SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11471-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

MICHAEL ALEXANDER Respondent

Before:

Mr R. Nicholas (in the chair)
Ms A. Horne
Mrs L. McMahon-Hathway

Date of Hearing: 17-20 October 2016

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

Denis Barry, barrister of 5 Paper Buildings, Temple, London EC4Y 7HB, instructed by Peter Cadman, solicitor of Russell Cooke, 8 Bedford Row, London WC1R 4BX for the Respondent.

JUDGMENT

Allegations

The Allegations against the Respondent by the Applicant were that, whilst a partner in various firms:

1. On or around 26 November 2008, when advising his clients, RP & CP, in relation to a loan of £100,000 by them to his business, he failed to insist that they took independent legal advice and proceeded with the transaction, thereby acting when there was a conflict of interest, contrary to Rule 3.01 of the Solicitors Code of Conduct 2007 ("SCC 2007");

2. On or around 4 December 2008, when advising his clients, RP & CP, in respect of a debenture to secure their lending to his business, he failed to advise them of a material fact, namely that his wife had a prior legal charge which materially impacted on the value of the security being granted, thereby failing to disclose to his clients all information of which he was aware which was material to those clients' matter, contrary to Rule 4.02 of the SCC 2007;

3. On or around 28 August 2009, when advising his clients, RP & CP, in relation to a loan of £25,000 by them to his business, he failed to insist that they took independent legal advice and proceeded with the transaction, thereby acting when there was a conflict of interest, contrary to Rule 3.01 of the SCC 2007;

4. On or around 18 November 2009, when advising his clients, RP & CP, in respect of a debenture to secure their lending to his business, he failed to advise them of a material fact, namely that his wife had a prior legal charge which materially impacted on the value of the security being granted, thereby failing to disclose to his clients all information of which he was aware which was material to those clients' matter, contrary to Rule 4.02 of the SCC 2007;

5. On or around 16 April 2010, he made a materially false statement to RP & CP by stating "as previously explained your money is secure in view of the Debenture you hold" in circumstances where he was aware that there was a prior legal charge in favour of his wife which meant that the money was not secure, and thereby failed to act with integrity, contrary to Rule 1.02 of the SCC 2007;

6. On or around 16 April 2010, he made a misleading and disingenuous statement to RP & CP by stating "as previously explained your money is secure in view of the Debenture you hold" in circumstances where he was aware that there was a prior legal charge in favour of his wife which meant that any security that had been given did not actually provide RP & CP with certainty that they would recover their money, and thereby failed to act with integrity, contrary to Rule 1.02 of the SCC 2007;

7. On or around 25 November 2010, he made a materially false statement to RP & CP by stating "I really am doing everything I can to resolve this and at the end of the day there are several people in a similar position but you are the only one I have ensured is fully secured and protected …" in circumstances where he was aware that his wife had also lent money to his business and she held also held a prior legal

charge, placing her in a similar position, and thereby failed to act with integrity, contrary to Rule 1.02 of the SCC 2007;

8. On or around 25 November 2010, he made a misleading and disingenuous statement to RP & CP by stating "I really am doing everything I can to resolve this and at the end of the day there are several people in a similar position but you are the only one I have ensured is fully secured and protected …" in circumstances where he failed to disclose that his wife, who may not have been in a similar position, held a prior legal charge, and thereby failed to act with integrity, contrary to Rule 1.02 of the SCC 2007;

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.

10. Allegations 5 and 6 and Allegations 7 and 8 were made in the alternative.

Documents

11. The Tribunal considered all the documents in the case including:

Applicant

- Application and Rule 5 Statement with exhibit JHRD/1 dated 14 January 2016
- Costs Schedule
- First Witness Statement of RP with exhibit RP/1 dated 5 May 2016
- Second Witness Statement of RP with exhibit RP/2 dated 6 July 2016
- Witness Statement of CP dated 6 July 2016
- Inter-parties correspondence
- Costs Schedule

Respondent

- Answer to Rule 5 Statement dated 19 February 2016
- Witness Statement of Respondent with exhibits MA/1-MA/53 dated 1 June 2016
- Inter-parties correspondence
- Statement of Means
- Bundle of financial documents
- Respondent's written closing submissions

Factual Background

12. The Respondent was born in 1950 and admitted to the Roll of Solicitors on 15 November 1973.

13. At all material times up to 2 April 2009, the Respondent practised at AWB Solicitors LLP ("AWB"), trading as Alexander Bosher Solicitors. At all material times from 3 April 2009, the Respondent practised at Alexander Lawyers LLP ("AL LLP"). In this Judgment, references to "the Firm" are references to either AWB or AL LLP as

the context requires, and references to "the Firms" are references to both of them, unless otherwise specified.

14. At the date of the Rule 5 Statement, the Respondent remained upon the Roll of Solicitors, holding a practising certificate subject to conditions and practising as a consultant at The Law House Limited, Building 3, Chiswick Park, 566 Chiswick High Road, London, W4 5YA.

15. On 22 January 2013 a complaint against the Respondent was made to the SRA. An investigation was duly commenced.

The First Loan

16. Up to late 2008, RP, and his wife, CP, ran a business which was involved in freight forwarding. In late 2008, they decided to retire and sell that business. The Respondent was instructed to act for them in relation to that sale. He continued to act for them at all material times thereafter. RP and CP were long term clients and personal friends of the Respondent, who had acted for them since the late 1990s in relation to many of their business transactions.

17. At some point around November 2008, the Respondent proposed to RP and CP that they make a loan to the Firm of £100,000 for a period of 1 year (the "First Loan"). The Respondent explained that the loan was required to fund a lucrative part of the Firm involving PPI Litigation. RP responded that he and CP had decided to sell their business in order to give them both an easier life - at that time they had a low appetite for risk.

18. The Respondent explained that the First Loan would be secured by a debenture over the Firm's assets (the "First RP Charge"). He further explained that the Firm had the "tail end of some short term loans" which amounted to about £250,000 which were on course to be settled over the next year. A repayment to RP/CP of £125,000 in 12 months was proposed. The Respondent arranged for his personal assistant and accounts manager, DM, to provide RP with a projected cashflow for the Firm over the following year, including the anticipated income from the PPI business and, potentially, if requested, other information.

19. The Applicant's case was that the Respondent had failed to take positive action to advise RP, and failed to ensure that anyone else advised RP, that the Respondent's wife, LA, held a fixed and floating charge over the assets of AWB created on 22 March 2006 (the "First LA Charge"). This would take priority over the First RP Charge, and secured a liability of £443,073.59 at the time.

20. Having discussed the position with CP, RP had then had another discussion with the Respondent when RP told the Respondent that CP and RP had decided to make the First Loan, provided it was 100% secure, and they were relying on him to put the necessary security in place. The Applicant's case was that the Respondent explained that he would send RP a letter saying that they needed to take independent legal advice, but said "I can tell you now that it is a waste of money as the loan is 100% secure." RP told the Respondent that RP and CP were going to have a heavy tax bill in 12 months - for approximately £100,000. They therefore required the

money advanced by the First Loan back by then. The Respondent told RP that he guaranteed that they would have the money back by then, with interest.

21. The Respondent prepared a loan agreement and a debenture for the First Loan and the First RP Charge and provided them to RP on 24 November 2008. In the covering e-mail, the Respondent stated:

> "As I mentioned to you, I obviously cannot advise you on these documents and I must recommend to you that you should seek independent advice on these documents."

22. Following further discussions, the Respondent provided engrossed documents to RP on 1 December 2008. The covering letter stated:

> "As previously mentioned I cannot advise you in this matter and if you do have any queries regarding the contents of the documents or any issues other than the procedural issues mentioned above, it is important that you should seek independent legal advice."

23. At around this time the First Loan document and the First RP Charge was executed by RP & CP and returned to the Respondent, who arranged for appropriate registration at Companies House.

24. At some point prior to 3 March 2009, the Respondent contacted a firm of insolvency practitioners, Ashcrofts Business Recovery and Insolvency, for advice on various options available to the Firm due to its financial position. This culminated in a decision that the only option available, despite the funds advanced by the First Loan, was Administration. Therefore, on 2 April 2009, Joint Administrators were appointed over AWB by LA by virtue of the First LA Charge. The Statement of Affairs of the Firm as at 2 April 2009 indicated an estimated total deficiency as regards members of £1,325,229.00. Specifically, it indicated assets of goodwill of either £550,000 or £750,000, but secured creditors of £1,203,326.00.

25. There were 5 secured creditors, in order of priority:

25.1 LA;

25.2 Barclays Bank Plc;

25.3 Clydesdale Bank Plc;

25.4 Hampshire Trust; and

25.5 RP & CP.

26. In the circumstances, RP & CP never recovered any of the First Loan from the Firm.

The Second Loan

27. Following the administration of AWB, the Respondent agreed to transfer the liability for the First Loan to a new firm that was set up to take over the practice of AWB, namely AL LLP. In addition, on 28 August 2009, RP & CP signed a loan agreement lending a further £25,000 to AL LLP, with a repayment date of 31 October 2009 ("the Second Loan").

28. This agreement specifically stated, at clause 6:

> "6. Independent Advice
> The Lender [RP & CP] acknowledges that they have been advised to seek independent legal advice in respect of the Advance but have chosen not to do so."

