SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11437-2015

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

RAFIQUE HUSSAIN CHOWDHURY Respondent

Before:

Mr A. N. Spooner (in the chair)
Mr S. Tinkler
Lady Bonham Carter

Date of Hearing: 6 April 2016

Appearances

Inderjit Johal, barrister of The Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham, B1 1RN for the Applicant.

The Respondent did not appear but was represented by Yash Bheeroo, Counsel of 39 Essex Chambers, 39 Essex Street, London, WC2R 3AT.

JUDGMENT

Allegations

1. The Allegations against the Respondent were:

1.1 The Respondent created client care letters on three files, which he was required to produce to the Forensic Investigator on 9 March 2015, and backdated each of them to the beginning of the retainer in order to make them look customary and thereby:

1.1.1 acted without integrity, in breach of Principle 2 of the SRA Principles 2011 ("the Principles")

1.1.2 failed to behave in a way that maintains the trust the public placed in the Respondent and in the provision of legal services in breach of Principle 6 of the Principles.

It was alleged the Respondent had acted dishonestly in relation to Allegation 1.1.

1.2 The Respondent failed to return client monies promptly or inform clients that money was retained at the end of the matter and thereby breached Rules 14.3 and 14.4 of the SRA Accounts Rules 2011 ("the Accounts Rules").

1.3 The Respondent failed to [part allegation withdrawn] give or send a bill of costs, or other written notification before taking payment of his costs from client account on a number of reviewed files and thereby breached [part allegation withdrawn] Rule 17.2 of the Accounts Rules.

1.4 The Respondent failed to maintain adequate books of account or conduct client account reconciliations and thereby breached Rules 1.2(f) and 29.1, 2, 4, 6 and 12 of the Accounts Rules.

The Respondent admitted Allegations 1.2, 1.3 and 1.4. The Respondent also admitted Allegation 1.1 but did not admit the allegation of dishonesty.

Documents

2. The Tribunal reviewed all the documents submitted by the Applicant and the Respondent which included:

Applicant:

- Application dated 19 October 2015 together with attached Rule 5 Statement and all exhibits
- Letter dated 16 March 2016 from the Applicant to the Respondent
- Applicant's Statement of Costs dated 19 October 2015
- Applicant's Statement of Costs dated 29 March 2016

Respondent:

- Respondent's Response to the Rule 5(2) Statement dated 23 November 2015
- Respondent's Bundle of Authorities
- Skeleton Argument on behalf of the Respondent dated 5 April 2016
- Letters from the Respondent's General Practitioner dated 31 March 2016 and 5 April 2016

Preliminary Matter

Proceeding in Absence

3. Mr Johal, on behalf of the Applicant, referred the Tribunal to the two letters provided by the Respondent's General Practitioner dated 31 March 2016 and 5 April 2016. These indicated the Respondent was suffering from anxiety and depression for which he was receiving medication and treatment. The letters stated that any additional stress was likely to have a detrimental effect on the Respondent's mental and physical well-being and that he would benefit from a period of rest. Mr Johal submitted the Respondent had decided not to attend the hearing today for health reasons and had not made any application to adjourn. The Respondent was therefore clearly content for the hearing to proceed in his absence.

4. Mr Bheeroo, on behalf of the Respondent, confirmed this was correct and that the Respondent did not apply for an adjournment.

5. The Tribunal was mindful that it should only decide to proceed in the Respondent's absence having exercised the utmost care and caution. He was clearly aware of today's hearing and did not apply for an adjournment. He was also represented by Counsel who could make submissions on his behalf. Both parties agreed that the hearing should proceed as the Respondent had voluntarily absented himself due to his health. These were serious allegations and it was in the public interest and in the Respondent's interest that matters should be concluded expeditiously. The Tribunal was satisfied that it was appropriate for the hearing to proceed in the Respondent's absence, and that matters should be concluded without any further delay.

The Applicant's Application to Withdraw Part of Allegation 1.3

6. Mr Johal made an application to withdraw part of Allegation 1.3 which alleged a breach of Outcome 1.13 of the SRA Code of Conduct 2011. This was on the basis that the Respondent had produced evidence to show that he had provided his clients with costs information at the outset. There was therefore no longer a reasonable prospect of proving this allegation. Mr Bheeroo did not object to the withdrawal of part of this allegation. He confirmed that subject to those withdrawals, the remaining part of Allegation 1.3 would be admitted.

7. The Tribunal, having noted the Respondent had provided evidence to the Applicant to confirm he had provided adequate costs information to his clients and had not breached Outcome 1.13, was satisfied it was appropriate and proportionate for the part of Allegation 1.3 that related to these breaches to be withdrawn. The Tribunal allowed the application.

