SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11598-2017

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ANDREW LAURENCE BROWN First Respondent
SANDRA BENSON Second Respondent

Before:

Mr E. Nally (in the chair)
Miss T. Cullen
Mrs C. Valentine

Date of Hearing: 26 March 2018

Appearances

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

The First and Second Respondents did not attend and were not represented.

JUDGMENT

Allegations

1. The allegations made against the First Respondent in a Rule 5 and 8 Statement dated 17 January 2017 were that:-

1.1 Between the dates of 6 August 2014 and 13 October 2014, the First Respondent facilitated, permitted or acquiesced in the improper transfers of money from client account to office account thereby breaching Rule 20.1 of the SRA Accounts Rules 2011 ("SAR") and/or in breach of Principle 2 of the SRA Principles 2011 (the "Principles")

1.2 The First Respondent failed to remedy breaches of the SAR promptly on discovery in breach of Rule 7.1 of the SAR.

1.3 The First Respondent failed to run his business or carry out his role in the business effectively and in accordance with proper governance and sound financial and risk management principals thereby breaching Principle 8 of the Principles.

2. The allegation against the Second Respondent, who was not a Solicitor and who was employed by the First Respondent's practice, was that she has been guilty of conduct of such a nature that in the opinion of the SRA it would be undesirable for her to be employed by a solicitor in connection with his or her practice as a solicitor in that she:

2.1 Between the dates of 6 August 2014 and 13 October 2014, she facilitated, permitted or acquiesced in the improper transfers of money from client account to office account thereby breaching Rule 20.1 of the SAR.

3. In respect of allegations 1.1 and 2.1 the Applicant alleged that the First and Second Respondents acted dishonestly. However, dishonesty was not an essential ingredient to sustain the respective allegations.

Documents

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

Applicant

- Application and Rule 5 and 8 Statement dated 17 January 2017 with exhibit "KMS1"
- Forensic Investigation Report of Lindsey Barrowclough dated 11 March 2015
- The Applicant's Schedule of Costs dated 17 January 2017 and 20 March 2018
- Medical Information from the Second Respondent's GP dated 7 July 2017 and covering letter from the Second Respondent (undated)
- Medical Report of Dr T Garvey in respect of the Second Respondent dated 19 September 2017
- Witness Statement of Lindsey Barrowclough dated 7 November 2017
- Email from Mr Moran to the First Respondent re the test for dishonesty dated 19 March 2018
- Email from Mr Moran to the Second Respondent re the test for dishonesty dated 19 March 2018

First Respondent

- Email dated 22 March 2017 and Reply
- Answer of the First Respondent to the Second Respondent's Answer (undated but produced in accordance with direction 8.5 dated 2 May 2017)
- Email from the First Respondent dated 7 July 2017
- Email from the First Respondent dated 22 March 2018

Second Respondent

- Second Respondent's Answer dated 11 April 2017
- Letter from Second Respondent (undated but received by SRA on or about 9 February 2018)
- Letter from Second Respondent (undated but received on 15 March 2018)

Preliminary Issues

Applicant's Application to Proceed with the Hearing in the Respondents' Absence

5. Neither the First nor Second Respondents attended the hearing. Mr Moran applied to proceed in their absence.

6. The First Respondent was clearly aware of the hearing. He had sent an email dated 22 March 2018 which referred to his previous email of 7 July 2017 which stated: "Having moved abroad in early 2015 and being of very limited financial means, I do not propose to attend the Hearing and ask that the Tribunal makes a decision it considers appropriate. I do not in any way mean any disrespect to the Tribunal through my non attendance." He confirmed in the email dated 22 March 2018 that this remained his position. Mr Moran submitted that the Tribunal in July 2017 had concluded that the First Respondent had voluntarily absented himself and he invited this Division to reach the same conclusion.

7. The Second Respondent had sent two documents to the Tribunal. One sent on or about 9 February 2018 and one received on 15 March 2018. There was also a medical report from Dr Garvey dated 19 September 2017 which confirmed that the Second Respondent had capacity to participate in the proceedings and give instructions provided adjustments were made. The report stated that further adjournments were unlikely to be helpful. The Second Respondent's earlier email stated that she was not able to attend the Tribunal due to changes in her health. She said that "I want cancel the court and I am leaving it with the SRA to decide..." Her email dated 15 March 2018 stated "I do want the tribunal to go ahead without me..." Mr Moran invited the Tribunal to proceed in the Second Respondent's absence.

8. Mr Moran referred the Tribunal to the relevant legal principles set out in R v Jones [2002] UKHL 5 and General Medical Council v Adeogba [2016] EWCA Civ 162. He outlined the factors that must be considered by the Tribunal when determining whether or not to proceed in the Respondents' absence. The starting point was that a respondent had a right, in general, to be present at the hearing of allegations made against him. However, the Tribunal, had a discretion under Rule 16(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 to proceed with the hearing in the

absence of a respondent. Lord Bingham in Jones had said that that discretion had to be exercised with great care and it was only in rare and exceptional circumstances that it should be exercised in favour of the hearing continuing in the absence of the respondent.

9. In Adeogba, it was held that whilst the principles outlined in Jones were the starting point, it was important that the analogy between a criminal prosecution and regulatory proceedings should not be taken too far. In a criminal prosecution steps could be taken to enforce attendance by a defendant; in regulatory proceedings the respondent could not be compelled to attend. The decision whether or not to proceed in the respondents' absence, should be made in the context of the Tribunal's duty to protect the public.

10. The Tribunal decided that it should exercise its power under Rule 16(2) to hear and determine the application in the Respondents' absence. It was in the public interest for the matter to be heard. The Tribunal concluded that the First Respondent had been consistent in stating that he was not attending the substantive hearing (both in July 2017 and March 2018). He had submitted a Reply and participated in the proceedings. The Tribunal was satisfied that he had voluntarily absented himself. In respect of the Second Respondent she was clearly aware of the hearing. She had made detailed representations including in her recent documents. She wanted the hearing to proceed in her absence and the medical report from Dr Garvey stated that further adjournments were unlikely to be helpful. The Tribunal was satisfied that the Second Respondent had voluntarily absented herself.

Application to amend the Rule 5 and Rule 8 Statement

11. Mr Moran applied for leave to amend paragraph 60 of the Rule 5 and Rule 8 Statement to refer to the test for dishonesty as set out in Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67. The Applicant had written to the Respondents and told them it would be inviting the Tribunal to apply the test as set out in Ivey. Neither Respondent had acknowledged this email from Mr Moran although they had both responded to other emails sent to their respective email addresses.

12. The Tribunal accepted that the correct test for dishonesty was the test as set out in Ivey and this was the test that the Tribunal would apply. Whilst the Tribunal did not consider it strictly necessary for the Rule 5 and 8 Statement to be amended there was no disadvantage to either Respondent in leave being given for this amendment to be made. The First and Second Respondents knew that they were facing an allegation of dishonesty and had been informed of the revised test. The Tribunal granted leave to amend paragraph 60 of the Rule 5 and Rule 8 Statement to refer to the test for dishonesty as set out in Ivey.

Factual Background

13. The First Respondent was born in April 1959 and admitted to the Roll of Solicitors on 4 January 1999. As at the date of the hearing, his name appeared upon that Roll. The First Respondent was living outside of the jurisdiction. At all relevant times, the First Respondent carried on practice as one of two directors of Handley Brown LLP ("the Firm") which was located in Preston. The second director of the Firm was a

limited company which in turn was solely owned by the First Respondent. The Firm closed on 1 November 2014.

14. The Second Respondent was not a solicitor and was employed as a cashier at the Firm. The Applicant was informed by the First Respondent that the Second Respondent was asked to leave the Firm on 27 October 2014 and that she was made redundant on 3 November 2014.

15. There had been a previous SRA investigation, in respect of the Firm, which had commenced on 14 August 2012. This resulted in the production of a Forensic Investigation Report dated 11 September 2012. This related to concerns in respect of business management and identified that the Firm was in financial difficulties with debts of £1,180,233.00. Following that report, there was a period of engagement between the SRA's Supervision department and the First Respondent.

16. On 19 November 2014, Lindsay Barrowclough, a Forensic Investigation Officer ("FIO") commenced an inspection of the books of account and other documents of the Firm. That inspection culminated in a report dated 11 March 2014 ("the FIR"). The second investigation was commissioned following concerns in respect of the Firm's compliance with the SAR.

17. On 18 January 2016 the Applicant wrote to the First Respondent requesting an explanation of the misconduct alleged. The First Respondent responded to the Applicant's request for an explanation by way of letter attached to an email dated 29 February 2016. The Applicant wrote to the Second Respondent requesting an explanation of the conduct alleged on 8 April 2016. That letter was resent by email on 11 May 2016 and by letter on 4 October 2016. The Second Respondent responded to the Applicant's request for an explanation by letter attached to an email dated 14 October 2016.

