SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11483-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

JONATHAN BEDE MCAREAVEY Respondent

Before:

Mr A. N. Spooner (in the chair)
Mr I. R. Woolfe
Mrs C. Valentine

Date of Hearing: 25 January 2017

Appearances

Shaun Moran, solicitor of Solicitors Regulation Authority of Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant.

The Respondent did not attend and was not represented.

JUDGMENT

Allegations

1. The allegations against the Respondent made by the Applicant were set out in a Rule 5 Statement dated 16 February 2016. The allegations were:-

1.1. That on or about 7 July 2015 he created two back dated documents dated 30 September 2014 and 1 October 2014, namely a client care letter and bill of costs, with the intention of leading an employee of the SRA to believe that they had been produced and sent to the client on or about 1 October 2014 when they had not, and thereby breached any or all of:

1.1.1. Principle 2 SRA Principles 2011 ("the Principles");

1.1.2. Principle 6 of the Principles; and

1.1.3. Principle 7 of the Principles.

1.2. That between 1 May 2014 and 31 May 2014 he misappropriated client monies to the value of £15,750.00 from the client account of Unsworth & Wood and thereby breached Rule 20.1 SRA Accounts Rules 2011 ("SAR").

1.3. That between 28 August 2014 and 26 September 2014 he took payment of the sum of £2,574.72 in respect of costs without first sending written notification to his clients in breach of Rule 17.2 SAR.

1.4. That between 26 April 2013 and 29 July 2015 he failed to return client money to the value of £888.75 to his clients when there was no longer any proper reason to retain it and thereby breached Rule 14.3 SAR.

1.5. That on or about 17 September 2012 he received client monies to a value of £287.18 which he did not thereafter pay into client account and thereby breached Rule 14.1 SAR.

1.6. That from 31 October 2014 onwards he failed to keep the accounting records of his practice properly written up in breach of Rule 29.01 SAR.

1.7. That from 31 October 2014 onwards he failed to complete a reconciliation of client monies held within the client accounts of his practice at least once every five weeks in breach of Rule 29.12 SAR.

1.8. That he delivered an accountants report for the period 1 August 2012 to 31 July 2013 more than six months after the end of that accounting period in breach of Rule 32.1 SAR.

1.9. That he failed to deliver an accountants report for the period 1 August 2013 to 31 July 2014 in breach of Rule 32.1 SAR 2011.

1.10 That from 2 June 2014 onwards he failed to respond to questions asked of him by a Forensic Investigator in the employment of the SRA and thereby breached Principle 7 of the Principles.

1.11 That he failed to comply with a decision of the Legal Ombudsman and thereby breached Principle 4 of the Principles and further breached Principle 7 of the Principles.

2. Whilst dishonesty was alleged with respect to the allegation at paragraphs 1.1, proof of dishonesty was not an essential ingredient for proof of any of the allegations.

Documents

3. The Tribunal considered all the documents in the case which included:

Applicant

- Application and Rule 5(2) Statement with exhibit AJB1 dated 16 February 2016.
- Forensic Investigation Report ("FIR") of Lindsey Barrowclough dated 29 July 2015.
- Witness Statement of Lindsey Barrowlcough dated 5 May 2016.
- Witness statement of Sarah Wilson dated 12 May 2016.
- Witness statement of Caron Taylor (Process Server) dated 6 January 2017.
- Chronology of Correspondence with the Respondent.
- Costs Schedules dated 16 February 2016, 26 May 2016, 2 November 2016 and 20 January 2017.

Respondent

- Letter from the Respondent to the Tribunal dated 8 April 2016 enclosing a medical report dated 29 March 2016 from Breakspear Medical.
- Letter from the Respondent to the Tribunal dated 27 May 2016 enclosing Medical Reports of Dr Silver dated 24 May 2016.

Other Documents

- Memorandum of Hearings heard on 1 June 2016 and 9 November 2016.

Preliminary Matter

Application to proceed in the absence of the Respondent

4. Mr Moran for the Applicant made an application to proceed with the substantive hearing in the absence of the Respondent, pursuant to Rule 16(2) of The Solicitors (Disciplinary Proceedings) Rules 2007 ("the Rules"). The Rules provide that the Tribunal has the power to hear and determine an application, notwithstanding that the Respondent fails to attend in person and is not represented, if the Tribunal is satisfied that notice of the hearing was served on the Respondent in accordance with the Rules.

5. On the 6 January 2017 the Respondent had been personally served, by a process server engaged by the Applicant, with the Memorandum of the Hearing on 9 November 2016, which contained the date of this hearing, a letter from Mr Moran dated 4 January 2017 with accompanying documents including a letter from

Mr Moran dated 13 December 2016, a consent form in respect of the Respondent's medical record and a chronology of correspondence.

6. The Applicant had had no contact with the Respondent since the hearing on 9 November 2016 and all correspondence sent to him remained unanswered. The Respondent had not complied with the directions made at the hearing on 9 November 2016 as he had not returned the consent form to the Applicant to enable it to obtain the Respondent's medical records and had not provided any further medical evidence. The Applicant had raised the possibility of a "pastoral" visit or call with the Respondent in its letter of 13 December 2016 but had received no response.

