

# SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 11446-2015

## **BETWEEN:**

SOLICITORS REGULATION AUTHORITY

Applicant

and

ANTHONY REESE WHITWELL

Respondent

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Before:

Mr A. Ghosh (in the chair)

Mr P. Jones

Mr M. Palayiwa

Date of Hearing: 4 October 2016

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## **Appearances**

Andrew Tabachnik, barrister of 39 Essex Chambers, 81 Chancery Lane, London WC2A 1DD, instructed by James Dunn, solicitor of Devonshires Solicitors, 30 Finsbury Circus, London, EC2M 7DT, for the Applicant

Scott Allen, barrister of 4 New Square, London WC2A 3RJ instructed by Clare Hughes-Williams, solicitor of DAC Beachcroft LLP, Sovereign House, Imperial Way, Newport, NP10 8UH for the Respondent.

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## **JUDGMENT**

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## **Allegations**

The Allegations originally made against the Respondent by the Applicant were that whilst a Partner in Pennington's solicitors LLP ("the Firm"):

1. Between 1 January 2011 and 5 October 2011, he acted for its client, Mrs JDB, in the drafting of her will ("the Will"), when he was in a personal relationship with DF, who was a significant beneficiary under that Will, and therefore acted when there was a conflict of interest, or a significant risk of a conflict of interest, contrary to Rule 3.01 of the Solicitors Code of Conduct 2007 ("SCC 2007");
2. Between 1 January 2011 and 5 October 2011, he failed to notify his client, Mrs JDB, when responsible for drafting her Will, that he had a duty to advise her to take independent advice about a bequest of a significant amount to DF, who was an employee of the Firm, contrary to rule 3.04 of the SCC 2007;
3. Between 13 January 2012 and around 30 June 2012, he exercised the discretion that he held under the Will to appoint a legacy of £550,000 in money and other assets to DF, an employee of the Firm with whom he was in a personal relationship, and thereby acted without integrity, contrary to Principle 2 of the SRA Principles 2011;
4. Between 13 January 2012 and around 30 June 2012, he exercised the discretion that he held under the Will to appoint a legacy of £550,000 in money and other assets to DF, an employee of the Firm with whom he was in a personal relationship, and thereby allowed his independence to be compromised, contrary to Principle 3 of the SRA Principles 2011;
5. Between 13 January 2012 and around 30 June 2012, he exercised the discretion that he held under the Will to appoint a legacy of £550,000 in money and other assets to DF, an employee of the Firm with whom he was in a personal relationship, and thereby acted where there was an own interest conflict or significant risk of an own interest conflict, contrary to Outcome 3.4 of the SRA Code of Conduct 2011 ("SCC 2011");
6. On or around 2 December 2013, he told material untruths to two investigators of the Applicant by falsely claiming that he was not responsible for the preparation of a Deed of Appointment relating to the Will, and thereby acted without integrity contrary to Principle 2 of the SRA Principles 2011;
7. On or around 27 November 2014, he caused his solicitor, JW, to provide material untruths to a regulatory manager of the Applicant by falsely claiming that he was not responsible for the preparation of a Deed of Appointment relating to the Will, and thereby acted without integrity contrary to Principle 2 of the SRA Principles 2011;
8. Between 17 June 2012 and 25 June 2012, he instructed his trainee solicitor, MB, to witness signatures on a Lasting Powers of Attorney when MB was not present at the time that the original signatures were placed on those documents, and thereby acted without integrity, contrary to principle 2 of the SRA Principles 2011.

9. Whilst dishonesty was alleged with respect to all of the Allegations, proof of dishonesty was not an essential ingredient for proof of any of the Allegations.

### **Documents**

10. The Tribunal considered all the papers in this matter including:

### **Applicant**

- Application and Rule 5 Statement with exhibit JHRD/1 dated 12 November 2015
- Further and Better Particulars of Rule 5 Statement and exhibit JHRD/2
- Statement of Agreed Facts, Admissions and Outcome dated 15 September 2016 (“SAF”)
- Applicant’s Note to Tribunal for Hearing on 4 October 2016
- Costs Schedule

### **Respondent**

- Answer to Rule 5 Statement
- Amended Answer to Rule 5 Statement
- Respondent’s Answer to Further and Better Particulars of Rule 5 Statement
- Note for the Tribunal on Behalf of the Respondent