Witnesses

18. The FIO gave evidence to the Tribunal. The Tribunal considered that the FIO's evidence was clear and was of assistance to the Tribunal particularly in understanding the "batch reports" that had been used by the Firm and the significance of what had and had not been recorded in them.

19. The First Respondent had not included a statement of truth in his submissions to the Tribunal. Mr Moran did not invite the Tribunal to draw an adverse inference in respect of the First Respondent but instead to consider what weight should be given to what he had said. This was the approach that the Tribunal adopted.

20. The written and oral 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 and made notes of the oral evidence. 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

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

22. **Allegation 1.1 - Between the dates of 6 August 2014 and 13 October 2014, the First Respondent facilitated, permitted or acquiesced in the improper transfers of money from client account to office account thereby breaching Rule 20.1 of the SAR and/or in breach of Principle 2 of the Principles.**

Allegation 2 and 2.1: The allegation against the Second Respondent, who was not a Solicitor and who was employed by the First Respondent's practice, was that she has been guilty of conduct of such a nature that in the opinion of the SRA it would be undesirable for her to be employed by a solicitor in connection with his or her practice as a solicitor in that she: Between the dates of 6 August 2014 and 13 October 2014, she facilitated, permitted or acquiesced in the improper transfers of money from client account to office account thereby breaching Rule 20.1 of the SAR.

22.1 Rule 20.1 of the SAR prohibits the withdrawal of client money from client account otherwise than in circumstances specified within sub paragraphs (a) - (k) of that Rule. The FIR identified that as at 15 October 2014, there was a minimum cash shortage of £52,426.80 on the client account of the Firm made up of twenty five improper transfers made from client to office account between 6 August 2014 and 13 October 2014, creating a client account cash shortage of £50,001.00; and a number of other accounting errors creating a cash shortage of £2,425.80.

22.2 Following a period of engagement between the First Respondent and the Applicant, the First Respondent contacted the Applicant by telephone on 17 October 2014 and confirmed that he had discovered that from September 2014, the Second Respondent, who was the Firm's cashier, had made client to office transfers in an effort to help cash flow, totalling £38,830.00. The First Respondent's parents had replaced the same amount into the client account. The First Respondent told the Applicant that a review of the client account would be undertaken by Mrs CW, a qualified accountant who had previously worked at the Firm.

22.3 A further cash shortage in the sum of £19,179.00 was identified by Mrs CW following her initial review completed on 28 October 2014. This sum was replaced in full on 29 October 2014 by way of a payment of £9,822.65 from the First Respondent's family into client account and costs of £9,356.35 which were due to the Firm from 17 October 2014 and were used to offset the shortage. Thereafter, a further £2,425.80 shortfall was identified by Mrs CW's continued review of the books of account. This sum was attributable to a number of accounting errors. The review continued until 18 December 2014 when Mrs CW provided the FIO with a copy of a client account reconciliation showing that no differences existed between the client funds held at the bank and those recorded on the Firm's client matter listing.

22.4 In respect of the twenty five improper transfers, the first improper transfer from client to office account took place on 6 August 2014 in the sum of £5,500. This was subsequently replaced the following day. The FIO's analysis of the actual transfers made during the period 1 August 2014 to 15 October 2014 when compared to the authorised transfers was as follows:

Total client to office transfers made at the bank	£179,536.75
Less total office to client transfers made at the bank	£5,662.00
Total value of client to office transfers	£173,874.75
Less total value of authorised transfers as per batch report	£123,873.75
Difference (Minimum Cash Shortage)	**£50,001.00**

22.5 The batch reports detailed the individual client to office account transfers that were due. There was a batch report for each day. The cashier would make one transfer for the gross amount that should be transferred based on the batch report. In addition to the improper transfers, the FIR identified that on eighteen occasions between 1 August 2014 and 15 October 2014, the total amount transferred from client account to office account at the bank did not match the total amount shown on the daily batch transfer reports, with both under and over transfers being made. The FIO's evidence was that the amount that was withdrawn from client account was dictated by what liabilities were due that day.

22.6 On 19 November 2014 a meeting was held between the First Respondent and the FIO. He told the FIO that on 22 September 2014, the Second Respondent had told him that a payment needed to be made for £2,000.00 and that there was not enough money in the Firm's office account. The First Respondent said that the Second Respondent had told him that "there was client money in a probate account". The First Respondent said that he told her "ok" but that the money needed to be put back as soon as possible. He stated that he knew it should not have been done. The Second Respondent did not inform him that the £2,000.00 had not been replaced and he said that he did not check himself to see whether this had in fact been done.

22.7 A further meeting was held between the First Respondent and the FIO on 12 December 2014 at which the First Respondent was asked to explain further about his knowledge of the transfers carried out by the Second Respondent. He reiterated the account given to the FIO on 19 November 2014, explaining that there had been a concern in relation to cash flow during the two weeks leading up to the discussion with the Second Respondent. The First Respondent again confirmed that he agreed to the transfer of £2,000 available within a probate account in order to make a payment stating that it needed to be paid back as soon as possible. He stated that, in hindsight, he knew that it should not have been done. He said that he genuinely thought that it would be a short term issue; he could have gone to his father; and it was not a massive amount.

22.8 The First Respondent accepted that he knew the transfers were in breach of the SAR but did not think of it in terms of dishonesty. He was aware of two further occasions where further transfers were made by the Second Respondent and that, after the third occasion, he told her not to do it again. The First Respondent also stated that on 14 October 2014, he discussed the transfers that had been made from client account with the Second Respondent. He asked her to confirm that they had not exceeded

£10,000.00 and described feeling shattered to learn from the Second Respondent that the transfers totalled over £30,000.00.

22.9 In written correspondence to the Applicant, forwarded by email on 29 February 2016 the First Respondent acknowledged that "there was an occasion in September 2014 when Ms Benson advised that she wanted to make an urgent payment of £2,000.00 but that there was insufficient funds in the office account and that she proposed to use funds from client account for the payment. I acknowledge that I agreed the request but explained that the funds must be transferred back as a priority."

22.10 The First Respondent stated that his reasonable expectation was that the money would be replaced within a short time period without compromising the Firm's ability to meet client liabilities. He stated that there was no reason for him to check that the Second Respondent had transferred the money back as she was the accounts manager. He stated that he had good reason to believe that if the transfers back into client account were not made, then he would be informed. The First Respondent stated that he was advised at a later date by the Second Respondent that she had made a total of three transfers from client account and that he told her not to do this again. The First Respondent stated that he was concerned to learn of what had happened but it was clear from the conversation that the Second Respondent was informing him of what had happened and that this had now been paid back to balance the account. He stated that there was no indication that this was ongoing or that the balance had not been rectified. Other than the three occasions referred to, the First Respondent stated that he was unaware of any other unauthorised transfers taking place from client to office account. He confirmed that he did not instruct nor authorise the Second Respondent to make those transfers or put pressure on her to do so.

22.11 A meeting was held between the FIO and the Second Respondent on 10 December 2014. The Second Respondent confirmed that she had joined the Firm on 4 August 2014, having twenty five years of experience as a cashier. She explained that the Firm had financial problems right from the outset. The Second Respondent explained that by September, there were concerns as staff had not been paid for August and the First Respondent promised that they would get paid in September. She said that he was away in London when she called him to advise that there was no money in the Firm's office account to pay the salaries. She stated that the First Respondent had asked her what money there was and she had confirmed that there was money in an estate account. He then advised her to "pay it out of there and I'll sort it." She explained that he told her to take enough to cover the salaries and that this was the first time he had asked her to do this. The Second Respondent said that she felt pushed into that situation as people said that they were not going to move until they were paid. The Second Respondent explained that, the following Monday morning, she asked the First Respondent how it was going to be sorted and he said that it would be paid over time. She said that there was always something that needed to be paid and that the First Respondent would say "this has to go now, this has to be paid."

22.12 The Second Respondent said that by October 2014, the First Respondent had said that he did not realise that the total amount transferred from client to office account was so much and that they would need to make a plan to pay it back. She referred to this being around the same time a complaint was received to the Legal Ombudsman and

that the First Respondent "then started panicking [and] then started asking how much was owed."

22.13 The Second Respondent stated that the First Respondent would instruct her to transfer credit card payments on the same day despite such payments taking two days to clear. The Second Respondent said that she told the First Respondent that it was wrong but that this made no difference and he was burying his head in the sand. The Second Respondent referred to several emails sent to her by the First Respondent asking for things to be paid. She stated that she was put under pressure to make the payments but that the First Respondent was not explicit in his instructions to her to make the payments. He referred to being the Firm's Compliance Officer for Legal Practice ("COLP") and Compliance Officer for Finance and Administration ("COFA") and confirmed that he would take responsibility. She said that each transfer from client to office account was made on instruction from the First Respondent saying that something had to be paid.

