SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11559-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ALAN RICHARD BIRKBECK Respondent

Before:

Mr J.A. Astle (in the chair)
Mr M. N. Millin
Mrs L. McMahon-Hathway

Date of Hearing: 21 March 2017

Appearances

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

The Respondent appeared briefly by telephone, part way through the hearing, in order to apply for an adjournment.

JUDGMENT

Allegations

1. The Allegations against the Respondent were:

1.1 On 20 January 2015 the Respondent was made bankrupt. He continued practising as a solicitor until 16 June 2015. In doing so the Respondent breached the following principles of the SRA Principles 2011:

1.1.1 Principle 2 – by continuing to practise while bankrupt, and in not telling his employer, he acted without integrity;

1.1.2 Principle 5 – by practising while his certificate was automatically suspended, he did not provide a proper standard of service, as clients were not getting advice from a properly authorised solicitor;

1.1.3 Principle 6 – by not telling his employer about his bankruptcy he did not behave in a way which maintained the public trust in him or his profession;

1.1.4 Principle 7 – by not telling the SRA about his bankruptcy he did not comply with his legal and regulatory obligations.

1.2 In November 2015 the Respondent allowed a custody record to state that he worked for a firm (PDS) when representing a defendant. PDS had never employed him. In doing so the Respondent breached the following principles of the SRA Principles 2011:

1.2.1 Principle 2 – by misleading the police station officials, he acted without integrity;

1.2.2 Principle 6 – by misleading the police station officials, he did not behave in a way which maintained the public trust in him or his profession.

It was alleged the Respondent acted dishonestly.

1.3 In May - June 2015 the Respondent borrowed £8,250 from an individual he represented. The Respondent did not advise the individual to take separate legal advice and had not repaid the money. The Respondent breached the following principles of the SRA Principles 2011:

1.3.1 Principle 2 – by borrowing money from someone he represented without giving the appropriate advice, he acted without integrity;

1.3.2 Principle 6 – by borrowing money from someone he represented without giving the appropriate advice, and in not repaying, he had not behaved in a way which maintained the public trust in him or his profession.

1.4 The Respondent had not replied to correspondence from the SRA requesting an explanation for his actions. In not doing so the Respondent breached Principle 7 of the SRA Principles 2011, as by not co-operating with the SRA he had not complied with his legal and regulatory obligations.

Documents

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

Applicant:

- Application dated 30 September 2016 together with attached Rule 5 Statement and exhibits
- Applicant's Schedules of Costs dated 30 September 2016 and 20 January 2017

Service and Proceeding in Absence

3. Mr Horton, on behalf of the Applicant, stated the Rule 5 Statement had been served on the Respondent in accordance with the rules and the Respondent had acknowledged receipt indicating he would respond within a week. Mr Horton had contacted the Respondent a number of times but had heard nothing further.

4. The matter had previously been listed for a substantive hearing on 7 February 2017. Mr Horton reminded the Tribunal that on 6 February 2017 the Respondent had telephoned the Tribunal indicating he had suffered a bereavement that morning. As a result of this he applied for an adjournment by email that day, which was granted by consent.

5. Mr Horton stated a Memorandum of the Adjournment had been prepared and emailed by the Tribunal to the Respondent on 9 February 2017. It had been sent to the same email address used by the Respondent to submit his application for an adjournment. That email appeared to have been delivered as there was nothing to indicate otherwise. The Memorandum confirmed the adjournment had been granted and also stated the substantive hearing would be relisted to 21 March 2017. Mr Horton submitted the Respondent must have received that email otherwise he would not have known the outcome of his application for an adjournment and would have contacted the Applicant or the Tribunal to find out what had happened on 7 February 2017.

6. Mr Horton confirmed he had tried to contact the Respondent that morning on his mobile telephone and had got through to a generic voicemail on which he had left a message. He submitted the Respondent had been served with details of the hearing under the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR"). Whilst the rules did not provide specifically for service by email, and the Respondent had not made a request to be served by email, the Respondent had only contacted the Tribunal by email and telephone. Mr Horton submitted it could therefore be implied that email was his preferred method of communication. Mr Horton also reminded the Tribunal that the Respondent had not notified the Applicant or the Tribunal of any change of address. Mr Horton reminded the Tribunal that the Civil Procedure Rules did allow for service by email and Rule 10(3) of the SDPR allowed service by other methods.

7. Mr Horton further submitted that if the Tribunal was satisfied the Respondent had been served with notice of today's hearing, it should proceed in the Respondent's absence. The Respondent had had several months to respond to the allegations and

had not done so. His application for an adjournment in February 2017 seemed to indicate he intended to attend the final hearing but he had not done so. Mr Horton submitted a further adjournment would not result in his attendance. Mr Horton reminded the Tribunal that one of the allegations related to the Respondent's failure to co-operate.

