SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11309-2014

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

TOM JENKINS MERRALLS Respondent

Before:

Mr J. P. Davies (in the chair)
Mr I. R. Woolfe
Mr P. Wyatt

Date of Hearing: 28 and 29 July 2015 and 17 November 2015

Appearances

Mr Jonathan Goodwin, of Jonathan Goodwin, Solicitor Advocate, 17E Telford Court, Dunkirk Lea, Chester Gates, Chester CH1 6LT for the Applicant

The Respondent appeared.

JUDGMENT

Allegations

1. The allegations against the Respondent, Tom Jenkins Merralls as amended at 1.7.2 below with the consent of the Tribunal part way through the hearing were that:

1.1 he failed to ensure compliance with the Accounts Rules, contrary to Rule 6 of the SRA Accounts Rules 2011 ("SAR 2011").

1.2 he failed to remedy the SAR breaches promptly upon discovery, or at all, contrary to Rule 7.1 of the SAR 2011.

1.3 he transferred money from client to office bank account, contrary to Rule 17.2 of the SAR 2011.

1.4 He acted contrary to all, alternatively, any of Principles 4, 5 and 6 of the SRA Principles 2011, and thereby failed to achieve outcomes O(1.7), O(1.9), O(1.10), and O(1.13) of the SRA Code of Conduct 2011 ("SCC 2011") in that he failed to provide to clients any of the required client care information, relating to how his services were regulated, the clients' right to complain or how the costs would be calculated and charged.

1.5 He acted contrary to all, alternatively, any of Principles 2, 3, 6, and 8, of the SRA Principles 2011, and thereby failed to achieve outcome O(7.4) of the SCC 2011 and/or Rule 14.5 of the SAR 2011, in that he allowed his firm's client bank account to be used as a banking facility.

1.6 he acted contrary to all, alternatively, any of Principles 2, 3, 6 and 8 of the SRA Principles 2011, and thereby failed to achieve Outcomes O(1.3), O(7.3), O(7.4), and O(7.5) of the SCC 2011, in that he involved himself in transactions which were suspicious and had the hallmarks of dubious financial investment schemes and/or failed to have regard to the Warning Notice issued by the Applicant in respect of High Yield Investment Fraud.

1.7 He acted contrary to all, alternatively any, of Principles 2, 6 and 7 of the SRA Principles 2011, and thereby failed to achieve outcomes O(10.1), O(10.3), O(10.6) in that he:

1.7.1 continued his involvement in transactions which were suspicious and had the hallmarks of dubious financial investment schemes when he knew of the Applicant's concerns in relation to his involvement in such schemes.

1.7.2 used a separate business, TJM Law Ltd, set up on or around 29 January 2014 to facilitate his continued involvement from 10 March 2014 in transactions which were suspicious and had the hallmarks of dubious financial investment schemes when he knew of the Applicant's concerns in relation to his involvement in such schemes.

1.7.3 misled, or attempted to mislead, the Applicant by making representations to the Applicant and/or the Investigation Officer that were inaccurate, misleading

and untrue as to his continued involvement in the dubious financial investment schemes.

Whilst dishonesty was alleged with respect to allegations 1.1 and 1.7 above, proof of dishonesty was not an essential ingredient for proof of the allegations.

Documents

2. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement dated 27 November 2014 with exhibit JRG1
- Applicant's statement of costs for 28 and 29 July 2015
- Applicant's supplemental statement of costs dated 12 November 2015

Respondent

- Response to allegations in Rule 5 Statement dated 7 January 2015
- Personal Financial Statement dated 2 November 2015

Preliminary Issues and issues which arose during the course of the hearing

3. The Respondent represented himself and, having regard to the seriousness of the allegations which he faced, the Tribunal wished to have clarification before Mr Goodwin opened his case for the Applicant about the basis upon which dishonesty was alleged in respect of allegations 1.3, and 1.7.1, 1.7.2 and 1.7.3. After exchanges during which the Respondent indicated that he might wish to apply to withdraw several of the admissions which he had made to the underlying allegations (he denied dishonesty in all aspects alleged throughout the hearing), the Respondent was given the opportunity to consider his position. It was emphasised to the Respondent that the underlying allegations stood alone and that the allegation of dishonesty had to be proved to the required standard that is beyond reasonable doubt separately regarding each allegation in respect of which it was additionally alleged. After a short adjournment the Respondent reaffirmed his admission of allegation 1.3 without dishonesty as well as his admissions to allegations 1.7.1 and 1.7.2 without dishonesty but he applied and was given permission to withdraw his admission to the underlying allegation 1.7.3. The remainder of his admissions stood. Mr Goodwin did not object to the application.

4. Subsequently during detailed submissions by Mr Goodwin about allegation 1.7.2, the Respondent was minded to apply to withdraw his admission to allegation 1.7.2 as originally drafted because, having heard the submissions, he regarded the allegation as inaccurate and prejudicial with regard to his denial of dishonesty. The allegation as originally put, read:

> "[He] set up a separate business, TJM Law Ltd, on or around 29 January 2014 to facilitate his continued involvement in transactions which were suspicious and had the hallmarks of dubious financial investment schemes when he knew of the SRA's concerns in relation to his involvement in such schemes."

Mr Goodwin did not consider the Applicant to be prejudiced by an amendment which was proposed to the allegation at the conclusion of the exchanges between the parties and the Tribunal, and for which the Tribunal gave permission to Mr Goodwin. On the basis of the amended wording the Respondent maintained his admission to the underlying amended allegation 1.7.2 whilst maintaining his denial of the allegation of dishonesty associated with it.

Factual Background

5. The Respondent was born in 1977 and admitted to the Roll of Solicitors in 2003.

6. At all relevant times, the Respondent practised as a recognised sole practitioner under the style of TJM Law ("the firm") from offices in Bromley, Kent.

7. On 10 July 2014, an Adjudication Panel resolved to intervene in the Respondent's practice.

8. The Forensic Investigation Department of the Applicant carried out an inspection of the books of account and other documents of the firm commencing on 28 November 2013 and produced a Forensic Investigation ("FI") Report dated 25 June 2014.

9. The FI Report particularised the Respondent's involvement in acting as an escrow agent to facilitate diamond purchases on behalf of clients wishing to purchase diamonds from diamond brokers. Attached to an e-mail dated 27 March 2014 in Answers to questions posed by the Investigation Officer ("IO") Mr Gary Page, the Respondent explained, amongst other things, how he came to be involved in the conduct of the escrow matters and stated:

> "An existing property client introduced me to a diamond broker firm ([AC]) who requested whether I could offer an escrow account. After looking into the matter I concluded I could, as a matter of principal (sic)... I carried out ID checks against [AC] and also the wholesaler [P] and met with both the owners of [AC] and [P] in their offices in London. [P] then introduced me to other broker firms, whom I conducted ID checks against before dealing with them."

10. By e-mail dated 3 December 2013, the Respondent explained how the investor clients were introduced to his firm. He said, amongst other things,

> "The escrow clients are introduced by way of the broker sending over the signed Escrow Agreement, ID and other supporting paperwork such as their terms. Around the same time funds are received from the buyer either by way of transfer or cheque. There are no referral arrangements with any of the escrow matters whether between [the firm] and the brokers or between [the firm] and the wholesaler ([P])."

11. It was recorded in the FI Report that the IO asked the Respondent to take him through a practical example of the work undertaken by the firm in respect of the escrow matters from initial introduction and cross referenced to the Escrow Agreement (also referred to as the Escrow Instruction Agreement) until closure of the transaction. The

Respondent stated in the email dated 3 December 2013, omitting paragraph numbering:

> "[The firm] receive the Escrow Agreement, ID and other supporting paperwork from the broker.
>
> [The firm] receive funds from the buyer.
>
> Upon receipt of the wholesaler's invoice, funds are then paid direct to the wholesaler [P] then to the broker.
>
> [The firm] inform the wholesaler and broker of completion.
>
> [The firm's] invoice raised.
>
> Broker advises the buyer of completion."

12. The IO asked the Respondent to explain what due diligence procedures, if any, were undertaken by the firm prior to dealing with the brokers and wholesalers and throughout the transactions. In his response dated 29 November 2013, the Respondent stated:

> "ID checks and checks on websites to check their existence. Other due diligence comes in the form of meeting with the Companies staff members at their offices usually before any Escrow work is carried out in their transactions."

13. The Respondent produced on request 14 files and client ledgers in relation to the firm's client investors which identified that the investment mainly related to the purchase of diamonds, with the diamond brokers involved including IASL and OF. In response to an e-mail from the IO dated 28 November 2013, the Respondent stated:

> "I can confirm that all funds received in respect of Escrow matters were received into the client account and were from the buyers (my clients) only."

14. The IO noted payments from the firm's Barclay's Bank client account in the period 2 October 2013 to 31 October 2013 to eight entities (including AC and P) listed in the FI Report. The Respondent explained to him that with the exception of P which was a wholesaler, all of the entities were brokerage companies for the sale of diamonds and they were not the Respondent's clients. He also named eight other entities with whom he had dealt and with whom he had no agreement.

15. The Respondent produced a breakdown of the firm's billing fees taken during the conduct of the escrow matters. It showed 363 fee billings totalling £63,414.06 which took place between 1 May 2013 and 29 November 2013. The billings related to clients who in some cases had made more than one investment.

16. The Respondent provided a sample Escrow Agreement with his response dated 28 November 2013.

17. The Escrow Instruction Agreement stated that the investor client(s) acknowledged that the firm's role was simply to hold the monies and distribute the purchase funds in accordance with the diamond supplier's instructions and not to provide any legal advice to the client purchaser or perform any underlying legal transaction.

18. By e-mail dated 29 November 2013, the Respondent set out what he said was the work undertaken in relation to the fee charged by him. He said, amongst other things, omitting paragraph numbers:

> "The work we carry out is:
>
> Carrying out ID checks or otherwise satisfying ourselves clients (buyer's) ID is verified.
>
> Ensuring the Escrow Agreement is signed and a copy is on the file.
>
> Ensuring the funds are in, cleared and source verified (transfer or scanned copy cheque prior to paying in).
>
> Completing on the transaction once the wholesaler's invoice [P] is in.
>
> Transfer of funds to wholesaler and broker.
>
> Liaising with the brokers to ensure all queries such as if funds have arrived are dealt with.
>
> Liaising with clients if they have any queries."

19. The IO wrote to eight of the client investors by way of a letter dated 24 February 2014 which requested them to contact the IO with regard to their investment purchases. Five investors subsequently did so and were interviewed. One investor, Mr W stated that he had been promised a return of 15% on his investment by IASL. The IO obtained witness statements, copies of which were before the Tribunal.

20. None of the individuals instructed the firm to act for them and the FI Report recorded that they did not take or receive legal advice from the Respondent's firm in respect of their investment purchases. An examination of the client matter ledgers in respect of the above purchasers/investors showed that the firm's fees were deducted from the monies received from the purchasers and the remaining balance was distributed as per the instructions of the diamond wholesaler and/or diamond broker.

21. Examination of the client matter files provided by the Respondent showed that save for the exception of the client L matter file, no bills of costs were generated. Mr L stated that the only documentation received by him was a letter explaining terms and conditions attached to making payment through the firm's client account, but that he did not receive any other documentation from the Respondent's firm. In his e-mail dated 27 March 2014, the Respondent confirmed that he would not generally provide a bill of costs to the investor clients "unless the client asks for a bill".

22. Within the same document the Respondent confirmed that he viewed the investor client as his client. He stated: "My clients are the buyers of Diamonds and on whose behalf I held funds".