22.14 In an email to the FIO dated 12 December 2014, the Second Respondent wrote:

> "I have thought about what you said that Laurence said that he did know about all transfers, which in a way I can see what he was thinking because some of the transfers were done when he put me under pressure that payments had to go out, but never actually said the word transfer from client to cover, it was the terms he used odviosuly [sic] to cover himself, but as you could see from his emails he seemed really demanding and unstable sometimes in the way he viewed things as if he was going to turn things round and get loads of fees in, as I said I have never been put under pressure like this over sending out payments and I have worked in practices for about 25 years… I did want to say sometimes no you cannot do this, but it was his reaction when I said to him over some cash he needed…"

22.15 In correspondence to the Applicant, attached to an email dated 14 October 2016, the Second Respondent referred to the stress that she was put under whilst working for the First Respondent. She also referred to the first occasion that she was asked by the First Respondent to transfer money from client to office account which was shortly before his daughter's graduation day and after telling his staff that a payment would be made to them the following day. She referred to that day being a Thursday and that the First Respondent had stood over her and told her to transfer the money. The following day, staff had still not received their payments and when approached by their supervisor she contacted the First Respondent by telephone who then told her to transfer the money, assuring her that it would be sorted out later that day. She asked the First Respondent about the situation again the following Monday upon discovering that the money had not been transferred back and he told her that it was all in hand.

22.16 Both Respondents appeared to be in agreement that there was a discussion in relation to at least one of the unauthorised transfers from client to office account in the sum of £2,000. This, in itself, represented a breach of Rule 20.1 of the SAR. It was the Applicant's case that the First Respondent permitted this breach to take place and the Second Respondent facilitated the same.

22.17 In relation to the additional twenty four unauthorised transfers from client to office account, the First Respondent was, at the very least, acquiescent in the Second Respondent's facilitation of those transactions. The Applicant relied on the following facts in support of this:

- The First Respondent's knowledge of the Firm's financial difficulties both historically as highlighted in full within the previous Forensic Investigation Report and the mounting losses made by Firm as recorded in the Firm's management records for 2013 and 2014.

- The First Respondent's knowledge of the £2,000 unauthorised transfer that he accepted instructing/permitting the Second Respondent to make and, on his own admission, his subsequent knowledge thereafter of two further unauthorised transactions carried out by the Second Respondent.

- On the First Respondent's own account, he asked the Second Respondent to confirm that the total amount transferred did not exceed £10,000. The fact that that question was asked of the Second Respondent inferred that he had knowledge of, and acquiesced in the further transfers being undertaken by the Second Respondent.

22.18 There were various emails sent by the First Respondent to the Second Respondent The first example of such an email was on 18 September 2014 and said: "Sandra-Can you please factor in-I need £1440 that I will take out via a "Cash Cheque and thus needs to be before 3-30pm" On 6 October 2014, the First Respondent sent two emails to the Second Respondent. The first email was as follows: "Please pay £500 to Spitfire - before 12 noon today - else telephones will be suspended…" The second email chain appeared to relate to a proposed payment plan offered to the First Respondent on 6 October 2014 by a third party, indicating that £1,500.00 must be paid "today" and thereafter various other amounts to be paid on each day of the week during the course of that same week. As a result of which, the First Respondent then emailed the Second Respondent as follows: "Sandra- please see below- can we please get the £1,500 sent now please."

22.19 On 8 October 2014 the First Respondent emailed the Second Respondent and said: "Sandra-can you please pay £500 to [IP]- before 1pm today…" The next day he emailed her and said: "Sandra-please also pay £500 to [IaP] immediately-thanks". None of those emails included instructions as to where the payments should be made from and each email indicated a sense of urgency. Against this background and in light of the First Respondent's knowledge of the Firm's financial position generally coupled with the First Respondent's knowledge of at least three unauthorised transfers having been facilitated by the Second Respondent, one of which he accepted permitting, it was the Applicant's case that the First Respondent was acquiescent in respect of all of the improper transfers from client to office account and that the Second Respondent facilitated those transfers in breach of Rule 20.1 of the SAR.

22.20 In relation to the accounting errors, this created a cash shortage of £2,425.80 in breach of Rule 20.1 of the SAR. Those errors arose during the time period that the Second Respondent was employed as the Firm's legal cashier. It was the Applicant's case that the Second Respondent facilitated the improper transfer of money from

client to office account and that, as the principal of the Firm, the First Respondent was under an obligation to comply with the requirements of the SAR.

22.21 A solicitor of integrity would have been mindful of his professional and fiduciary duties in respect of the client account and the sacrosanct nature of such monies. A legal cashier with twenty five years of experience in that field would have had full knowledge of and training in the SAR and the importance of client money. Indeed the Second Respondent admitted that this was the first occasion in twenty five years that she had been asked to make such transfers and she knew it was wrong and contrary to the SAR. Both Respondents played a role in the improper transfers of money from client to office account in order to meet urgent payments that were due. Those payments were made on a systematic basis. Both Respondents would have been aware that client money cannot be used to meet the Firm's payments. The First Respondent failed to act with integrity in breach of Principle 2 of the Principles.

22.22 In Mr Moran's submission both Respondents accepted the underlying facts. They did not dispute what had happened but they offered different accounts of how they arrived at the situation. The fact that the First Respondent had had to ask the Second Respondent how much had been transferred meant that he had lost control of the Firm's finances. It also demonstrated that he had at least some underlying knowledge of what was going on.

22.23 Ms Barrowclough told the Tribunal that the First Respondent was the sole signatory on the bank account. He had not checked that there were sufficient funds when he directed the Second Respondent to make payments. The Second Respondent was responsible for inputting the transfers onto the system and would have made the actual transfers. The First Respondent had told the FIO that he had thought that he was not seeing as many "chits" as he should have for the financial transfers at the time but he had not followed up the lack of these with the Second Respondent.

22.24 The FIO described the Firm's accounting records as a mess. She had not found any records in respect of authorisation of payments. The Firms' financial position had gradually been getting worse and it was unable to meet its liabilities. There was more than one transfer for £2000 so it was hard to precisely date the first improper transfer that the First Respondent accepted that he had authorised. By Autumn 2014 the Firm did not hold money for very many clients. The Firm did have some dormant client balances. However, generally there was very little client money held. The FIO did not think that the £2,000 had actually been paid from the probate ledger.

22.25 The Second Respondent had said that she had made a report to the Law Society about what had happened. She had not been able to produce a copy of the email she sent or any acknowledgment. The FIO had made enquiries but had not been able to find a record of any such email.

<u>The First Respondent's Position</u>

22.26 The First Respondent admitted allegation 1.1.

22.27 In his Reply he acknowledged and accepted the improper transfers made. He explained that the previous cashier left the firm in August 2014 and he recruited via an employment agency to help avoid disruption in the business. He thought that the Firm would benefit from a cashier who was experienced in working in a solicitor's practice, with a will writing department and who also had experience of being in sole charge so that they were aware of procedures rather than just following in a team. The new cashier was the Second Respondent and the First Respondent asked the outgoing cashier concerned to arrange a period of overlap to assist the smooth takeover of the accounts operation and this was agreed and organised. The transfer of knowledge on workflow process between the cashiers had appeared at the time to go smoothly. The work would often involve speaking with the consultants who would meet with the Second Respondent to discuss the fees and receipts obtained and have their work logged in. The First Respondent said that that there were many transactions to carry out and this needed to be done diligently but otherwise it was not a complex task. The work was in essence no different to that at other firms. Indeed whilst there were many transactions to consider this was still a relatively small business operation and not onerous as a work load for one experienced full time cashier.

22.28 At the end of August and September 2014 there was a slowdown in the income to the Firm. This was due to less visits being successfully arranged and of those that were there was an increase in postponements and cancellations. This became the First Respondent's focus over the next few weeks and one of his initial actions was to seek to reduce the level of outgoings in fixed monthly payments. This was to allow time to establish whether what was happening was a short term event be it seasonal or more sustained. If more sustained he needed to establish what should be done more generally with regard to any redundancies. The First Respondent spoke or met with the main creditors and reduced the monthly outgoings as best he could. He spoke with the staff to discuss the situation and explained that he proposed to pay the staff wages in segments as income was received.

22.29 The First Respondent was working hard and trying to ensure the business would successfully work its way through a quiet period – by reducing monthly outgoings by agreement and making sure the fundamentals of the business plan were still correct and operating as they did in the small scale test period in November and December 2013. Through September 2014 the most noticeable issue was the need to pay staff by stages to match with the cash flow from fee income. This comprised the two solicitors heading the department together with the cashier and visit arranging team.

22.30 In hindsight costs could have been reduced further by redundancies at an earlier stage but one of the key issues the First Respondent saw was to increase the number of successful visits by the consultants and this required those arranging the visits to do so in viable numbers. The staff and consultants were aware of the slow down and the efforts to work through it with regard to efficiency savings by, for example, the consultants being more flexible with their available hours and visits reconfirmed by letter or phone on the day to reduce cancellations. As the situation slowed further many of the long standing creditors were accepting of revised reduced payments but some of the smaller creditors were not prepared to wait.