29. By a mortgage debenture dated 17 November 2009 and created by the Respondent, the Firm granted a fixed and floating charge over the assets of the Firm to LA as security for all monies due from the Firm to LA (the "Second LA Charge").

30. By a mortgage debenture dated 18 November 2009 and created by the Respondent, the Firm granted a fixed and floating charge over the assets of the Firm to RP & CP as security for all monies due or to become due from the Firm to RP & CP (the "Second RP Charge").

31. The Applicant's case was that at the time of the creation of the Second RP Charge, the Respondent did not advise RP & CP of the existence of the Second LA Charge, despite knowing of it, which meant that the security of the Second RP Charge was secondary to the Second LA Charge.

32. On 16 April 2010, the Respondent wrote to RP setting out the then present financial position of the Firm. The conclusion of that e-mail stated:

> "As previously explained your money is secure in view of the Debenture you hold."

33. The Applicant's case was that this statement was materially false as demonstrated practically by the fact that the loans were never repaid in their entirety, and legally by the fact that the security held was of an uncertain value, given the Second LA Charge. Alternatively, the Applicant's case was that if the statement was true, because there was security in place, of whatever value, then it was misleading and disingenuous.

34. On 25 November 2010, the Respondent wrote to RP regarding various aspects of the outstanding loans and stated:

> "… I have no argument over your support which has and always will be appreciated. However at the end of the day the bulk of my work is property based and the bottom dropped out of the market. We moved to PPI but were badly let down by the supplier of the work who simply did not perform. We agreed refinancing but for reasons

> outside my control that is delayed with current eta February/March next year. The end result is that for 2 years now I have been living off credit cards!! I really am doing everything I can to resolve this and at the end of the day there are several people in a similar position but you are the only one I have ensured is fully secured and protected …"

35. The Applicant's case was that this statement was false as the Second LA Charge meant that the Respondent's wife was also fully secured and protected, indeed in priority to RP. Alternatively, the Applicant's case was that if it was true, because LA was not similarly secured and protected, for whatever reason, then the statement was misleading and disingenuous.

36. The Firm was the subject of a winding up petition by HM Revenue and Customs dated 12 November 2010 and subsequently went into a Company Voluntary Arrangement ("the CVA") on 13 January 2011.

37. The CVA subsequently failed and the Firm was the subject of another winding up petition, followed by another appointment of administrators by the Respondent's wife on 28 March 2013, on the basis of the Second LA Charge.

The Applicant's Investigation

38. On 17 October 2014, a Supervisor of the Applicant wrote to the Respondent requesting an explanation for various breaches of the SCC 2007 and Solicitors Accounts Rules 1998 which he identified, and requesting supporting documentation.

39. On 30 October 2014, the Respondent provided a response. This response claimed that:

39.1 a large quantity of documentation had previously been provided to the Applicant and therefore requested that those documents were all reviewed prior to the Applicant asking any further questions;

39.2 his understanding at the time of the First Loan was that "whilst [RP] decided in his mind that he did not want legal advice, he was seeking advice from his Accountant on the matter."

39.3 At the time of the First Loan full accounting information was provided to RP. He was given free access to DM and was free to ask any questions and obtain any information with regard to the affairs of the Firm that he wished;

39.4 That the fact that the interest rate on the First Loan was 25% reflected RP & CP's understanding of the risk that they were taking. He never would have advised RP that the First Loan was 100% secure;

39.5 When the First Loan was transferred to AL LLP new debentures were put in place. For unknown reasons, Companies House registered the debentures the wrong way round even though they were sent in at separate times. The intention at the time was that RP would have the first debenture registered and LA would have a second

debenture. In the circumstances, it was correct that RP was not advised that LA had a prior debenture.

39.6 The discussions with RP at the time of the First Loan were on the basis that he was a family friend and not a client; and

39.7 In late 2008, the Respondent believed that RP was instructing other solicitors, including, he believed Birkett Long in Chelmsford.

40. Subsequently there was an exchange of correspondence with the Respondent regarding the provision of further documentation and further responses were provided. On 8 January 2015 an Authorised Officer of the SRA decided to refer the conduct of the Respondent to the Tribunal.

Chronology

Date	Event
24.03.06	First LA Charge registered
30.05.06	Barclays Charge
5.10.06	Date on draft "Declaration of Satisfaction" regarding first LA Charge
5.10.07	Hampshire Trust Charge
27.05.08	Clydesdale Bank Charge
1.11.08	Approximate date that Respondent proposed to RP that a loan be made for £100,000
14.11.08	DM sent RP a 12-month cashflow projection for the Firm
24.11.08	Respondent sent RP draft loan and debenture agreements
26.11.08	First Loan agreement signed by Respondent
1.12.08	Respondent sent RP loan and debenture agreements signed by Respondent
4.12.08	Date of second allegation
4.12.08	First RP Charge sent to Companies House for registration
6.12.08	**First RP Charge registered**
31.03.09	AWB Solicitors ceased trading and sold its assets and book debts to Alexander Lawyers LLP
27.05.09	Report from joint administrators
28.08.09	Date of Second Loan of £25,000 from RP to the Firm
31.10.09	Date that the Second Loan was due to be paid back. RP sought repayment of the loan
11.11.09	£10,000 paid back by Respondent to RP.

Date	Event
17.11.09	Mortgage debenture in favour of LA – the Second LA Charge
18.11.09	Mortgage debenture in favour of RP and CP – the Second RP Charge
19.11.09	Letter sent to Companies House together with the relevant fee – Second LA charge
25.11.09	Companies House write to say that the wrong form has been used for an LLP in respect of each Charge.
26.11.09	Correct form provided by Respondent – Second RP Charge
27.11.09	**Second RP Charge registered at Companies House as "charge no 1"**
2.12.09	Second LA Charge registered at Companies House as "charge no 2"
10.12.09	£5,000 paid back by Respondent to RP
13.04.10	RP/CP chase overdue repayment from Respondent
16.04.10	Respondent emailed RP stating "as previously explained your money is secure in view of the Debenture you hold".
12.11.10	Date of winding up petition by HMRC
25.11.10	Respondent emailed RP stating "I really am doing everything I can to resolve this and at the end of the day there are several people in a similar position but you are the only one I have ensured is fully secured and protected"
23.12.10	CVA proposed
13.01.11	CVA meeting and CVA approved
13.06.12	Date of Deed of Postponement. Priority agreed such that LA receives first £30,000, then RP/CP repaid, then LA receives the balance.
22.01.13	Complaint made to SRA
28.03.13	Administrators appointed in respect of Alexander Lawyers LLP
17.10.14	Explanation with Warning letter ("EWW")
30.10.14	Respondent replied to EWW
26.11.14	Further response from Respondent to EWW
27.11.14	Respondent provided further details to EWW response
9.1.15	Respondent informed of referral to the Tribunal

Witnesses

RP

41. RP confirmed that the contents of his Witness Statements were true to the best of his knowledge and belief.

42. The Respondent had been RP's solicitor since the mid-to-late 1990s. In 2008 he had asked for the £100,000 loan, knowing at the time that RP and CP were selling their business. The Respondent was central to the negotiations regarding the sale of the company. The last thing RP and his wife wanted to do was to refuse and upset the man who was leading the negotiations. The Respondent provided reassurance to him that the loan will be 100% secure as it would be secured by debenture over AWB's assets. The Respondent had told RP that PPI litigation was a successful area at the time. The Respondent did not tell him that his wife, LA, held a fixed and floating charge over AWB's assets. The Respondent arranged further for DM to provide RP with cash flow projections and other business documents, which looked "rosy". RP did not discuss the financial position or the legal documents with any other professional as he trusted the Respondent as a solicitor and as his friend.

43. During a conversation with the Respondent, the Respondent explained that he would send RP a letter stating that RP needed to take independent legal advice but had said "I can tell you now that it is a waste of money as the loan is 100% secure". RB subsequently received a letter from the Respondent which referred to independent legal advice. At no point had the Respondent insisted that RP and CP take independent legal advice, nor did he refuse to continue acting despite knowing that they had not obtained it.

44. In summer 2009 the Respondent approached RP and CP to request a further loan of £25,000. This was intended to be a short-term loan with a repayment date of 31 October 2009. The Respondent intimated that without the further loan he would probably not be able to continue in business and the original loan of £100,000 would therefore be at risk. On 18 November 2009 the Firm granted RP and CP a charge over the assets of the Firm as security for all monies due. RP was not aware that at the time the Respondent had, the previous day, granted a similar charge to LA.

45. On 12 January 2010 the Respondent had suggested that the interest on the outstanding £25,000 loan should be offset against ongoing legal costs as "this would then avoid VAT issues". RP agreed to this. On 16 April 2010 the Respondent stated "as previously explained your money is secure in view of the debenture you hold". On 25 November 2010 the Respondent stated "… I am really doing everything I can to resolve this and at the end of the day there are several people in a similar position but you are the only one I have ensured is fully secured and protected…".

46. RP confirmed that the loans had never been repaid in full.

47. In cross-examination RP confirmed that he was familiar with the idea that banks protected their interests by registering securities at Companies House. He further confirmed that he had from time to time received advice from accountants and from Birkett Long, though not about the loans.