The Tribunal's Decision

8. The Tribunal first considered the issue of service. The Tribunal had sent the Respondent an email dated 9 February 2017 which attached the Memorandum relating to his Application for an Adjournment. The end of that Memorandum confirmed details of today's substantive hearing. It had been sent by email only, to the same email address used by the Respondent to make his application for an adjournment on 6 February 2017. It was not sent by post by either the Tribunal or the Applicant.

9. Rule 10 of the SDPR stated:

> "(1) Any application, Statement or other document required to be served under rules 6(5), 8(5) and 9(4) shall be served –
>
> (a) personally; or
>
> (b) by sending by guaranteed delivery post or other guaranteed and acknowledged delivery to the last known place of business or abode of the person to be served; and
>
> (c) in such other manner as the Tribunal may direct.
>
> (2) Any Statement, notice or document other than one which is required to be served in accordance with paragraph (1) may be served in accordance with that paragraph.
>
> (3) In the case of a solicitor, any Statement, notice or other document required to be served under these rules may be served –
>
> (a) by leaving it at the address shown as his place of business .....
>
> (b) by any of the methods mentioned in paragraphs (a) to (d) of rule 6.2(1) of the Civil Procedure Rules 1998(a) as they may be modified, amended or replaced.
>
> (4) Any application, Statement, notice or other document served in accordance with paragraph (1) shall be deemed served on the second working day following the day on which it is delivered, posted or transmitted."

10. It was clear from these provisions that service could be effected by email. The Respondent had only made contact with the Tribunal by email and as the Memorandum containing confirmation of today's substantive hearing had been sent to the Respondent to the email address from which he had corresponded, the Tribunal

was satisfied that he had been served with details of today's hearing. It particularly took into account the fact that the Respondent, having applied for an adjournment on 6 February 2017, had not subsequently contacted either the Tribunal or the Applicant to enquire about the outcome of his application. It could therefore be implied from this that he had received the Tribunal's email of 9 February 2017 attaching the Memorandum informing him that the adjournment had been granted and the hearing relisted to 21 March 2017.

11. The Tribunal was mindful that it should only decide to proceed in the Respondent's absence having exercised the utmost care and caution. In this case the Respondent had been provided with every opportunity to attend. His application for an adjournment of the substantive hearing of 7 February 2017 had been granted but he had not engaged further with the Tribunal since 6 February 2017. The Rule 5 Statement had been served on the Respondent in October 2016 and he had not filed any Answer or engaged substantively with the proceedings. The Tribunal was satisfied that a further adjournment was unlikely to result in the Respondent's attendance.

12. There was correspondence from the Respondent to the Applicant exhibited to the Rule 5 Statement which provided some information about the Respondent's position. This would be taken into account by the Tribunal to minimise any prejudice to the Respondent.

13. Taking into account the circumstances of this case, and in light of the serious allegations, the Tribunal considered matters should be concluded without any further delay. The Tribunal was satisfied that it was appropriate and in the public interest for the hearing to proceed in the Respondent's absence.

The Respondent's Application for an Adjournment (by telephone)

14. After Mr Horton had concluded presenting the Applicant's case and the Tribunal had retired to deliberate on the allegations, Mr Horton received a voicemail message from the Respondent and addressed the Tribunal further. He stated the Respondent had called him back whilst the hearing had been in progress, not realising who Mr Horton was or that the voicemail message left by Mr Horton related to the Tribunal hearing. When Mr Horton had telephoned the Respondent during the recess, the Respondent informed Mr Horton that he had not known the substantive hearing was today and that he would be willing to speak to the Tribunal panel on a conference call.

15. There was then a short hearing by telephone conference. The Respondent stated he was working in Leeds and that he had tried to telephone Mr Horton about an hour ago. He explained the circumstances of his bereavement on 6 February 2017 and stated he had spoken to a member of the Tribunal's staff on that day when he was told that he would be contacted within 30 days to discuss his availability. He said he had made it clear to that staff member that he wanted to attend the final hearing. The Respondent confirmed he had received an email from the Tribunal shortly after that which was on his laptop at home.

16. The Respondent also stated he had called the Tribunal office about 7 days earlier, on Tuesday or Wednesday, but the person he had previously spoken to in February 2017 was not available. The Respondent had been in a rush and had been unable to call again as he was working long hours, leaving home at 4am and returning at 8pm. The Respondent said he was certain, from memory, that the email sent to him by the Tribunal warned him the hearing would be during this week. This was the reason why he had called the Tribunal office the previous week. The Respondent stated he was not given any fixed date. He had diarised calling the Tribunal again tomorrow to chase the matter up.

17. The Respondent made reference to his health issues and stated his health had impacted on his ability to comply with the Tribunal's directions. He said he had found it difficult to leave his home for 9 months. He was now working in the building industry and did not plan to return to the legal field. The Respondent stated he wished to respond to the allegations as he had text messages on his phone which contradicted the Applicant's evidence, and he wished to produce these. The Respondent requested an adjournment so that he could attend a future hearing in person. He stated he was turning his life around and it would be wholly irresponsible of him not to request an adjournment even if there were costs consequences for him.