23. On 10 September 2013, the Applicant issued a Warning Notice to the profession in respect of High Yield Investment Fraud**.** The IO particularised certain of the terms of the Notice in the FI Report. These included:

> "This warning notice is for anyone who is involved in or is considering acting for clients involved in the promotion or facilitation of financial arrangements that are dubious.
>
> Law firms have been targeted in the past by fraudsters promoting high-yield investment schemes which have proved to be ineffective and often fraudulent. Practitioners must not become involved in schemes that appear dubious or bear the hallmarks of possible fraud."

and

> "Economic pressures on law firms can lead to difficulty in obtaining work or finance and there is a temptation to act in financial schemes either for fees or to make a promised profit...
>
> It is important always to bear in mind that a scheme that appears to be too good to be true is usually fraudulent. This notice sets out some factors that indicate there may be a fraud.
>
> Whilst this notice does not form part of the SRA Handbook, the SRA may have regard to it when exercising its regulatory functions.
>
> The Principles
>
> It is your duty to ensure you do not become involved in potentially fraudulent financial arrangements...
>
> If you are, or are considering, becoming involved in any financial arrangement, you must consider whether you can comply with the Principles in the SRA Handbook. Whilst all the Principles may be relevant, some require particular attention:
>
> - integrity
> - independence
> - best interests of the client
> - behaving in a way that maintains the trust of the public places in you and the provision of legal services..."

24. By e-mail dated 27 March 2014, the Respondent confirmed that he did not recall receiving or indeed seeing the Warning Notice. In his answers to questions posed by the IO attached to his email dated 27 March 2014, the Respondent commented upon

the Warning Notice and the Escrow Agreement, in which he had involved himself and said:

> "Having now read the warning notice, I agree it would raise a question mark over the escrow facility. However, I am only now aware of the promised rate of 10-15% return and also that you appear to be suggesting this is a high rate of return."

25. The Respondent continued to receive fees in respect of the Escrow Instruction Agreement in 68 transactions subsequent to 10 September 2013 resulting in a total of £12,089.98 taken in fees by the firm.

26. The Respondent conceded that he continued to receive monies into his client account from investor clients after 10 September 2013 and continued with the conduct of these matters because he had not seen the contents of the Applicant's Warning Notice. The Respondent conceded that he may not have complied with the warnings given in the notice.

27. On 7 March 2014, the IO provided the Respondent with a copy of a High Court judgment dated 29 November 2012 in the case of Patel v SRA [2012] EWHC 3373 (Admin) which related to a solicitor permitting the use of a client account for banking facilities when there was no underlying legal transaction.

28. The FI Report referred to relevant parts of the judgment. The Respondent was asked whether he had operated a bank facility contrary to the Accounts Rules. The Respondent indicated that he felt there was an underlying transaction and that he was not providing a banking facility.

29. The IO examined client matter ledgers supplied by the Respondent in respect of the escrow transactions and prepared two schedules in relation to the transactions; the first dealing with ledgers which related to the files requested and examined by the IO and the second dealing with the remaining transactions found in ledgers supplied to the IO by the Respondent.

30. By reference to the ledgers, the IO calculated that the Respondent conducted 392 Escrow transactions and received a minimum of £5,151,581.08 into his Barclays Bank client account which was subsequently paid to the relevant diamond wholesalers and brokers less fees of which the Respondent had taken a minimum of £75,960.91.

31. The IO noted in relation to the receipt of monies from the various client investors and subsequent transfer of monies to the commodity brokers, after deduction of the firm's fees, that:

- No client's instructions as to the transfer of monies received from investors and subsequently transferred to the various commodity brokers were found on any of the files

- No client's instructions were found on any of the files in relation to the taking of fees on account of costs.

- Whilst most of the transactions predated the issue of the Applicant's High Yield Investment Fraud warning on 10 September 2013, the Respondent did not comply with the warnings in relation to subsequent transactions.

- The transactions involving the Respondent were nothing more than administrative services, such as the checking of documents, and were in reality no more than a means whereby the Respondent was able to satisfy himself that the conditions for transferring funds to the sellers had been satisfied.

- None of the transactions had any relation to any ongoing client matter or any underlying legal transaction.

32. The Respondent stated to the IO or more than one occasion that he had ceased carrying out escrow work.

Witnesses

33. Mr Gary Page gave evidence. The witness had been employed for seven and a half years by the Applicant and its predecessors as an IO. He had undertaken around 150 investigations and previously had served as a police officer for 30 years. He confirmed the truth of the FI Report. The Respondent had mentioned the HSBC account and the witness was under the impression that it had a zero balance and that all funds in it had been transferred to a client account at Barclays. The witness had no further information about it at that point. The witness was referred to a statement that he made dated 20 October 2014 attaching copies of the firm's HSBC client bank account statements (in error described as Metro Bank in the statement) supplied to him by the Respondent on 11 June 2014 at the witness's request for the period 28 March 2014 to 4 June 2014. The witness had never seen any HSBC bank statements for TJM Law Ltd (as opposed to the firm TJM Law). He knew this was a client bank account and confirmed that he was concerned to discover the account was in use after March 2014 because he was under the impression that the Respondent had ceased all escrow work. He provided the Warning Notice to the Respondent. It had been drawn to the attention of the profession through the Applicant's website and by e-mail and would have been highly publicised in the Gazette. The witness confirmed that he contacted a limited number of clients and interviewed a number. Some had extreme difficulty contacting the diamond brokers to try to get money back. Others had returns which did not match their investment. The witness clarified for the Tribunal that he did not know how much interest had been earned on the total amount of over £5 million which the firm received and paid out for the diamond purchases in the 392 transactions; he assumed very little as the money came in and went straight out.

34. In re-examination, Mr Goodwin referred to the firm's bank accounts with Metro Bank and Handelsbanken which the witness had not listed in the FI Report but which were referred to in the Respondent's response to the allegations dated 1 September 2014 when he said:

> "I did not mention to Mr Page about the Metro bank and Handelsbanken accounts as these accounts were being operated by TJM Law Ltd."

The witness stated that at the initial interview with the Respondent he understood that the Respondent was responsible for the conduct of all transfers and was making them as well.

35. The Respondent was given some time to consider whether he wished to ask any further questions by way of cross-examination. Upon resuming, the Respondent asked the witness about the nature of their relationship over the eight months of the investigation setting aside the e-mail of 27 March 2014 (the interpretation of which was disputed between the parties). The Respondent asked whether the witness would say that he lied or was obstructive. The witness responded that apart from that e-mail, the Respondent had been helpful and assisted the witness when he asked for information and responded to him promptly. The witness stated that the only reason that the use of the HSBC account came to light was because the witness asked about further transactions on that account and until that point the Respondent had not told him about those transactions. The witness believed that he would have found out about the use of the account in any event because the Applicant would obtain information from other sources which he could not disclose.

36. **The Respondent** gave evidence and save as set out below it is recorded under the relevant allegation. The Respondent explained that he had submitted a response to the allegations in a document dated 1 September 2014. He confirmed that it was true. He had also made a response dated 7 January 2015 to the Rule 5 Statement in which he admitted all the allegations save dishonesty and which he stood by save in respective of the admission of underlying allegation 1.7.3 which he had withdrawn earlier in hearing. The Respondent had set up his sole practice in May 2008; before that he had worked for five years in another firm. Immediately before the escrow work was taken on the practice's work consisted primarily of leasehold enfranchisement and some conveyancing; remortgages, purchases and sales, although it varied from time to time. There were one or two fee earners other than the Respondent, the number varying from time to time.

37. The Respondent had been introduced to the escrow work by a client for whom his firm had undertaken sale and purchase transactions. The client asked if it was an area of law in which the Respondent could practise. The Respondent said that he did not know and would have to find out. He had looked at Rule 14(5) about not providing a banking facility and understood that there must be an underlying transaction or that the work must be related to a service the firm was providing. The Respondent thought that it was just another line of work that would help build up the firm. Before taking on the work the Respondent's role was as the business owner to build up the practice. Turnover was around £170,000-£200,000 per year. The profit was between £40,000 and £50,000. The Applicant had intervened in his practice in July 2014; the reason given related to dishonesty in the matters now covered by these proceedings. At that time there was one fee earner solicitor, one part-time consultant solicitor and one part-time administrator. The Tribunal asked whether the Respondent had undertaken anything other than property and leasehold enfranchisement and he replied that in the early days there were one or two probate matters, taken on as additional work to fill up time. There was a short period of time when he employed a solicitor who did some will work and he thought this was for around six months in the early days of the firm.

Findings of Fact and Law

38. 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.

(The submissions recorded below include those made orally at the hearing and those in the documents. Paragraph numbers are generally omitted in quotations unless they aid comprehension.)

39. **Allegation 1.1 - He [the Respondent] failed to ensure compliance with the Accounts Rules, contrary to Rule 6 of the SRA Accounts Rules 2011 ("SAR 2011").**

Allegation 1.2 - He [the Respondent] failed to remedy the SAR breaches promptly upon discovery, or at all, contrary to Rule 7.1 of the SAR 2011.

Allegation 1.3 - He [the Respondent] transferred money from client to office bank account, contrary to Rule 17.2 of the SAR 2011.

39.1 In the Rule 5 Statement, it was set out that the Respondent was under an obligation to ensure compliance with the Accounts Rules. In that regard he failed as a consequence of the breaches identified in the FI Report and particularised within the Rule 5 Statement. The Respondent was under an obligation to remedy any breach of the Accounts Rules promptly upon discovery, to include the replacement of any money improperly withdrawn from client bank account. He failed to do so. The Respondent deducted and transferred monies in respect of his fees from client to office bank account without delivering a bill of costs or written notification to his clients. The improper withdrawals resulted in a minimum cash shortage of £75,960.91. The Respondent did not agree the shortage and had not replaced it.

39.2 Mr Goodwin referred the Tribunal to the e-mail dated 27 March 2014 from the Respondent to the IO attached to which were answers to questions posed to him by the IO. He stated:

> Q. "Are the purchasers supplied with a bill of cost (sic) from your firm as in the copy files supplied to me as I have not seen any bills of costs supplied to investor/purchasers."
>
> A. "Generally not, unless the client asks for a bill."
>
> Q. "Please provide me with all bills of costs sent to purchasers."
>
> A. "There are no invoices to supply."

In answer to an earlier question relating to whether it was still his view that the diamond brokers were not his clients, the Respondent's answer included:

> "Yes, this is still my view. My clients are the buyers of Diamonds and on whose behalf I held funds."

Mr Goodwin submitted that this showed that no bills had been raised and there had not been any written intimation delivered to clients as required by Rule 17.2 (allegation 1.3). The FI Report set out the number of transactions and the value:

> "[The Respondent] has stated that he has conducted 363 transactions involving the issuing of Escrow agreements, which took place between 1 May 2013 and 29 November 2013 and for which the firm has received a total of £63,414.06 in fees. From examination of client matter files and ledgers, [the IO] has calculated that [the Respondent] has conducted 392 Escrow transactions and has received a minimum of £5,635,755.40 into his client bank account from investors, which has been subsequently paid onto the relevant diamond wholesalers and brokers."

The Report continued that the Respondent had taken a minimum of £74,838.91 in fees in respect of these transactions. Clients were not aware that costs were being deducted by the firm. Invoices supplied to clients by the diamond brokers showed a unit price for the diamond as the purchase price for the diamond alone and the clients were not made aware that this included the firm's fees. The Respondent had not provided client care letters to the clients detailing his costs or provided any written notification or bills of costs to the clients. The FI Report further recorded that the Respondent did not accept that a shortage existed or replaced the cash shortage. (Allegation 1.2)

39.3 Mr Goodwin submitted that allegations 1.1, 1.2 and 1.3 were breaches of the accounts rules and they were admitted. Even absent any dishonesty these breaches were serious. There were degrees of seriousness as set out in the case of Weston v Law Society [1998] Times, 15th July which was quoted in the Tribunal's Guidance Note on Sanctions:

> "...The tribunal had been at pains to make the point, which was a good one, that the solicitors' accounts rules existed to afford the public maximum protection against the improper and unauthorised use of their money and that, because of the importance attached to affording that protection and assuring the public that such protection was afforded, an onerous obligation was placed on solicitors to ensure that those rules were observed."