7. Mr Moran referred the Tribunal to the case law including Tait v Royal College of Veterinary Surgeons 2003 WL 1822941, R v Hayward and others [2001] EWCA Crim 168, which at paragraph 22 set out eleven particular factors to be considered and GMC v Adeogba [2016] EWCA Civ 162, in which the factors to be considered included fairness to the regulator as well as to the Respondent. Mr Moran submitted that the Respondent had waived his right to be present as this was the third hearing he had not attended and he had not responded to correspondence. Unlike in criminal proceedings, the Respondent could not be compelled to attend disciplinary proceedings. There was an allegation of dishonesty and the proceedings had been started last year. It was in the public interest for the matter to proceed.

8. On the last occasion the Tribunal had directed that "Unless the Respondent co-operates in providing access to his medical records and/or provides a suitable medical report in good time before the adjourned hearing, the Tribunal dealing with the case on 25 January 2016 is likely to proceed with the case in the absence of the Respondent". The directions made on 9 November 2016 had not been complied with and the Respondent had not produced any documents to the Tribunal.

9. The Tribunal was satisfied that the Respondent had been served with notice of the hearing. In addition to correspondence being sent by the Tribunal to the Respondent and correspondence being sent by the Applicant to the Respondent the Respondent had been personally served on 6 January 2017.

10. The Tribunal noted that in deciding whether or not to proceed in the absence of a Respondent, it should have regard to the Respondent's Article 6 and 8 rights and to the case law including Hayward, and the House of Lords decision in R v Jones (Anthony) [2002] UKHL 5, [2003] 1 AC 1, which approved the decision in Hayward as well as the factors set out in Adeogba. In the light of Jones, the Tribunal noted that it should proceed with the utmost caution in determining whether to proceed in the absence of a Respondent.

11. There was medical evidence from Dr Silver in the report dated 24 May 2016 that the Respondent suffered from a severe and debilitating condition. At that time, Dr Silver had expressed the opinion that the Respondent was not in a fit state to participate in these proceedings. However this report was now some eight months old. The Applicant had tried to contact the Respondent on a number of occasions since the hearing in June 2016. Without any information from the Respondent and without any updating medical evidence, the Tribunal could not conclude that the Respondent was unable to engage with the proceedings for medical reasons.

12. The Tribunal had to consider fairness to the prosecutor/regulator as well as to the Respondent. In this instance, the hearing had been adjourned twice before and if it was adjourned again today there was no evidence that this would secure the Respondent's attendance. Whilst there were no public protection issues in this matter as the Respondent did not hold a Practising Certificate, the Tribunal considered that these were serious allegations and the case should proceed expeditiously as there was a general public interest in doing so.

13. The Tribunal decided to proceed in the absence of the Respondent.

Application for an Adjournment

14. The FIO had not attended the hearing. During the course of Mr Moran opening the Applicant's case the Tribunal raised a number of queries on Mr Moran's submissions. Mr Moran applied for an adjournment of the hearing to enable the FIO to attend the Tribunal and clarify matters for the Tribunal. The FIO was on an inspection outside of London on the day of the hearing and was not able to make arrangements to attend the Tribunal at short notice. The FIO had not attended the hearing as a Civil Evidence Act Notice had been served on the Respondent and he had not served a Counter-Notice.

15. Mr Moran had applied for the case to be heard in the absence of the Respondent. It was a matter for the Applicant as to whether or not it had the FIO available to give evidence if required. The fact that the Respondent had not disputed the contents of the FIR did not mean that the Tribunal would not have matters upon which it required clarification from the FIO.

16. Mr Moran having applied to proceed the Tribunal was not minded to adjourn the matter to allow the FIO to attend. The Tribunal had another matter to deal with from approximately 12.30 to 2pm and this would afford Mr Moran the opportunity to see if he was able to clarify the matters raised by the Tribunal. In the event Mr Moran did not renew his application for an adjournment after the hearing recommenced.

Application to correct errors in the Rule 5 Statement

17. There were a number of typographical errors in the Rule 5 Statement. In allegation 1.10 the date should have been 2 June 2015 not 2 June 2014 and in paragraph 33 the date that the relevant Accountants Report was due was 31 January 2014 not 31 January 2013. The Applicant was given leave to amend these dates.

18. In paragraph 34 there was reference to an accounting period ending 30 April 2013. The previous accounting period had between from 1 August 2012 to 31 July 2013 and the Tribunal queried the reference to 30 April 2013 (which had been included as a comparison date in the Accountant's report dated 11 April 2014). Mr Moran was unable to assist the Tribunal and no amendment was made to the Rule 5 Statement in this respect. However this did not affect the way in which allegation 1. 9 was pleaded. The allegation itself referred to an accountants report being due for the period 1 August 2013 to 31 July 2014.

Factual Background

19. The Respondent was admitted to the Roll of Solicitors in November 1991 and, as at the date of the Rule 5 Statement, his name remained on that Roll. He did not hold a practising certificate.

20. From 18 August 2006 until the closure of that firm on 12 October 2015 the Respondent practised as a recognised sole practitioner under the style of "Unsworth & Wood" ("the Firm") from offices in Wigan.

21. On 26 May 2015 a duly authorised Forensic Investigator ("FIO") in the employment of the SRA commenced an inspection of the books of account and other documents of the Firm. In addition to inspecting those documents, the FIO also interviewed the Respondent on 27 May 2015. That inspection culminated in a FIR dated 29 July 2015. Subsequently, the Adjudication Panel of the SRA considered the matters which were the subject of the present proceedings and decided to Intervene into the Firm.