Factual Background

8. The Respondent, born in 1977, was admitted as a solicitor on 15 December 2005.

9. At the material time the Respondent practised as a member, COLP and COFA of Gateway Solicitors LLP of 527 Katherine, London, E7 8EB ("the firm"). The firm had one other member, Ashcroft Law Limited which was a company of which the Respondent was the sole shareholder and director.

10. The firm was intervened into on 8 July 2015 and the Respondent's practising certificate was suspended.

11. Following receipt of a qualified Accountants' Report, the SRA commenced an investigation into the firm and produced a Forensic Investigation Report ("the Report") dated 4 June 2015. On completion of the Report a Supervision Report dated 15 June 2015 was prepared by the SRA. The Respondent provided a Response to the SRA on 26 June 2015. A decision was made by an Adjudication Committee on 6 July 2015 to intervene into the firm.

12. Following the departure of the firm's bookkeeper in April 2012, no books of account had been kept or reconciliation statements prepared until May 2013, when the books were brought up to date by the firm's auditors. Although the Report confirmed that all breaches identified in the auditors report had been remedied, other breaches were identified. Residual balances were being retained in the client account on completed matters where no notification had been given to the client of the retention.

13. The Forensic Investigation Officer ("the FIO") requested remedial action be taken and he returned to the firm on 9 March 2015 to resume his investigation. The Respondent informed the FIO that all residual balances had been resolved. The Respondent also confirmed he had established that profit costs in the sum of £156,966 and disbursements of £11,417.30 making a total of £168,383.30 were due to the firm, which he had transferred from the firm's client bank account to the firm's office bank account. On reviews carried out of 7 files by the FIO, it became evident that no bills of costs or other notification of costs had been sent to the client and neither had there been any review undertaken by the Respondent of the files to identify what costs were owed.

14. The resultant shortage of £168,383.30 was rectified on 12 March 2015 by the Respondent transferring the monies back to client account. He thereafter carried out an exercise of reviewing the files to identify costs, billing clients then transferring costs to office account and returning any remaining money back to clients.

15. The file reviews also revealed that no client care letters had been provided to clients and it became evident during the investigation that the Respondent had created client care letters which he had backdated to the commencement of the retainer.

Allegation 1.1

16. On 3 files examined by the FIO, the FIO found they all contained client care letters which were freshly printed and inserted into the correspondence section of the file. After the FIO interrogated the metadata relating to the client care letters, it revealed that all three letters had been generated that same day, on 9 March 2015.

17. The files gave the impression that the following client care letters had been created in or around the time the retainer commenced:

- On the file of AVL the Respondent had been instructed in or around late January 2014. The client care letter on this file was dated 2 February 2014.

- On the file of MS and RA the Respondent had been instructed in or around March 2014. The client care letter on the file was dated 14 April 2014.

- On the file of MA and NA the Respondent was instructed in or around May 2012. The client care letter on this file was dated 16 May 2012.

18. The Respondent was interviewed by the FIO and asked whether the letter on the file of MS and RA had been generated to mislead the FIO into believing that the letter had been sent on 14 April 2014. The Respondent did not answer. However, later in the interview he confirmed he had generated client care letters on all three files before they were passed to the FIO. He stated:

> "We need to have client care letters on the file."

The Respondent was asked:

> "What did you think I would believe when reading this letter?"

He replied:

> "The letter went there so I put it on the file".

19. The FIO asked the Respondent:

> "Do you confirm deliberately misleading me by placing the client care letter on the file?"

The Respondent replied:

> "Not done to mislead you, it just wasn't in the file so I put it there".

20. The FIO asked the Respondent:

> "If I hadn't asked to interrogate the metadata, would you have told me that the letter had been generated today?"

The Respondent replied:

> "I don't know, because I should tell you, yes."

The Respondent did not answer when he was asked:

> "Were you going to?"

21. In a Response to the SRA dated 26 June 2015 the Respondent accepted that on the morning of the meeting on 9 March 2015, he had:

> "…….. acted in an inappropriate manner and had a 'moment of madness'. He panicked due to the great stress he was under resulting both from the investigation, being understaffed, and family issues…."

Allegations 1.2 and 1.3

22. An examination by the FIO of the firm's client listing on 4 February 2015 revealed a number of matters where residual balances were being retained in client account in relation to matters that appeared to have been completed. No client notifications had been sent informing the clients of the amounts retained and the reasons for such retention.

23. The FIO explained to the Respondent the provisions of Rule 14 and Rule 17 of the Solicitors Accounts Rules (that client monies must be returned to clients promptly and that before taking fees you must provide your client with a bill or other notification of costs). The investigation was then postponed to 9 March 2015 to allow the Respondent to prepare a schedule identifying all completed matters where residual balances were being held and to record what action was being taken to remedy the position.

24. The investigation resumed on 9 March 2015 when the Respondent advised the FIO that all residual balances had been resolved. He confirmed that he had examined the client listing and established that profit costs in the sum of £156,966 and disbursements in the sum of £11,417.30 were due to the firm. The Respondent had, on 27 February 2015, raised bills of costs totalling £168,383.30 and transferred this sum from the firm's client bank account to the firm's office bank account.

