SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11468-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

KEITH FREER Respondent

Before:

Miss T. Cullen (in the chair)
Mr W. Ellerton
Mr S. Hill

Date of Hearing: 8 March 2017

Appearances

Andrew Bullock, Barrister employed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant.

The Respondent did not appear and was not represented.

JUDGMENT

Allegations

1. The allegations against the Respondent, made on behalf of the Solicitors Regulation Authority ("SRA") were that:

1.1 Between 6 June 2007 and 28 July 2011, he misappropriated the total sum of £87,892.13 from the client account of Widdows Mason ("the Firm"), a firm in which he was a partner. In doing so he breached any or all of:

1.1.1 Rule 1.02 of the Solicitors Code of Conduct 2007 ("the SCC 2007");

1.1.2 Rule 1.06 of the SCC 2007; and

1.1.3 Rule 22(1) of the Solicitors Accounts Rules 1998 ("the SAR").

1.2 He made a loan of £69,735 from the office account of the Firm to his client MGC Ltd, for the purposes of funding litigation between MGC Ltd and Mr W. In doing so he breached any or all of:

1.2.1 Rule 1.03 of the SCC 2007; and

1.2.2 Rule 3.01 of the SCC 2007.

1.3 On 5 November 2009 he joined with his client Mr JY in an agreement to purchase land at Kearsely, Bolton, and thereby further breached Rule 3.01 of the SCC 2007.

1.4 By acting for both Mr JY, the borrower and Mr GJ and Mrs SJ, the lenders, in relation to a Loan Agreement also made on 5 November 2009, he acted in circumstances where there was a significant risk that the best interests of Mr JY would conflict with the best interests of Mr GJ and Mrs SJ. In doing so he further breached Rule 3.01 of the SCC 2007.

1.5 By acting for Mr JY, the borrower, in relation to that Loan Agreement, the proceeds of which were to be applied for the purpose of both paying legal costs due to the Firm and purchasing land of which he was to hold the legal title jointly with Mr JY, he acted in circumstances where the best interests of Mr JY might conflict with his own interests in relation to the matter. In doing so he further breached any or all of:

1.5.1 Rule 1.02 of the SCC 2007;

1.5.2 Rule 1.06 of the SCC 2007; and

1.5.3 Rule 3.01 of the SCC 2007.

1.6 By acting for both Mr JY and Mr GJ and Mrs SJ in or about November 2009 on the grant of a Legal Charge over properties at Kearsley securing the liabilities and obligations of Mr JY under that Loan Agreement he breached Rule 3.16(2)(b) of the SCC 2007.

1.7 On or about 28 January 2013 he caused a bill of costs to be raised which he knew was addressed to his client at ABS Ltd in relation to legal costs incurred by his client Mr BB. In doing so he breached any or all of:

1.7.1 Principle 2 of the SRA Principles 2011 ("the Principles"); and

1.7.2 Principle 6 of the Principles.

2. Whilst dishonesty was alleged with respect to allegation 1.1, proof of dishonesty was not an essential ingredient to substantiate that allegation.

Documents

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

- Notice of Application dated 23 December 2015
- Rule 5 Statement and Exhibit AJB1 dated 23 December 2015
- Applicant's Schedule of Costs dated 23 February 2017
- Respondent's Answer dated 10 October 2016
- Respondent's letter dated 14 February 2017 together with financial enclosures
- Correspondence from the parties to the Tribunal
- Respondent's Statement in mitigation as to sanction and costs (undated).

Preliminary Matters

The Respondent's non-attendance

4. The Respondent did not attend the hearing and was not represented. The Applicant applied for the case to proceed in the Respondent's absence, pursuant to Rule 16(2) of the Solicitors (Disciplinary proceedings) Rules 2007 ("SDPR"), which provides that:

> "If the Tribunal is satisfied that notice of the hearing was served on the Respondent in accordance with these Rules, the Tribunal shall have the power to hear and determine an application notwithstanding that the Respondent fails to attend in person or is not represented at the hearing."

5. Mr Bullock submitted that the Respondent had explicitly stated from the outset that he would not attend the Substantive hearing. This had been made clear by him in correspondence to the Applicant and the Tribunal. It was clear that the Respondent was aware of the hearing date, as was demonstrated by him in correspondence and in his submission of his statement in mitigation and as to costs. Accordingly, Mr Bullock invited the Tribunal to proceed in the Respondent's absence.

6. The Tribunal had regard to the cases of R v Jones [2001] EWCA Crim 168 and GMC v Adeogba [2016] EWCA Civ 162. The Tribunal noted that in his letter to the Tribunal dated 14 February 2016 the Respondent stated that "I do not wish to be seen as being in any way disrespectful to the Tribunal but having taken advice ... it is not my intention to directly engage in this process with the view to (a) minimise costs and allow matters to be progress (sic) in my absence ...". Further, in his Answer dated 10 October 2016, the Respondent stated: "...I do not have any intention of attending

any hearing …". In his letter to the Tribunal dated 27 February 2017, the Respondent stated: "I trust the Tribunal will proceed with the final hearing on the 8th March 2017 …".

7. The Tribunal was satisfied that in this instance the Respondent had chosen voluntarily to absent himself from the hearing. He had made clear in his correspondence that he did not intend to attend the substantive hearing. It was in the interests of justice that the matter should be heard and determined. The conduct complained of had commenced, according to the Applicant in 2007 and concluded in 2011. The matter had been referred to the Tribunal and certified by the Tribunal as showing a case to answer in January 2016. There was nothing to indicate that the Respondent would attend the proceedings if the case were adjourned. On the contrary, the Respondent expressly stated that he wanted the matter to proceed. In light of these circumstances, the Tribunal determined that it was just to proceed with the case, notwithstanding the Respondent's absence.