Witnesses

22. The Tribunal did not hear any oral evidence. The written evidence of the witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

Findings of Fact and Law

23. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

24. **Allegation 1.1 - That on or about 7 July 2015, the Respondent created two back documents dated 30 September 2014 and 1 October 2014, namely a client care letter and bill of costs, with the intention of leading an employee of the SRA to believe that they had been produced and sent to his client on or about 1 October 2014 when they had not, and thereby breached any or all of: Principle 2; Principle 6 and Principle 7 of the Principles.**

<u>The Applicant's Case</u>

24.1 Principle 2 of the Principles 2011 provides that "You must … act with integrity" whilst Principle 6 of those Principles provides that "You must … behave in a way that maintains the trust the public places in you and in the provision of legal services". Principle 7 further provides, amongst other things that "You must … comply with your … regulatory obligations and deal with your regulators … in an open … and co-operative manner".

24.2 In the course of her investigation, the FIO identified a client ledger for a Mr D marked "Notary" to which £2,400 had been transferred on 1 October 2014. However, no client file could be found for that matter.

24.3 The Respondent's secretary had reviewed the Firm's bill book and electronic record of bills and stated that no bill for this matter had been raised. During a telephone call to the Firm on 3 July 2015 the FIO asked the Respondent to ensure that all client matter files relating to Mr D were available for review on 8 July 2015.

24.4 When the FIO attended on the Respondent on 8 July 2015, he explained the absence of a client file in relation to Mr D and the Notary matter on the basis that he was instructed by Mr D in his capacity as a notary to deal with Spanish property which formed part of the estate of the late Ms CG. In support of this explanation he drew the attention of the FIO to a client care letter dated 30 September 2014 and a bill of costs dated 1 October 2014 which had been retained on the client matter file relating to Ms CG Deceased.

24.5 The FIO asked the Respondent where the bill had come from as she had previously checked the Firm's electronic and hard copy central record of bills and had identified that no bill of costs had been raised for this matter. The Respondent admitted that he had drafted the bill and the client care letter in question the night before his meeting with the FIO on 8 July 2015; and that no bill of costs or client care letter had previously been produced or sent to the client. The FIO made a contemporaneous note of her meeting with the Respondent.

24.6 A solicitor of integrity, faced with a request by a FIO from their regulator to produce a copy of a file would be astute to ensure that the contents of that file had not been altered when it was produced. Under no circumstances would such a solicitor introduce backdated documents on to the file in order to mislead their regulator. Furthermore, the public would expect that any document emanating from a solicitor's office would be truthful as to its contents. The creation of a backdated document by a solicitor would therefore inevitably undermine the trust the public placed in that solicitor and in the provision of legal services.

The Respondent's Case

24.7 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

24.8 The Respondent had created the two documents, produced them to the FIO as genuine and when challenged admitted to her that he had created them the previous night and backdated them.

24.9 The Tribunal considered that what was meant by integrity or lack of integrity was a matter for it on the facts of the case. In this case the production of backdated documents to mislead the regulator demonstrated a lack of integrity. Principle 2 had been breached.

24.10 The production of documents created purely to mislead the FIO was not behaviour that would maintain the trust that the public placed in the Respondent and in the provision of legal services. The public would not expect a solicitor to act in this way and Principle 6 had been breached.

24.11 Principle 7 required the Respondent to comply with his legal and regulatory obligations and to deal with his regulator and ombudsman in an open, timely and co-operative manner. Clearly the Respondent's actions had been in breach of Principle 7.

24.12 Allegation 1.1 was proved beyond reasonable doubt.

25. **Allegation 1. 2 -That between 1 May 2014 and 31 May 2014 the Respondent misappropriated client monies to the value of £15,750 from the client account of Unsworth & Wood and thereby breached Rule 20.1 of the SAR.**

The Applicant's Case

25.1 Rule 20.1 SAR sets out the circumstances in which client money may be withdrawn from a client account. Client money may not be withdrawn from client account otherwise than in those circumstances.

25.2 Between 1 May 2014 and 31 October 2014, the Respondent made seven round sum transfers between client accounts operated by the Firm and its office accounts ranging in value between £750 and £3,600 and amounting to a total value of £15,750. Four transfer had been made on the matter of A deceased being two payments of £3,000.00 and two further payments of £3,600.00 and £1,800.00. One had been made on the matter of C deceased in the sum of £1,200.00; one on the matter of M in the sum of £750.00; and one on the matter of Mr D in the sum of £2,400.00.

25.3 The client ledgers for each matter evidenced those transfers. When the FIO reviewed the client matters, where those transfers had been made, she found no evidence on any of those files to indicate that those transfers were made for any purpose which would have been permitted by the SAR.

25.4 The Respondent was the only person able to operate any of the various office or client accounts of the Firm and accordingly, each of those seven transfers must have been made him personally. The FIR confirmed that no bill of costs had been raised in relation to any of those seven transfers and there was also no evidence that they were made for any other purpose which would have been permitted by Rule 20.1.

25.5 Whilst the FIO was satisfied that the shortage upon the client account arising from those misappropriations was replaced by the Respondent by 3 July 2015, the allegation was concerned with the original transfer of the monies.