25. A schedule was provided to the FIO identifying 154 client matters where residual balances had been retained by the firm, including three matters where retention monies totalling £3,500 had been legitimately retained. When the FIO examined some of the files, they revealed that money transferred had been done without the delivery of bills of costs or notification of costs to the client concerned which resulted in a shortage of £168,383.30 at the revised extraction date of 28 February 2015. The

examination further revealed that the client matter files had not been reviewed prior to the raising of the bills.

26. On the file of AVL, the transaction completed on 29 April 2014 and a residual balance of £14,410.84 was held. On 27 February 2015 a bill of costs and completion statement was generated and on the same day the sum of £14,410.84 was transferred from the firm's client bank account into the firm's office bank account. Neither the bill of costs nor the completion statement had been given to the client. The client ledger did not record any of the disbursements itemised on the completion statement as having been paid by the firm. After corrective measures had taken place, the sum finally returned to the client was £4,181.84.

27. On the file of MS and RA, the transaction completed on 16 June 2014 and a residual balance in the sum of £3,018.09 was held. On 27 February 2015 a bill of costs and completion statement was generated and on the same day the sum of £3,018.09 was transferred from the firm's client bank account into the firm's office bank account. Neither the bill of costs nor the completion statement had been given to the client. The client ledger did not record any of the disbursements itemised on the completion statement as having been paid by the firm. After corrective measures had taken place the sum finally returned to the client on 20 June 2015 was £1,203.09.

28. On the file of MA and NA, the transaction completed on 6 March 2013 and a residual balance was held in the sum of £2,390. On 27 February 2015 a bill of costs and completion statement was generated and on the same day the sum of £2,390 was transferred from the firm's client bank account to the firm's office bank account. Neither the bill of costs nor the completion statement had been given to the client. The client ledger did not record any of the disbursements itemised on the completion statement as having been paid by the firm. After corrective measures had taken place the sum finally returned to the clients on 22 June 2015 was £1,384.

29. The cash shortage was rectified on 12 March 2015 by way of transfer of the sum of £168,383.30 from the firm's office account into the firm's client account. The FIO was advised by the Respondent's solicitor that the Respondent was preparing client care letters on all files and once they were agreed by clients, funds would be transferred back to office account. In total the sum of £23,297.78 was returned to clients.

30. In an interview with the FIO on 9 March 2015, the Respondent stated he had not taken the fees when due, initially because of bookkeeping problems. The fees were simply taken whenever it became necessary, and when the firm needed money in the office account. The Respondent confirmed the client care letters had not been sent on 151 matters. He agreed that bills were not raised or completion statements issued at the completion of matters. He also confirmed he had not reviewed the files before issuing the bills on 27 February 2015 and neither had the bills been delivered to the clients before the money was transferred. The Respondent confirmed that the exercise of billing and returning money to clients had now been carried out correctly and he provided the FIO with evidence of this.

Allegation 1.4

31. No books of account had been maintained for the period April 2012 to May 2013 and no client account reconciliations had been performed during that period. The Respondent explained to the FIO that his previous bookkeeper had left the firm in April 2012 and that the books had not been brought up to date until May 2013 which was done by his auditors. The Respondent stated he could not find a replacement for his previous bookkeeper.

32. On examination of the books of account on 4 February 2015 by the FIO, he found that they were now being properly maintained and that the breaches identified by the auditors had been rectified.

Witnesses

33. The following witnesses gave evidence:

- David Bailey (SRA Forensic Investigation Officer)

Findings of Fact and Law

34. The Tribunal had carefully considered all the documents provided including the character references, the evidence given and the submissions of both parties. The Tribunal confirmed that all allegations had to be proved beyond reasonable doubt and that the Tribunal would be using the criminal standard of proof when considering each allegation.

35. **Allegation 1.1: The Respondent created client care letters on three files, which he was required to produce to the Forensic Investigator on 9 March 2015, and backdated each of them to the beginning of the retainer in order to make them look customary and thereby:**

1.1.1 acted without integrity, in breach of Principle 2 of the SRA Principles 2011 ("the Principles")

1.1.2 failed to behave in a way that maintains the trust the public placed in the Respondent and in the provision of legal services in breach of Principle 6 of the Principles.

It was alleged the Respondent had acted dishonestly in relation to Allegation 1.1.

35.1 The Respondent had admitted Allegation 1.1 save for the allegation of dishonesty.

35.2 Mr Johal referred the Tribunal to the case of Twinsectra Ltd v Yardley & Others [2002] UKHL 12 which set out the test to be applied when considering the issue of dishonesty. Firstly, the Tribunal had to consider whether the Respondent's conduct was dishonest by the ordinary standards of reasonable and honest people. Secondly, the Tribunal had to consider whether the Respondent himself realised that by those standards his conduct was dishonest.

