SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 11676-2017

BETWEEN:

SOLICITORS REGULATION AUTHORITY — Applicant

and

MARK ANTONY WHITTAKER — Respondent

Before:

Mr S. Tinkler (in the chair)
Mr W. Ellerton
Mrs S. Gordon

Date of Hearing: 3 May 2018

Appearances

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

The Respondent did not appear and was not represented.

JUDGMENT

Allegations

1. The allegations against the Respondent were that:

1.1 Between 4 July 2014 and 26 October 2014 the Respondent made or caused the following improper payments/transfers/withdrawals to be made from DW Law's client account:

1.1.1 a total of £64,525.50 to his personal bank account;

1.1.2 a total of £8,816.22 to the bank accounts of third parties;

1.1.3 a total of £4,500 by cashing client account cheques;

1.1.4 a total of £25,153.13 to the firm's office account;

and thereby breached all, or any, of the following:

1.1.5 Principle 2 of the SRA Principles 2011 ("the Principles") by failing to act with integrity;

1.1.6 Principle 6 of the Principles by failing to maintain the trust the public placed in him and in the provision of legal services;

1.1.7 Principle 8 of the Principles by failing 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;

1.1.8 Principle 10 of the Principles by failing to protect client money and assets;

1.1.9 Rule 20.1 of the SRA Accounts Rules 2011 ("the SAR") by making improper payments/transfers/withdrawals from client account;

1.1.10 Rule 29 of the SAR by failing to keep accounting records properly written up to show his dealings with client money and office money relating to any client.

It was alleged the Respondent had acted dishonestly.

1.2 The Respondent made or caused the improper payments/transfers/withdrawals referred to in Allegation 1.1 while his practising certificate was suspended and/or in breach of a practising certificate condition on his practising certificate and thereby breached all, or any, of the following:

1.2.1 Principle 2 of the Principles by failing to act with integrity;

1.2.2 Principle 6 of the Principles by failing to maintain the trust the public placed in him and in the provision of legal services.

1.3 The Respondent submitted false and misleading information to the firm's professional indemnity insurer and thereby breached all, or any, of the following:

1.3.1 Principle 2 of the Principles by failing to act with integrity;

1.3.2 Principle 6 of the Principles by failing to maintain the trust the public placed in him and in the provision of legal services.

It was alleged the Respondent had acted dishonestly.

Documents

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

- Application dated 5 July 2017 together with attached Rule 5 Statement and all exhibits
- Trial Bundle
- Report dated 23 June 2017 from Strategic Intelligence and Risk Services Europe
- Email dated 23 August 2016 from the Solicitors Regulation Authority ("SRA") to the Respondent
- Letter dated 12 April 2018 from the Applicant to the Tribunal
- Email dated 30 April 2018 from the SRA to the Respondent
- Schedule of the Respondent's SRA status history

Preliminary Issues

Service of Proceedings

3. The Respondent did not attend the hearing and was not represented. Mr Gibson, on behalf of the Applicant, referred the Tribunal to an email dated 24 May 2016 from the SRA to the Respondent which attached a letter setting out the allegations and informed the Respondent of the investigation. That email had been sent to the email address that was on the SRA's system at that time. Mr Gibson accepted that a different email address had been used subsequently on 23 August 2016.

4. Mr Gibson drew the Tribunal's attention to a report dated 23 June 2017 from Strategic Intelligence and Risk Services who had tried to locate the Respondent. The report confirmed the Respondent was believed to be in Florida. His address and contact telephone number in Florida were given to the Tribunal when proceedings were issued on 5 July 2017. Mr Gibson stated the Tribunal attempted to serve proceedings on the Respondent at his Florida address but the documents were returned as not delivered.

5. Mr Gibson stated that he then attempted to arrange for personal service of the proceedings on the Respondent via an enquiry agent. The enquiry agent attempted service but was unable to serve the Respondent. On making further enquiries it transpired that although the Respondent had been staying at an address in Florida, he was no longer there and there was no forwarding address for him.