The Respondent's Case

25.6 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

25.7 Monies had been withdrawn from client account other than in accordance with Rule 20.1 of the SAR. There had been seven round sum transfers on four client matters. The Tribunal had seen the respective client ledgers which showed these transfers. The fact that the monies had been replaced did not negate the original breach of the Rule 20.1. Allegation 1.2 was proved beyond reasonable doubt.

26. **Allegation 1.3 - That between 28 August 2014 and 26 September 2014 the Respondent took payments in the total sum of £2,574.72 in respect of costs without first sending written notification to his clients in breach of Rule 17.2 of the SAR.**

The Applicant's Case

26.1 Rule 17.2 of the SAR provides that "If you properly require payment of your fees from money held for a client or trust in a client account, you must first give or send a bill of costs, or other written notification of the costs incurred, to the client or the paying party."

26.2 In addition to the matters set out in respect of allegation 1.2 above, the FIO identified two further matters (Mr EM and Mrs BM and Mr JS) on which payments totalling £2,574.72 received from the clients had been paid directly into an Office Account of the Firm. This sum comprised £1,512.72 in respect of Mr EM and Mrs BM and £1,062.00 in respect of Mr JS.

26.3 The Respondent told the FIO that this had been done because he had agreed a fixed fee with clients in respect of the work to be undertaken. However, the FIR set out that a review of the files in question revealed that neither contained a client care letter nor any evidence that a written notification of costs had been provided to the client.

The Respondent's Case

26.4 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

26.5 The Tribunal had before it evidence that the sums had been received in respect of the two specified client matters. There was no evidence that the Respondent had sent a bill of costs or provided written notification of the costs incurred before taking payment. Therefore he had breached Rule 17.2 and allegation 1.3 was proved beyond reasonable doubt.

27. **Allegation 1.4 - That between 26 April 2013 and 29 July 2015 the Respondent failed to return client money to the value of £888.75 to his clients when there was no longer any proper reason to retain it and thereby breached Rule 14.3 of the SAR.**

The Applicant's Case

27.1 Rule 14.3 of the SAR provides that, amongst other things, "Client money must be returned to the client (or other person on whose behalf the money is held) promptly, as soon as there is no longer any proper reason to retain those funds…"

27.2 The FIO exemplified two matters in the FIR where the Firm had failed to return client money to clients for a period in excess of a year without proper reason.

27.3 The matter of Mr and Mrs E was a conveyancing transaction which completed on 12 September 2013, a credit balance of £388.75 arose on the client account ledger as at 1 November 2013 which remained as at 31 October 2014. The background to the retention was that the mortgage redemption had been insufficient and a further £388.75 had been required. The Respondent had asked the clients for this sum, the clients had transferred funds and subsequently the Respondent had paid it to the mortgage company. However, the Respondent was already holding £388.75 in client account and did not require additional monies. There was no evidence on the file to determine that there was a proper reason to retain those funds and there was no evidence on the file to show that the Firm had written to the clients to confirm the reason for their retention.

27.4 In relation to the matter of Ms JC, a credit balance in the sum of £500.00 arose on the client account on 26 April 2013. Ms JC terminated her retainer by 14 May 2013 at the latest. However the credit balance of £500.00 remained on that ledger as at 31 October 2014. Telephone notes recording conversations between the client and the Respondent's secretary Mrs. S demonstrated that the client had asked the Firm to "...sort out the bill and let her know what monies would be refunded to her..." on 14 May 2013 and said that "...she wants her money back..." on 18 April 2013.

The Respondent's Case

27.5 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

27.6 Ms JC had asked for her money back in April or May 2013 and despite this the Respondent had not returned it by 31 October 2014, almost eighteen months later. Mr and Mrs E had been asked for additional monies in 2013 despite the fact that the Respondent had in fact held the monies required. The client ledger showed a credit balance in the sum of £388.75 as at 1 November 2013. These monies remained on the ledger on 31 October 2014. There was no evidence that these monies were still properly required and no explanation as to why they had not been returned to the client promptly. This was in breach of Rule 14.3 of the SAR and allegation 1.4 was proved beyond reasonable doubt.

28. **Allegation 1.5 - That on or about 17 September 2012 the Respondent received client monies to a value of £287.18 which he did not thereafter pay into client account and thereby breached Rule 14.1 of the SAR.**

The Applicant's Case

28.1 Rule 14.1 of the SAR provides that "Client money must without delay be paid into a client account, and must be held in a client account, except when the rules provide to the contrary"

28.2 On or about 17 September 2012, the Respondent received a cheque for £287.18 from Eon in relation to the matter of Mr NW Deceased. The cheque was addressed to the Executor of Mr NW. That cheque had still not been banked as at 12 June 2015 when the FIO conducted a review of the relevant file. There was therefore a minimum delay of two years and nine months in paying the relevant monies into client account. It was not known whether the relevant cheque was subsequently banked and, if it was, upon what date.

The Respondent's Case

28.3 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

28.4 The cheque concerned was addressed to the Executor of NW. The Respondent was not the Executor of the Estate and there was no evidence before the Tribunal that the Respondent would have been able to pay this cheque into his client account. Whilst the money was clearly money due to the Estate of NW, without evidence that the Respondent could have paid the monies into his client account, the Tribunal could not be sure that Rule 14.1 of the SAR had been breached and allegation 1.5 was not proved beyond reasonable doubt.