Submissions for the Applicant regarding allegation 1.3 Dishonesty

39.4 Mr Goodwin submitted that it was not necessary to prove intent permanently to deprive in order to prove dishonesty (Bultitude v Law Society [204] EWCA Civ 1853). There was no allegation of theft but the Respondent had transferred money from client to office account in breach of the accounts rules when he knew that he was not entitled to until a bill or written intimation had been given to the client. The Respondent conceded that he did not deliver bills or give a written notification to clients prior to making the transfer. Mr Goodwin submitted that Rule 17.2 was clear:

> "If you properly require payment of your fees from money held for a client or trust in a client account, you must first give or send a bill of costs, or other written notification of the costs incurred, to the client or the paying party."

The requirement to deliver a bill or other written notification was basic and known to all in private practice and it was inconceivable that the Respondent did not know about it. This would be viewed as dishonest by the ordinary standards of reasonable and honest people and satisfied the objective test in the case of Twinsectra Ltd v Yardley [2002] UKHL 12. Mr Goodwin submitted that the Respondent who must have been aware of Rule 17.2 took a conscious decision to transfer costs without a bill and so the Tribunal could conclude that his actions had been dishonest because solicitors did not take money to which they were not entitled. Mr Goodwin clarified for the Tribunal that there was no provision in the Escrow Agreement about the taking of fees. There was no reference to fees to be deducted from investment funds to buy diamonds and even if there was a bill or written intimation it was needed before the transfer was made. The Escrow Agreement sought to limit the Respondent's retainer and in this connection Mr Goodwin referred to paragraph 3 of the agreement signed by the client Mr W:

> "The Purchaser acknowledges that he/she/they/it has not been advised by TJM Law in any way in respect of the Purchaser's decision to purchase the Diamonds. The Purchaser is not relying on TJM Law to establish that [IASL] are able to provide the Purchaser with any title to the Diamonds or that the Diamonds have any value and the Purchaser acknowledges that TJM Law's role is simply to hold the money in respect of the purchase of the Diamonds and to distribute the Purchase Funds in accordance with the Diamond Supplier's instructions."

Mr Goodwin submitted that by signing this document the clients acknowledged that they had not received advice and therefore would believe no fee would arise. The reference to distributing the purchase funds was a purely administrative service with the Respondent acting as banker in receipt of money and making payment out. The Respondent did not raise a bill because that could cause a question as to the reason for the amounts deducted, given what was in the Escrow Agreement. In response to an enquiry from the Tribunal as to how it could be shown that the Respondent actually knew as opposed to must have known" that he acted in breach of Rule 17.2 and that it is necessarily dishonest, Mr Goodwin submitted that the assertion was made in the absence of contrary evidence and because a solicitor was not entitled to take money until he had complied with the rules. If there was an isolated incident (for example the solicitor raising a bill the day after the money was taken) or there was some mistake (for example the bill was prepared but not sent) then there would not be a question of dishonesty but here there was a pattern of conduct of not delivering bills or written intimations. Mr Goodwin could not produce any documents to show that the Respondent knew of Rule 17.2 but he would have known of the requirement and he had transferred over 300 payments from client account without a bill. The Tribunal could therefore conclude that the Twinsectra test was satisfied. In terms of the objective test the public would certainly say that this was dishonest. As to the subjective test, the Respondent undertook property work and would know of the requirement; even a trainee would know this after a few months in a solicitor's office.

It was inconceivable that the Respondent did not know of the requirement to raise a bill before taking the money. This might be a matter for evidence.

Submissions and evidence of the Respondent

39.5 The Respondent stated that he accepted now that he ought to have raised invoices. He felt that the escrow work was a separate side of the business and each transaction was of a brief nature. He felt he did not need to raise a bill and that the Escrow Agreement was sufficient and so he did not send out a client care letter. He had not looked into the detail of whether a bill of costs was necessary. He had accounted to HMRC for VAT each time. The Respondent described the process; he received the purchase money from the client and the first thing he did was to pay an amount to the diamond wholesaler, he took his fees from the balance by means of the client account software and the rest of the money went to the broker. The Respondent agreed that he had done a fair amount of business in the five years before he took on the escrow work, mainly leasehold enfranchisement. He was familiar from his old firm with preparing completion statements to include costs and disbursements and knew that money received from the client went into client account. He raised bills in conveyancing by habit and he had carried that across into his practice. He had not read Rule 17(2); he was not aware of the specific requirement to raise a bill on every occasion.

39.6 The Respondent agreed that the clients did not know of the breakdown of the payments made from their purchase monies and stated that he should have advised them at the outset or by a separate bill afterwards. He did not think that they were misled because of the small amount involved. It was put to the Respondent that the clients did not believe that they would be charged fees by the firm and he responded that no-one works for nothing and he had done some work. He felt that the Escrow Agreement satisfied any regulations that needed to be dealt with at the time. He considered that it was a reasonable assumption that the clients thought that he would make a small administrative charge. He had not looked into the brokers' documents to see if something was said about his fees. As to whether clients knew that the brokers would receive payment, the Respondent stated that it was entirely inconceivable that the brokers would not receive anything; the clients would not think that the broker was working for nothing. He had no evidence with him that the broker advised clients of their fees or of the Respondent's. It was put to him that the clients would not expect to be billed because no advice had been given and the Respondent replied that "no one does nothing for nothing". He now accepted that he ought to have told them that they should expect something to be deducted but the brokers could have been telling them so far as he was aware. He seriously believed that each and every client would have accepted that it was part and parcel of his involvement in the escrow work. He did not believe he was prejudicing the clients by not sending an invoice in taking the fee and it was only since the intervention that he realised that this was a technical breach of the Rules.

39.7 The Respondent stated that he agreed his fee with the brokers beforehand but he did not render an invoice to the broker. The money came from the money paid by clients but he considered that effectively his fee came from the broker's part of the purchase money. His charge was initially based on a fixed fee but in the later stages because of the "grief and hassle" with the banks, the Respondent had told the brokers that he needed to charge more because of the extra administration; the net result was that the

broker suffered. The client would not be charged more. The Respondent stated that he did not regard such activity as dishonest at the time and still did not but he was being told that it was by a number of people.

39.8 As to the amount of money which went through the client account of the firm before March 2014, the Respondent could not verify the exact amount because he had no access to the software. The biggest diamond purchase made was in the sum of £40,000 and the lowest was around £5,000. The largest of his fees was around £800 or £900.

39.9 The Respondent was directed to the agreement which Mr W had signed with the firm which contained the acknowledgement that no advice had been given by the firm. He agreed that this was clearly a retainer limited to ensuring that the wholesaler was paid to avoid the risk that the broker would run off with the money. With hindsight the Respondent accepted that the speed of the transactions did not justify a departure from the rules regarding raising a bill.

39.10 The Respondent explained the mechanics of processing fees for both conveyancing and escrow work. Because of the brief nature of the transaction and the small amount of involvement with the client no physical bill template was raised for the escrow work. There was no bill number. Conveyancing and leasehold enfranchisement transactions could last months or a year but the escrow transactions could last a day; that was his mindset. The client account software required the ledger to show a bill on the office side and the money was transferred reducing the debt to nil. In respect of conveyancing work it was not physically possible to take the money from client account until the bill had been raised. The escrow work was different but he did not take the money until the entry had been raised on the software. As to how the system operated when the new entity TJM Law Ltd was set up, the Respondent did not believe that it was registered for VAT; it only lasted four months. The same process was followed as when the law firm undertook the transactions but the amount which would have been VAT would go to the broker; the broker received more. The Respondent believed that his own fee went to a separate office account which he opened for TJM Law Ltd at a different bank.

39.11 As to it being important for a sole practitioner to be familiar with all the regulatory requirements, the Respondent stated that experience with the regulations came on line/as part of CPD and a lot of regulations were based on common sense. He had never familiarised himself with the entirety of the regulations word by word. As to the SAR 2011 aimed at protecting clients' money, the Respondent felt that he did that. In respect of the 1998 Accounts Rules which were in force when he set up his practice, he had not taken these to bed and read them word by word. He had looked into buying software to help with compliance a year or two into running the business but he did not adopt it because of the time it would take to implement and the extra costs. It was put to him that these were not complex ABS rules but simple accounts rules. The Respondent rejected this. While accepting that he was 10 years qualified when he embarked on the escrow work and therefore not an inexperienced solicitor, he stated that he was in regard to rules and regulations which were changing all the time. As to whether he should have set up on his own if he did not understand the rules, the Respondent stated that he felt he understood enough of the rules because they were based on general common sense and, if one read them verbatim and continued to do

so every time they changed, a 35 hour day would be needed. If one gathered 20 sole practitioners and tested them on the accounts rules one would get worrying responses. The Respondent stated that he did not know of the SAR 2011 being in force. Mr Goodwin put it to the Respondent that a trainee would know the provisions of Rule 17.2 but the Respondent begged to differ.

39.12 The Respondent agreed that there was an annual audit of his client account and his accountant's report to the Applicant but stated that the accountants had not raised the need for bills. They only mentioned minor breaches which needed to be corrected after the audit and these were few and far between. He not had an audit since he began the escrow work.

39.13 The Respondent stated that he did not necessarily prepare the bills but he would sign them off. It was he who made the transfer to office account. He could not afford to employ a bookkeeper because his profit was only £40,000-£50,000 a year. It was put to him that the escrow work was very profitable but the Respondent stated that he did not feel that he needed a bookkeeper.

39.14 The Respondent denied dishonesty in withdrawing money from client account in escrow work because of the brief nature of the transaction, the average length of which was one day. He had not agreed with the IO that there was a cash shortage (and could not confirm the amount because his computers and records had been taken away overnight), at the time he felt that he did not need to raise the bills and that he had complied with all he needed to by dealing via the software which enabled him to account to HMRC. He denied that his conduct was dishonest by the ordinary standards of reasonable and honest people because, as he explained earlier, a large number of solicitors who ran their own law firms would not know that the relevant rules existed. He believed that an ordinary person would not view it as dishonest if an individual was not aware of the rules and decided a bill was not necessary but had complied with the tax rules. Conversely by the ordinary standards of reasonable and honest people he considered that if an individual was aware of the rules, but failed to comply with them, the solicitor would be seen as dishonest. He rejected the assertion that he did not send the bills because, if he did so, the clients would raise questions.

39.15 The Tribunal asked the Respondent if the IO discussed bills for the escrow work with him and the Respondent replied that he had not but he "kind of" wished that the IO had because it would have formed the basis of a discussion about a serious breach of the rules. He did not believe that questions were raised about bills although he could not recall.

<u>Findings of the Tribunal regarding allegations 1.1, 1.2 and 1.3</u>

39.16 The Tribunal considered in respect of allegations 1.1, 1.2 and 1.3 the submissions for the Applicant, the evidence including oral evidence and the submissions and admissions of the Respondent. The Tribunal found that the Respondent had failed to ensure compliance with the Accounts Rules; he showed a woeful ignorance of them but compliance with the rules was a matter of strict liability for a solicitor. His actions in transferring money from client to office account in breach of Rule 17.2 created a shortage on client account which he did nothing to remedy either promptly or at all.