### **Preliminary Matters**

#### Application for the matter to be dealt with by way of Agreed Outcome

11. The parties had invited the Tribunal to deal with these Allegations in accordance with the SAF, annexed to this Judgment. The Applicant applied under Rule 11(6) of the Solicitors (Disciplinary Proceedings) Rules 2007 (“SDPR”) for permission to withdraw Allegation 8 and the dishonesty elements of Allegations 1 and 2.
12. The Tribunal had declined to deal with the application on the papers as it wished to hear from the parties before determining whether or not to grant the applications.
13. The parties applied for the hearing of their joint application for the outcomes proposed by them in the SAF to be endorsed by the Tribunal, to be held in private. This was on the basis that privileged discussions may be referred to which may prejudice any future substantive hearing if the Tribunal were to decide not to approve the SAF and the outcomes proposed therein. The parties’ application for the substantive hearing of their application for their proposed outcomes to be endorsed by the Tribunal to be held in private, was heard in camera.
14. The Tribunal enquired whether the admissions made by the Respondent in the SAF were unconditional or whether they were conditional on the SAF and the proposed outcomes therein being approved by the Tribunal. After taking instructions, Mr Allen confirmed that the Respondent’s admissions were unconditional and the position would not change even if the SAF and the proposed outcomes were not to be approved. The Tribunal noted that there could be no prejudice to any party or any question of privilege in that case. Both parties withdrew their applications for privacy and the hearing proceeded in public.

### Applicant's Submissions

15. Mr Tabachnik submitted that while any dishonesty on the part of a solicitor was a very serious matter, gradations of seriousness occurred. In the present case the Respondent has tendered admissions of dishonesty to the most serious of the allegations and had put forward no exceptional circumstances, accepting that the inevitable sanction would be a strike-off.
16. Prior to the SAF, by way of his amended answer, the Respondent had admitted Allegations 1-7, including lack of integrity, but had denied Allegation 8 and any dishonesty. By way of the SAF, the Respondent now admitted dishonesty in respect of allegations 3-7 with the Applicant seeking to withdraw the dishonesty charges relating to Allegations 1 and 2 and to withdraw Allegation 8 in its entirety. In such circumstances the public interest and the interests of the profession were sufficiently vindicated by the proposed order set out in the SAF without the need to pursue the remaining allegations of dishonesty. The Applicant was conscious that the proportionality of such a course would be questionable in the light of the admissions made and the acknowledgement of the inevitable sanction.
17. On the matter of costs, the parties had agreed a compromise figure of £56,500 which reflected 77.2% of the costs incurred. The Tribunal queried the basis of this as there was a concern that the profession would be left to pick up the balance. Mr Tabachnik submitted that by reaching this agreement, the need for argument as to the availability or quantum of reasonable costs by way of a summary assessment, the costs of the detailed assessment if ordered, or arguments as to the Respondent's means, was avoided. This was consistent with the overriding objective. Mr Allen confirmed that this also reflected the Respondent's position.

### Respondent's Submissions

18. Mr Allen endorsed the submissions made on behalf of the Applicant. The Respondent had never previously thought of himself as a dishonest person, and his recollection of the period was poor. He could not fully explain why he had acted in the way he did. He now admitted the allegations of dishonesty to which there appeared objectively to be no credible answer.
19. The Respondent's focus now was on preserving his improved mental state and rebuilding his relationship with his wife. He no longer wished to practise as a solicitor and had no desire to face a contested hearing which raked over these issues which had already caused him and his family much pain. He wished to put the chapter of his life to which these Allegations related, and about which he was ashamed, behind him. The Respondent accepted that he had not acted in accordance with the high standards that he had hitherto set for himself, and which the profession expected.
20. It was for these reasons that the Respondent now admitted a number of the allegations of dishonesty made against him. He invited the Tribunal to note that it was shortly after the Applicant provided full particularisation of its case on dishonesty, within the voluntary Further and Better Particulars of the Rule 5 statement, that the Respondent indicated to the Applicant that he was willing to be struck off the Roll and discussions began in respect of what in due course became the SAF.

21. The Tribunal sought clarification as to the Respondent's position with regard to dishonesty. The Respondent's Note suggested that at the material time he may not have appreciated that he was acting dishonestly by the ordinary standards of reasonable and honest people. If that was the case then his position would not be consistent with the second limb of the test for dishonesty in Twinsectra v Yardley and Others [2002] UKHL 12. Mr Allen confirmed that the Respondent had been fully advised as to the test in Twinsectra. The Respondent struggled to recall his state of mind at the time. The only way he could explain his actions was that he must have been dishonest and that at the time he must have known he was acting dishonestly.
22. The Tribunal asked for clarification from both parties as to the position with regard to the involvement of MB, the Trainee Solicitor who was the subject of Allegation 8, which the Applicant was seeking to withdraw. Mr Tabachnik submitted that it would not be proportionate to spend two days at the Tribunal having a contested hearing about the content of a short meeting that took place many years ago. Allegation 8 had not been brought in order to vindicate the reputation of MB, it had been brought in relation to the Respondent's regulatory position. Mr Allen confirmed that the Respondent was not making any allegation against MB and he had not cast any aspersions even when the matters remained contested. His position had been that there had been nothing more than a misunderstanding.