29. **Allegation 1.6 – From 31 October 2014 onwards the Respondent failed to keep the accounting records of his practice properly written up in breach of Rule 29.01 of the SAR.**

The Applicant's Case

29.1 Rule 29.01 of the SAR provides that "You must at all times keep accounting records properly written up to show your dealings with:(a) client money received, held or paid by you; including client money held outside a client account under rule 15.1(a) or rule 16.1(d); and (b) any office money relating to any client or trust matter."

29.2 The FIO found that the Firm's accounting records had not been written up since 31 October 2014. In interview with the FIO the Respondent explained that his accounting functions had been outsourced to Quill Pinpoint and he stated that he had been unable to get them to bring them up to date due to his own impecuniosity.

The Respondent's Case

29.3 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

29.4 The FIO commenced her inspection on 26 May 2015. She found that the Firm's accounting records had not been written up since 31 October 2014. This was not in compliance with the requirements as set out in Rule 29.01 of the SAR and allegation 1.6 was proved beyond reasonable doubt.

30. **Allegation 1.7 - From 31 October 2014 onwards the Respondent failed to complete a reconciliation of client monies held within the client accounts of his practice at least once every five weeks in breach of Rule 29.12 of the SAR.**

The Applicant's Case

30.1 Rule 29.12 of the SAR requires that a solicitor must, at least once every five weeks, reconcile the balance on their client cash account with the balances showing on the statement and pass books for all client accounts and on all client ledgers. The FIO found that no such reconciliations had been carried out since 31 October 2014.

The Respondent's Case

30.2 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

30.3 As stated above, the FIO commenced her inspection on 26 May 2015. She found that the Firm's reconciliations had not been carried out since 31 October 2014. This was not in compliance with the requirements as set out in Rule 29.12 of the SAR for the reconciliations to be undertaken at least once every five weeks. Allegation 1.7 was proved beyond reasonable doubt.

31. **Allegation 1.8 – The Respondent delivered an accountants report for the period 1 August 2012 to 31 July 2013 more than six months after the end of that accounting period in breach of Rule 32.1 of the SAR.**

The Applicant's Case

31.1 Rule 32.1 of the SAR states that "If you have, at any time during an accounting period, held or received client money, or operated a client's own account as signatory, you must deliver to the SRA an accountant's report for that accounting period within six months of the end of the accounting period."

31.2 The Accountant's Report for the Firm in relation to the Report Period from 1 August 2012 to 31 July 2013 ought to have been delivered to the SRA by 31 January 2014 in order to comply with the provisions of Rule 32.1. However, it was in fact dated 11 April 2014 and was sent to the SRA under cover of a letter bearing the same date.

The Respondent's Case

31.3 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

31.4 On the evidence before the Tribunal it was clear that the Accountant's Report due by 31 January 2014 had not been provided by that date. The report for the relevant period was dated 11 April 2014. The Respondent had not complied with the requirements set out in Rule 32.1 of the SAR and allegation 1.8 was proved beyond reasonable doubt.

32. **Allegation 1.9 – The Respondent failed to deliver an accountants report for the period 1 August 2013 to 31 July 2014 in breach of Rule 32.1 of the SAR.**

The Applicant's Case

32.1 The Accountant's Report for the accounting period ending 30 April 2013 confirmed that, as at that date, the cash held in client account by the Firm, and client money held in any account other than a client account, after allowances for lodgements cleared after date and for outstanding cheques, totalled £116,832.84. Accordingly, in relation to the accounting period commencing 1 August 2013 (and all subsequent accounting periods during which he continued to hold client money), the Respondent was required to, if he had stopped holding client money, deliver a final report within six months of the date upon which he stopped holding client money in compliance with Rule 33.5 SAR. Otherwise he was required to deliver an Accountant's Report in compliance with Rule 32.1.

32.2 Rule 33.5 states: "If you for any reason stop holding or receiving client money (and operating any client's own account as signatory), you must deliver a final report. The accounting period must end on the date upon which you stopped holding or receiving client money (and operating any client's own account as signatory), and may cover less than twelve months."

32.3 The Respondent failed to deliver either a final report or any Accountant's Reports for any of the accounting periods from 1 August 2013 onwards. The witness statement of Sarah Wilson confirmed that the last Accountant's Report received in respect of the Firm was on 11 April 2014 and that no report had been received in relation to any accounting period ending between 1 August 2013 and 30 October 2014 when the Rule ceased to be in force.

32.4 After 31 October 2014 the Respondent would only have been under an obligation to deliver an Accountant's Report in relation to an accounting period after that date if that report was qualified. A final report had not been received in respect of the Firm. The Firm had not been granted a waiver from its obligations to file Accountant's Reports or to file a final report. The obligation to file a final report in the event that the Respondent stopped holding or receiving money still applied.

The Respondent's Case

32.5 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

32.6 The last Accountant's Report for the Firm was dated 11 April 2014. This covered the period up to 31 July 2013. Although there had been changes to the SAR in respect of when Accountant's Reports were required the Respondent had been required to file an Accountant's Report for the period 1 August 2013 to 31 July 2014 and had not done so. This was in breach of Rule 32.1 of the SAR and allegation 1.9 was proved beyond reasonable doubt.