48. It was put to RP that the document supplied by DM on 8 November 2008 was an aspirational cash flow. RP told the Tribunal that it was not explained to him in that way. Any discrepancies between it and the information provided by the Respondent to RP were not spotted by him at the time. The Respondent had guaranteed the loan 100%. It was suggested to RP that the Respondent had told him about the loans from the banks and the fact that they were secured. RP stated that this was not the case. His understanding was that RP's and CP's loan was the first charge and was therefore 100% secured, and he probably assumed the bank loans were secured by the Respondent giving personal guarantees. RP denied that the First Loan was an investment, stating that it was a loan. He was asked whether he accepted that the effective return of 25% reflected that it was a risky loan, to which he responded that if there had been any indication of risk he and CP would not have gone ahead. They were in the process of retiring and were risk averse.

49. RP confirmed that in 2009 he was becoming concerned about the repayment of the loan. He denied that he had any interests in the legal business or that he was working with the Respondent on business opportunities for the Firm. His priority was trying to recover his money and he was "doing anything to save the situation". He was therefore working with PB, an insolvency advisor, to help him through the CVA process.

50. RP confirmed that the Second Loan had a rate of interest of 6% per annum. He was asked why this was different from the 25% rate of the First Loan and RP explained that the 25% figure was not per annum, it was a fixed sum of £25,000. The fixed sum had been suggested by the Respondent and accepted by RP and CP. Had the Respondent suggested 6% per annum in respect of the First Loan, he may or may not have accepted it.

51. It was put to RP that the Respondent had corrected the fact that the forms had been submitted the wrong way round, causing the difficulty regarding the priority of the charges in 2009. The correction was demonstrated in the CVA in 2010 and the Respondent's assurance was therefore an accurate one when, on 16 April 2010, he had told RP that his money was secure. RP reiterated that he had not been repaid. It was put to RP that the Respondent had been correct when he told RP that there were other people in a similar position but that RP was the only one who was fully protected. RP said that he took this to mean other clients from whom the Respondent may have borrowed money.

CP

52. CP confirmed that her Witness Statement was true to the best of her knowledge and belief.

53. CP told the Tribunal that her recollection of events was poor. She recalled there being a loan for £100,000 and that assurance was provided that it was 100% secure.

54. In cross-examination she confirmed that she would have seen emails from DM and she agreed that she may have written emails to the Respondent from time to time making enquiries about the amount of interest owed, although without seeing the actual emails she could not be sure. She had historically been involved in the finances

of her husband's businesses, although she was not a qualified accountant. CP was shown the Excel document that had been provided by DM in November 2008 and she confirmed that she would have seen this at the relevant time. It was suggested that this document reflected what everyone hoped would happen and not what actually happened. CP replied that she would hope that cash flow projections would be realistic. She agreed that the document indicated that the Firm had a considerable amount of debt and that she would have wanted to have a "good look" at this before putting £100,000 into the business. She could not recall whether she had done so or not. It was put to CP that she and her husband knew that there were bank loans in place for the Firm. CP was unable to answer that; she could not remember exactly what was discussed in relation to that. She was also unable to say whether or not she and her husband knew that bank loans were guaranteed by charges on the business.

The Respondent

55. The Respondent gave evidence on oath and confirmed that the contents of his witness statement were true to the best of his knowledge and belief.

56. The Respondent was asked why the expectations that were contained in the cash flow document had not materialised. He explained that the PPI work had failed and this was for a variety of reasons. In some cases the client's claims were insufficiently strong, while at the same time banks were defending the claims robustly.

57. The Respondent was referred to Rule 3.01 of SCC 2007 and agreed that in any case where a potential loan from the client is being considered there is the potential for an obvious conflict of interest. He was further referred to the guidance note at paragraph 41 which stated "In all these cases you should insist the client takes independent legal advice. If the client refuses you must not proceed with the transaction". The Respondent accepted that he had not insisted that RP and CP take independent legal advice nor had he refused to proceed with the transaction in light of their failure to do so. The Respondent therefore admitted breaching Rule 3.01 in relation to Allegation 1 and Allegation 3, but denied doing so dishonestly. He said that he did not appreciate that at the relevant time the Rule required him to do more than advise his clients that they should take independent legal advice.

58. The Respondent was taken through the financial performance of the Firms, including the years when the Respondent's drawings were relatively healthy. It was put to him that he had not repaid any of the money owing to RP/CP despite these improvements in finances. The Respondent confirmed that this was correct and stated that he had required those drawings in order to survive financially. In addition the CVA prevented him from paying anything to a creditor without the consent of the supervisor. He confirmed that he had not sought such consent as he was looking to arrive at a "proper solution rather than a piecemeal solution".

59. It was put to the Respondent that the fee projections provided to RP in November 2008 were overly optimistic and took no account of the possibility of the PPI work failing. The Respondent stated that at the time he did not see it this way, as the purpose of the First Loan was to keep the PPI team in place and therefore generate the fees projected.

60. It was put to the Respondent that at the time of the First Loan, the Firm owed his wife in the region of £443,000. He agreed that it was a "substantial six-figure sum".

61. The Respondent confirmed that he had acted as Company Secretary for a number businesses owned by RP and CP. He was asked whether this reflected his personal as well as professional relationship with RP and CP at the time, and he explained that the friendship developed at a later stage, and his role as company secretary reflected the fact that RP needed someone to perform that role and the Respondent was the person who could do so. He was familiar with the role due to his previous in-house role at Ford. The Respondent told the Tribunal that he dealt with Commercial and Company law but did not regard himself as an expert. He agreed that by November 2008 he had dealt with the process of giving companies charges over the Firm's assets on a number of occasions so was familiar with the process.

62. The Respondent confirmed that he approached RP and CP for a loan of £100,000. The agreement for a repayment in the sum of £25,000, rather than at a rate of interest, came as a result of discussions between himself and RP. The Respondent was happy to agree to this, as he anticipated a large amount of work coming to the Firm. As far as the Respondent could recall it was his, the Respondent's, suggestion that a debenture should be granted to RP. It was put to the Respondent that if a friend who is also a solicitor offers a return of effectively 25% on a loan, as well as offering security, that this was clearly intended to look attractive to the lender. The Respondent agreed that that was how it may look, but this was not his intention at the time. His intention "was to do the right thing".

63. The Respondent agreed that without the PPI work the prospects for the Firm were dire. It was put to him that the only thing saving the company from insolvency at the end of 2008 was his hope about the PPI work coming in. The Respondent stated that it was more than hope as he had correspondence confirming that such work would flow. The Applicant suggested that the Respondent had not explained to RP that the future of the Firm relied on "a bet on PPI". The Respondent agreed that he had not used those words, but stated that he had showed RP a letter from a provider and in his (the Respondent's) mind there was no concern. The Respondent disagreed with the suggestion that he had been "desperate to get money out of [RP] to keep PPI afloat". He said that if a quarter of the cases had succeeded then the various loan repayments could have been covered. The Respondent had needed to hold together the team in order to do that work rather than let it slip away. The offer of 25% return was not a measure of the Respondent's desperation. There was clear evidence that the work was going to flow, and there was no doubt in his mind that it would do so. He would advise and expect any client to seek the advice of an accountant in such circumstances.

64. The Applicant suggested to the Respondent that if RP had taken independent legal advice there was no chance of the Respondent getting the loan. The Respondent stated that at the time RP was free to take whatever advice he wished, and the Respondent had advised him to seek advice from an accountant. The Respondent completely denied advising RP, or giving the strong impression to RP, that he should not "waste his money" by taking independent legal advice. He did not say that and would not have done so. The Respondent denied ever discouraging RP from seeking any advice.

It was RP who had felt that taking such advice was un-necessary and would be a waste of money.

65. The Respondent agreed that the existence of security was material to somebody considering lending money. It was common ground that RP had no idea at the time that there was a charge in favour of LA. The Respondent stated that he too had no knowledge of this charge still being registered. When the Firm had moved its banking to Barclays the bank had required that the first LA charge be removed. The Respondent had produced and given the draft Deed of Satisfaction to the relationship manager at Barclays bank as she had insisted on filing it herself. He had assumed that she had actually filed it, and it only came to his knowledge that she had not done so when he consulted an insolvency practitioner the following year. While his wife still had loan agreements with the Firm, his understanding was that those loans were no longer secured by a charge. It was put to the Respondent that he had told RP that RP had priority over the Respondent's wife. The Respondent stated that he had given an assurance to RP that he had priority over his wife's loans as his understanding was that his wife's loans were not protected by a charge. The Respondent had no knowledge that the Deed of Satisfaction had never been sent to, or was never received by, Companies House. It was put to the Respondent that a simple check at Companies House any time between October 2006 and November 2008 would have revealed that the First LA charge remained in place. The Respondent replied that he had no reason to carry out such a check. During any refinancing it would be the bank that would check this, and indeed Clydesdale had never raised an issue in connection with the First LA Charge. It was put to the Respondent that the Deed of Satisfaction was a "recent construction of [his] own", something that the Respondent emphatically denied. It was sworn before a solicitor and was a genuine document. It was put to the Respondent that if Barclays wished to take priority over the Respondent's wife this could have been addressed by a deed of priority. The Respondent replied that Barclays required the removal of the LA charge. Unfortunately the paperwork relating to the Barclay's loan was long since destroyed, save for the draft Declaration of Satisfaction.