### **Findings of Fact and Law**

23. 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 Tribunal considered whether the admissions had been properly and unequivocally made. Having heard the clarifications on behalf of the Respondent, namely that the admissions were unconditional and unequivocal, the Tribunal was now satisfied that the admissions were properly made.
24. In the circumstances the Tribunal was satisfied that it was a reasonable and proportionate step for the Applicant to withdraw the Allegations of dishonesty in respect of Allegations 1 and 2 and to withdraw Allegation 8. The Tribunal found that the SAF was a proper basis for the resolution of these matters.

### **Previous Disciplinary Matters**

25. None.

### **Sanction**

26. The Tribunal referred to its Guidance Note on Sanctions when considering whether the proposed sanction was appropriate. The Respondent had not submitted that there were any exceptional circumstances such as to make a strike-off inappropriate. The Respondent had admitted to serious Allegations of dishonesty and the proposed sanction was clearly appropriate.

**Costs**

27. The Tribunal was satisfied that the figure agreed between the parties was a reasonable and proportionate figure. The Applicant's submission that time and resources had been saved by avoiding detailed argument on the matter had force. In the circumstances the Tribunal approved the figure of £56,500.

**Statement of Full Order**

28. The Tribunal Ordered that the Respondent, ANTHONY REESE WHITWELL, Solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that the Respondent do pay the costs of and incidental to this application and enquiry fixed in the sum of £56,500, to be paid by 29 November 2016; and pursuant to Rule 11(6), the Tribunal consents to the withdrawal by the Applicant of the following allegations, which the Applicant so withdraws:

Allegation 8, including the dishonesty allegation in that regard; and  
The dishonesty allegations in relation to Allegations 1 & 2.

Dated this 27<sup>th</sup> day of October 2016  
On behalf of the Tribunal

A. Ghosh  
Chairman

IN THE MATTER OF THE SOLICITORS ACT 1974 (AS AMENDED)

SOLICITORS REGULATION AUTHORITY

Applicant

-and-

ANTHONY REESE WHITWELL

Respondent

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STATEMENT OF AGREED FACTS,  
ADMISSIONS AND OUTCOME

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Note: Attached to the Rule 5 statement and its Further and Better Particulars submitted in these proceedings are paginated bundles of documentation marked JHRD1 & JHRD 2. References to page numbers in this statement are references to pages in JHRD 1, unless otherwise indicated.

All facts contained within this statement are agreed by the Respondent. That agreement is confirmed by his signature at the bottom of this document.

**The Allegations**

The Respondent, Anthony Reese Whitwell, admits that, whilst a partner in Penningtons Solicitors LLP (the “Firm”), and as detailed further in paragraphs:

1. 15 to 27 below, between 1 January 2011 and 5 October 2011, he acted for his client, Mrs JDB, in the drafting of her will (the “Will”), when he was in a personal relationship with DF, who was a significant beneficiary under that Will, and therefore acted when there was a conflict of interest, or a significant risk of a conflict of interest, contrary to Rule 3.01 of the Solicitors Code of Conduct 2007 (“SCC 2007”);
2. 15 to 27 below, between 1 January 2011 and 5 October 2011, he failed to notify his client, Mrs JDB, when responsible for drafting her will, that he had a duty to advise her to take independent advice about a bequest of a significant amount to DF, who was an employee of the Firm, contrary to Rule 3.04 of the SCC 2007
3. 27 to 35 below, between 13 January 2012 and around 30 June 2012, he exercised the discretion that he held under the Will to appoint a legacy of £550,000 in money and other assets to DF, an employee of the Firm with whom he was in a personal relationship, and thereby acted without integrity, contrary to Principle 2 of the SRA Principles 2011 (“SRA Principles 2011”);