33. **Allegation 1.10 - From 2 June 2015 onwards the Respondent failed to respond to questions asked of him by a Forensic Investigator in the employment of the SRA and thereby breached Principle 7 of the Principles.**

The Applicant's Case

33.1 By an email timed at 16.34 on 2 June 2015, the FIO wrote to the Respondent requesting specific information in relation to the client matters of A Deceased; C Deceased; Mr EM and Mrs BM; and Mr JS, together with:

- A list of all "live" client matter files to include details of the work type;
- Details of all outstanding complaints against the firm (together with all client files where a complaint was outgoing). The information sought in this regard included the file of Mr D;
- A copy of the client account reconciliation statement;
- Copy documentation to confirm that the sale of his home was to complete on 12 June 2015 (this was a matter of significance to the SRA because the shortage on the client account arising from the misappropriation of client money by the Respondent was to be replaced out of the proceeds).
- Copies of correspondence with his Professional Indemnity Insurers with respect to a request for a quote for run-off cover.

33.2 By a further email timed at 12.41 on 17 June 2015, the FIO reiterated her request for the information which she had previously asked the Respondent to provide on 2 June 2015. The FIO also identified other matters in relation to which action was required and requested a response by 22 June 2015.

33.3 On 23 June 2015 the Respondent purported to respond to those emails (in part) by sending the FIO three emails. In the first time, timed at 14.41, he stated that he had "...made funds available to pay Pinpoint and the accountants, to bring the reconciliations up to date..." In the second, timed at 16.46 he confirmed he had attended to the matters of Mr D, A Deceased and C Deceased, enclosing

correspondence to confirm the position. In the third, timed at 16.52 he confirmed that he had obtained a quote for Professional Indemnity Insurance run-off cover in the sum of £18,809.04 plus IPT.

33.4 Subject to this, the Respondent had not responded to either the email of 2 June 2015 or the email of 17 June 2015 by the date of the FIR. This was despite the FIO having requested that he do so on five separate occasions between 29 June 2015 and 24 July 2015.

33.5 In order to deal with the FIO in a timely and co-operative manner, and thus comply with his obligations under Principle 7, the Applicant submitted that the Respondent should have produced all the information which she had requested within the timescale stipulated. If he was unable to do so for good reasons, for example ill-health, then he should have explained the position to her and agreed an alternative timescale for production with which he could comply. Under no circumstances, should he have failed to produce the information requested without further engagement.

The Respondent's Case

33.6 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

33.7 The Respondent had provided some replies to the FIO's correspondence. He had not answered all of her questions nor provided all of the information she had requested. However, given that he had sent her three emails, all on 23 June 2015, partially addressing the points that had been raised the Tribunal did not consider that the Respondent had, from 2 June 2015 onwards, failed to respond to questions asked of him by the FIO. He may have failed to respond satisfactorily to such questions but that was not how the allegation had been pleaded. Allegation 1.10 was not proved beyond reasonable doubt.

34. **Allegation 1.11 – The Respondent failed to comply with a decision of the Legal Ombudsman and thereby breached Principle 4 of the Principles and further breached Principle 7 of the Principles.**

The Applicant's Case

34.1 Principle 4 of the Principles 2011 provides that "You must ... act in the best interests of each client. The obligation to "deal with your regulators ...in an open, timely and co-operative manner" imposed by Principle 7 also extends to the Legal Ombudsman.

34.2 The Firm acted for a Mr IW, the executor of the estate of Mr NW Deceased. The Respondent had conduct of the matter. The beneficiaries of the Estate were a Mr DW and Miss LW. On 4 November 2013, the Legal Ombudsman decided that the service which Mr DW and Miss LW had received from the Respondent fell significantly below the standard which Mr DW and Miss LW were entitled to expect and that the Respondent should, amongst other things render no further bills for the work done in

the matter; send any remaining money in the estate account to Mr IW, the executor; and send Mr DW and Miss LW any papers belonging to them which it held.

34.3 That decision became binding upon the Respondent on 13 November 2013 and he was required to comply with it by no later than 27 November 2013. However, the Respondent did not comply with the Legal Ombudsman's decision in this respect and in consequence, on 31 March 2015 Deputy District Judge Bridson sitting in the Wigan County Court made an Order requiring the Respondent to comply with its terms within 14 days. The file did not contain any evidence that the Firm had complied with the Order. A review of the client account ledger showed that as at 31 October 2014 a balance of £9,930.11 remained on the client account.

34.4 In order to deal with the Legal Ombudsman in a timely and co-operative manner, the Respondent should have complied with the decision of the Legal Ombudsman in full by 27 November 2013. It should not have been necessary for the Legal Ombudsman to have taken proceedings to enforce that decision by making an application to the Court. However, once the Legal Ombudsman had taken this step, the Respondent should have promptly complied with the Order of the District Judge of 31 March 2015. It was plainly not in the best interests of Mr DW and Miss LW for the Respondent to fail to comply with the decision of the Legal Ombudsman and the Order of the District Judge.

The Respondent's Case

34.5 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

34.6 On the evidence before the Tribunal, the Respondent had not complied with the decision of the Legal Ombudsman. The fact that the Legal Ombudsman had had to obtain a court order to enforce the decision was evidence of this non-compliance. The Respondent had breached Principle 7 as he had not complied with his legal and regulatory obligations and had not dealt with his regulator and ombudsman in an open and timely manner.