Factual Background

8. The Respondent was born in January 1957 and admitted to the Roll of Solicitors in March 1984. His name remained on the Roll of Solicitors; he did not have a current practising certificate. He was a partner in the Firm from 4 January 1996 to 30 October 2013, when the Firm closed. He was subsequently a partner in HCB Widdows Mason Ltd from 30 October 2013 to 28 March 2014.

9. On 24 June 2014, a Forensic Investigation Officer ("FIO") in the employment of the Applicant commenced an inspection of the books of account and other documents of HCB Widdows Mason Ltd. The inspection culminated in a report dated 2 November 2014 ("the Report"). During the inspection the FIO viewed the following documents:

9.1 A Proof of Debt in relation to the Administration of MGC signed by the Respondent on behalf of the Firm dated 20 November 2008. It stated that the Firm claimed the sum of £69,375, including VAT and outstanding un-capitalised interest within the Administration as at 9 September 2008.

9.2 A Statutory Declaration made by JY a director and principal shareholder of MGC on 29 April 2009 in relation to the affairs of MGC.

9.3 A Deed of Settlement made between the Firm, MGC and the Administrators of MGC dated 5 November 2009 whereby, in consideration of MGC agreeing to sell the freehold and the leasehold land comprising a golf course and football pitches ("the Properties") to the Respondent and JY, the Firm agreed to withdraw its claim to be paid the sum of £69,375 claimed within the Proof of Debt.

9.4 An Agreement, also dated 5 November 2009, by which MGC (acting through its Administrators) agreed to sell the Properties to the Respondent and JY.

9.5 A Loan Agreement, also dated 5 November 2009, made between Mr GJ and Mrs SJ (as lenders) and JY (as borrower) whereby Mr GJ and Mrs SJ agreed to advance the sum of £375,000 to JY at an interest rate of 5% per year and JY agreed to pay 60% of the rental income of the Properties to Mr GJ and Mrs SJ.

9.6 A Legal Charge made between JY and the Respondent (jointly described as "the Borrower") and Mr GJ and Mrs SJ (jointly described as "the Lender") under which JY and the Respondent charged the Properties with payment or discharge of all money and other obligations agreed to be paid by them under the Loan Agreement.

10. JY, Mr GJ and Mrs SJ were all clients of the Firm.

11. The Report confirmed that between 29 June 2007 and 20 May 2009, a series of 163 transfers were made onto a client ledger bearing the name "Mr W Mason", the total value of the sums transferred being £71,386.01. The FIO was unable to verify the sources from which the sums being transferred were derived. The Report further confirmed that:

- Between 12 January 2009 and 6 May 2009, 60 office account debits to a total value of £12,041.23 were posted to the same ledger;

- On 17 June 2009, a transfer was made from the same ledger to the office account in the sum of £12,041.23. The ledger to which that transfer was ostensibly made did not, and had never, existed. In the course of his interview with the FIO on 28 August 2014, the Respondent accepted that this was "... a transaction which shouldn't have happened...", that he "... would have authorised it ..." and that he had breached the accounts rules and made an improper transfer. He explained that the monies had been used to pay wages.

- Between June 2010 and July 2011, 10 further transfers of sums ranging in value £2690.14 and £16,561.63, amounting to a total of £58,523.51, were made from the same ledger to other client ledgers and thereafter ultimately transferred to the office account or to pay expenses and disbursements relating to other clients. In the course of his interview with the FIO, the Respondent again admitted that he had made the decision to make these various transfers from client to office account and that they had been made because of "...cash pressure..." on the Firm.

12. The Report also confirmed that between June 2007 and June 2009, client credits to a total value of £17,327.39 were posted to a second client Ledger also bearing the name "Mr W Mason". Disbursements were then posted to the office side of the ledger to value of £17,327.39 as at 17 June 2009, on which date the entirety of the client monies on the ledger were transferred to the office bank account. In the course of his interview with the FIO, the Respondent accepted that he was not "... sure whether it was client or office money but it was in client account..." and that he transferred it in circumstances when it was not correct to do so. He also "accepted that monies have been used improperly".

13. No client file existed in relation to either of the ledgers in the name of Mr W Mason.

Witnesses

14. None.

Findings of Fact and Law

15. 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.

16. **Allegation 1.1 - Between 6 June 2007 and 28 July 2011, he misappropriated the total sum of £87,892.13 from the client account of Widdows Mason ("the Firm"), a firm in which he was a partner. In doing so he breached any or all of Rules 1.02 and 1.06 of the SCC 2007; and Rule 22(1) of the SAR.**

16.1 Mr Bullock submitted that the Respondent had accepted, both in his interview with the SRA and in his Answer in the proceedings, that he was responsible for making the transfers as a matter of expediency to meet the business expenses of the Firm at a time when the Firm was under financial pressure. It was not a part of the Applicant's case that the Respondent had made the transfers himself using the login details of members of the accounts staff. Mr Bullock submitted that it was not accepted, as suggested in the Respondent's statement in mitigation as to sanction and costs, that the accounts staff had undertaken transactions without the Respondent's prior approval.

16.2 The Respondent admitted allegation 1.1.

16.3 Rule 1.02 of the SCC 2007 provided that "You must act with integrity". Rule 1.06 of the SCC 2007 provided that "You must not behave in a way that is likely to diminish the trust the public places in you all the legal profession." Rule 22(1) of the SAR stipulated the various circumstances in which client money may be withdrawn from a client account.