66. The Applicant asked the Respondent how it was that the only document that had not been destroyed from the Barclay's file was the Declaration of Satisfaction. The Respondent explained that he had found the draft copy in his personal papers while looking for something else. The Respondent told the Tribunal that the file relating to the Clydesdale bank loan had also been destroyed at the end of November 2015. It was put to the Respondent that he must have known that this material was relevant to the SRA's investigation. The Respondent stated that at the time he did not have any inkling that that file would be relevant. Although the Respondent was aware that he had been referred to the Tribunal, by this point he had not appreciated that the allegations included dishonesty. His belief at the time was that the Clydesdale file had nothing of relevance.

67. The Respondent was referred to an email dated 26 November 2014 that he had sent to the SRA in which he had stated that the only debentures and securities record against the Firm in November 2008 were in favour of his wife. He was asked why he had not, in that email, described the surprise that he had received in May 2009 when he discovered from the joint administrators that his wife still had a charge, when in fact he thought it had been discharged. The Respondent stated that this was an oversight.

The Respondent accepted that when he had sent an email the following day making a correction to the previous day's email, he had again not raised this matter. It was put to the Respondent that his account about not knowing about his wife's charge being in existence was something that he had recently raised as part of his defence. The Respondent referred the Applicant to the Declaration of Satisfaction which he had given to the relationship manager at Barclays.

68. The Respondent was asked why the Second RP Charge was created one day later than the Second LA Charge. The Respondent described this as a "complete cock-up" on his part as he had "dated them the wrong way round". It was always his intention that the RP charge would be the first charge. It was put to the Respondent that he intentionally created his wife's charge one day before the RP charge because he knew that she would get priority if he did so. The Respondent denied this, stating that at the time he believed that it was the date of registration at Companies House that determined priority, and not the date of creation. He stated that this belief stemmed from his recollection of studying company law in his student days and he believed the law had not changed significantly in the intervening 40 years. He accepted that he had not checked the position and had made an error. He was extremely busy at the time and was the Firm's biggest fee earner. He "fundamentally believed and intended" that RP's charge should be dated first and LA's charge should be dated second.

69. The Respondent was informed by PB for the first time in June 2012 that in fact the Second LA Charge had priority over RP. PB did not know the reason why this was but he had taken advice on the issue of priority and in the course of those enquiries it had been established that RP did not have priority as the Respondent previously thought. The Applicant asked the Respondent whether he had sought any explanation for this, to which the Respondent stated that his sole objective was to remedy the situation. The Respondent denied that he had known all along that his wife's charge took priority. He was asked whether he had explained to RP in November 2009 that he was going to be creating a charge in favour of his wife, in apparent breach of clause 2 of RP's loan agreement. The Respondent stated he had done so verbally, and he believed that his wife's charge would be underneath RP's charge. The Respondent agreed that in hindsight he could have arranged a Deed of Priority at that stage. However he was very busy at the time.

70. The Respondent was asked about the financial prospects of the Firm in 2010, which by now was AL LLP. He told the Tribunal that the Firm had good prospects at that time and that, while it was struggling to cope with the level of debt, it was slowly improving. The Respondent fundamentally believed that had the Firm not faced the winding up petition it would have recovered and been able to meet all its liabilities over time. In the event, administrators were appointed in March the following year, ultimately leading to liquidation.

71. It was put to the Respondent that he had repaid his wife approximately £78,000, having repaid nothing to RP/CP. The Respondent was unable to explain the figures but stated that at no stage was any money repaid to his wife.

72. The Applicant asked the Respondent why he had told RP in the email of 16 April 2010 that his money was secure. The Respondent stated that this reflected his belief at the time. It was put to him that there was a difference between having a

security and having value in that security, to which the Respondent reiterated that he believed the money was secure based on how the business was developing. He was reminded that this was six months before the CVA, to which the Respondent replied that good progress was being made but in the end it wasn't fast enough. The Respondent was asked about the winding up petition from HMRC, which he knew about before he sent the email on 25 November 2010 stating that RP was "fully secured and protected". The Respondent confirmed that he had not brought this to RP's attention as he believed that the matter could be resolved. It was put to the Respondent that the reassurance offered in the email of 25 November 2010 "looked rather hollow" given that at the time he was negotiating a winding up petition that he had not told RP about. The Respondent explained that at the time of sending the email he was taking advice, but he had not received that advice at the time he wrote the emails. He felt at the time that it would have been "foolhardy" to give information that he was unsure about until the receipt of that advice. In response to questions from the Tribunal as to how, in the circumstances, he felt entitled to give the reassurance that he did to RP, the Respondent stated that RP had a debenture and he believed that any claim by HMRC would rank beneath RP's charge.

Findings of Fact and Law

73. 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 the evidence in respect of each Allegation individually, including when considering the question of dishonesty.

74. **Allegation 1: On or around 26 November 2008, when advising his clients, RP & CP, in relation to a loan of £100,000 by them to his business, he failed to insist that they took independent legal advice and proceeded with the transaction, thereby acting when there was a conflict of interest, contrary to Rule 3.01 of SCC 2007**.

Applicant's Submissions

74.1 The Applicant submitted that Rule 3.01 and the associated guidance was clear that it was not sufficient for the Respondent merely to recommend that legal advice be taken – he must insist on it or decline to act. The Respondent knew he should not have been proceeding in the way he did or, at the very least, he took so little care that it amounted to deliberately shutting his eyes.

74.2 The Applicant submitted, in respect of each of the Allegations, that the Respondent's actions were dishonest in accordance with the test for dishonesty accepted in Bultitude v Law Society [2004] EWCA Civ 1853 as applying in the context of solicitors disciplinary proceedings i.e. the combined test laid down in Twinsectra Ltd v Yardley and Others [2012] UKHL 12, namely the person has acted dishonestly by the ordinary standards of reasonable and honest people, and realised that by those standards he or she was acting dishonestly.

74.3 The Applicant submitted that, not only was the Respondent's conduct dishonest by the ordinary standards of reasonable and honest people but he must also have been aware that it was dishonest by those standards. Despite his clear knowledge of his obligation to advise RP & CP to take independent legal advice, demonstrated by his two letters to RP to that effect, he sought to dissuade RP from taking independent legal advice and proceeded in the knowledge that they had not taken independent legal advice. The Respondent failed to inform RP about the First LA Charge, which an independent legal advisor would have discovered by virtue of a simple Companies House search – hence he had motive to not insist that independent legal advice was provided. The Respondent had further informed RP that the First Loan was 100% secure, which would have been questioned by anyone providing independent legal advice – and so again he had motive not to insist that independent legal advice was provided, and this formed part of a course of conduct over these two discussions.

Respondent's Submissions

74.4 The Respondent submitted that the relevant factual focus should be on the level of legal protection that RP had. The legal advice that he should have had pertained to the debenture. Other assistance was available to RP, in particular, from his accountants. There was no reason for the Respondent to prevent RP seeking legal advice and indeed he had reminded RP twice that he should obtain independent advice on the matter. This was inconsistent with a desire not to be "exposed". All the witnesses were reliant on their memories of what happened some years ago. The Respondent had provided the spreadsheet to RP/CP and CP confirmed she had seen it. DM was available for RP to check any matter that he wished. RP's evidence as to the rate of interest was unsatisfactory: the fact that the rate of interest was 25% was not a figure picked at random. It demonstrated a reflection of the level of risk.

74.5 If the Tribunal was sure that the Respondent should have insisted that RP and CP should have sought independent legal advice and not to have done so was negligent, the charge was proven to this extent. There were degrees of negligence in this context and although negligence had not been pleaded by the Applicant it was nevertheless open to the Tribunal to make such a finding. Only if the Tribunal were sure that the Respondent had been acting in a deliberate way so as to expose RP to a substantial risk of loss, could he be dishonest. If the Respondent was not trying to stop RP seeking legal advice, or may not have been doing so, he cannot sensibly be regarded as dishonest. If the email of the 24 November and the letter of 1December 2008 were sent in a spirit of genuine advice, or may have been, the matter was not proven.

Tribunal's Findings

74.6 The Respondent had admitted breaching Rule 3.01. The rule and the attached guidance was clear and the Tribunal was satisfied that this was properly admitted on the evidence.

74.7 The Rule and the attached guidance required that the Respondent insist that RP took independent legal advice and that, if RP refused, he should cease to act. The Respondent had given evidence that he believed the Rule only required him to recommend that RP take independent legal advice, albeit he accepted that this was a

mistake on his part. The Tribunal could not be sure that the Respondent knew the actual wording of the Rule and therefore considered whether, even on his own erroneous understanding of the Rule, he had known that he was not complying with it.

74.8 There was a clear conflict of evidence as to whether or not the Respondent had verbally advised RP not to "waste his money" and not to take independent legal advice. RP had been consistent in his evidence that the Respondent had discouraged him from taking independent legal advice, and the Respondent had been equally consistent that he had never said such a thing; indeed it was his case that it was RP who had told him that he did not wish to waste his own money taking such advice.