4. 27 to 35 below, between 13 January 2012 and around 30 June 2012, he exercised the discretion that he held under the Will to appoint a legacy of £550,000 in money and other assets to DF, an employee of the Firm with whom he was in a personal relationship, and thereby allowed his independence to be compromised, contrary to Principle 3 of the SRA Principles 2011;
5. 27 to 35 below, between 13 January 2012 and around 30 June 2012, he exercised the discretion that he held under the Will to appoint a legacy of £550,000 in money and other assets to DF, an employee of the Firm with whom he was in a personal relationship and thereby acted where there was an own interest conflict or significant risk of an own interest conflict, contrary to Outcome 3.4 of the SRA Code of Conduct 2011;
6. 27 to 35 and 41 below, on or around 2 December 2013, he told material untruths to 2 investigators of the Applicant by falsely claiming that he was not responsible for the preparation of a Deed of Appointment relating to the Will, and thereby acted without integrity, contrary to Principle 2 of the SRA Principles 2011;
7. 27 to 35 and 42 below, on or around 27 November 2014, he caused his solicitor, JW, to provide material untruths to a Regulatory Manager of the Applicant by falsely claiming that he was not responsible for the preparation of a Deed of Appointment relating to the Will, and thereby acted without integrity, contrary to Principle 2 of the SRA Principles 2011;
8. The Respondent admits Allegations 3 – 7 on the basis that the Respondent acted dishonestly and the Respondent admits these allegations and admits dishonesty in accordance with the combined test set out in of *Twinsectra Ltd v Yardley* [2002] UKHL.

### **Factual Background**

9. The Respondent was born in 1958 and admitted to the Roll of Solicitors on 1 March 1983. He previously practised at the Godalming office of the Firm, but left in January 2013.
10. At present the Respondent remains upon the Roll of Solicitors, although he has not been practising as a solicitor since 23 September 2015.
11. At all material times the Respondent was subject to the regulation of the Applicant.
12. On 15 May 2013 a duly authorised officer of the Applicant (the “FI Officer”) commenced an inspection of the books of account and other documents of the Firm. That inspection culminated in a report dated 22 July 2014 (pages 1 to 228) (the “FI Report”).

### **Dramatis Personae**

13. DF was an associate solicitor at the Firm, working as part of the Respondent’s team. At all material times until around August 2012 she was in a confidential personal



relationship with the Respondent (164). Mr Whitwell informed Ms F that the relationship was over on 14 August 2012, and told his wife about the affair on 20 August 2012. Ms F resigned from the Firm with effect from 12 October 2012, albeit her last working day in the office was 14 September 2012 (20).

14. At all material times, DS was a consultant in the Firm in the same department as the Respondent.

### Mrs JDB

15. Mrs JDB was born on 26 June 1921 (229). She was married to AB until he passed away in 1997 (22). Mrs JDB was a life long friend of Ms F's mother (21), KF, and Ms F had known Mrs JDB since she was a child. AB and Mrs JDB treated DF "like a daughter"(21).

16. Ms F introduced Mrs JDB to the Firm in 2010 in order to prepare a Lasting Power of Attorney. The work was assigned to RR, a solicitor in the Firm's private client team. The sole appointed attorney was Ms F (160).

17. In January 2011, the Respondent was asked by Ms F to advise Mrs JDB in connection with a review of her will. Prior to that date, Mrs JDB had a will dated 17 November 2006 and codicil dated 8 January 2009 (at pages 230 – 237) which, taken together, left:

- 17.1. £30,000 to PN and, if she predeceased, her son, NAW;
- 17.2. £30,000 to KF [Ms F's mother], and if she predeceased, to Ms F;
- 17.3. £50,000 to Ms F;
- 17.4. £5,000 to KW;
- 17.5. £5,000 to WSE.

And the remainder to various charities.

18. On 27 January 2011, the Respondent attended upon Mrs JDB at the nursing home where she was living in order for the Respondent to take instructions from Mrs JDB on the terms of a new will.

19. A handwritten attendance note of the meeting is at page 114. This document appears to have been written in 3 different inks.

- 19.1. The title, at the top right, stating "Meeting Notes";
- 19.2. The date, at the top right, and the remaining top half of the document; and
- 19.3. "Discussing options re Will format" and below

The Respondent has stated that this was "the complete note before I drove away from the nursing home" (90).

20. A typewritten attendance note of the meeting is at page 115 and 116. The document states that it was dictated on 28 January 2011 (116). However, towards the end of the administration of the Mrs JDB Estate, the Respondent was approached by his colleague, DS, who informed him that "There's a bit of a concern don't think it's

very serious but there's a bit of a concern about the administration of the [B] Estate. I suggest you go back over your notes and you check them over for the benefit of the auditors and make sure that they are all in apple pie order". Thereafter, the Respondent changed the document on the Firm's computer system and replaced the original version on the file with the amended version. The original version has been destroyed, and the Firm's computer system does not hold a copy. The Respondent states that the change was simply to add the phrase "(see above re the NRB and transferrable NRB)" in the 7<sup>th</sup> line of the second paragraph on page 116 (88).