16.4 The Tribunal found allegation 1.1 proved on the facts, evidence, submissions and the admission of the Respondent. The Tribunal further found that the accounts staff had not transferred monies without the Respondent first approving the transactions. He had made clear in his interview, and in his Answer that he was entirely responsible for the transactions.

Dishonesty

16.5 Mr Bullock submitted that the Respondent had misappropriated almost £88,000 over a period of almost four years. He asked the Tribunal to accept the proposition that in misappropriating funds from client account in order to pay the overheads of the Firm, the Respondent had acted dishonestly by the ordinary standards of reasonable and honest people.

16.6 Further, the Respondent knew that his conduct was dishonest by those standards as:

- The Respondent was an experienced solicitor who had been in practice for almost 25 years, and had been a partner for approximately 13 years. It was reasonable to assume that he would have been fully cognisant of his professional and fiduciary duties in relation to client monies.

- There was no evidence that any steps had been taken to trace those persons entitled to the monies held on the suspense accounts, nor did the Respondent seek any advice prior to transferring the monies. There was therefore no reasonable basis upon which the Respondent could conclude that the owners of the funds were untraceable, or that the transfer of the funds was permissible.

- The Respondent attempted to conceal his actions by moving the money through suspense accounts before transferring the monies into the office account. Such actions demonstrated, it was submitted, that the Respondent was aware that his conduct was improper.

- The Respondent had failed to attend the hearing and had failed to provide any form of honest explanation in relation to the misappropriation of client monies.

16.7 In his Answer, the Respondent stated:

> "I have not treated [the allegation of dishonesty] as a separate allegation, despite its description, as it does not stand alone; rather it is asserted to be a possible interpretation of my conduct in relation to allegation 1.1. For the avoidance of doubt I deny that assertion, but I also repeat that I do not have any intention of attending any hearing, and the SRA will be able to say anything it likes in relation to this issue, to the extent permitted by the Tribunal, without response from me. That is because nothing I say can influence the "bottom line" as to the only order the Tribunal can realistically make, and appearing at any hearing will therefore be extremely stressful for no purpose whatsoever. In those circumstances a moment's reflection should make it obvious why I take the position I do on this "allegation". A finding by this Tribunal based on anything the SRA may choose to say, whether I attend the hearing or otherwise participated or not, is purely a matter for the Tribunal."

16.8 When considering dishonesty the Tribunal applied the test that was set out in Twinsectra v Yardley and others [2002] UKHL 12, as applied to disciplinary proceedings by Bultitude v Yardley [2004] EWCA Civ 1853 and Bryant v Law Society [2007] EWHC 3043. As per Lord Hoffman at paragraph 27 of Twinsectra:

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

16.9 This was the test which had been approved by the courts. The Tribunal noted that there was no suggestion that the Respondent's capacity to distinguish between right and wrong had been impaired by mental or any other illness.

16.10 The Tribunal determined that reasonable and honest people, operating ordinary standards would find it dishonest for a solicitor to use client monies to support a firm when the firm was facing financial difficulties. Accordingly, the objective limb of the Twinsectra test was satisfied.

16.11 The Tribunal determined that the use of suspense accounts, and moving money through those accounts into the office account, demonstrated that the Respondent was trying to conceal the origins of the monies. This was a deliberate act on the part of the Respondent that had no legitimate or honest explanation. Further, the suspense accounts were masquerading as client accounts. It was clear that the Respondent appreciated what he was doing; his actions were a conscious decision to siphon money off the client account and use it for the Firm's benefit when the Firm was in financial difficulty. The Tribunal determined that in attempting to conceal his actions, the Respondent knew that his actions were wrong according to the ordinary standards of reasonable and honest people. The Respondent had readily admitted his misconduct during his interview with the FIO. The Respondent was an extremely experienced practitioner who, in having admitted the misappropriation of client money knew the sacrosanct nature of client account, and knew that his actions were wrong. There was no innocent explanation for his actions, and none had been advanced by him. Accordingly, the Tribunal found that the subjective limb of the Twinsectra test was satisfied and thus found beyond reasonable doubt that the Respondent had been dishonest.

16.12 Whilst it did not inform the Tribunal's findings in relation to dishonesty, the Tribunal did not accept the assertion in the Respondent's statement in mitigation and as to costs that he later ratified transactions that had been made by accounts staff without his knowledge. He had not mentioned this to the FIO during his interview, nor had he mentioned this when admitting allegation 1.1 in his answer. It was clear, as had been accepted by the Respondent, that transfers were made at his instigation.

17. **Allegation 1.2 - He made a loan of £69,735 from the office account of the Firm to his client MGC Ltd, for the purposes of funding litigation between MGC Ltd and Mr W. In doing so he breached any or all of Rules 1.03 and 3.01 of the SCC 2007.**

17.1 Mr Bullock submitted that the Proof of Debt and the Statutory Declaration, when taken together, confirmed that the Firm had provided a "bridging loan" to MGC to fund litigation. The Proof of Debt stated that the debt had been incurred due to "Advance Re: Court Funds and Legal Costs". In the Statutory Declaration JY gave details of the amount outstanding to creditors and stated that the debt of £69,735 related to a bridging loan made by the Firm "in respect of an ongoing dispute with a neighbour… It also includes costs incurred by [the Firm] acting on behalf of [MGC] over the last 2 years. Interest is still accruing on the bridging loan facility at a rate of 5% above base."