34.7 The Firm had acted for the Estate of Mr NW. The beneficiaries were Mr DW and Miss LW. Court proceedings had been required in respect of the Respondent's non-compliance with the Legal Ombudsman. There was no evidence that the Respondent had complied with the Court Order dated 31 March 2015 by the time of the FIO's inspection commencing on 26 May 2015. On the evidence before it, the Tribunal was sure that the Respondent had not acted in the best interest of each client in breach of Principle 4.

34.8 Allegation 1.11 was proved beyond reasonable doubt.

35. **Allegation 2 - Dishonesty in respect of allegation 1.1 only**

The Applicant's Case

35.1 The Applicant submitted that the Respondent's actions were dishonest in accordance with the test for dishonesty set out by Lord Hutton in Twinsectra Ltd v Yardley and Others [2002] UKHL 12 which was said to be the test to apply in solicitor's disciplinary proceedings as set out in Bultitude v Law Society [2004] EWCA Civ 1853. That test requires that the person has acted dishonestly by the ordinary standards of reasonable and honest people and realised by those standards he or she was acting dishonestly.

35.2 Reasonable and honest people would consider it to be dishonest for a solicitor to create backdated documents and supply them to the SRA, purporting that the date of the documents was the genuine date of their creation.

35.3 Furthermore, the Applicant submitted that the Respondent realised that, by those standards, he was acting dishonestly for a number of reasons. As an experienced solicitor with in excess of 14 year's post-qualification experience, who had been managing his own Firm for approximately nine years at the relevant time, the Respondent must be taken to have understood the importance of absolute frankness and candour when dealing with the SRA as his professional regulator. He must also be taken to have understood that an SRA investigation into his Firm was a significant event in his professional life and that information obtained in the course of that investigation was likely to be used by the SRA in considering whether it was necessary to take regulatory or disciplinary steps against himself or his Firm.

35.4 Since the FIO had requested that the Respondent produce all files relating to Mr D the Respondent must have appreciated that the "Notary" matter was of interest, or potential interest, to her in connection with her inspection. Consequently, he must also have appreciated that the client care letter and the bill of costs which he created and backdated on 7 July 2015 were likely to be relied on by the FIO and by the SRA as evidence of correspondence that had been produced and sent to the client on or about 1 October 2014. Those documents were both created by the Respondent after the FIO had requested copies of all files pertaining to Mr D and immediately prior to the date on which they were required to be produced. The irresistible inference arising from this is that they were created in response to that request, in order to explain the absence of a file on the "Notary" matter. The Applicant submitted that they were therefore created with the express purpose of misleading the FIO.

35.5 Lastly, it was in any event inconceivable that the Respondent did not understand that it was dishonest by the standards of ordinary and honest people to create documents with an intent to mislead others. He must have known that this was wrong.

The Respondent's Case

35.6 The Respondent had not provided an Answer. The Tribunal treated the allegation as denied.

The Tribunal's Findings

35.7 The Tribunal considered the test for dishonesty as set out in Twinsectra. In order for the first part of the test to be satisfied the Respondent had to have acted dishonestly by the ordinary standards of reasonable and honest people. The Respondent had produced a bill and client care letter to the FIO and had told her these had been sent to the client. When challenged he had admitted to the FIO that the documents had been created the previous night and had not gone to the client. The documents had been backdated. The Tribunal was sure that by the standards of ordinary and honest people the Respondent had acted dishonestly and the objective test was satisfied.

35.8 For the subjective test in Twinsectra to be satisfied the Respondent must have realised that by the standards of reasonable and honest people that his conduct was dishonest. The documents had been created after the FIO asked for the file pertaining to Mr D. The documents had not existed and had been created in response to this request and had been backdated. Had the FIO not realised that the bill had not been in the list of bills she had seen, the fact that the documents were not genuine may not have come to light. The Respondent only admitted what he had done when challenged. The SRA had submitted that the irresistible inference was that the documents had been created in response to the FIO's request and with the express purpose of misleading the FIO. The Tribunal found that the documents had been created with the express purpose of misleading the FIO.

35.9 The Respondent was an experienced solicitor who had been running his Firm for a number of years. Reasonable and honest people would consider it to be dishonest for a solicitor to create backdated documents and supply them to the SRA, purporting that the date of the documents was the genuine date of their creation. The Tribunal was sure that the Respondent as an experienced sole practitioner must have known that by the standards of ordinary and honest people it was wrong to create documents to mislead the person to whom the documents were given. The subjective test was met. Allegation 2 was proved beyond reasonable doubt.

Previous Disciplinary Matters

36. None.

Mitigation

37. The Respondent had not filed an Answer in the proceedings or provided any information specifically by way of mitigation. However, the Tribunal was aware that the Respondent had significant health issues and was mindful of these when determining sanction.

Sanction

38. The Tribunal referred to its Guidance Note on Sanctions (5th Edition) when considering sanction.

39. The Tribunal assessed the seriousness of the misconduct in order to determine which sanction to impose. Seriousness was determined by a combination of factors including the Respondent's level of culpability for his misconduct, the harm caused by the Respondent's misconduct and the existence of any aggravating and mitigating factors.