35.3 Mr Johal submitted creating client care letters and backdating them to the beginning of the retainer to give the impression that they were already on the file, when asked to produce the files by the FIO was conduct that would be regarded as dishonest by the ordinary standards of reasonable and honest people.

35.4 Mr Johal reminded the Tribunal that the forensic investigation had started on 4 February 2015 and was then postponed to 9 March 2015. There were three separate files where client care letters had been freshly printed and inserted into the correspondence section of the file. These were the files of AVL, MS and RA, and MA and NA. On two files the dates of the client care letters matched the dates the firm was instructed. On all of these files, Mr Johal submitted, it would have taken the Respondent some time and thought to construct the client care letters extracting information contained in the bill of costs.

35.5 Mr Johal submitted that although the Respondent claimed he had told Mr Bailey that he had created the letters prior to the interview, Mr Bailey's evidence was that the Respondent had not informed him of this. Mr Johal submitted the Tribunal should prefer the evidence of Mr Bailey who had attended to give evidence on oath. The Respondent had not attended and could not therefore be cross-examined. Mr Johal referred the Tribunal to the Tribunal's Practice Direction Number 5 which indicated the Tribunal would be entitled to draw an adverse inference where the Respondent denied an allegation and did not give evidence or submit himself to cross-examination. In this case, whilst the Respondent had provided medical evidence, he had failed to supply a witness statement.

35.6 The Tribunal heard evidence from the Forensic Investigation Officer, Mr David Bailey. He confirmed the three files had been chosen at random. He stated he had arrived at the firm at approximately 9:30am, he had requested the files around 10am and he had received the files around 12pm. His recollection was that it had taken at least an hour for the files to be provided. Mr Bailey had asked the Respondent where the files were, after he had been waiting for some time, but the Respondent had not replied.

35.7 Mr Bailey stated that when he reviewed the files, he noticed there were some documents which appeared to be freshly printed and he asked the Respondent if he could see the electronic copies of those documents. Mr Bailey had then checked the 'properties' of the electronic copies of the client care letters and it became clear the documents had been created that day.

35.8 Mr Bailey had interviewed the Respondent at about 1pm and confirmed he had manually taken contemporaneous notes of the interview, which he had subsequently typed up at the first opportunity. This would usually be within a week of the interview taking place. The questions had not been prepared in advance as Mr Bailey had not known what would happen. Mr Bailey confirmed the Respondent had eventually acknowledged he had created the client care letters himself that day. Mr Bailey stated he had told the Respondent that he would also need to interview the staff to establish what had happened and at that point the Respondent said he had created the letters.

35.9 On cross-examination Mr Bailey confirmed the interview had lasted about 2½ hours and that he had not sent a transcript to the Respondent for approval. However his recollection was that the typed version was sent to the Respondent's solicitor. Mr Bailey accepted that not all of the handwritten contemporaneous notes had been transcribed into the typed interview notes, and it was possible that there may have been irrelevant parts of the interview which were not transcribed. Mr Bailey confirmed he did not have his contemporaneous notes with him. He accepted the Respondent had not had any involvement in deciding which parts of the contemporaneous notes were relevant and which were not. Mr Bailey also accepted the Respondent had never said he sent one of the client care letters to his client, even though in one of his questions to the Respondent during the interview, Mr Bailey had said that he had.

35.10 Mr Bailey accepted he had had some discussion with the Respondent in the Respondent's office after he had interrogated the metadata. This was prior to the interview taking place and this was when Mr Bailey had realised that he needed to record the Respondent's responses. Mr Bailey accepted there were no notes of this discussion. He accepted the Respondent had been nervous, scared and worried during the interview and that he had been apologetic after he had admitted his actions. Mr Bailey accepted he had not recorded the apology in the typed notes and stated he had only recorded what he considered was relevant.

35.11 Mr Bailey also accepted that he had not recorded that he had told the Respondent he would need to interview the Respondent's staff. When asked about the Respondent's behaviour Mr Bailey stated the issue of dishonesty was not for him to decide.

35.12 Mr Bailey accepted there had been no issues with the accounts prior to April 2012 and that all matters had been rectified by the Respondent and his auditors.