21. The typed attendance note now records Mrs JDB's instructions were that Ms F was to receive as much tax free cash as possible, and that the Respondent should not be too obvious in the drafting which achieved this aim, because Mrs JDB did not want Ms F to be aware of the extent of her legacy yet.
22. The attendance notes indicate that Ms F was present when the Respondent arrived, but left the room after introducing the Respondent to Mrs JDB. She did not take part in the meeting (115). She returned to visit Mrs JDB after the meeting was concluded (116). Mrs JDB's instructions to the Respondent were to prepare a will transferring her residuary estate (the "Residuary Estate") to the executors, who were to be partners of the Firm, to be held on a discretionary trust (the "Will"). There was then to be a letter of wishes (the "Letter of Wishes") which provided further guidance as to how Mrs JDB wished the discretion to be exercised.
23. Ms F was named as a beneficiary under the discretionary trust in the Will (125) and in the Letter of Wishes (131). The Letter of Wishes, at page 131, stated that
  - “1. I would like you to make the following tax free gifts upon my death of up to the extent of any unused inheritance tax exemption available on my death, namely:
    - (a) Thirty thousand pounds (£30,000) to [PN];
    - (b) Thirty thousand pounds (£30,000) to [KF] but if she dies before me then to her daughter [DF];
    - (c) Fifty thousand pounds (£50,000) to [DF]; and
    - (d) Five thousand pounds (£5,000) to [WSE].”

After these distributions, the residue was then to be divided equally between 18 charities.

24. The Will and the Letter of Wishes were subsequently approved and signed by Mrs JDB on 5 February 2011, and appropriately witnessed by third parties (124 – 130 and 131 – 132).
25. In the circumstances, on the face of the Will and the Letter of Wishes taken together, the only material changes from the previous will / codicil were:
  - 25.1. The removal of NAW (the son of PN, who she wanted to exclude from her estate) and KW (her window cleaner, with whom she had lost contact) (115/116); and
  - 25.2. The reference to “up to the extent of any unused inheritance tax exemption available on my death”. This applied to all the gifts, not just that to Ms F.

26. Apart from this latter discretionary direction applying to all the gifts, on the face of the Will and the Letter of Wishes, there was no material change from the previous will / codicil as to the amount that was bequeathed to Ms F.
27. At no time prior to her death did the Respondent notify Mrs JDB that he was in a personal relationship with Ms F (84). That personal relationship was also not disclosed to anyone within the Firm (91). That personal relationship existed from before Mrs JDB being introduced to the Firm, to August 2012.
28. Mrs JDB died on 5 October 2011. Probate was granted in the District Probate Registry at Winchester on 13 January 2012 with the Respondent as the sole executor, with power reserved to other executors (133). Further probate was granted in the High Court of Justice of the Isle of Man on 15 March 2012, again with the Respondent as the sole executor, with power reserved to other executors (134).
29. The probate work on the Estate of Mrs JDB was undertaken by the Respondent and his assistant solicitor, HG.
30. The Will and the Letter of Wishes combined provided the trustee(s) with a wide power of appointment of the Residuary Estate to the Beneficiaries under the Will. In other words, by virtue of the Will and Letter of Wishes which the Respondent had himself drafted in accordance with what the typed attendance note now records were Mrs JDB's instructions, the trustee(s) had a significant discretion to decide who should benefit under the Will.
31. On 6 February 2012, HG prepared a first draft Deed of Appointment which intended to evidence the exercise of the trustees' power of appointment conferred by the Will. A copy is at page 239. This document states:

“BY: Anthony Reese Whitwell of Highfield, Brighton Road, Godalming, Surrey GU7 1NS and ?? (the ‘**Appointors**’).

...

B. The Appointors are the present trustees of the Will (‘**the Trustees**’).

C. The Appointors wish to exercise their power of appointment under clause 3.2 of the Will in the following manner ... [our underlining, for emphasis]
32. This draft Deed of Appointment was reviewed by the Respondent between 16.25 and 16.39 on 21 March 2012 (238). Then, at 16.39 on 21 March 2012, the Respondent created his own document, document number 12473602 (the “Respondent’s Deed”), using a precedent from the Firm’s computer system. This work by the Respondent was concluded at 18.10 on 21 March 2012. The Respondent’s Deed was subsequently printed on 18 May 2012, modified on 18 May 2012, printed again on 29 May 2012, and subsequently modified on that date. Only the Respondent ever did anything on the Firm’s computer system with the Respondent’s Deed (whether viewing it, modifying it or printing it) from the time that it was created up to 7 December 2012 (241 - 242).