The Tribunal found each of allegations 1.1, 1.2 and 1.3 proved to the required standard; indeed they had been admitted.

Findings of the Tribunal regarding dishonesty in respect of allegation 1.3

39.17 The Tribunal considered the dishonesty allegation in respect of allegation 1.3 according to the two limbed test in the case of Twinsectra. The Tribunal had found the Respondent to be a less than frank witness but it accepted his evidence that he was not aware of the requirements of Rule 17.2 of the SAR 2011. This was a startling admission for anyone to make if it was true as this was one of the most important and essential of the accounts rules designed to protect clients' money. In those circumstances, the Tribunal considered that it was difficult to see how by the ordinary standards of reasonable and honest people the Respondent could be considered to have acted dishonestly when it was not possible to be sure that he was aware the rule existed and had only raised bills in his property related work out a force of habit because he had been trained to and because the system led him to. As the objective test had not been met, it was not necessary for the Tribunal to consider the subjective test. The Tribunal did not find dishonesty proved to the required standard in respect of allegation 1.3.

40. **Allegation 1.4 - He [the Respondent] acted contrary to all, alternatively, any of Principles 4, 5 and 6 of the SRA Principles 2011, and thereby failed to achieve outcome O(1.7), O(1.9), O(1.10), and O(1.13) of the SRA Code of Conduct 2011 ("SCC 2011") in that he failed to provide to clients any of the required client care information, relating to how his services were regulated, the clients' right to complain or how the costs would be calculated and charged.**

40.1 The Rule 5 Statement stated that investor clients were not provided with a client care letter giving any of the required regulatory information. Clients were not made aware that costs were being deducted by the Respondent from monies provided by them for the purchase of the diamonds. The Respondent conceded that the investors were his clients and he agreed that he should have their best interests at heart. However, notwithstanding that concession, he failed to provide client care letters to his clients detailing any required client information. The Escrow Instruction Agreement, which was sent to client investors, made no mention of the purchaser either being, or becoming, a client of the firm and contained an express disclaimer in respect of legal advice. This was inconsistent with the Respondent's subsequent explanation that he provided legal advice to the investor clients. The Escrow Agreement made no reference to any charges or costs to which the Respondent would be entitled. Examination of the client matter files revealed that none of the client investors were provided with any form of client care or engagement letter and there were no clients' instructions found on the client matter files, other than the Escrow Instruction Agreement form sent to the investor clients by the firm, which was signed and returned to the firm by the investor clients.

40.2 The Respondent was asked what research he had undertaken to ensure that people were not misled. He stated that he checked the brokers' terms and conditions which were signed by the client and that their identification matched a passport or driving licence but not that there was a breakdown of fees. He agreed that there was no client

care letter and he did not know whether the Escrow Agreement satisfied the regulations.

40.3 The Respondent explained that the Escrow Agreement was sent to the diamond purchasers by the brokers who had a template which they could send in a pack with their own agreement. He did not send anything direct to the purchasers until he received the pack signed from the broker; that was the first he was aware of clients being in the process of purchasing diamonds. He clarified that he either obtained information from the broker or directly from the purchaser. What happened next varied; in the latter stages he contacted the client by telephone to ensure they were of sound mind and not being coerced into the transaction. He definitely contacted a few clients if there was evidence of potential vulnerability for example if they were over 70 years of age. This was only in the latter stages because he had not previously received the impression that "boiler room" tactics were being used. He was only aware in the latter stages some brokers were doing that. Some clients contacted him. It was his employee Ms CS who contacted the clients where there was concern about possible coercion and if the Respondent did so he was wearing his TJM Law Ltd hat.

40.4 The Tribunal considered the submissions for the Applicant, the evidence including oral evidence and the submissions and admissions of the Respondent. The Tribunal found that the Respondent had by his actions breached Principle 4 (acting in the best interests of clients), Principle 5 (providing a proper standard of service to your clients) and Principle 6 (maintaining public trust) as well as Outcome 1.7 (informing clients whether and how the services you provide are regulated and how this affects the protections available to that client), Outcome 1.9 (clients are informed in writing at the outset of their matter of the right to complain and how complaints can be made), Outcome 1.10 (which included that clients are informed in writing both at the time of engagement and at the conclusion of the solicitor's complaints procedure) and outcome 1.13 (clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter). The Tribunal found allegation 1.4 proved to the required standard, indeed it had been admitted.

41. **Allegation 1.5 - He [the Respondent] acted contrary to all, alternatively, any of Principles 2, 3, 6, and 8, of the SRA Principles 2011, and thereby failed to achieve outcome O(7.4) of the SCC 2011 and/or Rule 14.5 of the SAR 2011, in that he allowed his firm's client bank account to be used as a banking facility.**

Allegation 1.6 - He [the Respondent] acted contrary to all, alternatively, any of Principles 2, 3, 6 and 8 of the SRA Principles 2011, and thereby failed to achieve Outcome O(1.3), O(7.3), O(7.4), and O(7.5) of the SCC 2011, in that he involved himself in transactions which were suspicious and had the hallmarks of dubious financial investment schemes and/or failed to have regard to the Warning Notice issued by the Applicant in respect of High Yield Investment Fraud.

41.1 Mr Goodwin submitted that the facts showed that the Respondent had allowed his firm's client account to be used as a banking facility in the absence of any underlying transactions which to his credit he admitted (allegation 1.5). He carried out no legal work, and the work he undertook had been purely administrative; he merely received funds from investor clients and paid them out to the diamond brokers/wholesalers,

after deduction of his fees. The Respondent was asked by the IO whether he agreed the services provided by the firm resembled that of a banker. The Respondent said:

> "Similar yes, but I have no experience of the banking world and how it operates. I think I have made it fairly clear how my escrow arrangements worked. I do not see an analogy of any further help".

The Respondent provided further representations indicating that he believed there was an underlying transaction in an e-mail of 27 March 2014. Mr Goodwin submitted that it was not a proper part of a solicitor's everyday business practice to operate a banking facility for third parties, whether they were clients of the firm or not. The work described by the Respondent was in reality no more than a means whereby the Respondent was able to satisfy himself that the conditions for transferring funds to the diamond brokers/wholesalers had been satisfied. In respect of allegation 1.6 Mr Goodwin relied on the facts and the Rule 5 Statement, and submitted that the Respondent involved himself in transactions which were suspicious and had the hallmarks of dubious financial investment schemes and/or failed to have regard to the Warning Notice issued by the Applicant in respect of High Yield Investment Fraud in September 2013.

41.2 The Tribunal considered the submissions for the Applicant, the evidence, including the oral evidence and the submissions and admissions of the Respondent.

41.3 In respect of allegations 1.5, the Tribunal found on the evidence that the Respondent had allowed his client account to be used as a banking facility; the Tribunal could find no underlying legal transaction in his escrow work. Indeed the Respondent had expressly excluded legal advice in the Escrow Agreement which investor clients signed. The Respondent stated in evidence while not resiling from his admissions that he understood the transactions but he had no training in valuing diamonds and that it was in respect of valuations that he distanced himself from advice giving in the Escrow Agreement. He considered the benefit to clients to be that if they paid the broker direct then, because the broker was not regulated, he could run off with the money. The Tribunal considered that this approach whether or not based in fact did not make the transactions in question anything other than providing a banking facility. The Respondent had been provided with a copy of the judgment in Patel v SRA [2012] EWHC 3373 (Admin) by the IO on 7 March 2014 but he continued the use of his client account regardless. The Tribunal found that the Respondent's actions therefore breached Principles 2 (integrity), 3 (not allowing independence to be compromised), 6 (maintaining public trust) and 8 (running his business or carrying out his role in the business effectively and in accordance with proper governance and sound financial and risk management principles) and the associated Outcome 7.4 (maintaining systems and controls for monitoring the financial stability of your firm and risks to money and assets entrusted to you by clients and others and taking steps to address issues identified) and Rule 14.5:

> "You must not provide banking facilities through a client account. Payments into, and transfers or withdrawals from, a client account must be in respect of instructions relating to an underlying transaction (and the funds arising therefrom) or to a service forming part of your normal regulated activities."

The Tribunal found Allegation 1.5 proved to the required standard; indeed it was admitted.

41.4 In respect of allegation 1.6, the Tribunal found that the Respondent involved himself in transactions which were suspicious and had the hallmarks of dubious financial investment schemes and/or failed to have regard to the Applicant's Warning Notice on High-Yield Investment Fraud dated 10 September 2013 of which as a solicitor he should have made himself aware. The Tribunal was satisfied that this conduct constituted a breach of Principles 2, 3, 6 and 8 and Outcome 1.3 (when deciding whether to act, or terminate your instructions, you comply with the law and the Code), Outcome 7.3 (identify, monitor and manage risks to compliance with all the Principles, rules and outcomes and other requirements of the Handbook, if applicable to you, and take steps to address issues identified), Outcome 7.4 as above and Outcome 7.5 (comply with legislation applicable to your business, including anti-money laundering and data protection legislation). The Tribunal found allegation 1.6 was proved to the required standard, indeed it was admitted.

42. **Allegation 1.7 - He [the Respondent] acted contrary to all, alternatively any, of Principles 2, 6 and 7 of the SRA Principles 2011, and thereby failed to achieve outcome O(10.1), O (10.3), O(10.6) in that he:**

1.7.1 continued his involvement in transactions which were suspicious and had the hallmarks of dubious financial investment schemes when he knew of the Applicant's concerns in relation to his involvement in such schemes,

1.7.2 used a separate business, TJM Law Ltd, set up on or around 29 January 2014 to facilitate his continued involvement from 10 March 2014 in transactions which were suspicious and had the hallmarks of dubious financial investment schemes when he knew of the Applicant's concerns in relation to his involvement in such schemes

1.7.3 misled, or attempted to mislead, the Applicant by making representations to the Applicant and/or the Investigation Officer that were inaccurate, misleading and untrue as to his continued involvement in the dubious financial investment schemes.

42.1 **In respect of allegation 1.7.1**, Mr Goodwin submitted that from May 2013 until June 2014, the Respondent involved himself in the diamond investment transactions when he said he was unaware of the Warning Notice issued in September 2013 by the Applicant. The Applicant's inspection of the Respondent's firm commenced on 28 November 2013. The FI Report recorded that there was very little use of the HSBC account between 2 February 2013 and 21 November 2013 with the exception of a small credit/debit transaction of £620, but it was used extensively after that date which corresponded with the freezing of the firm's Barclays client bank account on or before 21 November 2013. The first payments out were made from the HSBC account to the diamond brokers/wholesalers on 25 November 2013 with the amount of £10,898.66 to AC and £3,746.89 to P. Mr Goodwin submitted that whilst most of the transactions effected by the Respondent predated the issue of the Warning Notice on 10 September 2013, despite being put on notice as to the concerns of the Applicant and having been alerted to the Warning Notice and the observations of the High Court

in the case of Patel, the Respondent took a conscious decision to continue his involvement in the investment scheme until June 2014. Not only was his conduct in continuing his involvement in the suspicious and dubious financial investment schemes dishonest by the ordinary standards of reasonable and honest people, but he must also have been aware that it was dishonest by those standards..