18. The Respondent apologised to the Tribunal. He stated he had been shocked and surprised but was grateful Mr Horton had called him earlier that morning as he had always made it clear he wished to be present at the final hearing. He confirmed he would shortly be moving address and that any correspondence should be sent to him by email which would guarantee he received it. He confirmed his current address but advised he would be moving soon although he could not say exactly when.

The Tribunal's Decision

19. The Tribunal had considered carefully the Respondent's submissions. It was quite clear that the Respondent had received the Tribunal's email of 9 February 2017 as he was able to recall it. That email had attached a Memorandum which stated at the end that the substantive hearing would take place today. If the Respondent had not read that Memorandum, he should have done so, and in any event, failure to read the Memorandum in full was not a sufficient reason to grant an adjournment.

20. Whilst the Respondent had made reference to his health issues, no medical evidence had been provided in support. The Tribunal also took into account the Respondent's lack of engagement in these proceedings, save for his applications for adjournments. If the Respondent had needed more time to deal with the directions, he could have made a request for extensions of time to the Applicant and/or the Tribunal. He had not done so.

21. It was also clear that the Respondent was currently working full time. He had been fit to work recently and could therefore have contested the proceedings if he genuinely wished to do so. It was evident from the papers that the Respondent had submitted an application to be removed from the Roll of Solicitors on 6 April 2016 so he was clearly well enough to engage with the SRA on that issue. He had also sent a number of further emails to the SRA about his application to be removed from the Roll so he could have engaged with the substantive issues in these proceedings. He had not filed

an Answer to the allegations nor had he submitted any evidence to support his defence.

22. It was not clear to the Tribunal why the Respondent had called the Tribunal office only about 7 days ago if he expected a hearing was due to take place sometime this week. He appeared to have left it very late in the day to make that call and not to chase it up again. Taking into account the history of this matter, the Tribunal concluded the Respondent had been given every opportunity to engage and although he stated he now wished to engage, the Tribunal was satisfied that the public interest in proceeding in the Respondent's absence outweighed any prejudice there may be to the Respondent. The Respondent's application for an adjournment was refused.

23. The Respondent was reminded of his right to apply for a re-hearing under Rule 19 of the SDPR within 14 days, if he wished to do so. Such application must be in the prescribed form with a supporting statement. The Respondent was also reminded that any medical evidence of his condition at the relevant time would no doubt be of interest to a future division of the Tribunal considering such an application.

Factual Background

24. The Respondent, born in 1968, was admitted to the Roll on 15 March 2004. His name was removed from the Roll on 5 June 2006 and he was restored to the Roll on 14 January 2011. He did not have a current practising certificate.

25. At the material time, the Respondent was working as a part-time consultant at Healey Kenyon McAteer (HKM), until HKM suspended him on 16 June 2015.

Allegation 1.1

26. On 20 January 2015 the Respondent was made bankrupt. During the same month he started working as a part-time consultant for HKM. He did not tell HKM that he had been made bankrupt. Nor did he tell the Solicitors Regulation Authority ("SRA") that he had been made bankrupt. The Respondent continued to practise as a solicitor with HKM until 16 June 2015 when he was suspended because of his bankruptcy.

27. On 16 June 2015, a representative of the SRA spoke to the Respondent on the telephone. The Respondent stated :

- He had told the SRA that he had been made bankrupt and would supply a copy of the letter;
- He did not know his practising certificate was automatically suspended;
- When he had been previously declared bankrupt, he had notified the SRA and the SRA had imposed conditions;
- He undertook not to carry out any work;
- He would tell his employer.

28. On 23 June 2015, the Respondent applied to lift his suspension. In his application, the Respondent produced a handwritten letter dated 3 February 2015 notifying the SRA of his bankruptcy. The SRA had no record of ever having received this letter.

29. The Respondent had been bankrupt previously in 2004. He applied to lift his suspension in 2011. His practising certificate was reinstated on 14 January 2011.

Allegation 1.2

30. In August 2015 a clerk at the Ormskirk Magistrates Court telephoned PDS, a firm of solicitors, asking for "Mr Birkbeck from your office". The Respondent had told a defendant in criminal proceedings that he was employed by PDS but had not attended for a hearing. PDS told the clerk that the firm did not, and never had, employed the Respondent.

31. On 22 September 2015, the Respondent telephoned PDS' office manager to get details of where to send some paperwork relating to a police station attendance. The Respondent told the office manager that one of PDS's staff had asked him to attend. However, nobody at PDS had asked him to do so.

32. A custody record dated 28 October 2015 stated that the Respondent called on a Mr A, who was in custody at a police station. The custody record stated the Respondent had said he was employed by PDS.

33. On two occasions between September and November 2015 the office manager at another firm telephoned PDS' office manager to say that the Respondent had attended police stations, saying he was from PDS and represented the other firm's client.