22.31 The First Respondent was asked in late September by the Second Respondent for agreement to use funds from client account to meet an urgent payment of around £2,000 and advised by her on two further occasions after she had made similar such transfers. In each case the First Respondent understood this to have been a short term matter. Even so he acknowledged that to do so was a breach of the SAR.

22.32 The Second Respondent alleged that when she commenced working at the Firm the First Respondent had told her that the previous cashier was not happy with the financial situation and that he had effectively told her that he had told her lies during the recruitment process to induce her to take the job. The First Respondent denied the comments. His concern was for any new cashier to have the ability to carry out the tasks. He also said that the statement of the Second Respondent implied an atmosphere in the office and approach to staff which he did not recognise nor accept. The overlap in the office with the previous Cashier was a week rather than around a month. On those occasions when there was a delay in paying staff wages, care was taken to ensure staff were told of the delay in advance. They were also told when they would be paid.

22.33 The First Respondent said that he always engaged with the Applicant. His role during the material period was to ensure that those with whom the Firm dealt recognised it was difficult times but that the Firm was looking to discuss the situation and work its way through. The First Respondent strongly denied that he ignored the situation. He was looking at the strategic options available to the Firm including considering ways in which the Firm could adapt and progress at the same time, recognising the work being achieved. The First Respondent denied that he had had a prior business that had collapsed.

22.34 The First Respondent was trying to ensure that the business continued in a correct way and with the hard work of all staff. He had acknowledged that incorrect transfers were made. He was clear of the need to carry out work correctly. The situation and picture described by the Second Respondent was not how he was acting at the material time.

22.35 The transfers referred to by the Second Respondent, which the First Respondent was not aware of, occurred in August and into September 2014. He had not previously been aware of the length of period nor the number of times. Contrary to what the Second Respondent said, the First Respondent had acknowledged the transfers he did know about and had also agreed, that if he had known, he would have arranged for further funds to be paid into the Firm at an earlier date from close family sources.

22.36 The First Respondent denied that he was fully aware of all the transfers as alleged by the Second Respondent. He did not direct such incorrect transfers as stated. The allegation was vigorously denied. He accepted that he should have had a closer knowledge of the funds available rather than rely on receiving information. The First Respondent denied that the transfer of £5,500 was done at his direction. The transfers which he was aware were set out above.

22.37 The First Respondent denied that he had asked the previous cashier to transfer client monies but that she had refused. No such conversation took place. The Firm continued throughout the material period to constantly generate income from its

business. The First Respondent was focused on how this could be improved and reduce costs at the same time. He denied that the requests for payments to be made by the Second Respondent were requests to use anything other than office account.

The Second Respondent's Position

22.38 The Tribunal treated allegation 2.1 as denied.

22.39 The Second Respondent said that the First Respondent could not see how much debt he was in; all he could see was that he was going to make all these sales and money at any cost to other people. He knew there were no funds available when he asked her to pay some of his creditors and staff in order to keep the place open. The Second Respondent told the First Respondent and he just said to take the money from client as there were people out on the road making sales and money would come in later that day, and he would take full responsibility for these actions, as he was the COLP and COFA. The First Respondent had had daily updates on sales made, so he knew what money was coming in. There were people chasing for money and the First Respondent was not paying creditors.

22.40 When the Second Respondent started working for the First Respondent he told her that her predecessor was not happy with the financial situation and that he believed she could cope better as she had worked for a practice that had struggled and closed. The First Respondent effectively told the Second Respondent that he had told her lies during the recruitment process to induce her to take the job. When she commenced her employment she realised very quickly that it was a stressful Firm to work in and staff effectively hated the First Respondent and certain staff worked in fear of him. She overlapped with her predecessor for around two weeks and it was clear that she could not cope and greatly disliked the First Respondent.

22.41 There were about fifteen staff. Not all were paid on time and some were only part paid. There were occasions when the First Respondent offered staff extra money to defer their wages by a month. Some agreed but he did not pay them. Very shortly after joining the Firm the Second Respondent became aware of a problem. She was the fourth legal cashier to join the practice in twelve months. The others had all left.

22.42 The First Respondent told the Second Respondent at an early stage that the SRA was querying how he could pay a petition debt as a Winding-Up application had been made against the Firm. During her last month at the Firm the First Respondent told the Second Respondent to look out for an email from the SRA as he wanted her to reply for him stating that he was not available until a certain date. In her view the First Respondent was evading dealing with certain critical matters. He had also told her that he had a prior business that had collapsed. The Second Respondent described a very stressful job and a very difficult environment in which to work as staff were going unpaid due to poor cash flow and the First Respondent was trying to avoid the Winding-Up petition by using money that he would otherwise pay staff with to discharge the Firm's debts.

22.43 The Second Respondent said that the First Respondent told her to transfer monies from client account on the first few occasions and then just told her to get the money knowing there was no other way than his previous direction. The First Respondent

would effectively direct the Second Respondent to make payments from client account claiming that he believed there was money coming in later on. This occurred quite a few times and not just on the three occasions which the First Respondent admitted knowing about. According to the Second Respondent this was almost a daily occurrence towards the end of her employment. The First Respondent seemed to believe that he was due a substantial amount of money because he thought he was working to a fool proof plan.

22.44 The Second Respondent said that the payments that the First Respondent directed her to make from client funds were generally for expenses. The first occasion occurred when the First Respondent was due to attend his daughter's graduation but had promised to pay the staff on the Friday of that week. The previous day the First Respondent told the Second Respondent to use client money and said that he would cover it on the Monday but failed to do so. There was a further occasion on which the First Respondent needed to acquire a list for sales staff. The payment was required for noon on a certain day or the sales staff would have no work. There were no office funds available and the Second Respondent was directed to use client funds. The First Respondent would regularly say that the client money would effectively be his money in costs eventually in any event.

22.45 The Second Respondent said she told the First Respondent on one occasion that there was a high balance of probate money in a particular client account and that could not be used. She was aware that this was client money. She denied saying "there was client money in a probate account." The reference to a probate account was completely misconceived. She told the First Respondent that "there was probate money in client account" and that she was making the point that probate money could not be used at all. She described the First Respondent's reference to that money as misleading and self-serving. She described the First Respondent's explanation as an "incredulous story" as he admitted being fully complicit in the transfer of £2,000.00 of client monies. This illustrated his general practice and his mind set in thinking such matters were "short term issues" at the time. The Second Respondent denied that the First Respondent told her "not to do it again" after the two further occasions as this was the opposite of the actual position. The First Respondent was fully aware that he did not have the cash and yet continued to demand that the Second Respondent make payments to creditors. He was fully complicit and fully aware of what he was doing and he was instructing and pressuring the Second Respondent to do so.

22.46 The First Respondent was very threatening and would stand over the Second Respondent and on one occasion appeared to run at her as she was in the office next door. The Second Respondent felt very pressured by him. The First Respondent would always in these situations appear desperate and very threatening. The Second Respondent said that she had absolutely no choice but to follow the First Respondent's directions. She could not refuse and the First Respondent did not appear to care that he was complicit in such a serious breach. She felt very scared of him and threatened by him, effectively being pushed belittled, verbally abused and patronised.

22.47 The Second Respondent described the allegations that the First Respondent "discovered" transfers made by her as untrue, offensive and also laughable. According to the Second Respondent the First Respondent was fully aware of what he

was directing her to do and fully aware of his own lack of cash flow. The Second Respondent said that she had recorded her concerns about the Firm on the Law Society's website. The Law Society had called her by telephone to the office well before 17 October 2014. This was the date on which the First Respondent claimed he made his own disclosure which she described as self-serving and seeking to evade responsibility and point the finger at her for his own breaches of which he was fully aware. When the Law Society telephoned the Second Respondent said she could not speak to them because she was in the First Respondent's presence. The Second Respondent considered it was entirely unjust and unethical of the First Respondent to bring her into this Tribunal in this way, particularly as she had tried, without success, to seek help from the Law Society.

22.48 The Second Respondent found it very odd for the First Respondent to claim in his telephone call on 17 October 2014 that he had made a discovery of transfers from client account to help cash flow when he was aware that he had directed the Second Respondent to use client monies on three occasions. He was well aware of all transfers as he was fully complicit in them all and directed the Second Respondent to use the funds to assist his cash flow due to great pressure from creditors. The first improper transfer on 6 August 2014 was to pay staff. This was done at the direction of the First Respondent and he was fully aware of it. The Second Respondent had only just started working at the Firm.

22.49 The Second Respondent said that she was aware from discussions with her predecessor that the First Respondent had tried to use her to transfer client monies on previous occasions but she had had refused. In her response to the Applicant sent in October 2016 the Second Respondent acknowledged that she should have been more like her predecessor and should have stood up to the First Respondent and refused to make the transfers.