74.9 The Tribunal noted clause 4 of the loan agreement which stated "the borrower shall be responsible for and shall indemnify the lender from and against all costs and other expenses incurred in connection with the preparation and completion of this agreement." The effect of this clause was that RP would not have had to pay for independent legal advice as the Respondent would have been required to indemnify him for such costs. It would not therefore have been a waste of RP's money at all. The Tribunal rejected the Respondent's evidence that RP had told him that he did not intend to obtain independent legal advice on the basis of not wishing to incur the cost. The Tribunal found RP to be a credible witness and accepted his evidence that the Respondent discouraged him from obtaining such advice. His motive for so doing was his knowledge that the loan was less likely to have been made, had RP taken such advice. Whether or not the Respondent was actually aware of the terms of Rule 3.01 of the SCC 2007, as to which there was insufficient evidence, the Respondent was aware that advising his clients on the making of the First Loan and the security to be provided for it, gave rise to a conflict of interest which inevitably called for independent legal advice to be obtained.

74.10 The Tribunal considered the issue of dishonesty by applying two-stage test set out in Twinsectra.

74.11 The Tribunal considered the objective test. The Respondent, in his written communications with RP in his letter of 24 November 2008 and email of 1 December 2008 was ostensibly advising RP and CP to seek independent legal advice despite having sought to discourage them doing exactly that. The Tribunal was satisfied beyond reasonable doubt that this would be considered dishonest by the ordinary standards of reasonable and honest people.

74.12 The Tribunal considered the subjective test. At the material time the Firm had other liabilities which were not referred to in any correspondence between the Respondent and RP. There was no reference to the existing debentures held by Barclays bank, and the only document provided to RP was an aspirational cash flow. Despite it being aspirational it contained no 'health warning'. The email to RP of 14 November 2008 said "Mike has asked me to send you the attached cashflow for your information. If you have any questions please give Mike or myself a call". A budget would be regarded as aspirational but a cashflow should reflect reality. The result of describing the document as a cashflow was that the recipient would be entitled to regard it as reliable and it is clear that RP did so. When it had been put to him that it was in fact aspirational he replied "it was not described to me like that". The Tribunal accepted RP's evidence on this point. The Tribunal was concerned that the document did not

meet the description that had been given to it. The Tribunal noted the contents of the Respondent's email of 26 November 2014 to the Applicant, in which he indicated that he was aware of the First LA Charge at the material time. It was very likely that an independent legal adviser would have discovered the existing liabilities of which RP was, at the time, unaware. The Tribunal was satisfied that the Respondent was aware of this risk and that was why he had sought to discourage RP and CP from taking independent legal advice, despite being aware that the inevitable conflict of interest called for such advice to be given. The Tribunal was satisfied beyond reasonable doubt that the Respondent knew that by discouraging RP from taking independent legal advice that he was acting dishonestly by the ordinary standards of reasonable and honest people.

74.13 The Tribunal found this Allegation proved in full, including the element of dishonesty.

75. **Allegation 2: On or around 4 December 2008, when advising his clients, RP & CP, in respect of a debenture to secure their lending to his business, he failed to advise them of a material fact, namely that his wife had a prior legal charge which materially impacted on the value of the security being granted, thereby failing to disclose to his clients all information of which he was aware which was material to those clients' matter, contrary to Rule 4.02 of the SCC 2007**.

Applicant's Submissions

75.1 The Applicant again submitted that the Respondent had acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he was acting dishonestly.

75.2 Not only was his conduct dishonest by the ordinary standards of reasonable and honest people but he must also have been aware that it was dishonest by those standards. The Respondent had failed to inform RP about the First LA Charge or the amount owed to his wife, material facts of which he was aware – and he had motive not to inform RP of these issues, as it would have highlighted the fact that he had previously hidden these facts, and this formed part of a course of conduct over these two occasions

Respondent's Submissions

75.3 The Respondent's case was that he did not think that his wife had a prior legal charge at the time since he believed that Barclays Bank had removed the charge and this was supported by the Declaration of Satisfaction. The fact that there was a lack of material from the Barclays Bank file was frustrating, but there was no evidence from RP or CP on this topic. There was objective evidence of a document which was countersigned by a solicitor, who could have been asked about the matter by the SRA. It would not be safe to assume that this document did not have the weight that the Respondent had asserted it did. If he did not think that his wife had a prior legal charge, or may have thought that, the charge was not made out.

75.4 The particulars of dishonesty put in respect of this Allegation and Allegation 4 had been grouped together by the Applicant but in fact the factual issues between this Allegation and Allegation 4 were different. In respect of Allegation 2, the Respondent's case was that he thought there was no LA charge. In respect of Allegation 4, his case was that he had intended to give RP's charge priority over LA's charge. The Respondent noted that Allegation 2 was not pleaded on the basis of any of the other debentures issued by the Firm. It was not suggested that there was a failure to advise RP of any debentures granted to any bank.

Tribunal's Findings

75.5 It was common ground between the parties that the Respondent had failed to advise RP and CP of the fact that his wife had a prior legal charge. The Applicant's case was that the Respondent knew about his wife's charge and failed to disclose it. The Respondent's case was that the reason for not disclosing it was because he was unaware of it, believing it to have been removed as part of the Barclays bank refinancing in 2006. This was relevant to the question of whether or not the Respondent was aware that this amounted to a material fact. The Respondent, on his own evidence, had been aware that the First LA charge was still in existence since at least May 2009 when the joint administrators referred to it in their report. The Respondent did not contact RP to correct his previous representations as to the security provided by the First RP Charge, and the irresistible inference from his failure to do so was that the Respondent had not discovered this in May 2009, but had known all along that the First LA Charge remained in place.

75.6 The Tribunal considered the Declaration of Satisfaction, which had not been executed and found it implausible that the relationship manager at Barclays Bank would have wanted to submit this to Companies House herself and not relied upon the Respondent to do so and to provide her with a properly executed document. The Respondent must have known that he had provided the bank with an un-sealed document, that the bank had not spotted this, and had not itself arranged for the document to be submitted to Companies House because he had not subsequently been provided with a sealed copy in the usual way. In his email of 26 November 2014 to the SRA the Respondent had written "the only debentures and securities recorded against the Firm in November 2008 were a debenture in favour of my wife". That email contained no reference to Barclays Bank having insisted on but failing, unbeknown to him, to submit a Declaration of Satisfaction, or to the Respondent being surprised by a revelation in May 2009 that the First LA Charge remained extant. The Tribunal was satisfied beyond reasonable doubt that the Respondent was aware in December 2008 of the material fact, namely the existence of the First LA Charge, and failed to disclose this to RP and CP. The Tribunal was satisfied beyond reasonable doubt that the Respondent had breached Rule 4.02.

75.7 The Tribunal again considered the issue of dishonesty by applying the two-stage test set out in Twinsectra. The failure to disclose a material fact in circumstances where a solicitor was borrowing £100,000 from his client, the consequence of the failure to disclose being that the client was unaware that the solicitor's wife's interest took priority, would be regarded as dishonest by the ordinary standards of reasonable and honest people.

75.8 The Tribunal considered the subjective test. Having failed to insist that RP and CP obtain independent legal advice in the hope that they would not discover the First LA Charge, the failure to disclose the existence of it was a logical extension of this course of conduct. If the failure to mention the First LA Charge is had been an honest mistake the Respondent would have taken immediate steps to rectify the error upon discovery, and would have disclosed it without delay to RP and CP in a transparent and open manner. In the event the Respondent never disclosed the existence of the First LA Charge to RP/CP and a fresh charge was not registered in RP/CP's favour seven months. The Tribunal rejected the Respondent's evidence that this was merely an oversight on his part, and was satisfied that he had been fully aware of the First LA Charge remaining in existence throughout. He was not honestly mistaken as to its existence, and his failure to draw RP/CP's attention to it when it was referred to in the joint administrators' report could not be explained away as an oversight. His motive in not disclosing this material fact to RP and CP was his desire that they did not discover it, as this would have potentially jeopardised their willingness to lend the Respondent the money, with the consequences that would have followed from that. The Tribunal was satisfied beyond reasonable doubt that the Respondent therefore knew that he was acting dishonestly by the ordinary standards of reasonable and honest people.

75.9 The Tribunal found this Allegation proved in full, including the element of dishonesty.

76. **Allegation 3: On or around 28 August 2009, when advising his clients, RP & CP, in relation to a loan of £25,000 by them to his business, he failed to insist that they took independent legal advice and proceeded with the transaction, thereby acting when there was a conflict of interest, contrary to Rule 3.01 of the SCC 2007**.

Applicant's Submissions

76.1 The Applicant again submitted that the Respondent had acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he was acting dishonestly.

76.2 Not only was his conduct dishonest by the ordinary standards of reasonable and honest people but he must also have been aware that it was dishonest by those standards. The Respondent informed RP that the First Loan was 100% secure, which would have been questioned by anyone providing independent legal advice – hence he had motive not to insist that independent legal advice was taken , and this formed part of a course of conduct that was repeated over these two occasions. Despite his clear knowledge of his obligation to advise RP & CP to take independent legal advice, demonstrated by his previous two letters to RP to that effect, he proceeded in the knowledge that they had not taken independent legal advice, and this formed part of a course of conduct over these two occasions.