6. Mr Gibson stated that on 18 January 2018 the Tribunal granted his application for substituted service of proceedings on the Respondent by placing advertisements in the Law Society Gazette and in a local newspaper in Margate, Florida where the Respondent was last believed to have been residing. Mr Gibson confirmed an advertisement was placed in the Law Society Gazette on 5 February 2018 and an advertisement was also placed in a South Florida newspaper, on 24 February 2018. Mr Gibson submitted the Respondent had therefore been served as required.

7. Mr Gibson stated that as a precautionary measure, he had also emailed the Respondent on 30 April 2018 using both of the email addresses on the SRA records, to confirm that proceedings had been issued, service attempted and that a Tribunal hearing would take place on 3 May 2018. Mr Gibson confirmed he had received no response to that email.

8. The Tribunal having considered all the documents, the advertisements and the Applicant's submissions was satisfied that substituted service had been effected as ordered by the Tribunal on 18 January 2018. The Respondent had been notified of these proceedings and the substantive hearing date in accordance with Rule 10 of the Solicitors (Disciplinary Proceedings) Rules 2007.

Application to Proceed in the Respondent's Absence

9. Mr Gibson submitted the Respondent had been served in accordance with the rules and therefore made an application for the hearing to proceed in the Respondent's absence.

The Tribunal's Decision

10. The Tribunal was mindful that it should only decide to proceed in the Respondent's absence having exercised the utmost care and caution. The Tribunal took into account the criteria set out in the case of R v Hayward and Jones [2001] QB 862 when considering whether it was appropriate to proceed in the Respondent's absence.

11. The Respondent had not engaged with these proceedings at all. There was nothing to suggest that he would attend a hearing on a future date or had any medical issues that were preventing him from attending.

12. The Tribunal concluded that the Respondent was unlikely to attend at a future hearing if the matter were to be adjourned. The Tribunal also took into account the serious nature of the allegations which had been made against the Respondent. These involved allegations of dishonesty and related to events that had taken place in 2014. A significant period of time had elapsed since then and it was therefore in the public interest that matters should be concluded expeditiously. Taking all these matters into account, the Tribunal was satisfied that it was appropriate and in the public interest for the hearing to proceed in the Respondent's absence.

Factual Background

13. The Respondent, born in November 1962, was admitted to the Roll on 1 August 2002. He did not hold a current practising certificate.

14. At the material time, the Respondent was the sole equity partner of DW Law, Suite 22, Town Square Chambers, 15 Town Square, Stevenage, Hertfordshire, SG1 1BP ("the firm"). The firm was intervened by the SRA on 2 December 2014.

15. A SRA Forensic Investigation commenced on 6 November 2014 and culminated in an Interim Forensic Investigation Report dated 17 November 2014, and a Forensic Investigation Report dated 6 February 2015.

Allegation 1.1

16. On 31 October 2017, the Commercial Manager at HSBC Bank sent an email to the SRA which stated:

- The Respondent had been transferring payments via internet banking from the firm's client account to his personal bank account;
- Payments marked "Council" [sic] had also been made from the firm's client account by the Respondent to his girlfriend who lived in Romania;
- The Respondent had a bankruptcy petition served on him for a date in November 2014 relating to unpaid tax.

17. The Respondent, along with the firm's bookkeeper, had access to the firm's online banking system. A former partner of the firm, Mr D, also had access to the firm's online banking system but had left the firm on 31 January 2013. The Respondent, the firm's bookkeeper and the former partner were all signatories on the firm's client and office bank accounts.

18. The SRA's Forensic Investigation Officer ("FIO") identified 55 unallocated payments totalling £73,341.72 which had been made by telegraphic transfer from the firm's client bank account between 4 July 2014 and 26 October 2014. The payments had been made to 4 different bank accounts as follows:

- 35 payments totalling £64,525.50 were made to the Respondent's personal bank account
- 10 payments totalling £5,000.47 were made to the Respondent's girlfriend's bank account
- 9 payments totalling £2,315.75 were made to the bank account of one of the firm's salaried partners, Mr A
- One payment of £1,500 was made to the bank account of "[H] Counsel".