34. PDS confirmed the only contact they had had with the Respondent was when he asked them for some space to deal with paperwork from a previous firm, which PDS denied.

Allegation 1.3

35. On 17 April 2015 the Respondent was the on-call solicitor covering St Anne's Police Station in Merseyside. He was appointed to be the solicitor for Mr A.

36. On 20 May 2015, while he was still an undischarged bankrupt, the Respondent borrowed £5,000 from Mr A, giving an address at G Lane on an IOU document. The loan was for a period of 12 months which expired on 12 August 2015.

37. In mid-June 2015, the Respondent borrowed a further £3,250 from Mr A in two tranches (£3,000 and £250).

38. The Respondent continued to act for Mr A even though his practising certificate was suspended and (from 16 June 2015) he was no longer employed. On 17 August 2015, the day of Mr A's court hearing, the Respondent said that he could no longer represent Mr A.

39. The Respondent did not advise Mr A to take separate legal advice. Nor did he repay the loans.

Allegation 1.4

40. On 29 March 2016 the SRA wrote to the Respondent informing him of their investigation and the allegations. He was asked to respond by 13 April 2016. On 6 April 2016, the Respondent acknowledged receipt. He requested extensions of time to reply on 13 April 2016, 21 April 2016 and 28 April 2016. All the extensions were granted but the Respondent failed to respond substantively to the letter.

41. In April 2015 the Respondent applied to remove himself from the Roll stating that he was facing an investigation, he had health issues, he no longer wished to be involved in the legal profession and that he would undertake never to apply to the Roll or be re-instated as a solicitor or apply for a practising certificate again. He stated:

- He had been in police protection since 2008 due to threats from third parties;
- He had been made bankrupt because his name had been used to rent commercial property;
- He did not know the bankruptcy hearing was going ahead as his solicitors did not tell him or indeed attend;
- He had serious personal problems.

Witnesses

42. No witnesses gave evidence.

Findings of Fact and Law

43. The Tribunal had carefully considered all the documents provided and the Applicant's submissions. The Tribunal confirmed that all allegations had to be proved beyond reasonable doubt and that the Tribunal would be applying the criminal standard of proof when considering each allegation.

44. **Allegation 1.1.: On 20 January 2015 the Respondent was made bankrupt. He continued practising as a solicitor until 16 June 2015. In doing so the Respondent breached the following principles of the SRA Principles 2011:**

1.1.1 Principle 2 – by continuing to practise while bankrupt, and in not telling his employer, he acted without integrity;

1.1.2 Principle 5 – by practising while his certificate was automatically suspended, he did not provide a proper standard of service, as clients were not getting advice from a properly authorised solicitor;

1.1.3 Principle 6 – by not telling his employer about his bankruptcy he did not behave in a way which maintained the public trust in him or his profession;

1.1.4 Principle 7 – by not telling the SRA about his bankruptcy he did not comply with his legal and regulatory obligations.

44.1 Mr Horton, on behalf of the Applicant, informed the Tribunal that a Bankruptcy Order would automatically suspend a respondent's practising certificate. In this case, the Respondent had previously been made bankrupt in 2004 and he came off the Roll of Solicitors as a result. In 2011 the Respondent applied to be restored to the Roll.

44.2 On 20 January 2015, the Respondent was declared bankrupt for a second time. He claimed he had written to the SRA on 5 February 2015 to inform them of his bankruptcy but Mr Horton stated the SRA had no record of receiving that letter. Whilst Mr Horton accepted a solicitor may not realise a Bankruptcy Order would suspend their practising certificate, this was the second time the Respondent had been declared bankrupt so he should have known the consequences.

44.3 The Respondent had been contacted by the SRA by telephone on 16 June 2015 as the SRA became aware he had been adjudged bankrupt on 20 January 2015 as a result of information on the Insolvency Register. During that conversation the Respondent stated he was "just going to a prison visit" and that he had become aware of his bankruptcy in February 2015 whereupon he had written to the SRA to inform them of it. He said he wrote to the "compliance team" and could provide a copy of the letter. During this conversation the Respondent stated he did not know his practising certificate would be automatically suspended on being adjudged bankrupt. The Respondent stated that when he was previously made bankrupt he had notified the SRA and they had imposed conditions. He confirmed he had been working since his bankruptcy. It was made clear to the Respondent during that telephone conversation that he was not to carry out any work as his practising certificate was suspended and he would need to apply for the suspension to be lifted.

44.4 The Respondent wrote to the SRA on 23 June 2015 making an application for the lifting of the suspension on his practising certificate. In that letter he explained how his bankruptcy had come about claiming that his name, address and other details had been used to rent commercial property. This had led to the bankruptcy order being made against him in his absence on 20 January 2015. He stated in his letter that he had tried unsuccessfully to set the matter aside. He stated he was in dispute with his own solicitors who had acted for him on the matter and who appeared to have no knowledge of the hearing date.