35.13 The Tribunal heard submissions from Mr Bheeroo, on behalf of the Respondent. He submitted the Tribunal should not draw an adverse inference from the Respondent's failure to give evidence before the Tribunal. Whilst the Tribunal's Practice Direction Number 5 relied upon the authority of Muhammed Iqbal v The Solicitors Regulation Authority [2012] EWHC 3251, the Tribunal should also take account of the case of Wisniewski (a minor) v Central Manchester Health Authority [1998] Lloyds Report Med 223 in which Lord Justice Brooke stated:

> "If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

35.14 Mr Bheeroo submitted the Respondent's medical condition which had affected him since July 2015, for which he was receiving treatment and medication, was the reason for his absence and indeed, his GP had told him to avoid stress as that would exacerbate his condition. Whilst Mr Bheeroo accepted the letters from the Respondent's GP did not comply with the Civil Procedure Rules, he stated the second letter dated 5 April 2016 had been produced as the Applicant had requested further details of the length of the Respondent's illness. A fuller report may have been provided with the benefit of legal representation but the Respondent had been dealing

with matters himself while suffering from his medical condition. Indeed, he had only instructed Counsel directly a couple of days ago to represent him today. The Respondent had also instructed Mr Bheeroo earlier in November 2015 to prepare a written Response on his behalf but that was the extent of Mr Bheeroo's involvement. Mr Bheeroo was not aware of how long the Respondent had instructed solicitors to represent him but submitted the Tribunal should accept the medical letters and not draw an adverse inference from the Respondent's absence.

35.15 Mr Bheeroo confirmed the Respondent accepted he had breached rules and admitted the allegations made against him but submitted the Respondent had not acted dishonestly. He reminded the Tribunal that as well as considering the case of Twinsectra Ltd v Yardley & Others, the Tribunal also had to take into account the cases of Bryant and Bench v The Law Society [2007] EWHC 3043 (Admin) and Bultitude v The Law Society [2004] EWCA Civ 1853.

35.16 Mr Bheeroo accepted the objective element of the test for dishonesty was established in that the Respondent's conduct would be regarded as dishonest by the ordinary standards of reasonable and honest people. However, he submitted that the Tribunal must take into account the comments of Lord Hutton in the case of Twinsectra Ltd v Yardley & Others. The Tribunal had to consider whether the Respondent did have knowledge at the time that what he was doing would be regarded as dishonest by those standards. He may have become aware later but the Tribunal had to consider whether he was aware at the time.

35.17 Mr Bheeroo submitted the Respondent had been consistent in his position throughout. In his written Response dated 23 November 2015 the Respondent had stated he had acted in a moment of panic due to the tremendous pressure he was under at the time of the investigation. He had provided details of his family circumstances and had indicated that those personal problems together with running a busy practice while being short staffed had placed the Respondent under great pressure and had caused him to create the client care letters in a moment of panic.

35.18 Mr Bheeroo submitted the Respondent had inserted the client care letters into the files at the time as he thought they needed to be there. He was regularising the files not seeking to mislead anyone. He had been under pressure and thought that was what the file needed to show. It had been a moment of madness and his actions had been done in panic to place letters where he thought they should have been. Mr Bailey had accepted that none of those letters had been sent to the clients and nor had any client signatures been forged.

35.19 In relation to the issue of the costs indicated in the letters being extracted from the bills, Mr Bheeroo submitted this was evidence of the Respondent's moment of madness. He had not put estimates of costs into the letters. Indeed, Mr Bheeroo submitted, often the total costs were not known at the outset of the case. The Respondent had taken information which was already on the file and entered those details into the client care letter to ensure consistency. Had the Respondent been acting dishonestly, Mr Bheeroo submitted, he would have placed cost estimates into the letters in order to mislead the FIO into believing the letters had actually been created at the outset and sent to clients. He would have thought about what the letters

needed to say but instead, he had simply filled in information which was already on the file.

35.20 Mr Bheeroo submitted the Respondent had not been trying to intentionally mislead his regulator but had acted in panic. Up until 9 March 2015, the Respondent had only been facing accounts breaches and his panic had caused him to act as he had done. He had confirmed the letters had not been sent to clients and, Mr Bheeroo submitted this was clearly the product of someone who was trying to fix a problem but instead had made it worse for himself. Mr Bheeroo referred the Tribunal to the character references provided which were from respected and esteemed members of the community. Mr Bheeroo submitted the Tribunal could take these into account pursuant to the case of Donkin v The Law Society [2007] EWHC 414 (Admin) as there was an allegation of dishonesty. These references had been provided to the Applicant prior to the intervention and the Rule 5 Statement being issued.

35.21 Mr Bheeroo submitted the Tribunal had to consider whether the Respondent should be believed and whether he had a propensity to act dishonestly. Mr Bheeroo submitted the Respondent had not acted dishonestly. He had acted impulsively on the spur of the moment, in panic and under pressure. Mr Bheeroo submitted the Respondent had informed Mr Bailey prior to the interview of what he had done and he had apologised. He submitted the Respondent should receive credit for this.

35.22 The Tribunal was satisfied that creating client care letters and backdating them to the beginning of a retainer to give the impression that they had been created on that date was conduct that would be regarded as dishonest by the ordinary standards of reasonable and honest people.