19. The 35 payments totalling £64,525.50 were paid into the Respondent's bank account as follows:

Date	Ledger Narrative	Bank Statement Narrative	Authorised By	Amount
4.7.14	[S] MW	[S] Fixed Fee	n/a	£1,500.00
8.7.14	[S] MW	[S] Fixed Fee	n/a	£1,200.00
10.7.14	[S]	[S] Fixed Fee	n/a	£200.00
15.7.14	DW Law	Fixed Fee	n/a	£350.00
28.7.14	DW Law	Fixed Fee	n/a	£950.00
31.7.14	DW Law	Transcript/[M]287	n/a	£850.00
4.8.14	DW Law	Fixed Fee	n/a	£550.00
14.8.14	DW Law	Fixed Fee	Mr Whittaker	£300.00
22.8.14	DW Law	Fixed Fee	Mr Whittaker	£1,315.50
26.8.14	DW Law	Fixed Fee	Mr Whittaker	£450.00
29.8.14	DW Law	Fixed Fee	Mr Whittaker	£550.00
8.9.14	DW Law	Fixed Fee	Mr Whittaker	£250.00
11.9.14	DW Law	Fixed Fee	Mr Whittaker	£360.00
14.9.14	DW Law	Fixed Fee	Mr Whittaker	£350.00
16.9.14	[S]	[S] Fixed Fee	Mr Whittaker	£350.00
18.9.14	DW Law	22/ [s] Place	Mr Whittaker	£200.00
19.9.14	Fixed Fee	Fixed Fee	Mr Whittaker	£450.00
24.9.14	DW Law	Fixed Fee	Mr Whittaker	£450.00
25.9.14	DW Law	22/[s] place	Mr Whittaker	£250.00
26.9.14	DW Law	[S] Fixed Fee	Mr Whittaker	£450.00
28.9.14	DW Law	22/[s] place	Mr Whittaker	£350.00
1.10.14	Fixed Fee	Fixed Fee	Mr Whittaker	£450.00
2.10.14	Fixed Fee	Fixed Fee	n/a	£250.00
2.10.14	DW Law	Fixed Fee	Mr Whittaker	£350.00
3.10.14	DW Law	22/[s] place	Mr Whittaker	£45,000.00
3.10.14	DW Law	22/[s] place	Mr Whittaker	£500.00
3.10.14	DW Law	Fixed Fee	Mr Whittaker	£550.00
13.10.14	DW Law	LSC	Mr Whittaker	£650.00
16.10.14	DW Law	LSC	Mr Whittaker	£1,000.00
19.10.14	DW Law	LSC	Mr Whittaker	£400.00
19.10.14	DW Law	Fixed Fee	Mr Whittaker	£650.00
20.10.14	DW Law	LSC	Mr Whittaker	£850.00
22.10.14	DW Law	LSC	Mr Whittaker	£550.00
23.10.14	DW Law	LSC	Mr Whittaker	£1,000.00
24.10.14	DW Law	LSC	Mr Whittaker	£650.00
			TOTAL	**£64,525.50**

20. The payments which were recorded as authorised by the Respondent were on the basis of the online banking activity history form for each individual payment which was extracted from the online banking system and provided by the firm's bookkeeper. The payee details had also been extracted from the activity history forms. Where payments were authorised by the entry of "n/a", this was because the firm's bookkeeper could no longer access the information on the firm's online banking system and therefore an activity report for the payment could not be obtained.

21. The payee details were all provided by the Commercial Manager at the HSBC Bank on 13 November 2014. The FIO noted that all the payments had been made to the Respondent's personal bank account.