17.2 In his interview on 28 August 2014, the Respondent explained that the Firm had provided JY with a bridging loan facility during the course of his retainers. JY had been in dispute with a neighbour Mr W. To settle the dispute an agreement had been made whereby MGC would purchase a piece of land from Mr W. At about the same time the agreement had been entered into, JY was approached by Mr M to purchase the golf club, however the sale could not complete due to the ongoing litigation with Mr W. The purpose of the bridging loan was to allow JY to settle matters with Mr W, which would in turn enable the sale to Mr M to complete. It was envisaged that the bridging loan from the Firm would be paid from the proceeds of the sale of the golf club.

17.3 Mr Bullock submitted that the term "Advance" as used in the Proof of Debt, indicated this was not merely a 'creditor/debtor' relationship, but that a 'lender/debtor' relationship existed with the Firm advancing monies for the purposes of litigation. The £69,375 was a composite figure representing the totality of the liability to the Firm made up of both fees and an advance. For the purposes of the allegation, it was not material as to whether the entire amount was a loan, or whether there was a mixture of loans and unpaid fees, as on any view, the Firm was lending money to its client. This gave rise to a significant risk of conflict between the Respondent (as a partner in the Firm lending the money), and the client. Mr Bullock submitted that in any loan transaction made at arm's length on commercial terms, there was a substantial risk of conflict between the best interests of the lender and those of the borrower as:

- The terms may be prejudicial to either party and require negotiation; and

- In the event of the borrower defaulting, the interests of the lender may favour taking steps to obtain payment out of the income or the assets of the borrower (for example by obtaining a charging order on property owned by the borrower) which would be against the interests of the borrower.

17.4 Mr Bullock submitted that the Respondent's raising of the wording of the allegation was no answer; the Respondent stated that the purpose was to fund the purchase of land in settlement of the litigation. There was nothing in that point as the purpose of the loan was irrelevant; in agreeing to make the loan available, the Respondent had put himself in the position where his interests, as a partner in the Firm which was the lender, were potentially in conflict with the interest of MGC, the borrower.

17.5 Further, in providing a loan to fund litigation concerning Mr W, the Firm acquired a financial interest in the outcome of the claim being pursued by MGC. The independence of the Firm, and consequently the independence of the Respondent, was thereby compromised.

17.6 In his Answer, the Respondent stated that allegation 1.2 was wholly misconceived as the loan had nothing to do with litigation financing. It was not a champertous arrangement. There had been litigation between MGC and Mr W for a number of years prior to the Respondent's involvement, the essence of which was that Mr W wanted to prevent MGC operating a golf course from its premises.

17.7 The sale of the golf course and associated football pitches had been hampered by the then ongoing litigation. A contract had been issued and a deposit paid conditional on the resolution of the litigation, with fees to be paid from the proceeds of the sale.

17.8 On Counsel's advice, the claim was compromised under the terms of which a payment was to be made by MGC to Mr W to acquire the access land. A consent order was finalised and sealed by the Court. However, MGC were unable to raise the money required to comply with the Consent Order. The Firm agreed to advance a loan to facilitate completion of the transaction; the loan was to be repaid on completion of the sale.

17.9 The Tribunal determined that there was a clear potential conflict of interest between the Firm/Respondent and JY as submitted by Mr Bullock. The Tribunal accepted that the purpose of the loan, in determining whether there was a conflict/significant risk of a conflict was irrelevant, as it was the provision of the loan itself, in the particular circumstances, that caused the potential conflict. However, the allegation was not simply that a conflict existed or potentially existed due to monies having been loaned to JY by the Respondent, but that a loan was provided for the "purposes of funding litigation". Mr Bullock had accepted (during the course of the proceedings), that the entire amount was not for the purposes of funding litigation; part of the £69,375 was outstanding costs and part was provided by the Firm to facilitate completion of the transaction with Mr W. The Tribunal found the matter proved to the extent of the amount provided to JY by way of a loan to fund the litigation. The Tribunal did not deem it necessary to calculate the exact amount; it was clear that money had been loaned to JY by the Respondent in circumstances where the conflict/potential conflict was obvious, and thus the Respondent had breached Rule 3.01 of the SCC as alleged, but not in the amount alleged. Further, in loaning monies to JY, the Respondent had compromised his independence, as he had a vested interest in the outcome of JY's proceedings. Accordingly, the Tribunal found allegation 1.2 proved beyond reasonable doubt (but not in the amount of £69,375).

18. **Allegation 1.3 - On 5 November 2009 he joined with his client Mr JY in an agreement to purchase land at Kearsely, Bolton and thereby further breached Rule 3.01 of the SCC 2007.**

18.1 The Sale Agreement provided for the Properties to be transferred to the Respondent and JY jointly. In his interview, the Respondent explained to the FIO that this had been done because the Firm was owed £20,000 - £30,000 in respect of fees due in relation to the litigation concerning Mr W, and that "The sale of the golf course or the sale of the football pitches in a timely manner and at the right price, which would have enabled us to get the monies back because, at the end of the day, [JY] couldn't do anything without my signature because I was a co-owner."

18.2 Mr Bullock submitted that it was clear that purpose of the Sale Agreement was to provide an asset over which the Firm and the Respondent had some control so as to recoup monies that would otherwise have been lost in the Administration. He did not suggest that an actual conflict had arisen, however there was a significant risk that the duty owed by the Respondent to act in the interests of JY might conflict with his interests as a partner in the Firm. There was a possibility that it might come to be in

the best interests of JY for the Properties to be sold for less than the value of the debt owed to the Firm.