35.23 The Tribunal noted the Respondent had not provided any witness statement or any document in writing containing an explanation supported by a statement of truth. There was no oral evidence before the Tribunal from the Respondent as he had not attended before the Tribunal due to his health. Two medical letters had been provided from his General Practitioner dated 31 March 2016 and 5 April 2016. These confirmed the Respondent had been suffering from anxiety and depression since July 2015. This period post-dated the date of the SRA investigation which took place in February and March 2015.

35.24 So far as the evidence was concerned, the evidence before the Tribunal included that of Mr Bailey, the Forensic Investigation Officer, the documents provided and the Respondent's admission as to the facts. The Respondent's case was that he had created the client care letters in a "moment of madness" and he had not known this would be viewed as dishonest by the ordinary standards of reasonable and honest people.

35.25 The Tribunal found Mr Bailey to be consistent, credible, honest and straightforward. He did not try to give his own view as to whether the Respondent was dishonest even when cross-examined on this point. The Tribunal accepted there had been errors in the typed transcript, such as where Mr Bailey had incorrectly stated said the Respondent had not sent client care letters to the clients, and indeed, Mr Bailey himself accepted this. There was also an issue concerning parts of Mr Bailey's contemporaneous notes not being provided or available and that parts of those notes

were missing from the typed transcript. However, the Tribunal noted the Applicant had served a Civil Evidence Act Notice on 16 March 2016 and no Counter Notice had been served by the Respondent. Furthermore, in his written Response dated 23 November 2015, the Respondent accepted at paragraph 11 that the FIO's interview as set out in the Rule 5 Statement provided an accurate description. The Respondent had not suggested that notes on important parts of the interview were missing and had not challenged the accuracy of the interview notes.

35.26 The facts were that on 9 March 2015, Mr Bailey asked the Respondent to produce three client files. When the Respondent located those files, he found that they did not have client care letters on them. During his interview with Mr Bailey the Respondent stated that this was because no client care letters were ever sent on the 151 matters being investigated. On 9 March 2015 the Respondent produced three letters which had been backdated to 2 February 2014, 14 April 2014 and 16 May 2012. In two of these the Respondent had inserted the actual costs that the clients had been charged and which had been taken from the bill of costs that had been prepared at the conclusion of those cases.

35.27 The freshness of the paper on which the client care letters were written gave Mr Bailey some cause for concern and he asked to see electronic copies of the client care letters. Having investigated the metadata, Mr Bailey discovered the letters were created earlier that same day.

35.28 The transcript of the interview between Mr Bailey and the Respondent showed the Respondent was asked a number of questions about the letters. The Respondent did not initially admit he had created them, indeed, at page 58 of the bundle containing the transcript the Respondent stated:

> "I am asking others to do things".

When he was asked which members of staff had created the letters he stated:

> "I can't recall, it was either me or Miss [H]."

When asked again specifically who had printed one of these letters, stapled the pages and placed them in the file, he admitted he had been responsible. When the Respondent was asked whether in acting as he had, this was done to mislead Mr Bailey, he did not answer.

35.29 Whilst the Respondent's position was that he had informed Mr Bailey before the interview that he had created the client care letters, this was inconsistent with the typed interview notes and Mr Bailey's own evidence. The Tribunal preferred Mr Bailey's evidence over the Respondent's version of events.

35.30 The Tribunal found that although the Respondent claimed he was in a state of panic, there was a degree of planning and foresight in creating the client care letters and placing them on the file as the Respondent had changed the dates to coincide with the date of instructions to the firm, and he had inserted costs information from the bills of costs on the file. The Respondent's answers to Mr Bailey during interview were evasive and this clearly demonstrated he knew that what he was doing was wrong.

35.31 The Tribunal had taken into account the character references provided by the Respondent but noted that these were June 2015 and none of them made any reference to the Respondent's actions in creating the client care letters. Nor did they refer to any disciplinary proceedings or investigations. They were therefore of limited value.

35.32 Having regard to all the circumstances and having regard to the answers the Respondent gave to Mr Bailey in the interview, the Tribunal rejected his submission that he had acted in a "moment of madness". The Tribunal did not find this credible. Whilst these actions may have regularised the file, they also sought to mislead Mr Bailey and the Respondent knew this. He did not tell Mr Bailey he had put the letters on the file and had been evasive throughout the interview. The Tribunal was satisfied that the actions of the Respondent showed that he did know that his conduct would be regarded as dishonest by the standards of reasonable and honest people and therefore found dishonesty proved.

35.33 In relation to the issue of drawing an adverse inference under the Tribunal's Practice Direction Number 5, the Tribunal did not find it necessary to do so as the evidence provided and the documents before the Tribunal were sufficient for the Tribunal to make its finding.

35.34 Taking into account the Respondent's admissions, the Tribunal found Allegation 1.1 proved in its entirety, including the allegation of dishonesty.