22. The activity history form for the payment of £45,000 on 3 October 2014 showed the transaction was made at 1.33am.

23. The activity history form for the payment of £550 made on 22 October 2014 showed the transaction had been made at 1.19am.

24. The firm's bookkeeper confirmed to the FIO that reference to [S] was a reference to the Respondent's girlfriend's name in the narrative on the bank statement. Ten payments totalling £5,000.47 were paid to the Respondent's girlfriend's bank account on dates between 15 July 2014 and 26 October 2014 as follows:

Date	**Ledger Narrative**	**Bank Statement Narrative**	**Authorised By**	**Amount**
15.7.14	Counsel	Counsel Advice	n/a	£500.00
16.7.14	Counsel	Counsel Advice	n/a	£650.47
18.7.14	Counsel	Counsel [D] PT claim	n/a	£450.00
21.7.14	Counsel	Counsel Application	n/a	£400.00
4.8.14	DW Law	Counsel	n/a	£550.00
26.8.14	Counsel Fee	Counsel	Mr Whittaker	£500.00
22.9.14	Counsel Fee	Counsel Fee	Mr Whittaker	£500.00
27.9.14	Counsel Fee	Counsel Fee	Mr Whittaker	£500.00
23.10.14	Counsel Fee	Counsel Fee	Mr Whittaker	£500.00
26.10.14	Counsel Cash	Counsel Advice [B]/Cash	Mr Whittaker	£450.00
			TOTAL	**£5,000.47**

25. Nine payments totalling £2,315.75 were paid into the bank account of the firm's salaried partner, Mr A, on dates between 24 July 2014 and 25 October 2014. On 10 November 2014, Mr A confirmed to the FIO that the payments had been made to his personal account and that he had not been aware they were from the firm's client account. He stated the payments were related to salary advances and monies to pay for his vehicle lease hire which he had requested from the Respondent.

26. A payment of £1,500 was paid to H Counsel on 7 October 2014 with the ledger narrative "[H] Counsel" and the bank statement narrative "Counsel Fee/Whitt". This related to the Respondent's legal representation for his personal bankruptcy hearing at Hertford County Court and should not have been paid from the firm's client account.

27. Three payments were made from the client account by way of cashing a cheque drawn against the firm's client bank account as follows:

- On 11 July 2014, the sum of £1,500 was cashed with the ledger narrative "Cash". On the cheque stub was written "client" in the payee section even though this cheque had been drawn as cash.

- On 20 August 2014 the sum of £2,000 was cashed with the ledger narrative "Cash MW". The cheque stub stated "client refund .... [illegible] ... subject to lsc payment" even though this cheque had been drawn as cash.

- On 16 September 2014 the sum of £1,000 was cashed with the ledger narrative "Cash MW". The cheque stub was blank.

28. The FIO noted that the firm's professional indemnity insurance proposal form for the period 2014/2015 had been signed by the Respondent on 16 September 2014. The signature on the form appeared to be similar to the signature on the cheques.

29. Fifteen client to office account transfers had been made between 11 August 2014 and 15 October 2014 totalling £25,158.13 which were improper transfers. The ledger narrative relating to each entry except one stated "Reimburse Disbursement". The other entry dated 15 October 2014, the ledger narrative stated "Part Pay F/N 1037". The bank statement narrative for each entry stated "Internet transfer (to office a/c)".

30. On 13 November 2014, the FIO asked the firm's bookkeeper and Ms D, the firm's manager and a salaried partner working at the firm, whether the transfer dated 15 October 2014 related to a bill of costs "1037". They stated there was no bill of costs with that number. The firm's bookkeeper stated that he had entered the wrong narrative on the firm's accounting system and it self-populated the narrative with the bill number (1037). He stated he should have recorded the narrative as "Reimburse Disbursement".

31. These transfers were not allocated to a specific client matter.

32. During interviews with the FIO on 24 November 2014 and 7 January 2015, the Respondent informed the FIO that he did not agree with the client account shortage of £62,512.46. He stated this was because the unallocated withdrawals from client bank account represented either Legal Aid monies held in the client account which would have been due to the firm's office account, or funds which would have been transferred to the firm's office account for bills of costs.