42.2 **In respect of allegation 1.7.2** it was submitted in respect of the amended allegation that having set up the separate business TJM Law Ltd on or around 29 January 2014, the Respondent used it to facilitate his continued involvement in transactions which were suspicious and had the hallmarks of dubious financial investment schemes when he knew of the Applicant's concern in relation to his involvement in such schemes. In so doing the Respondent acted dishonestly by the ordinary standards of reasonable and honest people. Mr Goodwin submitted that he must also have been aware that it was dishonest by those standards in that he took a conscious decision to use the separate business for the purposes of continuing his involvement in the investment schemes which he knew were a matter of concern. Mr Goodwin again referred the Tribunal to the FI Report which recorded the balances shown at 31 October 2013 in respect of the Respondent's firm's bank accounts showing a zero balance in respect of the HSBC account. The Respondent provided bank statements on 28 November 2014 which were before the Tribunal; they ran from 28 March 2014 to 4 June 2014. The Respondent explained to the IO that the zero balance on the HSBC account was a result of transfers made from it to the Barclays client account during the period 10 April 2012 to 2 August 2012. Mr Goodwin submitted that those bank statements and earlier ones (a zero balance was shown on 2 February 2013) had the account name including "TJM Law Clients Account"); the HSBC account was never transferred into the name of the limited company. He again relied on the pattern of transactions shown by the bank statements. There was mixed usage for property and diamond investments up to 20 December 2013 from which date the account was used exclusively for commodity investment (escrow) transactions with payments made to diamond brokers.

42.3 Mr Goodwin submitted that on 11 June 2014, the IO asked the Respondent about his conduct of the HSBC bank account in the name of TJ Merralls t/a TJM Law:

> "1. Please confirm that HSBC granted you this banking facility in respect of your conduct of reserved legal activities whilst trading under the name of TJ Merralls t/a TJM Law.
>
> 2. Please confirm that you have informed HSBC that you are now using this account trading under the auspices of TJM Law Ltd.
>
> 3. Please confirm that you have informed HSBC that you are no longer using this bank account for conduct of transactions in relation to reserved legal activities.
>
> 4. Please confirm that you have informed HSBC that you are using this bank account for the conduct of Escrow work which is not the subject of reserved legal activity."

42.4 On 23 June 2014, the Respondent responded to the IO as follows:

> "1. HSBC opened the banking facility in respect of the legal work I was carrying out at the time the account was opened (2008). From recollection, there was no specific restriction to "reserved legal activities "as such. However no doubt it was discussed that the account was for the specific purpose of handling clients' funds through TJM Law.
>
> 2. I have not yet confirmed this to HSBC.
>
> 3. I have not yet confirmed this.
>
> 4. I have not yet confirmed this"

Mr Goodwin submitted that the HSBC account was opened in 2008 but the Respondent had not told the bank he was using the limited company and did not confirm to the bank that he was not using it for reserved legal activities and for escrow work. The Respondent used a solicitor's client account which was governed by the solicitor's accounts rules and subject to inspection by the Applicant.

42.5 **In respect of allegation 1.7.3,** it was alleged in the Rule 5 Statement that the Respondent misled or attempted to mislead the IO by making representations which were inaccurate, misleading and untrue as to his continued involvement in the dubious financial investment schemes. Mr Goodwin relied on the use of the HSBC bank account and the following:

- By e-mail dated 9 January 2014, the Respondent wrote the IO and said amongst other things:

  > "... Since the Barclays client bank account was frozen we have not been able to take any further deposits nor receive further funds in relation to escrow matters and this is unlikely to change given the bank's stance."

- By e-mail dated 27 March 2014, the Respondent wrote to the IO and said amongst other things:

  > "It is only since the [Applicant] provided me with the case, (Patel v SRA), and then the Warning Notice that I have come to learn that it is certainly conduct the [Applicant] (prima facie) would not approve of. I have ceased the escrow work."

  and

  > "Since becoming aware of the Patel case, I have ceased carrying out escrow work".

  The HSBC bank statements referred to above showed that this was not so; the account was used to facilitate further escrow transactions from 26 November 2013 to 11 June 2014. Therefore, the Respondent's representation on 27

March 2014 that he had ceased his involvement in escrow transactions was inaccurate, misleading and untrue.

- The Respondent conceded in his e-mail dated 11 June 2014:

> "The HSBC Account is used solely for the purpose of Escrow related transactions."

- By e-mail dated 23 June 2014, the Respondent wrote to the IO:

> "...I have decided that I will be withdrawing my company's Diamond Escrow Facility entirely. This is with immediate effect, although I do have a few pipeline sales that I will be honouring. In other words, no new transactions will be entered into from this point onwards.
>
> For the avoidance of doubt, I will no longer be involved in any capacity (whether personally or otherwise) with the Diamond Sales as the industry is showing signs of heading in a direction that is inconsistent with how [I] like to conduct my business."

- By e-mail dated 12 May 2014, the IO e-mailed the Respondent and said, amongst other things:

> "In relation to your HSBC client account...you have provided me with bank statements as up to 2 August 2012 which had a zero balance and funds transferred to your Barclays client account. Please confirm whether this client account has been closed. If this account has not been closed please explain why and provide me with copies of your bank statements up to today's date."

- The Respondent replied on 27 May 2014 and said, amongst other things:

> "Regarding my HSBC account, this has yet to be closed. I initially used this to continue with "pipeline" trades with the view to effectively windup the Diamond Escrow account side of the business. I separated all the TJM Law property funds from the escrow funds so that my property clients would not suffer any delay should there be any problems with the banks in the future (viz a viz freezing of the account). Not only were the funds separated but the escrow facility was changed to a limited company (TJM Law Ltd) so that effectively any escrow work was carried out outside the realms of the mainstream law firm. This was to ensure complete separation of the business and all escrow agreements are with TJM Law Ltd and no longer anything to do with Tom Merralls t/a TJM Law."

42.6 Mr Goodwin submitted that this was a clear answer and if it was not dishonest it was misleading. If the Respondent wanted to be open with the Applicant he should have said that he had ceased escrow work under the title of his law firm but was continuing with the HSBC account. Mr Goodwin submitted that this was inaccurate and misleading and the Tribunal could be sure to the criminal standard that the Twinsectra

test was satisfied; the Respondent knew that he was continuing the work. Furthermore the reply was inaccurate because the HSBC account was still in the name of the law firm and HSBC had not been informed of the changes and that TJM Law Ltd was using the account.

- On 28 May 2014 the IO e-mailed the Respondent with a further query in relation to the HSBC account and TJM Law Ltd including:

  > "Please confirm whether you are currently conducting escrow agreement work with regard to Diamond and other commodity investments using the HSBC account under the auspices of TJ M Law Ltd if not please state when this activity ceased.."

- On 11 June 2014, the Respondent replied including in response to that particular question:

  > "TJM Law Ltd does continue to conduct the odd escrow related transaction using the HSBC account"

  And in respect of another question:

  > "The HSBC account is used solely for the purpose of Escrow related transactions, and not used for any other transaction associated with the usual property law work."

42.7 Mr Goodwin submitted that the Respondent only gave this answer because the bank statements would show the facts and because the IO had continued his endeavours to obtain information about the account and the Respondent did not disclose it until then. Mr Goodwin contrasted with this response the Respondent's email of 27 March 2014 quoted above and submitted that prior to the IO raising the matter of the HSBC account with the Respondent in May 2014, the Respondent had made no mention in correspondence or in discussion with the IO of his continued use of the HSBC client account for the conduct of the investment transactions. Indeed the Respondent had positively asserted to the contrary in his e-mail dated 27 March 2014. It was inaccurate, misleading and untrue. Mr Goodwin submitted that the Respondent acted dishonestly by the ordinary standards of reasonable and honest people and he would have been aware that to such people what he did was dishonest because he took a conscious decision to make those representations to the IO.

42.8 Mr Goodwin clarified that the Applicant limited the dishonesty allegation to the time after the Respondent received the Warning Notice and was alerted to the Patel case. Mr Goodwin submitted that there was an important distinction to be drawn between the allegation of dishonesty in allegation 1.7 and allegation 1.6 when no dishonesty was alleged because the Respondent said that he did not know of the Warning Notice when he first became involved in the transactions.

42.9 Mr Goodwin clarified for the Tribunal that the Civil Evidence Act notices had not been challenged in respect of the documents. This included the statement of Mr W who said: "I took reassurance from the fact that my monies were paid into a solicitor's

client account and would be dealt with properly...” Mr Goodwin submitted that was a reasonable conclusion for a client to draw.

42.10 The Tribunal enquired what if any losses had been sustained and Mr Goodwin referred to the FI Report where it stated that the Respondent had not replaced the cash shortage. Some of the clients had complained to the police. The IO had contacted a handful of clients and more than £44,000 had been paid out of the Compensation Fund but Mr Goodwin had not undertaken the exercise of cross checking the firm’s clients with claims. The cost of the intervention was around £100,000 and a statutory demand had been served on the Respondent in respect of that cost fairly recently, which he was applying to set aside.

42.11 Mr Goodwin submitted that looking at allegations 1.7.1, 1.7.2 and 1.7.3, the Tribunal could find all proved as dishonest but each sub allegation was free standing and even absent a finding of dishonesty the allegations were individually and collectively serious by reference to the cases of Bolton v The Law Society [1994] 1 WLR 512 with its reference to discharging professional duties with complete integrity, probity and trustworthiness at all times and the case of Weston quoted above. In his dealings with Escrow Agreements, Mr Goodwin submitted that the Respondent abdicated his responsibility to protect client funds.

Submissions and evidence of the Respondent

42.12 The Respondent agreed with the Chairman’s summary that he had not been aware of the forbidden nature of this kind of activity and when he was made aware he continued his solicitor’s work via the firm and undertook the escrow work in the pipeline through the new vehicle the limited company. He continued using the firm’s client account for TJM Law Ltd because it was the easy option at the time as the account details of the HSBC account were on the escrow letter. He overlooked the requirement to have the account name changed to TJM Law Ltd. He had changed the agreement to show the name of TJM Law Ltd at the top and in retrospect he could have changed the account details but he did not think it necessary. There was a lot going on at the time. The most important thing to do was to separate the two types of work and see that the regulated property part of the business should be carried out properly. The Respondent found it difficult to estimate how much work was being done by the new entity; the vast majority of the escrow work had been undertaken before the changeover in March 2014; there might have been 50 cases.

42.13 The Respondent referred to the Rule 5 Statement which quoted from his e-mail of 9 January 2014:

> “...Since the Barclays client bank account was frozen we have not been able to take any further deposits nor receive further funds in relation to escrow matters and this is unlikely to change given the bank’s stance.”

He had been trying to make the point that he felt that the escrow work was coming to an end and he was using the HSBC account for pipeline transactions. Until then he had not received any Warning Notice and he was not aware of the Patel case. So far as the Applicant was concerned the investigation could have come to an end. When he had sent the e-mail on 27 March 2014 he did not feel that he was misleading the

Applicant as he had already transferred the escrow work to an entirely separate legal entity. He did not set it up to be unregulated; he set it up to separate the two lines of work. The Respondent submitted that he set up TJM Law Ltd as an entity entirely separate from the Applicant's procedures, rules and regulations and investigations and according to the IO's own views it could not be regulated.

42.14 The Respondent referred to his e-mails of 11 June 2014 and 23 June 2014 quoted above. He considered that his general relationship with the IO was one of cooperation and openness and the e-mails were not indicative of someone being dishonest or not open. It did not cross his mind to ask the IO whether if he stopped doing the work through the firm he could do it in a different way and would that be a problem. He might have set up a new bank account but asked for the matter to be viewed in the context of everything that was going on; he was running a law practice; he was subject to investigation by the Applicant; the Barclays account was frozen in November during December and part of January; there was the stress of dealing with clients and he was borrowing from his family so clients would not be prejudiced in order to substitute for the frozen money. In late February 2014 his third child was born and he spent two weeks at home. Over the next six months he had almost no sleep. He thought he did pretty well in that context.