33. The Respondent's Deed is at page 139. The reference at the bottom of that page states "12473602". This document states:

"BY: ANTHONY REESE WHITWELL of Highfield Brighton Road Godalming Surrey GU7 1NS (in this deed called the 'Appointor').

...

B. The Appointor is the present executor and trustee of the Will ('the Trustees').

...

D. The Appointor wishes to exercise the power of appointment under clause 3.2 of the Will in the following manner ..."

34. The Respondent posted 2.2 hours on the Firm's time recording system for 21 March 2012 stating (248):

"File Note and email. Letter to benefy Drafting deed of appointment"

35. The Respondent's Deed was executed at some point after 21 March 2012, but before around 30 June 2012, although it was dated 20 January 2012 on page 139 and 21 January 2012 on page 140. The Respondent's Deed split the residuary estate into 3 funds and appointed them as follows:

35.1. The first fund:

35.1.1. PN - £30,000

35.1.2. KF - £30,000

35.1.3. Ms F - £225,000; and

35.1.4. WSE - £5,000

35.2. The second fund, being for a cash sum not exceeding £325,000, which was conditional on approval of a claim submitted to HM Revenue and Customs in respect of the application of AB's nil rate band to Mrs JDB's estate, to Ms F;

35.3. The third fund, being the remainder, to 17 of the 18 charities mentioned in the Letter of Wishes. The Perennial (Gardner's Royal Benevolent Society) was omitted.

36. Subsequently these distributions were made, save that various relatively small adjustments were made in the payments to Ms F to take account of jewellery and chattels that she received instead. In the circumstances, Ms F, with whom the Respondent was in a personal relationship, received £550,000 in cash, jewellery and chattels from the Residuary Estate as a result of the Respondent personally, and singularly, exercising a discretion that he himself had drafted.

37. On 6 December 2012, at page 170, Tim Palmer, the compliance officer for legal practice for the Firm, reported the above matters to the Applicant.

38. On 7 January 2013, at page 160, the Respondent himself reported the above matters to the Applicant, stating that the delay was as a result of the Firm only providing him with a copy of the file on that day.
39. Subsequently the Firm referred the Estate of JDB to an independent firm of solicitors, Paris Smith, to take over as trustees, and to exercise the discretion to distribute the Residuary Estate again. Ms F agreed to execute a deed of variation to return the funds to the estate so that a new trustee could independently exercise the discretion afresh (253).
40. On 9 December 2013, two independent partners at Paris Smith, Crispin Jamesen and David Bird, considered the evidence. They concluded, at pages 259 - 260:

“On balance, the position is less than clear (and doubtless we would not have been instructed otherwise). It does seem, however, that the construction of [JDB]’s wishes which is least inconsistent with the apparent evidence is that the full nil rate band available to her after fixed payments to the other three named beneficiaries, in addition to that of her late husband, be appointed to [DF].”

### **The Applicant’s Investigation**

41. On 2 December 2013, the Respondent was interviewed by two officers from the Applicant. His solicitor, JW, was also present. During the course of that interview, it was stated (101):

“HS (SRA) - ... the Deed of Appointment ... I understand from what you were saying earlier there’s quite a lot of significant point as it’s the basis upon which the distributions was made I assume

AW (Respondent) – it’s the point at which you would demonstrate the exercise of the discretion of the trustees and at this point I would expect there to be two trustees on this document there are not, when I saw this document only as recently as the other week when, when [the SRA] sent these documents through I can only say that I was incandescent with rage, I should not have been the only person on that Deed of Appointment, I would not have expected it and [HG] who drafted that document should have known that, that document has not been executed in accordance with accepted standard practice. There is no way if I’d known I was the only signature on that document I would of signed it now you’re going to ask me why did I sign it ... do you remember me explaining to the pressure that I was under with the amount of the volume of paperwork, I know exactly how this document I can imagine exactly how this document was presented to me they all knew I was under significant pressure in terms execution and I’ve explained to you that [HG] sat directly behind me ...