22.50 The First Respondent had said that he trusted the Second Respondent and expected her to transfer money back into client account and that if the monies were not transferred back he would be informed. The Second Respondent stated that it was actually the First Respondent's money that would have had to be transferred into client account. It was entirely his responsibility and it was for him and the Firm to generate income. He was fully aware of the lack of cash flow and it made no sense for him to assert that it was for the Second Respondent to transfer money back without referring to him as there was no office money and no overdraft facility to effect transfers. The Second Respondent refuted the First Respondent's assertion that he only knew of three transfers. This was the First Respondent's word only. It was the First and Second Respondent's word against each other but the Second Respondent was aware that others could independently corroborate her account. It was clear to her that the First Respondent had admitted to being aware of the three transfers of client monies on the basis that others witnessed his instructions to her pertaining to those transfers.

22.51 The Second Respondent considered that the First Respondent had tried to be very clever in his instructions to her and while he never expressly said "use client money" he was fully aware that that was what had to be used as there was no overdraft facility and no cash available in client account. The First Respondent knew the only way the Second Respondent could comply with his demands was to use the same bridging

procedure as he had done, namely transfer from client to office account into which he was supposed to put back the funds. It was therefore wholly inappropriate for the First Respondent to express shock at other breaches than the three referred to. The Second Respondent only facilitated the breaches under duress and because she felt very threatened. In the circumstances the First Respondent in her view more than "acquiesced" to the transactions. He was fully complicit and directing her to do what she did. There was no gain for her in the breaches and she was not even paid the salary she was due.

The Tribunal's Decision

The First Respondent- Allegation 1.1

22.52 The First Respondent had admitted allegation 1.1. The FIO had identified a number of improper transfers from client account. The First Respondent was aware of at least three of these and had sent numerous emails asking for urgent payments to be made knowing the state of the Firm's finances.

22.53 The Tribunal considered whether the First Respondent had facilitated, permitted or acquiesced in the improper transfers. In respect of the three transfers that the First Respondent knew about he had clearly permitted them to be made. In respect of the other improper transfers he had asked the Second Respondent to make payments knowing there was no money in office account and had acquiesced in respect of these payments. The First Respondent had noted a lack of "chits" in the critical period, but he had not followed this up with the Second Respondent. He had had to ask the Second Respondent how much had been transferred by way of improper transfers. He clearly did not ensure that he was in control of the financial position. The Tribunal was sure that the First Respondent had facilitated the improper transfers.

22.54 Rule 20.1 specified when client money could be withdrawn from client account. None of the three transfers that the First Respondent knowing about were made in accordance with Rule 20.1. It was a matter of fact that Rule 20.1 had been breached. The First Respondent accepted that he had agreed to the £2,000 payment being made in breach of Rule 20.1 and knew about two similar transfers. He was the Firm's COFA, its sole principle and an experienced solicitor. He should have ensured compliance with the SAR. The Tribunal considered whether the First Respondent's' conduct amounted to a lack of integrity. The First Respondent had permitted the use of client funds for payments that should have been made from office account. These were improper payments and had been deliberately made; this was not a case where there was an inadvertent breach of the SAR. The Tribunal decided that there had been a breach of Principle 2 as the First Respondent had not complied with the SAR and had not safeguarded client money. Allegation 1.1 was proved in full, beyond reasonable doubt.

The Second Respondent- Allegation 2 and 2.1

22.55 The Second Respondent made the actual transfers. She was an experienced legal cashier and knew that client money could not be used in the way that it was used. The Tribunal noted that the Second Respondent had accepted that she had made the transfers but had sought to justify her reasons for making the transfers. She knew that

it was wrong to make the transfers. She knew that the Firm was in a mess financially. She said that her predecessor had been asked to make such transfers and had refused and that she should have done the same.

22.56 In terms of the factual basis of the allegation that between the dates of 6 August 2014 and 13 October 2014, the Second Respondent facilitated, permitted or acquiesced in the improper transfers of money from client account to office account thereby breaching Rule 20.1 of the SAR the Tribunal found that this was the case for the reasons stated above.

22.57 The next question for the Tribunal was whether the Second Respondent's conduct was of such a nature that it would be undesirable for her to be employed by a solicitor in connection with his or her practice as a solicitor. The Second Respondent had over twenty five years' experience. She knew that client money should not be used in this way but proceeded to make the transfers. This was not a case where there was a one-off improper transfer, there was a pattern of transfers over the period of her employment at the Firm. The Second Respondent had paid multiple payees from money that she knew to be client money. This included using monies transferred from client to office account to pay salaries, including her own. The Tribunal found that the Second Respondent's conduct was of such a nature that it would be undesirable for her to be employed by a solicitor in connection with his or her practice as a solicitor. Allegation 2.1 was proved beyond reasonable doubt.

23. **Allegation 1.2 – The First Respondent failed to remedy breaches of the SAR promptly on discovery in breach of Rule 7.1 of the SAR.**

23.1 Rule 7.1 of the SAR provides that "Any breach of the rules must be remedied promptly upon discovery. This included the replacement of any money improperly withheld or withdrawn from a client account." Furthermore, and by virtue of Rule 7.2 of the SAR that duty to remedy rested on the First Respondent as the principal of the Firm.

23.2 During a meeting between the FIO and the First Respondent on 12 December 2014 the First Respondent stated that following his knowledge that two more unauthorised transfers from client to office account had been carried out by the Second Respondent, making three transfers in total, he left it to the Second Respondent to put the money back into the client account. He also stated that he did not check with her that the money had subsequently been repaid.

23.3 In written correspondence to the Applicant, attached to an email dated 29 February 2016, the First Respondent maintained that he learnt of the shortfall in October 2014 after asking Mrs CW, a former employee, to establish the full picture. He also maintained that the shortfall was then replaced as quickly as possible thereafter.

23.4 It was the Applicant's case that the First Respondent had an obligation to ensure that the shortfall was replaced promptly upon discovery. On his own admission, the First Respondent was aware that at least three unauthorised transfers from office to client account had taken place prior to Mrs CW's review of the accounts in October 2014. It was not satisfactory for the First Respondent to rely on the Second Respondent to

replace the shortfall. The duty to remedy the breaches of the SAR rested on the First Respondent as the Firm's principal. Not only were those breaches not remedied prior to Mrs CW's review but the First Respondent made no enquiries with the Second Respondent as to what efforts had been made to replace the shortfall. The First Respondent was aware of the financial position of the Firm

The First Respondent's Position

23.5 The First Respondent denied allegation 1.2. Given the various pressures and the range of issues the First Respondent was dealing with, in relation to both clients and general running of the business, it was clear with hindsight that he should have had a much better understanding of the detailed financial position of the business and relied less on the cashier to provide the information. Had he become aware of the financial situation sooner then the steps that he did take to bring in external monies from his father would have been taken in good time to avoid the transfers that were in contravention of the SAR. Extra funds were brought in to correct the balance but he acknowledged that this should have been completed at an earlier stage through a better understanding of the financial position.

23.6 The First Respondent was actively undertaking steps to improve the Firm's position during this period and was aware that it was his responsibility as Partner, COLP and COFA to ensure the business was run properly. The Firm had no significant physical assets and was not trying to build up assets other than through the work put into developing the department. Personally the First Respondent had reduced his outgoings as far as possible by 2014 with his house remortgaged and he was making interest only payments. The First Respondent added just over £50,000 from his pension into the business during April. Other external monies were added from his father as part of regular funds to the business. The funds provided by his father were always in the form of a loan though there was no payment schedule and no pressure to commence such payments. Indeed no monies were paid back to his father during the period the Firm was operating.

23.7 It became clear to the First Respondent in early October 2014 that there had been insufficient monies coming in despite all efforts and that the improper transfers may not have been resolved. He asked the Second Respondent on 13 October 2014 to confirm the position and was told there were monies to be transferred back of around £30,000 but that she was not certain as to the total. The First Respondent knew that further external monies could be brought in quickly to correct and rectify the position and this was indeed arranged but he was shocked to find out the amount and number of transfers that had been made from early August.

23.8 The First Respondent asked Mrs CW who had worked at various times for the Firm to assist with confirming the details and arrange the correcting transfers using external funds he had brought in which were started later that week. The balances were indeed corrected and during the intervening period the Firm was not restricted in its ability to meet any payments to clients or the operation of the account. Later in the month with the slow down continuing and consultants not seeing enough visits arranged the First Respondent commenced closure of the Firm.

23.9 The First Respondent said that the Second Respondent had appeared to understand the training, workflows and procedures for the role. He acknowledged that he could and should have arranged external funds to the business at an earlier stage rather than wait to correct the balances in October.