Respondent's submissions and evidence regarding the allegation of dishonesty in 1.7

42.15 The Respondent's submissions about dishonesty included those already recorded above in respect of the underlying allegation 1.7. In the Rule 5 Statement it was alleged that he "took a conscious decision to mislead or attempt to mislead the IO" and he was thereby subjectively dishonest. The Respondent stated that he did not feel it necessary to impart information regarding TJM Law Ltd because it was an entirely separate business outside the Applicant's rules.

42.16 In cross examination the Respondent explained that he was the sole director and shareholder of the company TJM Law Ltd which had no company secretary. It had the same accountants as the firm and its registered office was an address in London which the Respondent used for post. He accepted looking back that, because he had not changed the reference to the Applicant in the Escrow Agreement or changed the bank account details, clients might think they were still dealing with the firm.

42.17 It was put to the Respondent that the escrow work was a profitable and attractive line of work in a firm where money was tight but the Respondent stated it was a lot of work to set it up. He had drafted the Escrow Agreement using bits and pieces of precedents that he had found online. Being dishonest would have been too much work just to make £75,000 in one year; he would have been looking to make several million pounds if he was dishonest. It was not a crime for work to be profitable.

42.18 The Respondent confirmed that he had no previous involvement in investment work but stated that when one first started one knew nothing and learned. It was not necessary for him to do so under supervision; one could attend courses. It was suggested that a solicitor would not proffer advice unless the solicitor was proficient and the Respondent replied that he gave no advice but he carried out an evaluation. When he undertook the research about escrow work, it was to see if escrow accounts were being used by solicitors anywhere and he concluded that a named major firm

were operating escrow accounts in the construction industry. They were a "huge" entity and no doubt they had many full-time members in their accounts department and that was good enough for him. The Respondent stated that he understood the transactions but he had no training in valuing diamonds and that it was in respect of valuations that he distanced himself from advice giving in the Escrow Agreement. As to the fact that from March to July 2014 the clients were dealing with the Respondent as an unregulated person, he stated that he was conscientious. He rejected the suggestion that this was because he was regulated but rather that it was because he would ensure that the wholesaler was paid. He agreed with the Tribunal's suggestion that this was because his solicitor's practice was running alongside the limited company and he had a solicitor's experience and qualifications and while wearing a different hat could give comfort to the client. He accepted regarding the disclaimer in the Escrow Agreement that he did not inspect the goods and ensure that they were physically received by the clients or look at arrangements about their being transported; he was not ensuring legal title.

42.19 Having regard to his continued involvement in the transactions from March to June 2014 after being given the warning notice, the Respondent confirmed that he understood the need for solicitors to be cautious because the involvement of a solicitor and client account lent credibility to such schemes. He agreed that once concerns had been raised a reasonable competent and honest solicitor would be cautious in involving themselves in dubious schemes. He started to make enquiries at the brokers and did not see prima facie that the escrow arrangement involved fraudulent schemes. It was put to him that, in order to fall within the warning notice, the arrangement just had to be seen to be potentially fraudulent. The Respondent agreed and so he had transferred the escrow business to a limited company. At the time he felt he could take his solicitor's hat off. He considered that, because he was only using the HSBC account for the limited company's purposes the HSBC client account was outside the regulations. The Respondent stated that the 50 or so transactions that he guestimated occurred between March and June 2014 were an insignificant part of the overall total of 392 if that was the correct number.

42.20 It was put to the Respondent that the FI Report recorded that the IO asked the Respondent if he agreed that the Warning Notice applied to the Escrow Agreements in that they promised a high interest return etc, and the Respondent replied:

> "Having now read the warning notice, I agree it would raise a question mark over the escrow facility. However, I am only now aware of the promised rate of 10-15% return and also that you appear to be suggesting this is a high rate of return."

The Respondent stated that he had no reason personally to believe that fraud was involved. Towards the end of the work he received an indication that the elderly were being coerced. In June 2014 there were several occasions when he refused to act for brokers because of their aggressive nature. He had questioned the brokers more and telephoned them to ask them about their technique for selling and to ensure that they were not coercing vulnerable people. He had not kept notes of the telephone conversations. He agreed that it would be good practice to take note of conversations with clients even if only to protect oneself but only if one was regulated. He rejected the suggestion that these enquiries and telephone calls had never been made. It was

put to him that the brokers were not likely to take notice of him if they were dubious and he responded that he was not a police officer. He felt that he satisfied himself that there was no fraudulent involvement. He was referred to the section in the warning notice where it was stated:

> "How do I reduce the risk of fraud?
>
> - Do not act if you have any doubts about the propriety of the transaction; or about how or why it is structured in a particular way....

In respect of whether he agreed that the first bullet above raised a warning, the Respondent stated that the warning notice came from the Applicant and he was not practising under a law firm or wearing his solicitor's hat at the time.

42.21 In respect of the changes to the Escrow Agreement when TJM Law Ltd was involved, the Respondent agreed that the only difference was that the word "Ltd" had been added on the front page. He was asked why clients would not receive the impression that this was a law firm and he asserted that there were other non-solicitor firms which had "law" in their name. As to the reference to TJM Law Ltd's client account in the first paragraph of the revised agreement, the Respondent stated that not only law firms had client accounts. The firm's version of the agreement showed the address of the firm's office but the TJM Law Ltd version used the registered office of the limited company. As to how a client would know that was the address of a limited company, the Respondent stated that when drafting it he had not given thought to that. The Respondent thought, but he could not be sure without checking, that the word "escrow" instead of "tom" was used for the email address with the same domain name. He asserted that the use of TJM Law throughout the document was an abbreviation for TJM Law Ltd and pointed out that this was recited at the beginning of the agreement.

42.22 The Respondent was asked about the statement of Mr W in which he said:

> "I took reassurance from the fact that my monies were paid into a solicitor's client account and would be dealt with properly. In fact this was explained to me by [IASL] that by paying the monies into a solicitor's client account this would afford the same safeguards as when buying a house and using a solicitor."

The Respondent replied that he could not comment as to the comfort which the client said he took and he could not verify what had happened and what IASL had said to Mr W. He was not challenging what the witness said he was told. If the client felt the same assurance in sending money to the limited company as it did in sending money to a regulated law firm, their confidence was not misplaced because he was at the helm and making sure the wholesaler would be paid. He was honest with people and told Ms CS to tell clients that he was not operating as a solicitor and if they did not want to proceed with the transaction then their money would be sent back. If he was ever asked he would say that he was not working under the guise of a law firm but no one ever asked. The Tribunal asked for an explanation of how the escrow work was done; the escrow files were kept in the firm's office but the limited company was a virtual office. The Escrow Agreements were not retained; they were all scanned in.

The limited company paid no rent to the law firm as the Respondent did not feel that formality was necessary. He had met a purchaser once who turned up out of the blue to ask questions. He could not recall whether this was at the time when the law firm was dealing or the limited company. The phone numbers for the limited company and the law firm were separate. When the work was done at the law firm if a phone call was received it would ring on the mobile phone held by Ms CS. The Respondent clarified that the limited company did not have its own notepaper because it was purely set up to do the escrow work so its name would be typed as the heading on plain paper with the registered office details added.

42.23 In respect of the reference to interest earned on money held belonging to TJM Law, the Respondent could not confirm details because he had no access to the software but as money came in and went out the same day, he thought there would have been no interest and there was never £5 million in the account at any one time. Also he recalled the interest rate at HSBC was 0.05%.

42.24 Mr Goodwin put it to the Respondent that he admitted allegations 1.7.1 and 1.7.2 which went to his continued involvement in the transactions notwithstanding that he had read the Warning Notice and the Patel case. The Respondent stated that they were not in his mind at the time and he rejected the suggestion that he knew his actions would be viewed as dishonest. He stated that he had read the Warning Notice and found no evidence of fraudulent activity; he took it on board but there was nothing of which he was aware or from his enquiries of the brokers that indicated fraud.

42.25 Having regard to allegation 1.7.3 and dishonesty, the Respondent agreed that solicitors did not make false statements but added "Not knowingly". The Respondent was referred to his response to the allegations dated 1 September 2014 when he referred to using the HSBC account to facilitate pipeline transactions. It was put to him that this gave away his knowledge that HSBC was being used for escrow transactions when he wrote the e-mail on 9 January 2014 and that the e-mail had been less than frank. The Respondent said that he could see now that there could be a different interpretation of what he had said but he had felt that the HSBC account was being used to bring escrow matters to an end.

42.26 Mr Goodwin referred to the wording of the IO's e-mail of 9 January 2014 at 14.12:

> "...Please confirm whether the firm is engaged in taking deposits from **new** clients in respect of similar previously discussed investments?
>
> Please confirm whether the firm are (sic) still engaged in taking client monies in respect of previous investments, if so please explain what sums have you been in receipt of over the last two months..."

The Respondent stated that the first paragraph of his reply at 15.26 on the same day 9 January 2014 explained the situation regarding the Barclays account.

> "Barclays have released my funds save for an amount (£154k approx) which they are currently holding. This sum is being held pending receipt from me of bank details for clients where these funds are for Escrow related matters. Essentially, the bank confirmed they are not happy with me continuing with

> the Escrow work. I am therefore in the process of obtaining bank details from "Escrow" clients. I have been and will continue to send bank details to Barclays and they will return those funds to clients direct."

The Respondent referred to the fact that the IO had underlined the word "new" and so he responded:

> "Since the Barclays client bank account was frozen we have not been able to take any further deposits nor receive further funds in relation to Escrow matters and this is unlikely to change given the bank's stance. I also believe that the brokers have found (or will find) another Escrow account holder given the circumstances i.e. My inability to compete on the Escrow matters."

The Respondent stated that there were just pipeline transactions. The Respondent maintained that brokers would find a new escrow agent because he could not complete on the funds frozen in his Barclays account. As to the IO referring in his email to "previous investments" and the Respondent having said nothing about the past two months and the use of the HSBC client account (although the IO had asked about the previous two months), the Respondent stated that he did not disclose that because at the time he felt escrow matters were coming to an end in days or weeks. He felt that was the extent of the Applicant's investigations. The Respondent was not taking any new clients on at the time. He did not add that he was still doing work via HSBC because of the emphasis on "new clients" although as the Tribunal pointed out the word "new" was not in the second paragraph quoted from the e-mail. It seemed that he did not answer that question but he was not requested to answer. There were no new deposits on the Barclays account. It was put to the Respondent that he had acted with lack of integrity and in breach of the other principles alleged and should have disclosed to the IO but the Respondent did not agree nor did he agree that he had been dishonest in choosing to answer as he did.

42.27 The Respondent was referred to his e-mail of 27 March 2014 in which he said:

> "I wish to convey from the outset of your investigations my mindset and beliefs at the time and during the period of dealing with the Escrow work."

It was put to the Respondent that this statement was not prompted by the written questions from the IO. The Respondent said he felt that because of the lengthy nature of the questions it would be helpful to set this out. It was put to him that there were two inaccuracies in his 27 March 2014 email when he said:

> "It is only since the SRA provided me with the case (Patel v SRA) and then the Warning Notice that I have come to learn that it is certainly conduct the [Applicant] (prima facie) would not approve of, I have since ceased the escrow work."

and

> "Since becoming aware of the Patel case, I have since ceased carrying out escrow work."