44.5 In his letter of 23 June 2015, the Respondent provided details of his difficult personal circumstances and stated he did not appreciate the bankruptcy automatically suspended him from practice. He stated this had been an oversight on his part in light of his other personal difficulties and that if he had been aware he should have notified the SRA he would have done so immediately.

44.6 The Tribunal had been provided with a copy of the Respondent's Bankruptcy Order dated 20 January 2015 together with a letter from HKM Solicitors sent on or about 17 June 2015. In that letter HKM confirmed that the Respondent had informed them on 16 June 2015 that he had been declared bankrupt at the end of January 2015 and that he accepted he should have bought the matter to the attention of the firm. HKM confirmed the Respondent had been working for the firm in a part time consultancy

capacity undertaking police station attendances and a few court attendances since the beginning of that year. HKM confirmed the Respondent's employment with them had been suspended pending confirmation from the SRA that he could continue to practise.

44.7 The Tribunal was satisfied that the Respondent had continued practising as solicitor from 20 January 2015, when he was declared bankrupt, until 16 June 2015. He had also failed to inform his employer, HKM of his bankruptcy. HKM stated the Respondent had previously worked with another local firm who appeared to have no issue with him so he had joined HKM with high regard. The fact that HKM immediately suspended the Respondent's employment on learning of his bankruptcy was an indication of how seriously they viewed his failure to inform them.

44.8 The Tribunal was satisfied the Respondent had breached Principle 2 of the SRA Principles 2011 and had acted with a lack of integrity by continuing to practise knowing he had been declared bankrupt and failing to inform his employers of this. He would have known he should not have worked having had previous experience of being declared bankrupt. Indeed he had informed the representative of the SRA who he spoke to on 16 June 2015 that he had been allowed to continue practising with conditions on his certificate. He had also breached Principle 6 as failing to inform his employers of the situation was behaviour which did not maintain the public trust placed in him or in the profession.

44.9 Clients of HKM would not have expected to be represented or be given advice by a suspended solicitor. The Tribunal was satisfied the Respondent had breached Principle 5 of the SRA Principles 2011 as he had not provided a proper standard of service to clients in that he was not authorised to carry out the work that he had done for them by practising while his certificate was suspended.

44.10 Regulation 15 of the SRA Practising Regulations 2011 requires a solicitor to inform the SRA within 7 days if he/she is made the subject of bankruptcy proceedings. Whilst the Respondent claimed he had notified the SRA of his bankruptcy by a letter dated 3 February 2015, Mr Horton confirmed the SRA had no record of receiving that letter. It was clear from the telephone conversation between the SRA and the Respondent on 16 June 2015 that the SRA had become aware of his bankruptcy on or about that date due to information contained in the Insolvency Register.

44.11 In the absence of any further information from the Respondent, and taking into account his failure to inform his employers of his bankruptcy, the Tribunal was satisfied that the Respondent had failed to inform the SRA of his bankruptcy either at all or within 7 days of being made subject to bankruptcy proceedings. He had previously been declared bankrupt in 2004 and would have been aware of the correct procedure he should have followed. He would also have been aware from that experience that his practising certificate had been suspended for a time due to his bankruptcy and he was not able to continue practising. Indeed he made reference to conditions being placed upon it when he was previously made bankrupt. The Tribunal was satisfied the Respondent had breached Principle 7 of the SRA Principles 2011 and had failed to comply with his legal and regulatory obligations by failing to inform the SRA of his bankruptcy.

44.12 The Tribunal found Allegation 1.1 proved in full.

45. **Allegation 1.2: In November 2015 the Respondent allowed a custody record to state that he worked for a firm (PDS) when representing a defendant. PDS had never employed him. In doing so the Respondent breached the following principles of the SRA Principles 2011:**

1.2.1 Principle 2 – by misleading the police station officials, he acted without integrity;

1.2.2 Principle 6 – by misleading the police station officials, he did not behave in a way which maintained the public trust in him or his profession.

It was alleged the Respondent acted dishonestly.

45.1 Mr Horton referred the Tribunal to a witness statement from NB, who was the Office Manager of PDS. That statement confirmed the Respondent had never been employed by PDS. After the correction of a typographical error, the statement also confirmed the Respondent had attended the offices of PDS on 27 July 2015 and had spoken to NB. He stated he wanted to transfer some files from his previous firm to PDS and asked if he could use the desk in PDS' office to sort out paperwork. His request was declined.

45.2 NB confirmed in her witness statement that shortly after the Respondent left their office, PDS received a telephone call from a client claiming the Respondent had provided her with the firm's telephone number as he stated he was working there. The client was informed this was not true. NB also confirmed that in August 2015 the firm received a telephone call from Ormskirk Magistrates' Court enquiring as to the whereabouts of "Mr Birkbeck from your office" as they were waiting in court to hear a matter on which he had been instructed. The firm was informed that "Alan Birkbeck of [PDS] had been instructed by a defendant.

45.3 NB stated in her witness statement that on 22 September 2015 the Respondent contacted the office again stating he had some paperwork to send to the office as he had covered a police station matter for RD of the firm. However, RD had never instructed the Respondent.