36. **Allegation 1.2: The Respondent failed to return client monies promptly or inform clients that money was retained at the end of the matter and thereby breached Rules 14.3 and 14.4 of the SRA Accounts Rules 2011 ("the Accounts Rules").**

Allegation 1.3: The Respondent failed to give or send a bill of costs, or other written notification before taking payment of his costs from client account on a number of reviewed files and thereby breached Rule 17.2 of the Accounts Rules.

Allegation 1.4: The Respondent failed to maintain adequate books of account or conduct client account reconciliations and thereby breached Rules 1.2(f) and 29.1, 2, 4, 6 and 12 of the Accounts Rules.

36.1 The Respondent admitted Allegations 1.2, 1.3 and 1.4. Accordingly, the Tribunal found these allegations proved on the Respondent's admissions and also on the evidence of Mr Bailey and the documents before it.

Previous Disciplinary Matters

37. None.

Mitigation

38. Mr Bheeroo submitted the Respondent had not intended to cause harm or mislead the investigator. This had been a spontaneous one off incident which took place in order to sanitise and regularise client files. There was no pattern or history of dishonest conduct and this had been a spur of the moment decision. Although the Tribunal had

not found the Respondent had acted in a 'moment of madness' Mr Bheeroo reminded the Tribunal that no client funds had been misappropriated, and no harm had been caused to clients. All the breaches had been remedied and rectified. The backdating of three client letters had not caused harm to the public and was an isolated incident in an otherwise unblemished long career.

39. Mr Bheeroo submitted the Respondent's conduct had not been deliberate. He was extremely remorseful and apologised profusely for his behaviour. He had made early admissions of the Accounts breaches.

40. Mr Bheeroo provided the Tribunal with details of the Respondent's personal circumstances. He was the sole breadwinner for seven people and striking him off the Roll would have an effect of some magnitude on him. Mr Bheeroo submitted this was a case where there were exceptional circumstances. This was a one off incident in a moment of madness and indeed, the Respondent had not been facing any allegations of dishonesty when the investigation started. Prior to this incident, the Respondent had always dealt with his clients and the court with integrity.

41. Mr Bheeroo referred the Tribunal to the case of SRA v Imran [11246-2014] in which the Tribunal had found Mr Imran had acted dishonestly. In that case, the Tribunal had found Mr Imran's actions were spontaneous and not planned, and that he had made a rash and spur of the moment decision. That Tribunal concluded the public would be inclined to empathise with a young man who had worked very hard to be the first in his family to go to university and achieve a professional qualification but who then subsequently made a spur of the moment, totally misguided and foolish decision. Mr Imran's misconduct was a single episode of very brief duration in a previously unblemished career and he had shown insight and remorse. He had been the family sole breadwinner. In that case the Tribunal had been satisfied that a suspension of two years was a sufficient sanction.

42. Mr Bheeroo submitted there were distinct similarities between the Respondent and Mr Imran's case. The Respondent had not been seeking to gain any personal benefit, he was good at his job as a solicitor, he had co-operated with his regulator and deserved credit for all of this. If he had not acted in panic, in a moment of madness, then he would not have been facing such a severe sanction. Mr Bheeroo submitted the Respondent's position was less severe than Mr Imran and that a period of suspension would be appropriate in this case too.

Sanction

43. The Tribunal had considered carefully the Respondent's submissions and the character references. The Tribunal referred to its Guidance Note on Sanctions when considering sanction. The Tribunal also 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 Tribunal also considered the aggravating and mitigating factors.

44. In this case the Tribunal had found dishonesty proved. The Respondent's conduct was deliberate and calculated to mislead the regulator. The dishonest conduct had been repeated on three files, albeit over a very short timescale, the Respondent had

been evasive in the early part of his interview with the FIO, and he had not admitted immediately what he had done. The accounts breaches had taken place over a long period of time. These were all aggravating factors.

45. The Respondent had a previously long unblemished record, he had remedied all the accounts breaches having been notified of them by the FIO and his dishonest conduct had been for a very short duration. He had apologised for what he had done showing some insight, he had co-operated with the investigation and had made a number of admissions. He had rectified all the accounts breaches once they had been drawn to his attention. The Respondent stated he had been stressed at the time due to his personal circumstances and these were all mitigating factors.

46. The Tribunal concluded that the Respondent's motivation in acting as he had done was to get through the investigation without having to have difficult conversations or further issues arising. The Tribunal accepted there had been no harm to clients or the public and no breach of trust. However, misleading the regulator did cause harm to the reputation of the profession.

47. The Tribunal considered the cases of Bolton v The Law Society [1994] I WLR 512, Bultitude v The Law Society, and Burrowes v The Law Society [2002] All ER (D) 231 (Dec) to which it had been referred. In Burrowes v The Law Society Mr Burrowes' actions had been completely out of character, he had not benefited financially or otherwise and the misconduct had been an isolated incident in a long unblemished career. The penalty of striking him off the Roll had been overturned on the basis that it was disproportionate.