18.3 The Respondent submitted that the parties' interests were aligned and no conflict arose; there was no conflict of interests, on the contrary there was a coincidence of interests.

18.4 The Tribunal noted that during the course of his interview, the Respondent was asked whether he thought that in being a co-owner such that JY could not do anything without his signature created a conflict of interests between the Respondent or the Firm and JY. The Respondent stated: "Well, in some senses I suppose that must be right, if there was a conflict. As we were in consensus and agreement, there was no conflict."

18.5 He was asked whether he accepted that there was a potential conflict to which he replied "obviously now". In his Answer the Respondent explained that "there was no actual conflict. The agreement provided both parties with the prospect of recovery; the interests of the parties were aligned".

18.6 Rule 1.03 of the SCC 2007 stated that "You must not allow your independence to be compromised". Rule 3.01(1) of the SCC 2007 stated that "You must not act if there is a conflict of interests…". The circumstances in which a conflict of interest would exist were set out in Rule 3.01(2) which stated, amongst other things, that "There is a conflict of interest if… Your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter."

18.7 The Tribunal determined that the terms of Rule 3.01 were clear; a conflict would exist if there was "a significant risk"; there was no requirement under the terms of Rule 3.01 for an actual conflict to be demonstrated.

18.8 The Tribunal considered that there was clearly a significant risk, as had been submitted by the Applicant, and admitted in interview by the Respondent, that a conflict could arise between the Firm/Respondent and JY. JY would require the consent of the Firm/Respondent to sell the Properties; as the Respondent had stated "…[JY] couldn't do anything without my signature because I was a co-owner". Accordingly, the Tribunal found allegation 1.3 proved beyond reasonable doubt on the facts, evidence and submissions.

19. **Allegation 1.4 - By acting for both Mr JY, the borrower and Mr GJ and Mrs SJ, the lenders, in relation to a Loan Agreement also made on 5 November 2009, he acted in circumstances where there was a significant risk that the best interests of JY would conflict with the best interests of Mr GJ and Mrs SJ. In doing so he further breached Rule 3.01 of the SCC 2007.**

19.1 The Respondent acted for both Mr GJ and Mrs SJ (as lenders) and JY (as borrower) in relation to the Loan Agreement dated 5 November 2009. In his interview on 28 August 2014, the Respondent confirmed that he had prepared the Loan Agreement. The loan being advanced was for £375,000. The purchase price for the Properties was £310,000. JY had agreed to repay £475,000. Mr Bullock submitted that JY was

borrowing more than the purchase price of the Properties so that he could repay the bridging loan advanced to him by the Firm, and outstanding fees owed to the Firm.

19.2 As had been submitted in respect of allegation 1.2, Mr Bullock submitted that there was a significant risk of a conflict arising between the interests of JY as the borrower, and Mr GJ and Mrs SJ as the lender, as the interests of lender and borrower were not coincidental.

19.3 The Respondent, in his Answer stated that:

- JY was entitled to reject the loan proposal at any time up to the point of completion;
- It was JY who wanted the deal to proceed; and
- There was no conflict of interest.

19.4 The Tribunal noted the following exchange from the Respondent's interview:

"FIO:	So, with this Loan Agreement, did you act for both [Mr GJ] and [JY]?
Respondent:	Yes
FIO:	Did you not consider there was a conflict of interest there?
Respondent:	Yes
FIO:	But you continued to act?
Respondent:	Well, I explained it to them that … the situation and [Mr GJ] did not want to take any independent advice."

19.5 The Tribunal considered that the potential for a conflict in these circumstances was abundantly clear. The Respondent had recognised this during his interview when he accepted that there was a conflict. It was inconceivable that a solicitor of the Respondent's experience would not have recognised the conflict, even where, at the time the agreement was contemplated, the parties were in agreement.

19.6 The Tribunal further noted that issues would arise in the drafting of the Loan Agreement. The terms of the Loan Agreement would not necessarily be of equal advantage to all of the parties that the Respondent was acting for. This would inevitably mean that the Respondent, in representing all parties to the agreement, could not act in the best interests of all clients.

19.7 The Tribunal determined that in acting for both JY and Mr GJ and Mrs SJ, when he knew (as admitted in his interview) that a conflict existed, the Respondent had clearly breached Rule 3.01 of the SCC as pleaded and alleged. Accordingly, the Tribunal found allegation 1.4 proved beyond reasonable doubt on the facts, evidence and submissions.

20. **Allegation 1.5 - By acting for JY, the borrower, in relation to that Loan Agreement, the proceeds of which were to be applied for the purpose of both paying legal costs due to the Firm and purchasing land of which he was to hold the legal title jointly with JY, he acted in circumstances where the best interests of JY might conflict with his own interests in relation to the matter. In doing so he further breached any or all of Rules 1.02, 1.06 and 3.01 of the SCC 2007.**

20.1 The Agreement dated 5 November 2009, by which MGC (acting through its Administrators) agreed to sell the Properties to the Respondent and JY, detailed that on completion of the sale a sum of £310,000 was to be paid to MGC. In his interview on 28 August 2014, the Respondent explained that some of the £375,000 being advanced by Mr GJ and Mrs SJ would be used to partly pay off JY's liabilities to the Firm.

20.2 Mr Bullock submitted that a conflict necessarily arose between the interests of the Respondent and those of his client JY as it was in the best interests of the Respondent for the Loan Agreement to be completed irrespective of whether or not it was prejudicial to JY:

- The Sale Agreement provided for the transfer of the Properties to the Respondent and JY, however JY alone was liable under the Loan Agreement. Consequently, JY was paying the whole purchase price, but not obtaining the whole of the Properties. This arrangement enabled the Respondent to acquire joint title to the Properties without providing any of the funds required for their purchase.