33. The Interim Forensic Investigation Report recorded that the client ledger account where Legal Aid money paid into the firm's client bank account had been posted had shown a debit client balance on 21 July 2014 to 2 November 2014. The FIO noted the firm did not hold any Legal Aid money in the firm's client account during this period. The ledger account was in fact overdrawn and could not be used to offset against the unallocated withdrawals.

34. Following a request from the FIO to the Respondent to produce the bills of costs he relied upon, the Respondent produced 77 bills of costs totalling £34,670.16. However the FIO noticed the bills were dated between 6 January 2014 and 8 October 2014, they ranged from between £71.20 and £3,168, thirty four of them had no client reference number, the other reference numbers on the bills did not correspond with any of the client ledger numbers and they appeared to be consecutively numbered from 1502. In

some instances a period in excess of 10 days had passed between consecutive bill numbers. The status of the bills was one of paid in full, outstanding amount or held on account.

35. In relation to three of the bills of costs produced the FIO checked whether they had been included in the firm's books of account as at 7 November 2014, or if the bill had not been posted. He also checked whether there were sufficient funds held for that client in each bank account in order to render the bill.

36. There were three client matters relating to the bills.

37. The first client was Mr L. There were 3 bills of costs provided totalling £5,549.60 – 6 January 2014 (Invoice number 1502) for £1,014.00; 21 March 2014 (invoice number 1524) in the sum of £1,367.60); and 12 May 2014 (invoice number 1537) in the sum of £3,168.00. Only two bills in the total sum of £2,043.60 had been posted on Mr L's client ledger account on 1 October 2013 (invoice number 1169) for £690.00 and 21 March 2014 (invoice number 2365) in the sum of £1,353.60.

38. It was not clear whether invoice numbers 2365 and 1524 were the same bill of costs. In any event the FIO noted that there were insufficient funds on Mr L's client account to render bills of £5,549.60 as the client ledger balance as at 7 November 2014 was £814.00 so the bills could not be offset in full against the client account shortage.

39. The second client was Mr W. On 9 January 2015 the FIO was provided with a bill of costs dated 18 March 2014 (invoice number 1518) in the sum of £90.00. One bill of costs had been posted on Mr W's ledger on 31 March 2014 (invoice number 2389) in the sum of £90.00. The client ledger account recorded that the firm had not received any funds into client account in respect of this matter and the client ledger balance had always been nil. Therefore no funds were held in client account for the bills to be rendered and offset in full against the client account shortage.

40. The third client was Mr H. On 9 January 2015 the FIO was provided with a bill of costs dated 14 April 2014 (invoice number 1529) in the sum of £851.40. Two bills of costs had been posted on the client ledger – 1 October 2013 (invoice number 1174) in the sum of £400 and 14 April 2014 (invoice number 2014/3) in the sum of £850 totalling £1,250.

41. It was not clear whether invoice numbers 2014/3 and 1529 were in fact the same bill of costs. The balance on Mr H's client ledger as at 7 November 2014 was nil. The firm was not holding any funds for Mr H in order to render the bill dated 14 April 2014 of £851.40, therefore the bill of costs could not be offset against the client account shortage.

42. On 3 November 2014, the Respondent paid £41,000 into the client account.

Allegation 1.2

43. The Respondent was made bankrupt on 20 May 2014 and his practising certificate was suspended on 27 May 2014.

44. On 10 July 2014 the Respondent sent an email to the SRA stating:

> "I have resigned from the partnership and have no dealing with client money."

He also made an application to have the suspension on his practising certificate lifted so that he could continue to work.