Respondent's Submissions

76.3 If the Respondent was not attempting to prevent RP from seeking legal advice, or may not have been doing so, he could not be regarded as having acted dishonestly. Only if the Tribunal was sure he was acting in a deliberate way to expose RP to a substantial risk of loss could the charge be proved. The Tribunal was invited to note that the Second Loan was after AWB had gone into administration on 2 April 2009. Furthermore, there was specific mention in the loan document itself that RP and CP had chosen not to seek legal advice. As the letter from RP and CP's solicitor made plain, the debenture was moved over to AL LLP. The Administrators' report suggested that the charge holders in AWB would be granted an equivalent charge over the assets of AL LLP, but in the event it was only RP/CP and LA who had any charges to be considered when AL LLP went into administration. 'Secure' in this context was plainly a reference to the debenture. There had only ever been two debentures taken out for AL LLP, and they were not in fact taken out until November 2009.

Tribunal's Findings

76.4 The Respondent had admitted breaching Rule 3.01. The rule and the attached guidance was clear and the Tribunal was satisfied that this was properly admitted on the evidence.

76.5 The facts in relation to this Allegation were slightly different to Allegation 1 in that this related to the Second Loan and the Second RP Charge, and this loan agreement contained a clause specifically relating to the taking of independent legal advice. This was contained in clause 6 which stated "the lender acknowledges that they have been advised to seek independent legal advice in respect of the advance but have chosen not to do so".

76.6 The Second Loan was approximately nine months after the First Loan. The Tribunal was satisfied that the Second Loan was made by RP/CP, in part, to try to ensure the repayment of the First Loan. There was no evidence of separate and explicit discouragement on the part of the Respondent concerning the taking of legal advice. However the discouragement that the Respondent gave concerning the taking of such advice prior to the First Loan agreement continued to have effect, given the proximity in time between the two loans and the context in which the Second Loan was made. The Tribunal accepted the evidence of RP that it was implicit that if he did not lend the Respondent an additional £25,000, his original £100,000 would be at risk. These circumstances therefore reinforced the Respondent's prior discouragement.

76.7 The Tribunal again considered the issue of dishonesty by applying two-stage test set out in Twinsectra.

76.8 The Tribunal considered the objective test. The Respondent had, in his written communications with RP prior to the First Loan, ostensibly advised them to seek independent legal advice despite having sought to discourage them doing exactly that. This representation had carried over due to the context of the Second Loan, discussion about which took place a short time after the First Loan, and was directly relevant to the repayment of that loan. The Tribunal was satisfied beyond reasonable doubt that

such discouragement, particularly when coupled with clause 6 of the loan agreement which was designed to imply that RP/CP had themselves freely elected not to obtain such advice, would be considered dishonest by the ordinary standards of reasonable and honest people.

76.9 The Tribunal considered the subjective test. The Respondent was in urgent need of the £25,000 loan in much the same way as he had been in respect of the £100,000 loan. Once again RP was not told about the Firm's existing liabilities or debentures and the Respondent would have readily appreciated that, had those matters been investigated and made known to RP/CP, their willingness to advance the Second Loan would have diminished because they would have appreciated that the value of the security they previously held and were being offered again was significantly less than had been represented to them. The Tribunal was satisfied beyond reasonable doubt that the reason that the Respondent failed to advise RP to take independent legal advice in respect of the Second Loan was that the existence of the First LA Charge may have come to light. Had RP's attention been drawn to the Joint Administrators' report of 27 May 2009 he would have seen that he ranked fifth at AWB and not first as he had been given to understand. This would have jeopardised the prospects of the £25,000 loan being advanced. The clause in the Second Loan agreement therefore had the effect of "topping up" of the Respondent's earlier representations on this point. The clause therefore amounted to a figleaf to disguise his true advice to RP which was that obtaining independent legal advice would be a waste of money.

76.10 The Respondent therefore knew that he was acting dishonestly by the ordinary standards of reasonable and honest people.

76.11 The Tribunal found this Allegation proved in full, including the element of dishonesty.

77. **Allegation 4: On or around 18 November 2009, when advising his clients, RP & CP, in respect of a debenture to secure their lending to his business, he failed to advise them of a material fact, namely that his wife had a prior legal charge which materially impacted on the value of the security being granted, thereby failing to disclose to his clients all information of which he was aware which was material to those clients' matter, contrary to Rule 4.02 of the SCC 2007**.

Applicant's Submissions

77.1 The Applicant again submitted that the Respondent had acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he was acting dishonestly.

77.2 Not only was his conduct dishonest by the ordinary standards of reasonable and honest people, but he must also have been aware that it was dishonest by those standards. The Respondent failed to inform RP about the First LA Charge, the Second LA Charge or the amount owed to his wife. These were material facts of which he was aware, and he had motive not to inform RP of these issues as it would have highlighted that he had previously hidden these facts; this formed part of a course of conduct over these two occasions.

Respondent's Submissions

77.3 The Respondent submitted that this Allegation required an individual to know that the relevant information was a material fact. The Respondent understood the case for the SRA to be put on the basis that this charge was either undertaken dishonestly or it was not made out. The Respondent's case was that he did not intend RP/CP to be disadvantaged in the way in which the interests were to be registered. If that was the case, or may have been the case, the Allegation was not made out. This charge was different from Allegation 2, as it was an agreed fact that the forms by which the charges were to be registered were filled in within a day of each other. Based on the way in which the documents were described on the Companies House documents, one could see how the Respondent would have thought that the Second RP Charge had priority over the Second LA Charge. When the matter came to light it was corrected straight away, by way of the Deed of Postponement on 13 June 2012.

Tribunal's Findings

77.4 It was common ground between the parties that the Respondent had failed to advise RP and CP of the fact that the Second LA Charge had priority over the Second RP Charge. The Applicant's case was that the Respondent knew this and failed to disclose it. The Respondent's case was that the reason for not disclosing this fact was because he was unaware of it, believing the charges to have been registered with RP/CP having priority.

77.5 The legal position was that LA's charge took priority, having been created on 17 November 2009, over RP's charge which was created on 18 November 2009. The Respondent was an experienced practitioner in the field of Commercial and Company law. He had worked in-house at Ford, and had also acted as Company Secretary for a number of businesses, including some owned by RP/CP. He had also been involved in at least three re-financing arrangements for the Firms within a two-year period including Barclays, Clydesdale and Hampshire Trust. The Tribunal therefore rejected the Respondent's evidence that his knowledge of Company law was limited to his academic studies 40 years previously. The dating of 18 November 2009, was significant as it was the day after the Second LA Charge and the Respondent therefore knew and the Respondent therefore knew that his wife's charge took priority. The Deed of Postponement was not an immediate correction and paragraph 13.6 of the CVA proposal, signed by the Respondent in December 2010, showed that LA was secured but did not show the same for RP/CP. The Tribunal was satisfied beyond reasonable doubt that the priority of the Second LA Charge was a material fact of which the Respondent was aware and failed to disclose contrary to Rule 4.02. The Tribunal found the breach of Rule 4.02 proved.

77.6 The Tribunal again considered the issue of dishonesty by applying the two-stage test set out in Twinsectra. The failure to disclose a material fact in circumstances where a solicitor was borrowing £25,000 from his client, the consequence of the failure to disclose being that the client was unaware that the solicitor's wife's charge took priority, would be regarded as dishonest by the ordinary standards of reasonable and honest people.

77.7 The Tribunal considered the subjective test. The Respondent had given contradictory explanations as to how it had come about that LA had a charge that took priority over RP/CP. In his evidence to the Tribunal the Respondent stated that the reason for the RP charge not taking priority was due to "a complete cock-up on the basis that I dated them the wrong way round". This was inconsistent with his witness statement in which he had stated "I have no idea how that occurred given that [RP]'s documents were sent to Companies House in advance of the document in favour of my wife". If the Respondent had been under the misapprehension that the question of priority was determined by the date of registration by Companies House then it would not have mattered which way round he had dated them. Moreover, if the Respondent had indeed intended to give RP/CP priority over his wife he could easily have drawn up, dated and filed the Second RP Charge before doing anything to process the creation and filing of the Second LA Charge. His decision to deal with them both at the same time, date his wife's first and send them off to Companies' house for filing within (at the most) one day of each other, amounted to, at the very least, a cavalier risk that his intentions would go awry and he must have chosen to shut his eyes to that risk.

77.8 The Tribunal had rejected the Respondent's evidence that he was not sufficiently familiar with the procedure for correctly registering debentures and charges as discussed above. The only logical explanation for dating the documents in the way he did was to give his wife priority. His failure to disclose the material fact of the existence and priority of the Second LA Charge to RP/CP was therefore deliberate, and his motive was his desire to financially detrimental consequences of their realisation that they did not, in fact, have a first charge over the Firm's assets. The Tribunal was satisfied beyond reasonable doubt that the Respondent therefore knew that he was acting dishonestly by the ordinary standards of reasonable and honest people.