45.4 Mr Horton submitted there could be no doubt that the person mentioned in the custody record, and the person who attended PDS was the Respondent. He had repeatedly acted for a number of clients in the same geographical area, and he had not disputed the evidence attached to the Rule 5 Statement. Mr Horton submitted that if it had not been the Respondent, it could be reasonably be assumed that the Respondent would have contacted the Applicant immediately on receipt of the papers to deny his involvement.

45.5 Mr Horton submitted the Respondent had acted dishonestly in relation to this matter. He submitted the Respondent knew he was not able to speak to anyone in police custody without proper authority. The Respondent was not a sole practitioner and therefore needed to indicate to the police that he was employed by a firm. Mr Horton stated that in August 2015 the Respondent had not been employed by any firm of

solicitors, yet he informed various third parties that he was working at PDS when the reality was that he had simply asked them for an office where he could sort out papers. Mr Horton accepted that the Respondent may not have been able to claim payment for the work he had carried out but he may have been trying to build a client portfolio so that he could try to obtain employment with a firm.

45.6 The Tribunal had been provided with a copy of a Custody Record from St Anne's Street police station which contained the following entry:

> "28/10/2015 15.00
> Alan Burbeck [sic] from [PDS] has called. Stated DP's mum has contacted him to represent DP. He is busy today but has made arrangements for [LR] at [KP] Sols to deal".

45.7 The Tribunal also noted that a Civil Evidence Act Notice had been served on the Respondent on 6 January 2017 and he had not responded to that or taken issue with either the Custody Record or the witness statement of NB. Having considered these documents, the Tribunal was satisfied the Respondent had misled the police by claiming he worked for PDS when he did not. The Tribunal was satisfied that the Respondent had acted with a lack of integrity in doing so and had breached Principle 2 of the SRA Principles 2011. He had also breached Principle 6 as misleading the police was not behaviour that maintained the trust the public placed in him or his profession.

45.8 Allegation 1.2 also contained an allegation of dishonesty. The Tribunal had been referred to the case of Twinsectra Ltd v Yardley & Others [2002] UKHL 12 which set out the test to be applied when considering the issue of dishonesty. Firstly, the Tribunal had to consider whether the Respondent's conduct was dishonest by the ordinary standards of reasonable and honest people. Secondly, the Tribunal had to consider whether the Respondent himself realised that by those standards his conduct was dishonest.

45.9 The Tribunal was satisfied that informing the police of employment with a firm, when a solicitor was not employed by that firm, would be regarded as dishonest conduct by the ordinary standards of reasonable and honest people.

45.10 By November 2015, the Respondent's employment with HKM had been terminated. He knew he was not employed by PDS and indeed appears to have attended the offices of PDS in an attempt to transfer client files to them. The Respondent knew he was not employed by PDS but yet he was attending upon clients detained at the police station claiming to work for PDS when he knew this was not true. By claiming to be employed by PDS, the Respondent was able to attend on clients at the police stations - which he would not otherwise have been able to do and the Respondent knew this. The Respondent knew that the police would expect solicitors attending upon those in custody to be properly authorised. The Respondent's conduct took place during the time he was declared bankrupt. The Tribunal was therefore satisfied that the Respondent realised that by the standards of reasonable and honest people, his conduct in misleading police officials in order to gain access to potential clients in custody, was dishonest.

45.11 The Tribunal found Allegation 1.2 proved in full.

46. **Allegation 1.3: In May – June 2015 the Respondent borrowed £8,250 from an individual he represented. The Respondent did not advise the individual to take separate legal advice and had not repaid the money. The Respondent breached the following principles of the SRA Principles 2011:**

1.3.1 Principle 2 – by borrowing money from someone he represented without giving the appropriate advice, he acted without integrity;

1.3.2 Principle 6 – by borrowing money from someone he represented without giving the appropriate advice, and in not repaying, he had not behaved in a way which maintained the public trust in him or his profession.

46.1 Mr Horton referred the Tribunal to the witness statements of Mr A who had been a client of the Respondent whilst he was still working at HKM during his period of bankruptcy. In his statement Mr A could not confirm the exact date he had been asked by the Respondent to loan the Respondent £5,000. However he stated he handed the £5,000 in cash to the Respondent at the offices of HKM on 20 May 2015, after a meeting about his case. Mr A stated sometime later the Respondent wrote an IOU stating he would repay Mr A back in twelve weeks.

46.2 Mr A went on to say in his statement that in mid-June 2015 the Respondent had telephoned Mr A stating he was no longer working for HKM but was working for another firm. A short time after this, Mr A stated the Respondent asked Mr A to lend him a further £3,000 which he did. Mr A stated that at the end of June the Respondent informed him that his car had been broken into and his wallet stolen and that he needed £250 to pay for a course he was due to attend. Mr A said the Respondent originally asked for more money but Mr A could not afford this. Mr A stated the Respondent drove him to a cash machine where he withdrew £250 and paid it to the Respondent.

