the Respondent could pay costs, such that the only issue to be determined was the reasonable amount of those costs. It was submitted that it would be regrettable to have to return to the Tribunal on another occasion to seek an enforceable costs order, as this would increase the overall costs.

The Tribunal's Decision

240. The Tribunal considered carefully the application for costs, in the light of its knowledge of the case, the submissions on behalf of the Applicant and the Respondent's written representations.

241. The Tribunal found that the case had been exceptionally complex. It had taken the Tribunal members considerable time to read into the papers, which was not a criticism of the presentation of the documents but rather an indication of the complexity of the issues underlying the allegations.

242. The Respondent had not made any substantial admissions until a late stage and those admissions which he had made were limited in scope; the Applicant was required to prove the facts and detail even in relation to those allegations which appeared to have been admitted. The Respondent had made a further admission in the course of the hearing, but there remained a substantial dispute on the matter of the alleged dishonesty. Although one allegation had not been proved, it had been properly brought and pursued. There was no reason to reduce the costs because one allegation had not been proved to the highest standard, when tested in the course of the hearing. Further, there was nothing in the Applicant's presentation of the case which suggested any inappropriate conduct of the prosecution.

243. The Tribunal considered the costs schedule carefully. The Tribunal determined that it was proper to carry out a summary assessment of the costs of the proceedings. To postpone the determination of costs would add to the overall costs, and was not necessary. The Tribunal was satisfied it had sufficient information, including sufficient representations from the Respondent, to conduct the summary assessment properly.

244. The hourly rates of the two solicitors who had carried out the work were reasonable; one was a partner of considerable experience in Tribunal cases and the other was a Grade A solicitor. Blended rates of £166.25 and £175 per hour were clearly reasonable, being well within the rates generally allowed in civil litigation costs assessments and £100 per hour (or more) below the rates charged by the Respondent in 2010 onwards. The Tribunal noted that the claim for costs it had to consider had been reduced from over £93,000 to a little over £84,000 as the case had been shorter than anticipated as the Respondent had withdrawn without giving evidence and had not required the Applicant's witnesses to be produced.

245. Counsel's brief fee of £18,000 and refreshers of £8,250 might appear high but given the complexity of the case the Tribunal was satisfied that these charges were justifiable. The Tribunal noted that the Respondent had not queried counsel's fee, save that he objected that the fee had not been vouched. The costs expert's fee of £6,924 (which included preparation of the initial report, a supplementary report, the joint memorandum and a cancellation fee) also might appear high. However, the Tribunal was satisfied that the level of detail and investigation required was considerable and these costs were proportionate to the matters in issue.

246. Mr Havard, a partner in the firm representing the Applicant, had certified the costs were all incurred and the time claimed had been spent on this case. The Tribunal accepted that certification was correct, albeit it was noted that an item of disbursements which was incurred should properly have been apportioned with another matter. The Tribunal was satisfied that the time claimed had been spent. Further, the Tribunal determined that the time expended was reasonable and that the costs should be assessed substantially as set out in the schedule. Whilst two senior solicitors had been involved in the case, the Tribunal was satisfied that the involvement of both Mr Havard and Mr Griffiths was reasonable and proper in a case of this complexity. Further, some degree of file, peer and supervisory review was proper; the Tribunal was satisfied that there had been no unnecessary duplication of time. Whilst the Tribunal was satisfied that it was proper for Mr Havard to have attended the hearing on the first morning, as the partner with conduct of the matter, it was also proper that the costs of attendance with counsel of only one solicitor should be allowed. Indeed, the costs schedule had calculated the time of Mr Griffiths for most of the hearing and Mr Havard alone for the first morning; there was no period for which the Applicant had claimed the time of both solicitors in attending the hearing. That said, in order to carry through to its logical conclusion the Tribunal's view that the time of only one solicitor should be allowed for the hearing, it was also necessary to deduct the additional travel and accommodation costs incurred by Mr Havard. The Tribunal was provided with the appropriate figures to be deducted from the amount claimed.

247. Having considered all of the issues relating the costs of the case, the Tribunal determined that the reasonable and proper amount to allow for costs was £83,616.63.

248. The Tribunal then considered the information provided by the Respondent concerning his means, in order to determine if there was any reason to reduce the amount of costs and/or make an order that the costs should not be enforceable immediately. The Tribunal considered in particular the Respondent's statement of means and the other information he had provided, but noted that no supporting documents had been presented.

249. Mr Coleman had sought to address the Tribunal in relation to assets which, he said, were not disclosed in the statement of means. The Tribunal had established that the Respondent had not been given notice of these matters and declined to hear Mr Coleman's submissions; it did not take into account any suggestion that there were undisclosed assets and instead concentrated on the information actually set out by the Respondent.

250. The Tribunal noted that the burden of proof was on the Respondent, on the balance of probabilities, to show that he was unable to pay the costs or that payment would cause him undue hardship on the income and assets available to him. The Respondent had disclosed assets of over £100,000, which figure was in excess of the costs claimed, as well as liabilities. The Respondent had chosen not to attend the Tribunal to give evidence about his means, nor had he provided any supporting documents or details about some of the assertions made in the statement of means. The Tribunal had given the Respondent the opportunity to attend to deal simply with costs, even if he did not wish to make submissions on any other points, by setting out the time at which the Tribunal would begin to consider costs.

251. The Tribunal had found the Respondent to be thoroughly dishonest. It was not prepared to accept at face value his statements about his means. For example, he had referred to pension contributions of £500 per month, but he did not provide any capital value for a pension fund. There was reference to a house in France and another in England but no detail was given as to the Respondent's assertion that he had no interest in either. He appeared to have the use of two homes, and did not have any housing costs. The Respondent had asserted that the house in England belonged to his wife but in the absence of any supporting evidence the Tribunal was not prepared to accept this assertion.

252. In all of the circumstances, it was appropriate to make a normal order for costs, such that the Applicant could seek to enforce it by appropriate and proportionate means, in the sum of £83,616.63.

Statement of Full Order

253. The Tribunal Ordered that the Respondent, HOWARD VICTOR STONE solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £83,616.63.

DATED this 11th day of June 2014
On behalf of the Tribunal

P.S.L. Housego
Chairman