77.9 The Tribunal found this Allegation proved in full, including the element of dishonesty.

78. **Allegation 5: On or around 16 April 2010, he made a materially false statement to RP & CP by stating "as previously explained your money is secure in view of the Debenture you hold" in circumstances where he was aware that there was a prior legal charge in favour of his wife which meant that the money was not secure, and thereby failed to act with integrity, contrary to Rule 1.02 of the SCC 2007**.

Applicant's Submissions

78.1 The Applicant again submitted that the Respondent had acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he was acting dishonestly. Not only was his conduct dishonest by the ordinary standards of reasonable and honest people but he must also have been aware that it was dishonest by those standards. The Respondent was aware that there was a prior legal charge in favour of his wife, and the amount outstanding, and therefore that the statements made were false or misleading and disingenuous, and this formed part of a course of conduct, demonstrated by the start of the statement stating "as previously explained".

Respondent's Submissions

78.2 The Respondent submitted that the whole of the phrase pleaded in the Allegation was relevant. The security came from the debenture, not the financial soundness of the Firm. The Respondent submitted that whilst it may be true as a matter of fact that the effect of the provisions of the Companies Acts meant that there was a prior legal charge he did not know that at the material time. If he did not know that, or may not have known that, the Allegation was not made out. The evidence in support of that proposition was contained in the correspondence with Companies House; in the estimated Statement of Affairs, which set out everyone's understanding of the position when the CVA was proposed in December 2010; the way in which the documents were described by Companies House; the Deed of Postponement. When the matter came to light it was corrected straightaway. There was no sound basis for being sure that the Respondent was knowingly making a false statement in asserting that RP's debenture provided legal security.

78.3 If there was any uncertainty about the way in which the interests were registered and dealt with, at a time when RP had access to separate advice, the Tribunal should go on to consider integrity. The Respondent's candid, if rather alarming, comments about his knowledge of the relevant provisions were instructive. A person could lack integrity without being dishonest. It was sometimes expressed as lacking moral soundness, rectitude and steady adherence to an ethical code. The Respondent's lack of knowledge of the relevant provisions of the Companies Act did not mean that he lacked moral soundness, or had no adherence to an ethical code. Even if the Tribunal were to find that on occasion his actions had been financially cavalier, that was not the same thing as lacking integrity.

Tribunal's Findings

78.4 The Tribunal agreed with the Respondent's submission that the entirety of the pleaded wording had to be considered. It was agreed between the parties that "materially false" in this case meant "untruthful". In other words, the Tribunal had to be satisfied beyond reasonable doubt that the Respondent knew that the words "As previously explained your money is secure in view of the Debenture you hold" were untrue.

78.5 The Tribunal had found that the Respondent knew that the Second RP Charge did not take priority over the Second LA Charge. This did not automatically mean that RP/CP's money was not secure. If, for example, the Firm had been financially healthy and had sufficient assets to satisfy both the Second LA Charge and the Second RP Charges then RP/CP's money may still have been secure as it was secured by a debenture, albeit not one that had priority as they had been led to believe. The Tribunal noted that it subsequently became apparent that RP/CP's money was not secure as their security turned out to be worthless. However the Tribunal was required to consider the Respondent's knowledge on this specific point at the time he sent the email on 16 April 2010.

78.6 The question was therefore whether the Tribunal could be sure that the Respondent knew that the security was in fact worthless due to the lack of priority and the financial position of the Firm in April 2010. The winding-up petition from HMRC was not filed until November 2010, and the CVA was subsequently discussed in

December 2010. The Tribunal was unable, on the material before it, to make an assessment as to the precise financial state of the Firm as of April 2010. It was therefore not possible to be sure what the Respondent's understanding of the financial position of the Firm, and the quality of RP/CP's security, would have been at the time he sent the email to RP.

78.7 The Tribunal was not satisfied beyond reasonable doubt that the Respondent knew that the representation he made in the email was "materially false". The Tribunal could not therefore conclude that the Respondent had lacked integrity.

78.8 This Allegation was not proved. The Tribunal therefore moved on to consider Allegation 6 which was pleaded as an alternative Allegation.

79. **Allegation 6: On or around 16 April 2010, he made a misleading and disingenuous statement to RP & CP by stating "as previously explained your money is secure in view of the Debenture you hold" in circumstances where he was aware that there was a prior legal charge in favour of his wife which meant that any security that had been given did not actually provide RP & CP with certainty that they would recover their money, and thereby failed to act with integrity, contrary to Rule 1.02 of the SCC 2007**.

Applicant's Submissions

79.1 This was an alternative to Allegation 5.

79.2 The Applicant again submitted that the Respondent had acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he was acting dishonestly.

79.3 Not only was his conduct dishonest by the ordinary standards of reasonable and honest people but he must also have been aware that it was dishonest by those standards. Again the Respondent was aware that there was a prior legal charge in favour of his wife, and the amount outstanding, and therefore that the statements made were false or misleading and disingenuous, and this formed part of a course of conduct, demonstrated by the start of the statement stating "as previously explained";

Respondent's Submissions

79.4 In addition to the submissions made in relation to Allegation 5, the Respondent submitted that the Applicant had put the Allegation on the basis that 'misleading and disingenuous meant, in this context, that the information was 'incomplete', as opposed to Allegation 5 where the basis of the Allegation was that the statement was 'materially false', meaning 'untruthful'. If the Tribunal was sure that the Respondent had acted in a way which was incomplete but not untruthful, he could not be dishonest. The Tribunal's only option was to find the matter proved on the basis of lack of integrity or not proved at all.

Tribunal's Findings

79.5 Although pleaded as an alternative to Allegation 5, the circumstances forming the basis of this Allegation were different. Allegation 5 related to the money being "secure" whereas Allegation 6 was more specific in its pleading as it went beyond the question of whether the money was "secure" and referred to the "certainty that they would recover their money". The money being secure did not necessarily provide for RP/CP recovering it.

79.6 It was agreed between the parties that "misleading and disingenuous" in this context meant "incomplete". In other words, the Tribunal had to be satisfied beyond reasonable doubt that the Respondent knew that the words "As previously explained your money is secure in view of the Debenture you hold" painted an incomplete picture of the situation.

79.7 The Tribunal had found that the Respondent knew that the Second RP Charge did not take priority. This did not automatically mean that RP/CP's money was not secure but it did create uncertainty as to whether they would recover their money. Indeed, RP and CP did not subsequently recover their money. However the Tribunal was required to consider the Respondent's knowledge on this specific point at the time he sent the email on 16 April 2010. The obvious effect of RP/CP not having priority was that it created uncertainty about whether they would recover their money. The Respondent was aware of this and so his statement was incomplete as he did not tell RP/CP that their money was secured by a debenture that ranked second to that of his wife. The Tribunal was satisfied beyond reasonable doubt that the Respondent knew that his statement was incomplete and misleading.

79.8 The Tribunal rejected the submission by the Respondent that it was not open to the Tribunal to find dishonesty in respect of this Allegation. It was possible to dishonestly mislead a client and/or knowingly make an incomplete representation.

79.9 The Tribunal therefore again considered the issue of dishonesty by applying the two-stage test set out in Twinsectra. The making of a knowingly incomplete, and therefore misleading and disingenuous, statement to a client concerning the security of their loan would be regarded as dishonest by the ordinary standards of reasonable and honest people.

79.10 The Tribunal considered the subjective test. The Tribunal had found that the Respondent knew that his representation was incomplete and misleading. He had failed to correct his purported misapprehension as to the existence of his wife's charge upon discovery as discussed above. He had also created a second charge in favour of his wife, dating it so as to give it priority over the Second RP Charge, without telling RP that he had done so. The reason for the incomplete information was a deliberate intention to mislead RP/CP as to the certainty of them receiving their money back. The email of 16 April 2010 was sent in response to an email from RP of 13 April 2010 in which RP was getting increasingly frustrated with the Respondent's failure to repay the monies advanced under the First and Second Loans. The Respondent's intention was therefore to reassure and placate RP. The Tribunal was satisfied beyond reasonable doubt that the Respondent therefore knew that he was acting dishonestly by the ordinary standards of reasonable and honest people.

79.11 Any solicitor knowingly acting dishonestly could not be acting with integrity and therefore the breach of Rule 1.02 of SCC 2007 was found proved.

79.12 The Tribunal found this Allegation proved in full, including the element of dishonesty.

80. **Allegation 7: On or around 25 November 2010, he made a materially false statement to RP & CP by stating "I really am doing everything I can to resolve this and at the end of the day there are several people in a similar position but you are the only one I have ensured is fully secured and protected …" in circumstances where he was aware that his wife had also lent money to his business and she held also held a prior legal charge, placing her in a similar position, and thereby failed to act with integrity, contrary to Rule 1.02 of the SCC 2007**.

Applicant's Submissions

80.1 The Applicant again submitted that the Respondent had acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he was acting dishonestly.

80.2 Not only was his conduct dishonest by the ordinary standards of reasonable and honest people but he must also have been aware that it was dishonest by those standards. The Respondent was aware that his wife held a prior legal charge and therefore that the statements made were false or misleading and disingenuous.