- By acquiring joint title to the Properties, the Respondent secured the position of the Firm with respect to the monies owed by JY to the Firm

20.3 Mr Bullock further submitted that if the Respondent's explanation in interview was such that the Respondent was a joint title holder as (effectively) Mr and Mrs J's nominee, the making of the Loan Agreement was still to his benefit as a partner of the Firm, as it enabled JY to settle all or some of the amounts outstanding on the bridging loan provided to him by the Firm.

20.4 The Respondent submitted, by way of his Answer, that there had been a failure to appreciate that without the Firm's assistance, there would have been no purchase. There had been no prejudice to JY. It had been decided that the Firm would assist in the acquisition which meant that the transaction would involve the Respondent, on the Firm's behalf, becoming a party to the transaction. The Respondent's involvement was "persuasive for Mr GJ and Mrs SJ, who agreed to increase the amount of the loan to £375,000" (£310,000 being the amount required for completion).

20.5 The Tribunal determined that JY was clearly placed in a disadvantageous position. He was in debt to the Firm, and was being advised by the Firm/Respondent in relation to the Firm obtaining joint ownership of the Properties. JY was liable for the entirety of the loan used for the purchase, whilst the Firm, through the Respondent, gained the benefit of security on the amounts owed to it by virtue of the Respondent's joint ownership. It was fundamental, in the circumstances, that the Respondent/Firm advised JY to obtain independent legal advice. Given the obvious benefits to the Firm, the Respondent should not have acted for JY in this transaction. The conflict

was abundantly clear, and the Tribunal found beyond reasonable doubt that the Respondent was in breach of Rule 3.01 as pleaded and alleged. The Tribunal did not accept that a solicitor with the Respondent's extensive experience, who was acting with integrity, would represent JY in the particular circumstances given the obvious conflict, and thus found beyond reasonable doubt that the Respondent had breached Rule 1.02 of the SCC 2007. Further, he had failed to behave in a way that maintained the trust the public placed in him as a solicitor and in the provision of legal services in breach of Rule 1.06 of the SCC 2007. Accordingly, the Tribunal found allegation 1.5 proved beyond reasonable doubt on the facts, evidence and submissions.

21. **Allegation 1.6 - By acting for both JY and Mr GJ and Mrs SJ in or about November 2009 on the grant of a Legal Charge over properties at Kearsley securing the liabilities and obligations of JY under that Loan Agreement he breached Rule 3.16(2)(b) of the SCC 2007.**

21.1 Rule 3.16(2) of the SCC 2007 provided that:

> "You must not act for both the lender and borrower on the grant of a mortgage of land:
>
> .....
>
> (b) on the grant of an individual mortgage of land at arm's length."

21.2 Rule 3.17(1) of the SCC 2007 provided that:

> "A mortgage is a "standard mortgage" where:
>
> (a) it is provided in the normal course of the lender's activities;
> (b) a significant part of the lender's activities consists of lending; and
> (c) the mortgage is on standard terms.
>
> An "individual mortgage" is any other mortgage."

21.3 Mr Bullock submitted that the Legal Charge, negotiated between a private lender and a private borrower on other than standard terms, was an individual mortgage, and thus the Respondent was prohibited from acting for both JY and Mr GJ and Mrs SJ in relation to its grant.

21.4 The Respondent, in his Answer, submitted that the Legal Charge document necessarily required his involvement as the proposed registered title holder. The suggestion that it was not on standard terms and required negotiation was wrong.

21.5 The Tribunal considered the terms of Rules 3.16 and 3.17. Mr GJ and Mrs SJ were not providing funds in the "normal course of the lender's activities", nor did "a significant part of [their] activities consist of lending". Accordingly, under the provisions of Rule 3.17, the mortgage was an individual mortgage. Rule 3.16 expressly prohibited the Respondent from acting for the lender and borrower on the grant of an individual mortgage. The Respondent accepted that he had acted for JY and Mr GJ and Mrs SJ. The Tribunal determined in so doing, the Respondent had

acted in breach of the Rules as pleaded and alleged. Accordingly, the Tribunal found allegation 1.6 proved beyond reasonable doubt on the facts, evidence and submissions.

22. **Allegation 1.7 - On or about 28 January 2013 he caused a bill of costs to be raised which he knew was addressed to his client at ABS Ltd in relation to legal costs incurred by his client Mr BB. In doing so he breached any or all of Principles 2 and 6 of the Principles.**

22.1 The Firm acted for BB in relation to matrimonial matters. On 28 January 2013, an invoice was issued for legal costs incurred by BB in the sum of £2,468.60 which was addressed to ABS Ltd. During his interview, the Respondent clarified that ABS Ltd was owned by BB's brother, DB. The Respondent further explained that he had suspected that the reasons why DB had wanted to "recalibrate" the bill was so that "he could put it through his books". Mr Bullock submitted that a solicitor acting with integrity would not create misleading documents at the request of their client, nor would they amend a bill to enable their client to "put it through the books".

22.2 The Respondent, in his Answer denied allegation 1.7 on the basis of the instructions and information provided to him by his client, which he had no reason to challenge. The request was made by the company paying the bill to address the bill to the company. This was not an unusual request, and there could be many proper reasons for the request. No-one had been misled. Further, the Applicant had no evidence to show how the matter was treated by the company and there was no proper basis on which to infer that there was anything improper.