CG (SRA) – for best not to imagine if you can, if you can if you can be what you can recall

AW (Respondent) – I, I as best

CG (SRA) – I appreciate I understand

AW (Respondent) – as best I can imagine the thousands of documents

CG (SRA) – think may of happened but if you can think back

AW (Respondent) – when this document, when she prepared this document she would of swivelled round in her chair, I would of swivelled round in mine and she'd of said Anthony sign this I'd of said [HG] what is this, she'd of said this is the Deed of Appointment in relation to the [Mrs JDB] estate and she'd of would presented it to me like that

CG (SRA) – can you remember how it was presented to you

AW (Respondent) – yes because that 9 times out of 10 was how all documents were presented to me

...

AW (Respondent) – [HG] would have known that there should be two signatures on this Deed.

...

AW (Respondent) – she would know that she would require two signatures on a Deed of Appointment, she might well of started off with one executor with power reserved to the other

CG (SRA) – you assumed she knew that but you don't recall giving her training in that respect or signing off any other documents of a similar nature to satisfy yourself that she definitely knew that

AW (Respondent) – am I going to be, am I going to be um criticised for not specifically sitting down with each and every solicitor that walks through that department not giving them instructions and education on how to do a Deed of Appointment ... I'm sorry that's not acceptable

...

CG (SRA) – so with the Deed of Appointment am I right in saying you weren't aware of that ie yours being the only signature on there until you were given a copy of this by

AW (Respondent) – yes

CG (SRA) – Penningtons

AW (Respondent) – no by you

...

CG (SRA) – but you didn't give instructions to Hannah as to who the other trustee would be that would need to sign it

AW (Respondent) – yes I did, yes I did I very specifically said to [HG] the administration of this estate should remain within the private client team in Godalming by that it was clear that in respect of the execution of the Deed of Appointment it will be [LD] and myself who will be executing because we were the only two partners ...”

42. On 27 November 2014, the Respondent's Solicitor, JW, responded to questions that had been raised by the Applicant. She stated, on behalf of the Respondent, that (288 & 292):

“9. ... Our client entrusted the administration of the estate to one of his colleagues [HG] who was competent in these matters. He expected that when it came to recording the distribution of the estate as Trustee (in a Deed of Appointment) he would be joined by [LD], a fellow partner in the private client department in Godalming. This expectation is supported by his attendance note dated 21 December 2011 [Appendix A] recording a meeting with Ms [F], our client recovers in the 5<sup>th</sup> paragraph; “*There are two possible options open to the executors*” (our emphasis). Our client failed to notice that his colleague dealing with the estate had not included [LD] as a co-Trustee in the Deed of Appointment. This was because of the way in which the Deed (and all other items our client was expected to sign) was presented to him folded at the page for signature.

10. Our client acknowledges and accepts that, in a highly time-pressured environment, he failed to check the whole document, relying upon the expertise of his colleague to draft it properly.

11. In these circumstances, believing he (as Trustee) had been joined in the decision as to the distribution of the estate by another partner, and believing they would be executing the client's instructions – on which he would happily have been questioned and challenged at any stage by his fellow partner – he felt he was acting with complete integrity and independence and in a way consistent with departmental practice. Our client accepts that, in view of the relationship, his independence could have been compromised and he should not have put himself at risk of that happening. However, he knew that he was following the client's

instructions in the matter and, with another partner as Trustee, there would be sufficient safeguards in place.

...

43. On 9 October 2015, the Respondent wrote a letter to Devonshires Solicitors LLP entitled “Discrepancies in Memo dated 17 March 2015” (308 - 311). In this letter, he stated:

“When it came to acting as a trustee – to make decisions about the distribution of the residue of the estate – I expected to be joined by another partner, to whom power had properly been reserved. I have explained carefully and honestly the circumstances surrounding the preparation of the Deed recording the trustee decision which was prepared by the solicitor handling the case ... I have acknowledged that I did not check the whole document carefully enough, trusting her as an experienced solicitor to get this basic point right.

I am now in trouble for that oversight with all the unpleasant suggestions that I was somehow going to benefit, directly or indirectly from the estate. **At no time** were there any discussions about me seeking or receiving any benefit; that would have been dishonest and unprofessional. I was a partner earning very good money in a top 100 law firm and I did not need any more ... No one has accused me of ever suggesting to [HG] that I should be the only trustee. No one has provided any evidence to suggest I ever asked [HG] to be the only executor and the only trustee. I expected her to prepare the papers properly; the only crime I feel I am guilty of here is not ensuring the final document she asked me to sign had that second trustee’s name on it.” [Respondent’s emphasis]

### **Dishonesty**

44. The Respondent's actions in respect of allegations 3 to 7 were dishonest according to the combined test laid down in *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12 which requires that the person has acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he was acting dishonestly. The Respondent says that he now has no real recollection of his mindset and thought processes at the times material to this matter, but accepts that, viewed objectively, his actions as alleged in allegations 3 to 7 were dishonest, and that subjectively he must have appreciated this at the material time. In the circumstances, he does not dispute any of these allegations of dishonesty.