Mr Goodwin put it to him that he used the word "I" and could not divorce himself from his role as a solicitor. The Respondent rejected this on the basis that his mindset at the time was that he as a law firm had ceased the work and was carrying it on through a different legal entity about which he did not feel it necessary to tell the IO because it was not part of the investigation. In hindsight he could have dealt with it differently. It was put to him that it was only the persistence of the IO which meant that he provided the HSBC bank statements. The Respondent stated that he could have been obstructive or given a few lies but he would not deal with the IO that way. His mindset was that he was dealing openly and honestly with the IO. He agreed that he had hoped that the 27 March 2014 e-mail would be the end of the matter because the law firm was not doing the work. If the IO had asked him, he would have disclosed the existence of the HSBC account. He felt that by the response in his e-mail of 27 May 2014 quoted above (in which he provided information about use of the HSBC account) he was being open and honest. He agreed that what he had admitted was serious even without dishonesty.

42.28 In conclusion, the Respondent denied in respect of allegation 1.7.1, that, from the period March 2014 onwards when he had read Warning Notice and the Patel case, that he was acting dishonestly because he felt that through his own research and knowledge of the transactions which he had undertaken for the past three quarters of a year he had no reason to believe that any activity was taking place which was the subject of the Warning Notice and the Patel case and in any event he continued with the escrow work through the limited company and not under the auspices of the law firm.

42.29 The Respondent submitted in respect of allegation 1.7.2 that by his use of the limited company set up on 29 January 2014 to facilitate the escrow transactions from 11 March onwards, he was not acting dishonestly because he felt it was a separate legal entity; because it was not regulated or investigated by the Applicant it could continue with the escrow work unless he as a director became aware that dubious practices were going on.

42.30 The Respondent did not agree in respect of allegation 1.7.3 that the 9 January 2014 e-mail was misleading or untrue or inaccurate in response to the IO's request whether there were any new funds or new transactions taking place. In respect of the e-mail dated 27 March 2014, because he had continued with the escrow work purely through the limited company, he was not acting dishonestly by stating that he had ceased the work because it was the company which continued the work and the law firm subject to the investigation had ceased carrying out any escrow work. He admitted that the HSBC account was used in November and December 2013 and possibly even into January 2014 for client transactions but it was not dishonest of him not to disclose that to the IO because he held the opinion that all the escrow work would come to an end in days or weeks. His e-mail of 11 June 2014 provided information to the IO about the HSBC account which the Respondent submitted was indicative of someone not trying to be dishonest or concealing facts.

Determination of the Tribunal regarding allegation 1.7

42.31 The Tribunal reviewed the chronology of events and facts concerning the escrow work. The Tribunal noted that on or before 22 November 2013, Barclays Bank had

frozen the Respondent's client account. He had already netted around £50,000 in fees, about a quarter of the firm's annual fee income from the escrow work. At that point he had a choice either to cease the work completely or to find a way round the problem. The Applicant's investigation started on 28 November 2013. The HSBC client account which had been reduced to a zero balance as at 2 August 2012 was available to the Respondent and he began to use it including for some property work and made payments to the diamond brokers beginning on 26 November 2013. He had found a way round the problem of the frozen client account and was using the HSBC account for what he described as "pipeline" cases. During the investigation the escrow work was looked at although it was not until March 2014 that the Respondent saw the Warning Notice about dubious financial investment schemes or the Patel case. He finished off the pipeline cases and in January 2014 the limited company was formed. The Applicant had put all practitioners on notice of its grave reservations about this type of work. The Respondent accepted that he had read the Warning Notice when it was sent to him in March 2014 as well as the Patel case and so at that point he also became aware of the Applicant's concerns. He gave evidence that he had no knowledge that the transactions were fraudulent (if indeed they were). The Respondent decided to separate his law firm work from the escrow business. He estimated that once he actively used the limited company he undertook a further 50 transactions and said that he thought that he could do that because he was separating his role as a solicitor from that as the proprietor of the limited company. He substituted the name of the limited company and its registered address on the Escrow Agreement. The same domain name was used for e-mail purposes with the word "escrow" replacing "Tom". The body of the agreement continued to refer to TJM Law and the reference to regulation by the Applicant was also left in place. What the Respondent described as an abbreviation "TJM Law" and which was referred to as such at the beginning of the agreement, was used throughout the document. The limited company operated through the HSBC account which was a client bank account regulated by the Applicant. The Respondent continued to use this account even though he set up other bank accounts for the firm at Metro Bank and Handelsbanken. He attributed the failure to delete the reference to the Applicant to an oversight, and the continued use of the HSBC client account to convenience because the Escrow Agreement which he had changed in so few particulars referred to that account number. He attributed the continued use of TJM Law throughout the document but explained its use as being an abbreviation.

Allegation 1.7.1

42.32 The allegation was brought in connection with the period following 11 March 2014 when the Respondent saw the Warning Notice and the Patel case. The Respondent admitted allegation 1.7.1 and breach of principles 2, (integrity) 6, (maintaining public trust) and 7 (complying with legal and regulatory obligations and dealing with regulators and ombudsmen in an open, timely and constructive manner) and Outcomes 10.1 (ensuring that you comply with all the report and notification requirements in the Handbook that apply to you), 10.3 (notifying the Applicant promptly of any material changes to relevant information about you, including serious financial difficulty, action taken against you by another regulator and serious failure to comply with or achieve the Principles, rules, outcomes and other requirements of the Handbook) and 10.6 (cooperating fully with the Applicant and the Legal Ombudsman at all times, including in relation to any investigation about a claim for

redress against you). The Tribunal found that the Respondent had been in breach of Principles 2, 6 and 7 and outcomes 10.1, 10.3 and 10.6 and that allegation 1.7.1 was proved to the required standard, indeed it had been admitted.

Dishonesty in connection with allegation 1.7.1

42.33 The Tribunal considered the allegation of dishonesty according to the two limbed test in the case of Twinsectra. During the investigation the Applicant clearly had concerns about the diamond investment schemes but did not say that the Respondent must not get involved and it did not do so when the Warning Notice and Patel judgment were sent to him. The Respondent said that he undertook research before beginning the work and relied on the fact that a large firm of solicitors undertook escrow work albeit in the construction field and he then gained experience of escrow work. Once he was aware of the Applicant's concerns he did not continue blindly but decided there was nothing dubious in what was taking place but that he needed to separate the escrow business from the law firm; he did that by using the limited company of which he was the sole shareholder and sole director. The Tribunal considered that by the ordinary standards of reasonable and honest people this approach would be considered dishonest. However the Tribunal accepted that the Respondent was woefully ignorant of the regulations and that he believed that if he separated out the work in this way he could put his role as a solicitor to one side notwithstanding his thinking that he could continue to protect clients albeit the new entity was unregulated. Although bearing in mind that the Respondent was not at liberty to set his own standards, the Tribunal accepted that he had a genuinely held belief that what he did was acceptable. The Tribunal did not consider that subjective dishonesty had been proved to the required standard and therefore dishonesty as a whole was not found proved in respect of allegation 1.7.1.

Allegation 1.7.2 as amended

42.34 The Respondent admitted allegation 1.7.2 but denied dishonesty in connection with it. The Tribunal found that the Respondent had been in breach of Principles 2, 6 and 7 and outcome 10.1, 10.3 and 10.6 and that allegation 1.7.2 was proved to the required standard indeed it had been admitted.

Dishonesty in respect of allegation 1.7.2 as amended

42.35 When the Respondent used (rather than set up) the separate business TJM Law Ltd, as he admitted to facilitate his continued involvement from 10 March 2014 in the transactions knowing as he did the Applicant's concerns, he took minimal steps to differentiate the new entity from the law firm so far as his clients were concerned; looking particularly at the two forms of the Escrow Agreement the Respondent had only tinkered around the edges. The overall result was that the body of the agreement was the same as the version previously used by the law firm. He also continued to use the firm's HSBC client account for the escrow work which he had begun to do when the Barclays client account was frozen. The Tribunal considered that the Respondent had made insufficient separation of the limited company from the law firm and that by the standards of reasonable and honest people this would be considered to be dishonest. However bearing in mind the Tribunal's findings about the Respondent's mindset and his belief that he could effectively separate his roles, the Tribunal did not

find subjective dishonesty proved to the required standard and therefore dishonesty was not found proved in respect of allegation 1.7.2.

Allegation 1.7.3

42.36 The Respondent denied allegation 1.7.3 completely including the allegation of dishonesty. The Tribunal considered the e-mail dated 9 January 2014 from the IO and the Respondent's reply of the same day around an hour and a half later. In cross-examination, the Respondent admitted that he had not dealt with the second question in the e-mail relating to the work done in the previous two months in respect of client money relating to previous investments. He also stated unequivocally in his response that since the Barclays bank accounts was frozen they had not been able to take any further deposits nor receive further funds in relation to escrow matters. The Respondent explained his answer on the basis that he had interpreted the whole e-mail as relating to new clients but the Tribunal rejected this explanation. The wording of the IO's e-mail was quite plain; it related to two different aspects of the work. The e-mail exchange took place before the limited company was set up at the end of January 2014 but the Respondent had testified that he was processing what he described as pipeline work through the HSBC account and he did not disclose this to the IO. The Tribunal had been taken to the bank statements which showed payments to diamond brokers in November and December 2013 and on 6 January 2014. The Tribunal considered that the Respondent's email of 9 January 2014 replying to the IO's clear enquiries was deliberately selective.

42.37 The Tribunal considered the e-mail dated 27 March 2014 from the Respondent replying to the questions from the IO posed on 11 March 2014. The Respondent said in the e-mail that he wished to convey from the outset of the IO's investigations his mindset and beliefs at the time of and during the period of dealing with the escrow work. He stated unequivocally that, since he had become aware of the case of Patel and the Warning Notice and knowing that it was certainly conduct that the Applicant would not approve of (prima facie), he had ceased the escrow work. He repeated that statement by reference to the Patel case at the foot of the e-mail. The Respondent explained this by his view that since the work of a limited company was unregulated and not as he described it, the subject of the investigation, there was no need to disclose it to the IO. In respect of both of these e-mails and in the context of the Applicant's investigation in November 2013 and knowing of the Applicant's concerns about that type of work, the Respondent made no mention that he was continuing the work through the limited company. Unfortunately for the Respondent, the IO had other means of finding out about his use of the HSBC account and the limited company and sent him an e-mail on 12 May 2014 asking specifically about that account and for bank statements. The Respondent replied on 23 June 2014 to say that he would complete a few pipeline sales, enter into no new transactions and no longer would be involved in any capacity (whether personally or otherwise) with the diamond sales. The activities of the limited company having been brought into the open by the IO as Mr Goodwin alleged, the Respondent had no choice but to come clean.

42.38 The Tribunal was satisfied that knowing of the Applicant's concerns the Respondent deliberately opted for silence. In doing so the Tribunal found him to be in breach of Principle 2 (integrity), Principle 6 (public confidence) and Principle 7 (complying

with legal and regulatory obligations and dealing with regulators in an open time in cooperative manner) and outcome 10.1, 10.3 and 10.6 and that allegation 1.7.3 was proved to the required standard.

Dishonesty in connection with allegation 1.7.3

42.39 The Tribunal considered that, by the ordinary standards of reasonable and honest people the actions of the Respondent in making glaring omissions of disclosure and failing to qualify unequivocal statements to the IO about ceasing the escrow work in a matter which the Respondent knew to be of concern to the Applicant, would be considered dishonest by the ordinary standards of reasonable and honest people. There remained the question of subjective dishonesty. The Tribunal looked at the Respondent's position and mindset at the material time. He was a solicitor. He admitted that he did not read the regulations but he received a visit from the Applicant who found that he was involved in diamond purchasing. The Tribunal found that his reply to the 9 January 2014 email was deliberately selective. He said he did not know about the Warning Notice and Patel decision and only became aware of them in March 2014. His Barclays Bank account was frozen in November 2013 and he needed a way round. He used the HSBC account for the cases in the pipeline. He said there was nothing wrong with undertaking the purchases for clients because he had assessed the escrow work and it was not fraudulent and therefore he was not in breach of his obligations as a solicitor. However when he replied to the IO's e-mails in March 2014 he was aware of the Applicant's concerns about the work and the Tribunal found that, in deliberately not telling the IO about the limited company and his continued use of the HSBC client account for escrow work, the Respondent showed that he knew that he was behaving dishonestly. The Tribunal considered that his mindset was different in respect of allegation 1.7.3 to that in respect of allegation 1.7.1 and 1.7.2 so far as dishonesty was concerned. The questions posed by the IO in his e-mails of January and March 2014 created a new situation to which the Respondent acted dishonestly. The Tribunal found dishonesty proved to the required standard in respect of allegation 1.7.3.