45. On 5 August 2014 the Respondent's practising certificate was made subject to a number of conditions including the following:

> "2.1.1 He may act as a solicitor only as an employee.
>
> 2.1.2 He is not a sole practitioner, or a manager, or owner of an authorised body or authorised non SRA firm……..
>
> 2.1.4 He does not hold, receive or have access to client money, or act as a signatory to any client or office account, or have the power to authorise electronic transfers from any client or office account….."

46. On 19 August 2014, the bankruptcy order made against the Respondent was annulled.

47. During the period that the Respondent's practising certificate was suspended (27 May 2014 to 5 August 2014), the Respondent made improper payments to his personal bank account, and to the bank accounts of third parties from client account. He also wrote a cash cheque on 11 July 2014 which he was not entitled to do.

48. After 5 August 2014 and until 26 October 2014, the Respondent continued to make improper payments to his personal bank account and to the bank accounts of third parties. He also wrote two cash cheques dated 10 August 2014 and 16 September 2014 and made improper transfers from client to office account between 11 August 2014 and 15 October 2014. This was in breach of his practising condition 2.1.4.

Allegation 1.3

49. The firm's professional indemnity insurance for the period 1 October 2014 to 30 September 2014 was held with EIC.

50. The proposal form for this professional indemnity insurance sent to EIC was signed by the Respondent on 16 September 2014. The signature required was that of a "principal/partner/member/director". The Respondent was not entitled to sign the form as he was a Consultant.

51. The proposal form stated the firm had one equity partner and two salaried partners but did not state who held which position. The Respondent was not an equity partner or salaried partner as he was a Consultant.

52. In response to the question asking whether any present or former partners, consultants or employees had "previously been, or is currently subject, to a winding up for bankruptcy", the form had been ticked "No". This was not correct as the Respondent had been made bankrupt on 20 May 2014.

53. The form had also been ticked "No" in relation to whether any present or former partners, consultants or employees had "ever been refused a practising certificate or granted a conditional practising certificate". This was incorrect as the Respondent had conditions imposed on his practising certificate on 5 August 2014.

54. On 13 November 2014, the firm's bookkeeper provided the FIO with a document entitled "[A] Statement of Fact". This related to the firm's professional indemnity insurance due to commence on 1 October 2014 and included the name of the firm's professional indemnity insurer. It listed Ms D as the equity partner, Mr A as a salaried partner and the Respondent as a Consultant. The declaration, which required the signature of a "partner/director/member", was undated but signed by the Respondent who was not entitled to sign the form. The document had also been signed, but not dated by the Respondent under the "acceptance and declaration" section. The Respondent was named as being responsible for the overall supervision and control of the firm. He was also named as being responsible for risk management at the firm.

Witnesses

55. The following witnesses gave evidence:

- Sean Grehan (the SRA's Forensic Investigation Officer)

Findings of Fact and Law

56. The Tribunal had carefully considered all the documents provided, the evidence given and the submissions of the Applicant. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

57. **Allegation 1.1: Between 4 July 2014 and 26 October 2014 the Respondent made or caused the following improper payments/transfers/withdrawals to be made from DW Law's client account:**

1.1.1 a total of £64,525.50 to his personal bank account;

1.1.2 a total of £8,816.22 to the bank accounts of third parties;

1.1.3 a total of £4,500 by cashing client account cheques;

1.1.4 a total of £25,153.13 to the firm's office account;

and thereby breached all, or any, of the following:

1.1.5 Principle 2 of the SRA Principles 2011 ("the Principles") by failing to act with integrity;

1.1.6 Principle 6 of the Principles by failing to maintain the trust the public placed in him and in the provision of legal services;

1.1.7 Principle 8 of the Principles by failing 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;

1.1.8 Principle 10 of the Principles by failing to protect client money and assets;

1.1.9 Rule 20.1 of the SRA Accounts Rules 2011 ("the SAR") by making improper payments/transfers/withdrawals from client account;

1.1.10 Rule 29 of the SAR by failing to keep accounting records properly written up to show his dealings with client money and office money relating to any client.

It was alleged the Respondent had acted dishonestly.