22.3 The Tribunal referred to the transcript of the Respondent's interview in which the Respondent explained that DB was paying BB's fees. DB asked the Respondent to "recalibrate it on this basis which I agreed to do". The Respondent suspected that "the reasons why he wanted to do (sic) this way ... so he could put it through the books." The bill referred to work undertaken on behalf of ABS Ltd, but also included matters relating to BB's matrimonial case. When asked "Do you think this bill is misleading", the Respondent replied "yes". Further, when he was questioned as to why he agreed to draw the bill up in that way, the Respondent explained "Helping what I thought was a friend."

22.4 The Tribunal considered that for any solicitor in practice, particularly one with the Respondent's experience, to amend a bill for the suspected collateral fiscal advantage of a company was extraordinary. There was no issue in the company paying BB's bill, the issue was the re-drafting of the bill so that it appeared that it was a bill for which the company was fully liable. The Tribunal found, as alleged, that no solicitor acting with integrity would create a misleading document at their client's request, particularly a bill of costs. Thus, in so doing, the Respondent had acted without integrity in breach of Principle 2. In acting without integrity, the Respondent had failed to behave in a way that maintained the trust the public placed in him as a solicitor and the provision of legal services in breach of Principle 6. Accordingly, the Tribunal found allegation 1.7 proved beyond reasonable doubt on the facts, evidence and submissions.

Previous Disciplinary Matters

23. None.

Mitigation

24. In his statement in mitigation as to sanction and costs, the Respondent described the background of the financial difficulties suffered by the Firm, which was affected by the financial crisis and the collapse of RBS. The Firm was forced to close three offices and make 30 members of staff redundant. It was due to the financial difficulties faced by the Firm that the first transfer from a suspense account was made to meet staff wages. The Respondent explained that "the transfer from the suspense account was the only alternative to closing the firm." The Respondent stated that attempts had been made to try to establish ownership of the funds in the suspense account without success and that there was "no realistic prospect of identifying the true owner of the bulk of the money held on suspense." The Respondent then "made this deeply regrettable decision the consequences of which will now remain with me forever, together with the harm it has caused and will continue to cause my family."

25. The Respondent stated that he was "extremely distressed that I have allowed events to cloud my judgement so that I allowed the suspense accounts to be used in a manner with I know to be indefensible. I have recognised my failing from the outset and in an attempt to give reassurance to the SRA and to avoid any further harm to the profession and the public I tried to remove my name from the roll voluntarily. This was refused by the SRA because, it was said, I might not have then cooperated. By my action I believe that I have demonstrated this to be misconceived. I have cooperated throughout and would always have done so. I believe the Tribunal will recognise that I have cooperated fully with the investigation and made full and frank admissions to those allegations which have been correctly made and which I admit. But where allegations have been made that are not true I have denied them and fully explained why I am doing so."

26. The Respondent further explained that he had resigned himself "to the fact that I will never practise as a solicitor again whatever the Tribunal decides. In his Answer dated 10 October 2016, the Respondent stated that he accepted as a consequence of his admission to allegation 1.1, that he would be struck off the roll of solicitors.

Sanction

27. The Tribunal had regard to the Guidance Note on Sanctions (5th Edition – December 2016). The Tribunal's overriding objective, when considering sanction, was the need to maintain public confidence in the integrity of the profession. In determining sanction, it was the Tribunal's role to assess the seriousness of the proven misconduct and to impose a sanction that was fair and proportionate in all the circumstances.

Allegation 1.1 and Dishonesty

28. The Tribunal first considered the seriousness of the Respondent's proven and admitted conduct. The Tribunal found the Respondent completely culpable for the breaches; the misconduct having arisen as a direct result of his actions. The

Respondent's motivation for his misconduct was, by his own admission, to keep the Firm afloat. As he stated in his statement in mitigation as to sanction and costs, he either used the monies in the suspense accounts or the Firm would have had to close; he was propping up the Firm which indirectly was to his benefit – he was a partner of the Firm. His actions were planned. He had acted in breach of trust; as a solicitor, he was entrusted by clients to keep their money safe, and not to use it for his own or the Firm's purposes. He had direct control of the circumstances. The Tribunal did not find it plausible that the accounts staff had undertaken transactions that he later ratified. The Tribunal noted and accepted that the Respondent took full responsibility for the transfers. The Respondent was a very experienced solicitor who had been qualified at the time for almost 25 years, and had been a partner for 13 years.

29. The Respondent had caused significant harm to the reputation of the profession; it is an ultimate tenet of the profession that solicitors do not spend client monies for improper purposes. The Respondent had departed from the integrity, probity and trustworthiness expected of him as a solicitor. Every solicitor is aware of the sacrosanct nature of client account and under no circumstances should a solicitor borrow, take, divert or misappropriate client monies. Further, the Respondent had failed to repay any of the monies improperly taken. It was wholly foreseeable that clients would lose out; the Firm was in financial difficulties and the Respondent with his extensive experience knew that the public view of a solicitor using client account in this way would be damaging to the profession. The Respondent had caused significant harm to the reputation of the profession, which was in material breach of his obligation to protect the public and maintain public confidence in the reputation of the profession; as per Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin:

> "34. There is harm to the public every time that 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"."

30. The Respondent's conduct was aggravated by his proven dishonesty, which was deliberate, calculated and repeated. The Respondent had improperly and dishonestly used client monies in 163 transactions over a period of approximately 4 years. He had taken advantage using his position of trust as a partner in the Firm. The Respondent had attempted to conceal his wrong doing by the use of suspense ledgers, which were purportedly in clients' names. Given his experience, the Respondent knew that his conduct was in material breach of his obligation to protect the public and the reputation of the profession. The Respondent had a previously unblemished career and had accepted, from the outset, the misappropriation of client monies. However, he did not accept that the misappropriation of client monies in the circumstances was dishonest. The Tribunal determined that his insight was limited as were the admissions made.