Previous Disciplinary Matters

43. None.

Mitigation

44. Before mitigation was heard, Mr Goodwin confirmed that he had had discussions with the Respondent after the conclusion of the last hearing day and, as promised, had sent to him the case of Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin) as the Respondent might wish to seek to identify if he could, exceptional circumstances in this matter (such as might justify his not being struck off) an allegation of dishonesty having been found proved against him. Mr Goodwin had made clear that he could see no such exceptional circumstances. He had also provided the Respondent with the case of SRA v Spence [2012] EWHC 2977 (Admin) where the Tribunal had found dishonesty proved against the Respondent and imposed a three year suspension but Lord Justice Pitchford stated on appeal that the Tribunal had erred in law by appearing to treat repeated lies to the Applicant as a less culpable form of dishonesty than dishonesty in relation to clients' money. The Tribunal had referred

the Respondent at the conclusion of the last day of hearing to the Tribunal's Guidance Note on Sanctions. The Respondent had not read it and the Tribunal adjourned for a short period so that he could do so. His attention was particularly directed to those notes relating to mitigation. The Respondent confirmed that he had no other documents such as testimonials which he wanted the Tribunal to consider. He had submitted a Personal Financial Statement and had considered the case of Davis and McGlinchey [2011] EWHC 32 (Admin) and the possibility of his making representations based on his financial circumstances.

45. The Respondent expressed sincere regret at what he had done and stated that he had learnt lessons. It was very clear what was expected of a solicitor. He accepted that he had caused harm to the reputation of the legal profession and he would like to make good the harm and thought that he could help small firms avoid the danger of falling foul of the rules. The Respondent emphasised that he had no intention to do any harm; he had genuinely believed that he was protecting his clients' best interests by ensuring that the diamonds were purchased by the payment method involving him. He submitted that he had fully complied with the Applicant in the investigation. He invited the Tribunal either to make no order or to impose a reprimand in respect of his role as a solicitor. The Respondent reminded the Tribunal that at the end of the previous day's hearing in July 2015 a reference had been made to the possibility of him obtaining pro bono advice in respect of these proceedings. It was his intention to explore whether he had grounds for appeal against the finding of dishonesty made by the Tribunal and if so in respect of its prospects of success. If the Tribunal was minded to make an order he suggested that it be suspended for a specified period pending the outcome of any appeal. He submitted that that would be fair and proportionate in the circumstances.

46. The Respondent referred the Tribunal to his Personal Financial Statement and that he was facing a bankruptcy hearing in a week's time so that he could ill afford to pay anything in terms of costs and asked that the Tribunal make no order. The bankruptcy hearing followed on from a statutory demand served by the Law Society in respect of the costs of the intervention into his firm. The amount claimed was in the region of £97,000. The Respondent also informed the Tribunal that at the forthcoming bankruptcy hearing he would ask the court to make no order or that the order be stayed until the outcome of any appeal against the Tribunal decision Since the intervention the Respondent had undertaken a few labouring jobs for a family member. He had made a few tentative enquiries in around February 2015 about regaining his practising certificate, which had been suspended following the intervention and was told by prospective employers there was no chance of regaining it. In retrospect he realised that he could have obtained a practising certificate but he withdrew his application for one; it seemed a waste of money as it would be subject to restrictions. The Respondent now had a broken marriage and very young children. He was not in receipt of any state benefits but was living off credit cards and friends and family. Since the date of the intervention his life had been completely ruined. The Respondent no longer lived in the former matrimonial home and he had never had any financial interest in the property.

Sanction

47. The Tribunal had regard to its Guidance Note on Sanctions. The Respondent had admitted most of the allegations save dishonesty and that had been found proved in part in respect of his conduct towards his regulator in the person of the IO. The Respondent had breached Principles 2, 3, 4, 5, 6, 7 and 8 across the allegations. Even without dishonesty the Tribunal considered that in this case allegations 1.3, 1.6 and allegation 1.7 were very serious indeed. In assessing the seriousness of what the Respondent had done the Tribunal bore in mind his financial motivation. He was a sole practitioner and in direct control of his part of the diamond selling system and therefore was fully culpable for everything he had done. The Tribunal also had regard to the harm which had been caused by his misconduct. It was not just one client being treated in this way but the Respondent had adopted a systematic approach in respect of all his clients who were purchasing diamonds. He had submitted that the amounts of money involved were so small and the time taken to complete transactions was so short that he felt he had no need to inform clients about his fees. The Tribunal also found deeply unattractive his proposition that clients must have been aware that he would charge fees on the basis that no one gets anything for nothing. With this mindset he had taken £75,000 by way of fees. He had also allowed his client account to be used as a banking facility. In total a sum £5 million had passed through the client account of a solicitor who had 10 years practising experience but had scant regard for the accounts rules and who told the Tribunal that he had not had time to read the rules or note updates to them because they were common sense. It was astonishing that the Respondent's defence included ignorance of one of the most basic of the accounts rules Rule 17(2), the need to raise a bill or give a written notification of costs before transferring money from client to office account. His attitude to the need to give information to clients was equally worrying; instead of protecting his clients he expected them to make assumptions about what he was doing in terms of charging them. He had an opportunity to stop what he was doing when he had been given the warning notice and the case of Patel. At this point he had already undertaken a substantial number of escrow cases but he estimated that he did around 50 more under the umbrella of the limited company and the IO recorded an additional 68 transactions post 10 September 2013 resulting in fees of just over £12,000. It was clear from the client witness's evidence that the fact the Respondent was a solicitor encouraged the diamond purchasers, ordinary members of the public to proceed with the transactions. Ironically the Respondent's defence involved his belief that he was acting to protect his clients. The Tribunal had serious concerns about the Respondent's approach to his clients in that he expressly excluded from his agreement with them the responsibility to give them any advice. The Respondent had failed to meet essential requirements for the protection of clients. At least some of the purchasers were very unhappy with the outcome. The extent of the harm caused by the Respondent's misconduct was reasonably foreseeable in the circumstances. The Tribunal was concerned about the very limited understanding displayed by the Respondent about the extent of a solicitor's obligations; he thought it was acceptable to change his way of operating once alerted to the Applicant's concerns to the use of a vehicle which he thought was outside the Applicant's regulatory influence. He used what was essentially the same agreement with clients, simply changing the name of the entity at the top. He did not even take care to remove the reference to it being regulated by the Applicant. Dishonesty was an aggravating factor in this case. Were it not for the persistence of the IO the Respondent's continued activities might not come

to light. The misconduct continued over a period of time and in respect of the finding of dishonesty concealment of wrongdoing from the regulator was an essential part of the allegation found proved. The Tribunal considered with concern that the Respondent in giving evidence did not see the error of his ways. The Guidance Note stated that the most serious misconduct involved dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proved would almost invariably lead to striking off, save in exceptional circumstances. There were multiple allegations several of which were very serious. The Tribunal took care to avoid the risk of acting disproportionately by imposing a sanction for each matter where they essentially all arose out of one system of work, albeit involving hundreds of clients. However the Tribunal felt that it was essential to take a cumulative view of the allegations and impose a sanction determined by the totality of the misconduct as the allegations showed even without dishonesty a picture of a solicitor who could not safely be let loose upon the public. Notwithstanding this the Tribunal had regard to the case of Sharma but could find nothing which fitted into the small category of cases which constituted exceptional circumstances. The authority of the case of SRA v Spence was a very powerful one in terms of the proven allegation of dishonesty involved lying to the Applicant. The Tribunal considered that an appropriate and proportionate sanction in all the circumstances would be to strike off the Respondent. The Respondent had asked that any order be suspended pending appeal. The Respondent had made an argument linking the intervention into his firm which he had not challenged, apparently on advice, the bankruptcy proceedings and the Tribunal proceedings. As the bankruptcy proceedings arose out of the intervention which was quite a distinct matter from the Tribunal proceedings, the Tribunal did not consider a suspension of its order to be appropriate and in any event it felt that the order was needed for the immediate protection of the public.

Costs

48. Mr Goodwin informed the Tribunal that he had discussed the quantum of the costs with the Respondent who agreed an all-inclusive figure of £30,000, almost exactly the amount of the Applicant's costs schedule. The Tribunal's Guidance Note on Sanctions stated that it was not the purpose of an order for costs to serve as an additional punishment for the Respondent but to compensate the Applicant for the costs incurred in bringing the proceedings. The Respondent did not say that the proceedings were not properly brought. He had made admissions and denials and in respect of allegation 1.7.3 and the Tribunal had made a finding of dishonesty. Therefore an order for costs in favour of the Applicant would be an appropriate order. There was a discussion about the paragraphs of the Guidance Note which covered costs and the relationship between impecuniosity and the possibility of no order being made. The Guidance Note quoted the case of Davis and McGlinchey to the effect that it was open to a Respondent to contend that no order for costs should be made against him on the grounds of lack of means or that it should be a limited amount by reason of lack of means. According to the Personal Financial Statement of the Respondent he had no means. Mr Goodwin submitted that where no order was to be made rather than an order not to be enforced without leave of the Tribunal, it would be wholly wrong if the Respondent came into funds at a later date and the Applicant would be deprived of seeking costs against him. The Tribunal queried whether there was a reasonable prospect that the Respondent's position would improve. Mr Goodwin submitted that the Respondent was in work intermittently but had given no other information. The

Respondent might embark on a different career. The Respondent could not elaborate about the costs position and particularly the relationship of any costs order to his possible bankruptcy. He had not taken advice. The Respondent argued by analogy to the time it took to establish a career as a solicitor that to have another financially viable career would him take two decades, made more difficult by a published decision to strike him off. He submitted that it was extremely unlikely in the circumstances that he would immediately walk into a lucrative career.

49. The Tribunal considered the costs claimed to be reasonable. Only one of the aspects of the dishonesty allegation had been found proved but the Tribunal did not consider it appropriate to make any reduction to the costs. All of the allegations had been properly included in the Rule 5 Statement and pursued at the hearing. The Tribunal carefully considered the Respondent's circumstances. Its decision to strike him off meant that he would not be able to earn a living as a solicitor. It had regard to the cases of Merrick v Law Society [2007] EWHC 2997 (Admin) and D'Souza v The Law Society [2009] EWHC 2193 (Admin). This Respondent was relatively young and had many working years ahead of him. The Respondent was not presently the subject of a bankruptcy order. It was possible that he could find alternative employment and could make arrangements to pay the Applicant back. The Tribunal determined that it would make an order for costs in the agreed sum of £30,000 not to be enforced without leave of the Tribunal.

Statement of Full Order

50. The Tribunal Ordered that the Respondent Tom Jenkins Merralls, solicitor, be struck off the Roll of Solicitors and it further Ordered that he do pay the agreed costs of and incidental to this application and enquiry fixed in the sum of £30,000.00, such costs not be enforced without leave of the Tribunal.

Dated this 11th day of January 2016
On behalf of the Tribunal

J.P. Davies
Chairman