46.3 Exhibited to Mr A's witness statement was a text message sent to him by the Respondent on 27 August 2015 confirming the Respondent would transfer £8,250 to Mr A.

46.4 Mr Horton referred the Tribunal to an IOU document signed by the Respondent confirming Mr A had lent the Respondent in the sum of £5,000 for a twelve week period. He also referred the Tribunal to a letter from the Respondent to Mr A dated 6 May 2015 acknowledging receipt of a cheque in the sum of £3,000 as per their conversation on 20 May 2015. However, Mr A had denied receiving this letter. Mr Horton submitted that during the time the Respondent borrowed money from Mr A, he remained an undischarged bankrupt and he failed to inform Mr A that he should take independent legal advice before lending the Respondent any money.

46.5 The Tribunal considered very carefully Mr A's witness statement and the other documents provided. Whilst it was apparent Mr A had lent money to the Respondent and that as at 30 December 2016, which was the date of Mr A's witness statement, the sum of £8,250 was still outstanding, there was nothing in Mr A's witness statement to confirm he had not been advised by the Respondent to obtain independent legal advice. Accordingly, the Tribunal found Allegation 1.3.1 not proved on the basis that it could not be sure to the requisite standard that Mr A was not advised by the

Respondent to obtain independent legal advice. The Tribunal could not therefore find the Respondent had acted with a lack of integrity. The Tribunal found Allegation 1.3.1 not proved.

46.6 In relation to Allegation 1.3.2, the Tribunal was satisfied the Respondent had borrowed money from Mr A and had not repaid it by the date of Mr A's witness statement, 30 December 2016. The Tribunal was therefore satisfied the Respondent had failed to repay the money he had borrowed from Mr A and this was conduct that breached Principle 6 of the SRA Principles 2011, in that it did not maintain the trust the public placed in the Respondent or his profession. However, the Tribunal did not find the first part of Allegation 1.3.2 proved as it could not be satisfied to the requisite standard that the Respondent had borrowed money without giving the appropriate legal advice.

46.7 The Tribunal found Allegation 1.3.2 proved in part only in so far as the Respondent had not repaid the money he borrowed from Mr A and this was a breach of Principle 6.

47. **Allegation 1.4: The Respondent had not replied to correspondence from the SRA requesting an explanation for his actions. In not doing so the Respondent breached Principle 7 of the SRA Principles 2011, as by not co-operating with the SRA he had not complied with his legal and regulatory obligations.**

47.1 Mr Horton submitted there had still be no co-operation from the Respondent, indeed it was still not known whether he had repaid Mr A the money he had borrowed from him.

47.2 The Tribunal had been provided with a copy of a letter sent by the SRA to the Respondent dated 29 March 2016. This requested a response to the allegations from the Respondent by 13 April 2016. The Respondent acknowledged receipt of this letter on 6 April 2016. He then requested extensions of time to reply to the letter on 13 April 2016, 21 April 2016 and 28 April 2016. These extensions were all granted but the Respondent failed to respond substantively providing an explanation to the allegations.

47.3 The Tribunal was therefore satisfied that the Respondent had breached Principle 7 of the SRA Principles 2011 and had not cooperated with the SRA in not complying with his legal and regulatory allegations. The Respondent was clearly able to contact the SRA to request extensions of time to submit his response, he was able to make an application to come off the Roll of Solicitors and chase up these issues so it was rather surprising that he did not reply substantively to the SRA's correspondence. The Tribunal found Allegation 1.4 proved.

Previous Disciplinary Matters

48. None.

Mitigation

49. The only mitigation before the Tribunal was the information contained in the Respondent's letter to the SRA dated 23 June 2015. There was reference to the circumstances that led to the bankruptcy, which the Respondent claimed was because his name, address and other details had been used by third parties to rent commercial property.

50. The Respondent also set out details of his difficult personal circumstances at the time that he was made bankrupt. The Respondent stated in his letter that he did not appreciate a Bankruptcy Order automatically suspended him from practice. He stated it had been an oversight on his part given all the difficulties which he was dealing with at the time, and which continued to affect him.

Sanction

51. The Tribunal had considered carefully the Respondent's letter to the SRA. The Tribunal referred to its Guidance Note on Sanctions when considering sanction. The Tribunal also had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

52. Whilst the Respondent had made reference to difficult personal circumstances and health issues, there was no independent medical evidence to support what he had said. In addition whilst the Respondent stated he did not appreciate a Bankruptcy Order automatically suspended him from practice, the Tribunal found this hard to believe in light of the fact that he had previously been declared bankrupt in 2004 and on his own admission his practising certificate on that occasion had been imposed with conditions. It was therefore difficult to believe the Respondent's failure to inform the SRA of his bankruptcy was an omission as this was at the same time that he continued to practise while suspended. The Tribunal did not find this to be a credible explanation, notwithstanding the Respondent's difficult personal circumstances.