The Tribunal's Decision

23.10 The First Respondent was aware on or about 22 September 2014 that client funds had been used in breach of the SAR. He had said that it needed to be replaced promptly but took no steps to ensure that it was replaced and made no enquiries with the Second Respondent to ascertain what steps had been taken to replace the shortfall. He left it to the Second Respondent to replace the funds which she did not do. On his own case he was aware of two further transfers in breach of the SAR. Again the First Respondent left the rectification of the resulting shortfall to the Second Respondent. The Tribunal did not consider the fact that monies were paid in to rectify the shortage after Ms CW's review which commenced in October 2014 to be a prompt rectification of the shortage. The Firm's accounts were in a mess and the First Respondent had to ask the Second Respondent the level of shortage on client account and was shocked by her answer. The First Respondent only rectified the shortfall at that the point he had reported the issue to the Applicant and had asked Mrs CW to undertake a review. The First Respondent was the sole principal, COFA and COLP. This was his responsibility under Rule 7.2. Allegation 1.2 was proved beyond reasonable doubt.

24. **Allegation 1.3 – The First Respondent failed to run his business or carry out his role in the business effectively and in accordance with proper governance and sound financial and risk management principals thereby breaching Principle 8 of the Principles.**

24.1 On 14 August 2012 an investigation commenced at the Firm due to concerns in relation to business management. This culminated in a report dated 11 September 2012. That report identified that the Firm was in financial difficulties with debts of £1,180,233.00. Following that report the Firm was monitored by the SRA's supervision department. The FIR identified that on 1 November 2014, the Firm ceased trading and on 26 November 2014 the First Respondent was declared bankrupt.

24.2 In his written correspondence to the Applicant, attached to an email dated 29 February 2016, the First Respondent provided a detailed explanation of the efforts he had undertaken to monitor financial stability within the Firm. The management accounts for the Firm recorded that as at 30 April 2013 the Firm had made a net loss of £55,917.00. As at 30 April 2014 the Firm had made a net loss of £98,117.00. Between 1 May 2014 and 30 September 2014, the Firm made a net loss of £209,310.00. In addition the First Respondent provided copies of three County Court Judgments and a Winding-Up petition against the Firm to the FIO.

24.3 During the meeting on 12 December 2014, the First Respondent was asked by FIO how he had supervised the financial management of the Firm. The First Respondent explained that he had asked the cashier for monthly statistics and accepted that he should have realised that this was not good enough. The First Respondent accepted

that he did not check the Firm's bank accounts statements on a regular basis but said that he asked the cashiers questions and left it to them. When asked by the FIO how the First Respondent had decided which debts would be paid and not paid each month, the First Respondent indicated that he discussed this with his former cashier and would then leave her to make the decision on what to pay. The First Respondent therefore failed to run his business or carry out his role in the business effectively and in accordance with proper governance and sound financial and risk management principles contrary to Principle 8.

The First Respondent's Position

24.4 The First Respondent admitted allegation 1.3.

The Tribunal's Decision

24.5 Principle 8 required the Respondent to run his business or carry out his role in the business effectively and in accordance with proper governance and sound financial and risk management principles. The First Respondent was the COLP, COFA and sole principal. He was the only actual director, the other being a company owned by him. The First Respondent was aware that there had been an investigation by the SRA in 2012 due to concerns about the business. He had been engaged with the supervision department of the SRA. There was a history of the Firm being in financial distress and the financial position was steadily deteriorating. The First Respondent was aware he was facing a Winding-Up Petition and that there were County Court Judgments. He was aware that creditors were pressing for payment. He was aware that he could not pay staff salaries on time or in full. He displayed a cavalier disregard to the position and his response to the Firm's financial difficulties was to use client money to prop up the Firm. The Tribunal found allegation 1.3 proved beyond reasonable doubt.

25. **Allegation 3- Dishonesty in respect of allegations 1.1 and 2.1**

25.1 In the Rule 5 and Rule 8 Statement the Applicant had alleged that the Respondents' actions in respect of allegations 1.1 and 2.1 were dishonest in accordance with the test for dishonesty accepted in Bultitude v Law Society [2004] EWCA Civ 1853 as applying in the context of solicitors disciplinary proceedings i.e. the combined test laid down in Twinsectra Ltd v Yardley and Others [2002] UKHL 12: the person has acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he or she was acting dishonestly.

25.2 The Applicant was given leave to amend the reference to the test of dishonesty being the one set out in Twinsectra to the one set out in Ivey. In the Supreme Court case of Ivey, it was held by Lord Hughes that that the test in Ghosh "does not correctly represent the law and that directions based upon it ought no longer to be given". Rather, the correct test was as set out in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, as clarified by the Privy Council in Barlow Clowes International Ltd v Eurotrust International Ltd [2006] 1 WLR 1476 namely "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards".

25.3 Accordingly, Lord Hughes set out the test for dishonesty as follows:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

25.4 The Applicant alleged that both of the Respondents' actions were dishonest. Both of the Respondents were aware that money should not be improperly transferred from client to office account. The First Respondent was a solicitor and was the Firm's director and COFA. The Second Respondent was a legal cashier with over twenty five years of experience. Both of the Respondents were abundantly aware of the significant financial difficulties that the Firm was experiencing. It was common ground between the Respondents that a discussion took place in relation to an urgent payment of £2,000 that needed to be made. It was also common ground that a decision was taken that the money should be transferred from client account in order to make that urgent payment. This was, therefore, a conscious decision taken by the Respondents to breach the SAR by using client money that they were not entitled to use. They knew that they were not entitled to use client money and this would have been their actual state of knowledge or belief.

25.5 In addition to the £2,000 improper transfer from client to office account, the Second Respondent continued to make further transfers in circumstances when she knew that she was not entitled to do so. Furthermore, payments were being made in this way as early as 6 August 2014 and, therefore, prior to the discussion between the two Respondents relating to the payment of £2,000. The Second Respondent was the Firm's cashier at that time. The Second Respondent knew that she should not make the payments from client account but went ahead and made them anyway.

25.6 On the First Respondent's own account, he became aware of a further two improper transfers having been undertaken by the Second Respondent following the discussion of an amount of £2,000 being paid out. In the knowledge that the Second Respondent had breached the rules in this way, on at least three occasions, he continued to instruct the Second Respondent to make urgent and immediate payments without indicating where the payments should be made from. The First Respondent knew that client monies had been used to ease the Firm's cash flow problems on at least three occasions.

25.7 The First Respondent was the COLP, COFA and sole principal. He knew that the Firm was using client money for purposes that were not permitted. At best he adopted a position of wilful blindness until the point at which he approached the Second Respondent, on 14 October 2014, to request confirmation of the total sum transferred improperly from client to office account.

25.8 The Second Respondent knew that she was not meant to make such payments. She knew that she should have refused to make them just as her predecessor had refused to make them. She accepted that she should have stood up to the Respondent but due to her personal circumstances and difficulties she had not done so. It was important to her that she kept her job.

25.9 The First and Second Respondents knew the state of the Firm's finances. At a minimum they both knew that client money had been wrongly used on at least three occasions. In facilitating, permitting or acquiescing in the improper transfers of money from client account to office account the First and Second Respondents acted dishonestly by the standards of ordinary decent people.

25.10 The Tribunal would need to decide in the course of its deliberations whether it preferred the First or Second Respondents' evidence in determining allegation 3 as there was a conflict between their accounts.

The First Respondent's Position

25.11 The First Respondent denied allegation 3. The Firm operated as claimant personal injury firm until the end of 2013. Whilst there were profitable times the Firm was saddled with historic debt at a time when the government were reducing the fees available from such work. The redirection of the Firm at the start of 2014 was a significant change and included a major reduction in costs to operate. At the same time the number of full time staff reduced to two. Fresh agreements were reached for the main debt burden with much lower payments with the aim that expansion based on costs linked to income achieved. The Firm in 2014 was based around providing a will writing service to existing and new clients. This plan and proposals were put together and partly based on the experiences of a range of will writers in the locality who were successfully providing a similar service. Throughout 2014 the First Respondent's focus was in putting together the various elements of the business with regard to the staff and consultants, the office space and equipment, the systems and procedures. The new venture was working broadly as planned in the first half of 2014 but slowed in later months. By the end of September the dip in turnover had been incurred for a sustained period.

25.12 The circumstances showed that the First Respondent could and should have brought in further outside funds to provide the extra investment monies needed at a much earlier date rather than wait.

25.13 He was acting in an honest way and the weeks during which the improper transfers were made had not been hidden. These were identified by the First Respondent in early October 2014 and he arranged for the necessary funds to be brought into the business to correct the balance. The expected recovery in work was too slow for the business to survive the downturn and the Firm closed for business at the end of October 2014.

25.14 The Second Respondent alleged that she feared for her job and that she was pressured, bullied and forced by the First Respondent to effect the transfers of client monies at his direction. The First Respondent said that there was no approach to work on his part as described. He accepted that he was responsible for the transactions and was

COLP and COFA but he did not repeat the phrases as suggested by the Second Respondent. He denied that he told the Second Respondent to transfer monies from client account on the first few occasions and then just told her to get the money in knowing there was no other way than as his previous directions.