### **Dishonesty in relation to Allegations 3, 4 and 5**

45. The Respondent’s admitted breaches of Principles 2 and 3 of the SRA Principles 2011 and of Outcome 3.4 of the SRA Code of Conduct 2011, in acting in respect of



the discretionary appointment of substantial legacies to Ms F out of JDB's estate, were dishonest breaches on his part, satisfying both the objective and subjective elements of the test, in that:

- 45.1. The Respondent deliberately took steps (in particular, drafting, executing and implementing the Deed of Appointment at (139-143)) which enabled him to exercise the full and unchallenged power to enrich a person with whom he was in an undisclosed personal relationship. This was improper. The Respondent does not contest the proposition that he must have appreciated that this was so. Taking such steps when appreciating the impropriety of the same is dishonest by the ordinary standards of reasonable and honest people.
- 45.2. As the Respondent must have appreciated, acting as sole appointor would ensure he was unchallenged as to the extent of any discretionary appointments made to Ms F, and it would also ensure no difficult questions were asked as to how the Respondent came to act in relation to a Will where a significant bequest was to be made to an employee of the Firm. Acting in this manner, with the intention of taking himself beyond the scrutiny of other partners in the Firm, is clear evidence of the Respondent's dishonest state of mind at the material time.

#### **Dishonesty in relation to Allegations 6 and 7**

46. In falsely claiming that he was not the draftsman of the Deed of Appointment, the Respondent acted dishonestly, satisfying both the objective and subjective elements of the test, in that:
  - 46.1. The particulars set out in paragraph 45 above are repeated.
  - 46.2. Making a denial as to authorship of a document, which is known to be a false denial, is dishonest by the ordinary standards of reasonable and honest people.
  - 46.3. There is indisputable (and now undisputed) evidence that the Respondent himself drafted the said Deed in the period 21 March 2012 to 29 May 2012.
  - 46.4. Questions regarding the administration of Mrs JDB's estate had arisen by the autumn of 2012. Mr S told the Respondent of "concern" regarding "the [JDB] Estate" in about October 2012, in consequence of which the Respondent amended his typed attendance note and discarded the original, as he has admitted (88-89).
  - 46.5. Thereafter, the Firm investigated the matter, and discussions with the Respondent on both 29 and 30 November 2012 took place (JHRD 2 at pages 5 - 13).
  - 46.6. On 4 December 2012, the Respondent was asked to leave the Firm, which he did the following month (15). This was only a relatively short period (just months) after the Respondent had drafted and made appointments under the Deed.

- 46.7. It is not credible or conceivable that the Respondent had forgotten who drafted the said Deed in this relatively short period of time. The same contention applies to the 2 December 2013 interview (and the 27 November 2014 letter). The short point is that there was no lengthy period from the date of the Deed of Appointment when the Respondent was not, in one form or another, concerned with his actions relating to Mrs JDB's estate.
- 46.8. At interview, the Respondent sought to blame Ms G for having ignored his instructions and for having procured his signature without proper explanation (80, 101-3). He asserted that he had "made an assumption that LD whom I expected to be my co-signatory on this document [must] have been on the preceding page" (102). The Respondent knew that he was the author of the said Deed, and that he intentionally prepared it in a manner that made him sole appointor.

### **Referral Decision**

47. On 22 June 2015 a duly authorised officer of the Applicant decided to refer the conduct of the Respondent to the Solicitors Disciplinary Tribunal (Page 305)

### **Agreed Outcome**

48. In view of what is set out in the statement above and issues of proportionality relating to the remaining allegations, subject to the Tribunal's permission and discretion, the Applicant and the Respondent agree to an Order of the Tribunal that:

"the Respondent, ANTHONY REESE WHITWELL, Solicitor, be STRUCK OFF the Roll of Solicitors;

the Respondent do pay the costs of and incidental to this application and enquiry fixed in the sum of £56,500.00; and pursuant to Rule 11(6), the Tribunal consents to the withdrawal by the Applicant of the following allegations, which the Applicant so withdraws:

Allegation 8, including the dishonesty allegation in that regard;  
and  
The dishonesty allegations in relation to Allegations 1 & 2."