Respondent's Submissions

80.3 The Tribunal was invited to accept the Respondent's evidence about his understanding of the law, in which case the comment he made would have been true as he understood it. The matter was pleaded on the basis that this was a reference to the debenture, rather than the financial wisdom of any investment in a firm that he ran, let alone an investment by a client. The evidence that supported the Applicant's case was the timing of the filling in of the forms to register the Second LA and RP Charges. All of the other evidence pointed in the opposite direction. If the Respondent had been dishonest, he could have taken advantage of the position as a matter of Company law at the time of the CVA, which he did not.

Tribunal's Findings

80.4 Again, it was agreed between the parties that "materially false" in this case meant "untruthful". In other words, the Tribunal had to be satisfied beyond reasonable doubt that the Respondent knew that the words "I am really doing everything I can to resolve this and at the end of the day there are several people in a similar position to you but you are the only one I have ensured is fully secured and protected…" were untrue.

80.5 The Respondent knew that his wife had a charge. Even if the Tribunal had accepted his evidence that he believed it ranked beneath RP/CP, this statement would still have been untrue as it represented to RP/CP that they enjoyed exclusive full protection. The

Tribunal had found that the Respondent knew that his wife's charge had priority over the Second RP Charge and this made the lack of truthfulness of this statement even starker.

80.6 This email was sent on 26 November 2010, two weeks after HMRC had filed a winding-up petition against the Firm. The financial prospects for the Firm were dire and it would have been obvious to the Respondent that this was so. The Tribunal was satisfied beyond reasonable doubt that the Respondent knew he was making a materially false statement.

80.7 The Tribunal therefore again considered the issue of dishonesty by applying the two-stage test set out in Twinsectra. The making of a materially false statement to a client concerning the security of their loan would be regarded as dishonest by the ordinary standards of reasonable and honest people.

80.8 The Tribunal considered the subjective test. The Tribunal had found that the Respondent knew that his representation was untrue. He had failed to inform RP and CP about the true financial state of the Firm, most obviously the winding up petition, and had instead told them that they were in an exclusive position of safety with regards to their loan. The Respondent's evidence that he was wary of disclosing the information that the Firm was in financial difficulty without having first received advice was implausible and the Tribunal rejected it. If the Respondent had genuinely been awaiting advice before disclosing information to RP/CP then he would have said nothing to them either way; he would not have sought to offer them reassurance without any qualification. The reason he made the statement in the email of 26 November 2010 was because he intended to mislead RP/CP as to the prospects of them receiving their money back in order to secure their forbearance for a little longer. One month later he submitted the CVA proposal containing reference to a charge in favour of LA being secured but no reference to any security in favour of RP/CP.

80.9 The Tribunal was satisfied beyond reasonable doubt that the Respondent therefore knew that he was acting dishonestly by the ordinary standards of reasonable and honest people.

80.10 Any solicitor knowingly acting dishonestly could not be acting with integrity and therefore the breach of Rule 1.02 of SCC 2007 was found proved.

80.11 The Tribunal found this Allegation proved in full, including the element of dishonesty.

81. **Allegation 8: On or around 25 November 2010, he made a misleading and disingenuous statement to RP & CP by stating "I really am doing everything I can to resolve this and at the end of the day there are several people in a similar position but you are the only one I have ensured is fully secured and protected …" in circumstances where he failed to disclose that his wife, who may not have been in a similar position, held a prior legal charge, and thereby failed to act with integrity, contrary to Rule 1.02 of the SCC 2007**.

81.1 The Tribunal was not required to consider this Allegation as it was an alternative to Allegation 7, which had been found proved.

Previous Disciplinary Matters

82. On 20 November 2014 the Tribunal had approved a regulatory settlement agreement in which the Respondent had made, and the SRA had accepted, the following admissions:

- Contrary to Rule 1.04, 1.05, 1.06 and 4.02 of SCC 2007, he facilitated, permitted or acquiesced in a failure to disclose material information to lender clients and, in doing so, failed to act in the lender clients best interests;

- Contrary to Rule 3.01 (1) and 3.01 (2) (a) of SCC 2007 he facilitated, permitted or acquiesced in transactions where there was a conflict or a significant risk of a conflict of interest between the interests of two or more clients;

- Contrary to rule 3.02 (1) of SCC 2007 he facilitated, permitted or acquiesced in a failure to obtain the written consent of clients to act;

- Contrary to Rule 22 of the SAR 1998 he permitted a transfer of clients funds for the benefit of another without authority from the first client to do so;

- Contrary to Rule 32 of SAR 1998 he failed to keep accounting records properly written up.

83. The Respondent had been fined £2,000 and had agreed to pay costs in the sum of £7,500.

Mitigation

84. On behalf of the Respondent it was accepted that, in view of the Tribunal's findings, the Respondent was facing an immediate strike off. The practical effect of this would be that both the Respondent and his wife would lose their current employment. The Respondent owned a company for which both he and his wife were working and this depended on his ability to carry out legal work, which would now no longer be possible. He was already heavily indebted, including to RP/CP.

85. The Respondent applied for the strike off to be suspended until two weeks after the publication of this written judgement. This would ensure that his position was protected until he could be fully advised as to whether there was any merit in an appeal against the Tribunal's findings, and it would also enable him to wind up the company in a way that was not rushed and did not increase his level of debt or his ability to repay either RP/CP or the SRA. The Respondent accepted that he had a moral obligation to make repayments to RP/CP. The Tribunal had residual power under section 47 (2) of the Solicitors Act 1974, although the Respondent accepted that exercising that power in this way should be done very sparingly. The Respondent drew an analogy between the very exceptional circumstances in which a defendant having been convicted of a criminal offence in the Crown Court was granted bail pending appeal. However the Respondent submitted that this was a pragmatic solution particularly with regard to the Respondent's overall indebtedness.

86. The Applicant agreed that the Tribunal had such a power, but submitted that the primary objective was the protection of the public, and it was very hard to see what would justify the suspension of a strike off in a situation where six Allegations of dishonestly had been proved against a solicitor. This case had not involved a novel or difficult point of law and the case was therefore unexceptional. The Respondent's application did not "get beyond the starting gate".

Sanction

87. The Tribunal had regard to the Guidance Note on Sanctions (December 2015). The Tribunal assessed the seriousness of the misconduct by considering the Respondent's culpability, the level of harm caused, together with any aggravating or mitigating factors.

88. The Tribunal found that the Respondent's motivation was one of self-interest, primarily financial. His actions were planned and there was an element of breach of trust as he had taken advantage of client who was also at the time a personal friend. He had full control over the circumstances giving rise to the breaches and he was an experienced practitioner, both as a solicitor and also as a previous company secretary.

89. In terms of the harm caused to individuals he still owed nearly £100,000 plus interest to RP/CP. The Respondent's actions had caused significant harm to the reputation of the profession as a result of his having dishonestly taken advantage of client.

90. The matters were aggravated by the Respondent's dishonesty. Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin observed:

> "34. there is harm to the public every time a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."

91. The Respondent's actions had been deliberate, calculated and repeated, and continued over a number of years. He had concealed the true position from RP and CP from the outset, and had persisted with the subterfuge by creating false impressions on a number of occasions. The Tribunal noted that he had accepted a Regulatory Settlement Agreement in 2014.

92. In mitigation the Tribunal noted that the Respondent had accepted a moral obligation to repay RP/CP notwithstanding the winding up of AL LLP. The Tribunal was not able to identify any other mitigating factors.

93 The misconduct was so serious that a Reprimand, Fine or Restriction Order would not be a sufficient sanction to protect the public or the reputation of the profession from future harm by the Respondent. The misconduct was at the highest level and the only appropriate sanction was a Strike Off. The protection of the public and of the reputation of the profession demanded nothing less.

94. The Tribunal considered whether there were any exceptional circumstances that would make such an order unjust in this case. No such circumstances had been put forward in mitigation and the Tribunal found there to be nothing that would justify an

indefinite suspension. The only appropriate and proportionate sanction was that the Respondent be Struck Off the Roll.

95. The Tribunal considered the Respondent's application for the strike-off to be suspended. The Tribunal had concluded that the only appropriate sanction was the immediate removal of the Respondent from practice. The suspension of such a sanction would immediately have the effect of undermining its purpose and could only be justified in truly exceptional circumstances.

96. The circumstances presented by the Respondent were common to many Respondents who appeared before the Tribunal and were struck off. To allow the Respondent to remain in practice for several weeks while he considered his position with regards to an appeal would put the public at risk and would be deeply damaging to the reputation of the profession, a factor which took precedence over the interests of individual members of a profession.

97. As to the arrangements that the Respondent wished to make to wind down his business, this was again not an exceptional scenario. The Respondent had known for many months that he was facing serious allegations which, if proved, could very well result in a strike off. It was a Respondent's responsibility to put in place measures to cater for such an eventuality in advance of the hearing. The Tribunal was not prepared to place the public at risk in order to compensate for that lack of preparation.

98. The Respondent's application for the strike off to be suspended was refused; the Tribunal's order took effect immediately.

Costs

99. The parties had agreed that the Respondent should pay the Applicant's costs in the sum of £78,785.30. The Tribunal considered the Cost Schedule and was satisfied that this was an appropriate level of costs. The Tribunal therefore made an order for costs in the sum agreed.

Statement of Full Order

100. The Tribunal Ordered that the Respondent, Michael Alexander, 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 £78,785.30.

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

R. Nicholas
Chairman