53. The Tribunal considered the Respondent's culpability in this case was high. He had repeatedly held himself out as employed while suspended and he had misled police officers apparently in order to gain access to potential clients in custody. He had taken advantage of Mr A, who so far as the Tribunal was aware, had suffered financial losses in the sum of £8,250. The Respondent's conduct had been planned and had caused considerable harm to the trust the public placed in him and to the reputation of the legal profession.

54. The Tribunal considered the aggravating and mitigating factors in this case. The Tribunal had found the Respondent had acted dishonestly. His misconduct had been deliberate, repeated and continued over a period of time. He had taken advantage of Mr A, who was a vulnerable elderly person, of limited means, and who had suffered identifiable harm. As the Respondent had previously been declared bankrupt, he 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. There was no evidence of genuine insight or remorse from the

Respondent. Indeed his explanations about practising in ignorance while bankrupt were not credible. These were all aggravating factors.

55. The Tribunal then considered the mitigating factors. The Respondent had a previously unblemished record. It appeared from his correspondence that he had been suffering a number of personal difficulties at the material time although no supporting evidence of these had been provided. In any event, the Tribunal was of the view that such difficulties could not excuse him his conduct.

56. Taking into account the nature of the allegations found proved, the tribunal concluded these were serious and in light of the Respondent's culpability being high, the Tribunal concluded it would not be appropriate or sufficient to impose No Order, or a Reprimand, or a Fine. Such sanctions would not adequately reflect the seriousness of the misconduct and nor would they protect the reputation of the legal profession.

57. The Tribunal then considered whether any Restriction Order could be placed on the Respondent. However, given that the Tribunal had found an allegation of dishonesty proved the Tribunal did not consider this was a case where it would be appropriate to impose conditions on the Respondent's practising certificate. Furthermore, the Tribunal had found allegations proved in relation to the Respondent's failure to notify the SRA of his bankruptcy, to continue practising while bankrupt and failing to cooperate with the SRA. There was therefore no guarantee that the Respondent was likely to comply with any conditions, even if appropriate conditions could be identified.

58. The Tribunal next considered whether a Suspension would be an appropriate sanction in this case. There was no evidence of genuine insight from the Respondent. The Tribunal had found that he had acted dishonestly. The Tribunal had also found he had acted with a lack of integrity on more than one occasion. His conduct had caused a great deal of damage to public confidence in the profession, he had practised when not authorised to do so, he had taken advantage of Mr A, he had misled the police and he had failed to co-operate with his regulator. The Tribunal was satisfied that there was a need to protect both the public and the reputation of the legal profession from future harm from the Respondent. The Tribunal concluded that a Suspension would not be a sufficient sanction to reflect the seriousness of the misconduct and uphold the public's trust and confidence in the profession.

59. The Tribunal was also mindful of the case of SRA v Sharma [2010] EWHL 2022 (Admin) in which Coulson J stated:

> "Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll"

60. The Tribunal was satisfied that there were no exceptional circumstances in this case. The appropriate sanction to reflect the seriousness of the misconduct, ensure the protection of the public and the protection of the reputation of the legal profession was to strike the Respondent off the Roll of Solicitors. This would also maintain public confidence in the profession. The Tribunal therefore Ordered the Respondent be Struck Off the Roll of Solicitors.

Costs

61. Mr Horton requested an Order for the Applicant's costs in the total sum of £3,453 and provided the Tribunal with a breakdown of those costs. He confirmed he had not claimed any costs for his attendance at the Tribunal on 7 February 2017 when the previous substantive hearing had been adjourned, as he had also attended the Tribunal on another matter that day. Mr Horton confirmed the Respondent had been served with the Schedule of Costs in advance of the previous hearing of 7 February 2017.

62. The Tribunal considered the issue of costs carefully. It was satisfied that the amount of costs claimed was reasonable. Indeed the Schedule of Costs claimed only 4 hours of attendance for the hearing today even though the hearing had taken much longer. Accordingly, the Tribunal made an Order that the Respondent should pay the Applicant's costs in the sum of £3,453.

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

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

64. In this case the Respondent had not provided any documentary evidence of his income, expenditure, capital or assets and therefore it was difficult for the Tribunal to take a view of his financial circumstances. The Tribunal was also mindful of the cases of William Arthur Merrick v The Law Society [2007] EWHC 2997 (Admin) and Frank Emilian D'Souza v The Law Society [2009] EWHC 2193 (Admin) in relation to the Respondent's ability to pay those costs in light of the sanction imposed on him. However, in this case, the Respondent was relatively young and it had been clear from his earlier submissions in relation to his application to adjourn that he was currently in employment in the building industry. There was therefore no need to place any restriction on the enforcement of costs.

Statement of Full Order

65. The Tribunal Ordered that the Respondent, ALAN RICHARD BIRKBECK, 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 £3,453.00.

Dated this 26th day of April 2017
On behalf of the Tribunal

J. A. Astle
Chairman