Allegations 1.2 – 1.5

31. The Tribunal determined that the Respondent's motivation in relation to these allegations was the protection of the position of the Firm in relation to monies owed by his client to the Firm. His actions were planned and in breach of his position of trust as a solicitor. Clients would expect their solicitor to always act in their best

interests, and to advise if a conflict existed or potentially existed. The Respondent was solely responsible for his misconduct, and, as stated above was an experienced solicitor. The harm could have been lessened if the Respondent had, as he ought to have done, advised his client(s) to obtain independent legal advice. The purpose of the conflict rules was to ensure that solicitors act in the best interests of their clients. In representing clients where there was a real risk of conflict, and in representing a client whereby that client was solely responsible for the financial risk but the Firm/Respondent derived a benefit, the Respondent had caused harm to the reputation of the profession. He had several opportunities to step back from the potential conflicts, and to advise his clients to seek independent legal advice. Mr JY, Mr GJ and Mrs SJ had all subsequently complained about the Respondent's conduct to the Legal Ombudsman and/or the SRA. The Respondent ought to have known that his conduct was in material breach of his obligation to protect the public.

Allegation 1.7

32. The Tribunal determined that the Respondent's motivation was to 'help out a friend'. It involved a degree of planning as the Respondent had to 'recalibrate' the bill. The Respondent was an experienced solicitor who knew that drawing up a bill in the way that he did was misleading, and would cause harm to the reputation of the profession.

33. Given the nature of the findings made, the Tribunal did not consider it appropriate to impose individual sanctions for each allegation; it determined sanction on the totality of the misconduct found proved. The Tribunal found the seriousness of the totality of the Respondent's misconduct to be at the highest level; he was completely culpable in relation to all of the allegations. It considered and rejected the lesser sanctions within its sentencing powers such as no order, a reprimand or restrictions. The Tribunal had regard to the case of Bolton v Law Society [1994] 2 All ER 486 in which Sir Thomas Bingham stated:

> "....Lapses from the required standard (of complete integrity, probity and trustworthiness)....may....be of varying degrees. The most serious involves proven dishonesty....In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced by the solicitor, ordered that he be struck off the roll of solicitors."

34. The Tribunal had made multiple findings of a lack of integrity, and had found the Respondent to have been dishonest. The Respondent did not submit, and the Tribunal did not find, any exceptional circumstances in this case. The only appropriate and proportionate sanction, in order to protect the public, and maintain public confidence in the integrity of the profession and the provision of legal services, was to order that the Respondent be struck off the Roll.

Costs

35. Mr Bullock explained that costs had been agreed at £19,500, subject to any determination on costs by the Tribunal. The Respondent, in his statement in mitigation as to sanction and costs argued that the appropriate order should be:

"that the figure for the SRA's costs should not exceed £19,500; that a lower sum may be appropriate if the Tribunal is of the opinion that a regulatory settlement agreement ["RSA"] should have been considered or it costs have otherwise been wasted by the SRA; and that the order should not be enforced without leave of the Tribunal."

36. Mr Bullock submitted that the allegations faced by the Respondent were serious and included an allegation of dishonesty as well as multiple allegations of the Respondent acting where there had been a conflict of interest. The Applicant would have considered whether it was in the public interest to proceed on allegations 1.2 – 1.7 if the Respondent had admitted dishonesty, however dishonesty had been denied. Given that it was open to the Tribunal to find that subjective dishonesty had not been proved to the required standard, the Applicant concluded that it was appropriate to put the full gravamen of the case before the Tribunal. The case had been properly brought and properly pursued, notwithstanding the Respondent's suggestion that matters could be dealt with by way of an RSA. Further, it was not for the Respondent to say how the SRA should present its case subject to the admission made in relation to allegation 1.1.

37. As regards the Respondent's application for costs not to be enforced without leave of the Tribunal, Mr Bullock referred the Tribunal to the Respondent's letter dated 14 February 2017. In paragraph 8 of that letter, the Respondent stated that his SIPP fund was valued at £255,840.14. Mr Bullock submitted that notwithstanding the Respondent's assertion that this was not a realisable asset, the Respondent had demonstrated that he had assets available to meet a costs order. Further, when costs had been agreed between the parties, there had been no agreement or suggestion that there would be an application for costs not to be enforced without leave.

38. The Tribunal examined the schedule of costs submitted, and noted that the agreed costs of £19,500 represented a £7,259.18 reduction in the original costs claimed of £26,759.18. The Tribunal determined that the agreed amount was reasonable and proportionate. The Tribunal determined that the Respondent's SIPP was an asset that could be realised for the purposes of payment of costs. The evidence in relation to the value of the SIPP came from the Respondent. The Tribunal determined that the Respondent had not provided sufficient reasons for it to exercise its discretion in relation to the payment of costs. Further, the Respondent had demonstrated he had sufficient assets to fulfil any costs order, the amount of which he had agreed with the Applicant. Accordingly the Tribunal ordered that the Respondent pay costs in the agreed amount of £19,500.

Statement of Full Order

39. The Tribunal Ordered that the Respondent, KEITH FREER, 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 £19,500.00.

Dated this 27th day of March 2017
On behalf of the Tribunal

T. Cullen
Chairman