40. The Respondent found himself in the situation where the FIO was asking for documents that did not exist and the motivation for the dishonest creation of the documents appeared to be to enable the Respondent to get himself out of the predicament he found himself in. The motivation for the other misconduct appeared to be financial. The misconduct was planned and his actions were in breach of a positon of trust. The Respondent had not complied with the SAR and had taken client monies albeit the £15,750.00 had been replaced. The Respondent had direct control of and responsibility for the circumstances giving rise to the misconduct. He was an experienced solicitor who had run his own Firm for some years. In producing documents that had been created purely to mislead the FIO, the Respondent deliberately misled the regulator. His culpability was high.

41. The Respondent's conduct had had a detrimental impact on Mr DW and Miss LW. They had had to go to the Legal Ombudsman. Ms JC had not received her money back despite asking for it. The impact of the Respondent's misconduct upon those directly and indirectly affected by it, and upon the public and the reputation of the legal profession was significant. The Respondent had not complied with the Legal Ombudsman nor a Court Order. The extent of the harm that was intended or might reasonably have been foreseen to be caused by the Respondent's misconduct was substantial.

42. Dishonesty had been alleged and proved. The misconduct was deliberate and calculated and continued over a period of time. The Respondent had concealed his wrong doing and had fabricated documents to try and cover it up. The Respondent knew or ought reasonably to have known that the conduct complained of was in material breach of his obligations to protect the public and the reputation of the legal profession. These were all aggravating factors.

43. The Respondent had made good the sum of £15,750.00 by 3 July 2015 and this was a mitigating factor. There were no other mitigating factors identified. The Tribunal subsequently considered the Respondent's health as an issue of personal mitigation. There was no evidence of genuine insight and the Respondent had not engaged with these proceedings.

44. The Tribunal considered the range of sanctions available to it, commencing with No Order. Given that dishonesty had been alleged and proved the Tribunal did not consider No Order, Reprimand, a Fine or Suspension appropriate sanctions in this matter. The seriousness of the misconduct was at the highest level and this meant that a lesser sanction than Strike-Off was inappropriate. Further the protection of the public and the reputation of the legal profession required that the Respondent's name be struck off the Roll of Solicitors.

45. A finding that an allegation of dishonesty had been proved will almost invariably lead to striking off, save in exceptional circumstances. Before finalising sanction the Tribunal considered whether there were any exceptional circumstances but decided

there were not. The Tribunal was mindful that the Respondent had raised issues in respect of his health. However, there was no evidence before the Tribunal that at the time of the misconduct the Respondent's health affected his ability to conduct himself to the standards of the reasonable solicitor. Any lesser sanction than strike off would be wholly inappropriate.

Costs

46. The Applicant applied for its costs supported by a costs schedule in the sum of £21,537.80. Only twenty five per cent of the SRA's supervision costs had been claimed as the remaining seventy five per cent related to the Intervention.

47. Mr Moran acknowledged that the sum claimed would need to be reduced as the hearing had not lasted for a whole day and seven hours attendance had been included. Mr Moran submitted that the time for 1 June 2016 had been reduced by £780.00 and that no preparation costs had been claimed for the hearing on 9 November 2016. Mr Moran acknowledged that in fact the schedule still included £1040.00 (£910.00 and £130.00) for 1 June 2016 as the figure of £910.00 had inadvertently been included twice and that a deduction of £910.00 was required.

48. The Tribunal assessed the costs. There did not need to be any deduction in respect of the two allegations found not proved as these were interlinked with the allegations that had been found proved. The Tribunal considered that no significant additional time or costs had been spent or incurred in pursuing these allegations.

49. The Tribunal was concerned that the costs seemed to be high and disproportionate. The Tribunal allowed three hours for the hearing as had Mr Moran not encountered difficulty in explaining the FIO's conclusions to the Tribunal the length of hearing would have been reduced. Thirty six hours had been claimed for the drafting and preparation of the Rule 5 Statement. The Tribunal reduced this to twenty hours as it considered that thirty six hours was excessive. The time spent by the FIO also appeared to be high and the FIO was not there to explain why this had been necessary. The amount claimed for the FIO report was £9,268.80 and the Tribunal reduced this by £2,000.00. The Tribunal assessed costs at £16,000.00. There was no evidence before the Tribunal as to the Respondent's means and accordingly the Tribunal did not consider whether costs should be reduced in light of the Respondent's means.

50. There were a number of typographical errors in the Rule 5 Statement and the cross-referencing in the Rule 5 Statement did not match the pagination in the exhibit bundle AJB1. Mr Moran agreed to provide the Tribunal with an amended version of the Rule 5 Statement setting out the correct page numbers for the documents in the exhibit bundle within forty eight hours which he did. It was unfortunate that this was the second case in two days where the cross-referencing in the Rule 5 Statement had been incorrect and had resulted in difficulties for the Tribunal in identifying the relevant documents when preparing to hear the case.

51. Further the FIR and its appendices had been redacted. However the Rule 5 Statement was pleaded in such a way as to refer to parts of the FIR that had been redacted. The Tribunal reduced the costs it had assessed that the Respondent should pay from

£16,000.00 to £15,000.00 to reflect the state of the papers and the errors in the Rule 5 Statement.

Statement of Full Order

52. The Tribunal Ordered that the Respondent, JONATHAN BEDE MCAREAVEY, 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 £15,000.00.

Dated this 10th day of February 2017
On behalf of the Tribunal

A. N. Spooner
Chairman