25.15 The First Respondent said that the request for the Second Respondent to make payments was part of operating a business and, having revised stage payment schemes with suppliers he was then asking that such payments be made. The purpose of asking for these to be made was to allow them to be paid from office account, noting that the funds available would change on daily basis. He denied asking the Second Respondent to use client monies at all or in the manner described by the Second Respondent. The First Respondent did not repeatedly request monies from client account and the purpose of the request for payments by e mails was to enable such payments to be organised. He did not recall using the phrases mentioned by the Second Respondent. He denied that he acted in a desperate and threatening manner or that he would stand over the Second Respondent or behave as otherwise described by her. The allegation was untrue.

The Second Respondent's Position

25.16 The Second Respondent denied the allegation. She said that she had absolutely nothing to gain by effecting transfers of client monies at the First Respondent's direction. She feared for her job. There was no dishonest intention on her part. She was pressured, bullied and forced by the First Respondent. Whilst she was under great pressure from the First Respondent she did not want to leave the job without further employment as she would not have qualified for job seekers allowance. This meant she had to stay in the job until she could find alternative employment.

25.17 The First Respondent would always say "I am the COLP and COFA of the practice" and "I take full responsibility for all transfers" that the Second Respondent was to make. He placed her under great pressure to pay creditors and she found herself compromised as there were no office funds to make payments. The First Respondent would say things like "make the payments, no matter what".

25.18 In respect of the various emails sent by the First Respondent to the Second Respondent the Second Respondent said that these showed that the First Respondent was in a desperate financial situation. She knew the situation she was in was wrong. The fact she was told to pay £500.00 to Spitfire (who provided the telephone lines) before noon on 6 October 2014 showed that the Firm was in a dire situation. She had to pay that creditor come what may so the Firm could carry on trading as it could not do so without operative telephone lines.

25.19 The Second Respondent denied that she had acted dishonestly as effectively she had no choice and was entirely directed under duress by the First Respondent. The assertion that the First Respondent acted out of "wilful blindness" was refuted as being preposterous. He was aware on his own case of three transfers of client funds and it was unsustainable for him to maintain that he was wilfully blind at the material time. He was fully complicit in the transfers and they were done at his direction.

The Tribunal's Decision

25.20 The Applicant had invited the Tribunal to decide whether it preferred the First or Second Respondents' evidence in respect of allegation 3. When reaching its findings the Tribunal did not find it necessary to determine this issue given its findings as to each Respondent's state of knowledge including such findings as were based on their own evidence. The question for the Tribunal was whether each Respondent was objectively dishonest by the standards of ordinary decent people having regard to his/her state of knowledge and belief at the relevant time.

The First Respondent

25.21 The First Respondent knew the financial state of the Firm even if he displayed wilful blindness as to the precise state of the client and office account balances. The management accounts for 2014 showed that the Firm's financial position was gradually worsening. The First Respondent knew that there was an issue with cash flow in September 2014. He knew that creditors were chasing the Firm. He knew that PAYE and VAT were overdue. He knew that the Firm held limited client monies by this time due to the nature of its work. The First Respondent knew that he agreed to the £2000 being paid from client money. The First Respondent knew that there had been two further such transfers. The First Respondent knew that he asked for a number of urgent subsequent payments to be made without knowing that there were office funds to meet these payments. The First Respondent was an experienced solicitor and the Firm's COFA. He knew that client money was being used in breach of the SAR. He had admitted allegation 1.1.

25.22 This was the First Respondent's state of knowledge and belief at the relevant time. Given the First Respondent's state of knowledge and belief at the relevant time the Tribunal found that he was objectively dishonest by the standards of ordinary decent people. Ordinary decent people would expect a solicitor to ensure that client money was kept sacrosanct and protected in accordance with the SAR. They would not expect a solicitor to permit the use of client money for payments that should have been made out of office account. Allegation 3 was found proved beyond reasonable doubt in respect of the First Respondent's conduct as admitted and found proved in respect of allegation 1.1.

The Second Respondent

25.23 The Second Respondent knew that she had made the payments. She knew that making these payments was wrong. She knew that the Firm was in financial distress and that its creditors were pressing for payment. She knew that client money could not be used in the way she used it. The Second Respondent accepted that she should have been like her predecessor and said no to making such payments. She accepted that she should have been stronger. However, she said that she felt compelled to make the payments because of the First Respondent placing her under pressure and her desire to retain her job. This was the Second Respondent's state of knowledge and belief at the relevant time.

25.24 Given the Second Respondent's state of knowledge and belief at the relevant time the Tribunal found that she was objectively dishonest by the standards of ordinary decent people. Ordinary decent people would expect a legal cashier to ensure that client money was kept sacrosanct and protected in accordance with the SAR no matter what pressure they were placed under by a solicitor. They would not expect a cashier to permit the use of client money for payments that should have been made out of office account, especially when that cashier had the Second Respondent's level of experience and knew that making such payments was wrong. Allegation 3 was found proved beyond reasonable doubt in respect of the Second Respondent's conduct as found proved in respect of allegation 2.1.

Previous Disciplinary Matters

26. None.

Mitigation

The First Respondent

27. The First Respondent operated the Firm to the best of his ability throughout the seven years. He always looked to develop the business on the basis of providing a good service for clients and making the quality and speed of service a feature of the work carried out. The First Respondent planned for the long term and backed this with monies invested from himself and his father. The First Respondent was involved in all aspects of developing the business.

28. The First Respondent was working hard and with honesty along with the staff and consultants to make a success of the business for the clients and all concerned. He reduced his takings as low as possible and added further external monies into the business. The business model was based on a test period at a smaller scale and was progressing in 2014. He responded to the slowdown in work by reducing outgoings as far as possible and checking what could be improved.

29. In considering sanction he asked the Tribunal to consider the time that the matter had been outstanding. He had co-operated with the Applicant and Tribunal throughout and had explained his conduct from the outset.

The Second Respondent

30. The Second Respondent had worked in legal practices for nearly thirty years, in various roles. She had always stuck to the SAR, and made sure that staff that she supervised also kept to the rules. She had a good clean record and no action had previously been brought against her. She was a highly conscientious individual. Her employment with the Firm lasted for a period of three months from August to October 2014 when the Firm closed. She had previously been made redundant and needed a job. She had only been paid by the First Respondent for about half her wages for the three month period.

31. When the Second Respondent went to the Firm she realised at the beginning that the company was insolvent and should not have been open. The First Respondent thought that because she had been at other firms that had financial problems and closed she could handle the hassle more, but as she was having a bad time at home the Second Respondent said she was lacking in confidence. She had been put under constant pressure from creditors and the First Respondent. At the time this was going on a member of the Second Respondent's family was ill.

32. The Second Respondent had been assessed by Dr Garvey. She had a history of problems with stress and depression related to personal difficulties and work related stress. He had diagnosed her with suffering from Recurrent Depressive Disorder and when he had seen her in September 2017 she was suffering from a Moderate Depressive Episode. He noted that the Second Respondent would be more susceptible to pressure from others than a more robust person.

33. The Second Respondent knew what happened was wrong and was deeply sorry for letting the First Respondent get to her and take these actions. She asked the Tribunal to consider allowing her back to employment, for financial and well-being reasons. She was currently too unwell to work.

34. In early 2018 the Second Respondent told the Tribunal that she had a number of health issues. She had not told her family about the proceedings, she wanted them to be over as she was under stress. Her life had fallen apart over this, if she had worked for the First Respondent for longer she would have taken him to an Employment Tribunal for the amount of harassment he put on her. He had got away with it, but she just wanted to forget about it and to stop reliving all her bad memories or she would never get better.

Sanction

35. The Tribunal referred to its Guidance Note on Sanctions - Fifth Edition (December 2016) when considering sanction.

<u>The First Respondent</u>

36. The First Respondent's motivation appeared to be to keep the Firm afloat. He had to pay his creditors and his staff. He was trying to stave off County Court Judgments and a Winding-Up Petition. Despite the Firm's financial position the First Respondent drew a salary and drawings. His actions were planned. The Tribunal had before it emails from the First Respondent directing the Second Respondent to make payments, albeit they did not specifically say whether the payments should be made from office or client account.. He was the Firm's COLP and COFA and had the primary responsibility for client money. To that extent he had acted in breach of positions of trust. He had direct control of and responsibility for the circumstances giving rise to the misconduct. His culpability was at the highest level and was higher than the Second Respondent's culpability.

37. The First Respondent had misused the client account to prop up the Firm. The transfers had been numerous and systematic. The First Respondent had admitted a lack of integrity and had been found to be dishonest. There was no evidence put to the

Tribunal that any clients lost money but the Firm ceased trading with significant debts. This would have had a significant impact on the public's perception of solicitors and harmed the reputation of the profession. It was well established that the greater the extent of the Respondent's departure from the "complete integrity, probity and trustworthiness" expected of a solicitor the greater the harm to the reputation of the profession. In this case the First Respondent had left his moral compass at home and the level of harm was high. Whilst the First Respondent may not have intended the harm it was reasonably foreseeable given the financial liabilities of the Firm.