48. The Tribunal also considered very carefully the later case of SRA v Sharma [2010] EWHL 2022 (Admin) in which Mr Justice Coulson had stated:

> "13. …. (a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see Bolton and Salisbury. This is the normal and necessary penalty in cases of dishonesty, see Bultitude. (b) There will be a small residual category where striking off will be the disproportionate sentence in all the circumstances, see Salisbury. (c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, such as Burrowes, or over a lengthy period of time, such as Bultitude; whether it was a benefit to the solicitor (Burrowes), and whether it had an adverse effect on others.
>
> 34. Their first finding was that "there was no harm to the public". I assume that by this the Tribunal meant that no client suffered financial loss. It seems to me that this is a very narrow way of looking at dishonesty, and wholly fails to recognise the wider issues involved. In my judgment there is harm to the public every time a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."

49. The Tribunal also considered the case of SRA v Imran. The Tribunal found it could distinguish the case of Mr Imran because Mr Imran had been an inexperienced trainee solicitor whereas the Respondent had been a solicitor for over 10 years and therefore he was not inexperienced. The Respondent had not attended before the Tribunal and had failed to use the opportunity to personally explain his position, unlike Mr Imran who had given evidence. The Tribunal did accept the Respondent had some medical issues. The other distinguishing factor was that Mr Imran had provided strong testimonials, he had shown insight and remorse, he had self reported the incident and he had made immediate, frank and open admissions of his dishonesty.

50. The Tribunal accepted the Respondent's case was a sad one. This had been an isolated incident in an otherwise unblemished career. The main focus of the SRA investigation had been the Solicitors Accounts Rules breaches not the client care letters, but the Respondent's misconduct had substantially changed the investigation. He had sought to dishonestly mislead his regulator by consciously fabricating 3 letters. Whilst there had been a number of accounts breaches, these were all rectified and no clients suffered losses. As stated in Bolton, solicitors needed to be able to be trusted to the ends of the earth. Whilst no client had suffered financial loss, there was still harm to the reputation of the profession.

51. Taking all the circumstances into account, the Tribunal was satisfied that there were no exceptional circumstances and that accordingly the appropriate sanction necessary was to strike the Respondent off the Roll of Solicitors. This would maintain public confidence and protect the reputation of the profession.

Costs

52. Mr Johal requested an Order for the Applicant's costs in the total sum of £10,000. Mr Bheeroo confirmed this amount had been agreed.

53. Mr Johal submitted there was no information available about the Respondent's financial circumstances. He had been asked on 16 March 2016 to provide a Statement of Means but had failed to do so.

54. Mr Bheeroo confirmed the Respondent only had his firm to provide him with an income and that had been intervened in July 2015. The Respondent accepted he should pay the costs but requested an Order that costs should not be enforced without leave of the Tribunal. Mr Bheeroo was unable to explain why the Respondent had not supplied a Statement of Means but reminded the Tribunal of his ill health.

55. The Tribunal had considered carefully the matter of costs and was satisfied that the amount of costs agreed at £10,000 was reasonable. Accordingly, the Tribunal made an Order that the Respondent should pay the Applicant's costs in the sum of £10,000.

56. In relation to enforcement of those costs, the Tribunal had particular regard for the case of SRA v Davis and McGlinchey [2011] EWHC 232 (Admin) in which Mr Justice Mitting had stated:

> "If a solicitor wishes to contend that he is impecunious and cannot meet an order for costs, or that its size should be confined, it will be up to him to put before the Tribunal sufficient information to persuade the Tribunal that he lacks the means to meet an order for costs in the sum at which they would otherwise arrive."

57. In this case the Respondent had not provided any documentary evidence of his income, expenditure, capital or assets. The Tribunal's Standard Directions dated 21 October 2015 had required the Respondent to file a Statement of Means by 9 March 2015 if he wished his means to be taken into consideration. He had failed to do this. The Applicant had written to the Respondent on 16 March 2016 to remind him again to file a Statement of Means but he had still not done so. It was therefore difficult for the Tribunal to take a view of his financial circumstances.

58. The Tribunal was also mindful of the cases of William Arthur Merrick v The Law Society [2007] EWHC 2997 (Admin) and Frank Emilian D'Souza v The Law Society [2009] EWHC 2193 (Admin) in relation to the Respondent's ability to pay the Applicant's costs in light of the Tribunal's Order on sanction. In this case, it was possible the Respondent could gain some form of alternative employment, given his age. The Tribunal did not therefore consider it was necessary to restrict enforcement of the costs Order, particularly in the absence of a Statement of Means.

Statement of Full Order

59. The Tribunal Ordered that the Respondent, RAFIQUE HUSSAIN CHOWDHURY solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £10,000.00.

Dated this 23rd day of May 2016
On behalf of the Tribunal

A. N. Spooner
Chairman