57.1 Mr Gibson, on behalf of the Applicant, had very carefully taken the Tribunal through all the relevant client account ledgers, bank statement entries, cheque stubs and other related documents. He referred the Tribunal to the test for dishonesty set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67.

57.2 The Tribunal also heard evidence from Mr Grehan, the Forensic Investigation Officer, to confirm the content of his report was all correct. The Tribunal accepted Mr Grehan's evidence. Mr Grehan had confirmed in his report of 17 November 2014 that the only signatories on the firm's client account were the Respondent, the firm's bookkeeper (who was self-employed) and the former partner, Mr D, who had resigned in March 2013, long before these transfers were made.

57.3 The Respondent had failed to engage with these proceedings. The only responses the Tribunal had from him were those given during his interviews with Mr Grehan on 24 November 2014 and 7 January 2015. The Respondent had confirmed the firm was behind in PAYE and personal tax payments to HMRC in the sum of approximately £74,000. HMRC had issued a statutory demand and the Respondent had been made bankrupt on 24 May 2014, while he was out of the country. He stated the bankruptcy was rescinded on 19 August 2014 but also confirmed that he was subject to a further bankruptcy petition.

57.4 The Respondent denied there was any client account shortfall. He stated he had contacted all his clients and obtained figures from them which balanced with the client account. The Respondent stated he was unable to pay his accountant to verify this.

57.5 The Respondent did not dispute the payments had been made. He said he would transfer what he was allowed to transfer, based on a fixed fee as informed to him by the bookkeeper. He stated the bookkeeper informed him that is was "perfectly fine" for the Respondent to take fixed fee payments from the client bank account and transfer these to his own personal bank account. The Respondent claimed that the bookkeeper had made some of the payments and that the bookkeeper sometimes used the Respondent's online banking fob, when he had forgotten his own banking fob.

57.6 In relation to the payment of £45,000 made from the firm's client account to the Respondent's personal bank account on 3 October 2014, the Respondent stated this had been a genuine error and that he did not know whether he had made the transfer or the bookkeeper had done so.

57.7 The Respondent stated the unallocated payments to his personal bank account represented over £36,000 of fixed fees for which bills of costs had been raised. He also said some of the unallocated payments from the client account related to monies received from the Legal Aid Agency.

57.8 The Respondent confirmed the payments of £5,000.47 made to S were made to his girlfriend but he could not recall whether he had authorised or physically made those transfers. He stated all the unallocated payments from client account to third parties represented monies properly due to the firm.

57.9 The Respondent stated that he had not intended all the payments to go to his personal bank account, he thought he was making transfers online to the firm's office account but had sent it to his personal bank account by mistake. The Respondent stated the payments from the client account related to fixed fees and he could provide the corresponding bills of costs. He thought some of the payments made from the client account represented monies received from the Legal Aid Agency which had been held in the client account.

57.10 The Respondent could see no harm in making payments from client account to his own personal bank account, or to his girlfriend's account, or to a salaried partner's personal account as he believed this was money due to the firm. He said that the narrative on payments made to his girlfriend's account which stated "Counsel fee" were an "aide memoir" for him although his girlfriend was not a barrister and the fees did not represent payments to counsel on behalf of a client of the firm.

57.11 The Respondent confirmed the payment of £1,500 to H Counsel from the client account on 7 October 2014 was for his own bankruptcy hearing and that he had instructed the firm on this so he was a client. He stated the payment coincided with, and was offset against, a payment received from the Legal Aid Agency of £1,500.

57.12 In relation to the cheques drawn as cash, the Respondent accepted the cheque dated 20 August 2014 in the sum of £2,000 was in his handwriting. He accepted he had signed the cheque dated 19 September 2014 in the sum of £1,000. In relation to the third cheque dated 11 July 2014, the Respondent stated this was the bookkeeper's handwriting on both the cheque and the cheque stub. The Respondent said he had made some cash payments to builders when the firm had recently moved offices but he was unable to explain why the cash payments had been made from the client account other than to presume they were made against funds received from the Legal Aid Agency into that account. The Respondent accepted drawing cheques for cash against the firm's client bank account was "clearly improper".