38. Dishonesty had been alleged and proved. The misconduct was deliberate, calculated, repeated and continued over a period of time. The First Respondent had taken advantage of the Second Respondent. The First Respondent knew that the Second Respondent was a new employee and he put her in a position where she considered she was under extreme pressure to make payments, including for staff salaries. The Second Respondent was not a solicitor, she was a member of support staff and deserved better treatment from the First Respondent. The First Respondent was in a position of authority and had directed her to make payments. The fact that the Second Respondent had her own personal problems and vulnerabilities did not excuse the First Respondent's behaviour. The First 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. Staff members had been negatively impacted by the First Respondent's misconduct as ultimately they lost their jobs. Creditors, including the First Respondent's father, had not been paid and had also been negatively affected by the misconduct. These were all aggravating factors.

39. The First Respondent had made good the shortfall on client account albeit not promptly. He had contacted the regulator about the transfers. He had made some admissions at any early stage and had co-operated with the investigating body. These were mitigating factors. The Tribunal did not consider that he had genuine insight and noted that his admissions were limited and that allegations he had denied had been found proved. In terms of personal mitigation the Tribunal noted that the matter had been going on for some time and that the First Respondent had been made bankrupt.

40. The First Respondent's misconduct was at the highest level of seriousness. The Tribunal considered the range of sanctions available to it commencing with No Order. The Tribunal did not consider No Order, Reprimand, Fine, Restriction Order or Suspension sufficient sanction. Dishonesty had been alleged and proved. Unless there were exceptional circumstances this would almost invariably lead to Strike Off. The Tribunal could not identify any exceptional circumstances. The only appropriate sanction was for the First Respondent's name to be Struck Off the Roll of Solicitors. Given the First Respondent's misconduct the public would expect no less a sanction. It was necessary to maintain the reputation of the profession. The client account should be sacrosanct.

<u>The Second Respondent</u>

41. The Tribunal assessed the Second Respondent's culpability. The Second Respondent had made the payments. Her case had been that she was compelled to make them by the First Respondent. However, she knew what she was doing was wrong. She had

been a legal cashier for over twenty five years so had a significant level of experience. Although she stated that she did not receive any financial benefit the Second Respondent had been paid part of her salary and on her case client monies transferred had mainly been used to pay salaries. The Tribunal did not think that this was her primary motivation which appeared to be to keep her job and remain in employment. Her actions were planned, there was a pattern of improper transfers that commenced shortly after she joined the Firm. She had been in breach of a position of trust. The cashier of any firm had to ensure client money was only used as it should be used and she had not kept client monies safe. She had direct control over the payments themselves. The Tribunal accepted that the circumstances giving rise to the misconduct had existed prior to the Second Respondent joining the Firm. The misconduct arose out of the Firm's perilous financial position. The Second Respondent's culpability was high but not at the highest end of matters that came before the Tribunal. It was increased due to her role at the Firm, the fact she had made the payments and her level of experience.

42. The Firm's client account had been misused. Client monies were put at risk. The Firm had closed owing significant amounts of money. Staff had lost their jobs but this may have been inevitable given the Firm's financial position by the time the Second Respondent started her role. The public were entitled to expect that monies held in a solicitor's client account were safe and would expect the cashier to safeguard those monies. The Second Respondent's conduct would have had a detrimental impact on public perception of solicitors and the reputation of the profession. The harm caused by the misconduct was reasonably foreseeable. Not only should client money not have been used but the Second Respondent could see that monies were not being replaced.

43. Dishonesty had been alleged and proved. The misconduct was deliberate, calculated and repeated. It had continued over a period of time. The Second Respondent knew it was wrong and therefore must have known that it was in material breach of her obligations to protect the public and the reputation of the profession. These were all aggravating factors.

44. The Second Respondent said that she had contacted the Law Society about her concerns but the Applicant had not been able to trace this contact. The Tribunal did not consider that this was a mitigating factor as the Second Respondent should have ensured that the regulator was aware of what was happening and should have followed up on her contact with them. By way of mitigating factors the Tribunal took into account that the misconduct was of relatively brief duration in a long, unblemished career. The Second Respondent had shown some insight in that she knew she should have refused to make the transfers and she had co-operated with the investigating body.

45. The Tribunal concluded that the overall seriousness of the misconduct was high. It involved client money. The Tribunal then considered the Second Respondent's personal mitigation. It noted her medical condition and domestic circumstances as well as the pressure she said she was placed under by the First Respondent and the financial pressure to remain in a job in a working environment that she found stressful. She had been new in post and in a subordinate position to the First Respondent.

46. The Tribunal did not consider that No Order was the appropriate sanction. The Second Respondent had been the cashier for the Firm. She was experienced and knew what she was doing was wrong. Given the two allegations made and found proved the appropriate sanction in respect of the Second Respondent was for there to be an order under s.43 of the Solicitors Act 1974. This would prohibit, save with the prior consent of the regulator, any solicitor and others from employing or remunerating the Second Respondent. It would also prohibit the Second Respondent from being a manager or having an interest in a recognised body save with the prior consent of the regulator. This would protect the public and maintain the good reputation of the profession.

47. The Second Respondent was of limited means and unless the Applicant gave her permission the making of the s.43 order would deprive her of her current income if and when she was well enough to return to work. In the circumstances a financial penalty in addition to the s.43 order was not an appropriate sanction.

Costs

48. The Applicant applied for its costs in the sum of £19,887.90 as set out in a costs schedule dated 20 March 2018. Mr Moran asked the Tribunal to reduce this amount to reflect the fact that the hearing had not lasted the scheduled two days. He confirmed that the hotel cost included had been incurred the previous night and that the schedule related to both Respondents. Neither Respondent had submitted a Statement of Means. The Second Respondent had referred to her limited financial circumstances and the First Respondent had been declared bankrupt in November 2014.

49. If the Tribunal was minded to apportion costs rather than award them jointly and severally the Applicant would have no objection to this course of action. The Applicant's cost enforcement team would consider means when deciding whether to pursue costs.

50. The Tribunal assessed the Applicant's costs and reduced them by £910 to reflect the length of the hearing. The amount of costs payable was thus assessed at £18,977.90. The Tribunal carefully considered whether or not to apportion the costs or to order that they be paid on a joint and several basis. All of the allegations made had been found proved. Both Respondents had engaged with the proceedings. Each had blamed the other. The Tribunal was mindful that the First Respondent had been the sole principal of the Firm and its COLP and COFA. The Second Respondent had been its cashier for a very short period. The Firm was clearly in significant financial difficulty before she joined.

51. It was unclear whether either Respondent would have the resources to pay any costs order. There was a high level of acrimony between them and their culpability was different. In the circumstances the Tribunal decided that it was appropriate to apportion costs rather than award them on a joint and several basis. By approaching costs in this way each Respondent would have certainty as to what they had to pay now and would not have a further period of uncertainty whilst the Applicant sought to recover its costs from the other Respondent. The Tribunal considered that the correct apportionment was a ninety/ten split with the First Respondent paying the majority of the costs due to his role at the Firm and ultimate responsibility for its financial

situation. The Tribunal ordered that the First Respondent pay costs which it assessed in the sum of £17,080.11 and the Second Respondent pay costs which it assessed in the sum of £1,897.79.

The Respondents' Addresses

52. It was normal practice for the Respondents' address to be included in any Order of the Tribunal.

53. The Applicant and Tribunal did not hold a postal address for the First Respondent. He was believed to be living abroad and communication had been via an email address. In the circumstances an address for the First Respondent could not be included in the relevant Order.

54. The Second Respondent had requested that her address was not disclosed to the First Respondent. Accordingly, the Tribunal ordered that her address, which was known to the Tribunal and the Applicant, remain confidential and should not be included in the Order.

Statement of Full Order

55. The Tribunal Ordered that the Respondent, ANDREW LAURENCE BROWN 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 £17,080.11.

56. The Tribunal Ordered that as from 26 March 2018 except in accordance with Law Society permission:-

(i) no solicitor shall employ or remunerate, in connection with their practice as a solicitor SANDRA BENSON of an address known to the Applicant and Tribunal but to remain confidential;
(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice the said Sandra Benson
(iii) no recognised body shall employ or remunerate the said Sandra Benson;
(iv) no manager or employee of a recognised body shall employ or remunerate the said Sandra Benson in connection with the business of that body;
(v) no recognised body or manager or employee of such a body shall permit the said Sandra Benson to be a manager of the body;
(vi) no recognised body or manager or employee of such a body shall permit the said Sandra Benson to have an interest in the body;

And the Tribunal further Ordered that the said Sandra Benson do pay the costs of and incidental to this application and enquiry fixed in the sum of £1,897.79.

Dated this 13th day of April 2018
On behalf of the Tribunal

E Nally
Chairman