57.13 The Respondent claimed he did not know the bookkeeper had arranged for Legal Aid Agency funds to be paid into the firm's client account but accepted that when he did become aware, he did not make any attempt to change that arrangement because his practising certificate had been revoked due to his bankruptcy.

57.14 The Tribunal had been provided with a witness statement from the bookkeeper in which he confirmed he had raised concerns about the Respondent's high drawings with the Respondent as well as with Ms D and Mr A. He stated the drawings were making it difficult for him to manage the firm's cash flow. The bookkeeper stated cheque books and paying in books would go missing, counterfoils on cheque stubs had no information or the computer would not be working.

57.15 The bookkeeper confirmed in his statement that from 4 July to 27 October 2014, all payments made to the Respondent's girlfriend (S), Counsel's fees, fixed fees and the payment to Mr A were made by the Respondent's banking key fob. He stated he had only used the Respondent's key fob on one or two occasions when he had forgotten his own and that was to send money on behalf of specific clients whose details he provided.

57.16 The bookkeeper also stated that in July 2014, after discussion with the Respondent, Ms D and Mr A, he had made arrangements for the Legal Aid Agency payments to be made to the client account rather than the office account in order to restrict the Respondent from taking money out of the office account.

57.17 The Tribunal, having considered all the evidence before it, concluded payments and transfers had been made by the Respondent. They could only have been made by either him or the bookkeeper and in his interviews the Respondent had made a suggestion the bookkeeper had made some of them. However, the bookkeeper had denied this.

57.18 The 35 payments made to the Respondent's personal bank account totalling £64,525.50 had either been authorised by the Respondent or, in the case of 8 payments, an activity report to confirm who had authorised them was no longer available. Two payments had been made in the early hours of the morning, both of which were authorised by the Respondent, and this indicated they must have been made by him. It was highly unlikely that a bookkeeper would be making such payments to the Respondent's personal bank account in the middle of the night. The Tribunal concluded that the Respondent had made a significant number of these payments.

57.19 The payments of £5,000.47 to the Respondent's girlfriend were, on his own admissions during the interview with the FIO, made by the Respondent, as were the payments to Mr A of £2,315.75 and to H Counsel of £1,500.

57.20 In relation to the client account cheques which were cashed, the Respondent admitted the cheque dated 20 August 2014 contained his handwriting, and another cheque dated 19 September 2014 had been signed by him. The third cheque of 11 July 2014 he claimed had been written by the bookkeeper, but it was not clear who had signed it. The Tribunal concluded that there was no evidence to suggest anyone other than the Respondent had cashed these cheques and the inevitable conclusion was that he had.

57.21 In relation to the fifteen unallocated transfers in the total sum of £25,158.13, apart from one entry, these all contained the same ledger narrative and bank statement narrative. The Respondent had produced some bills which he claimed justified some of the payments. However a forensic analysis of those bills (which had emerged a significant time after the transfers had been made) did not match the office records and showed the bills had been consecutively numbered, which was just not plausible. This raised serious doubt about whether the bills could have justified the transfers in the first place.

The Tribunal concluded that the Respondent had allowed or caused such transfers to be made improperly from the firm's client account as they were made without being allocated to specific client matters.

57.22 The Tribunal then considered whether the Respondent had breached the various Rules and Principles as alleged. There was no doubt in the Tribunal's mind that the Respondent had made improper payments/transfers/withdrawals in breach of Rule 20.1 of the Solicitors Accounts Rules 2011 and had also breached Rule 29 by failing to keep accounting records properly written up to show his dealings with client money and office money. Client monies had been paid to the Respondent's own personal bank account as well as to the accounts of unrelated third parties. This was in breach of Rule 20.1 as these were not properly required to be made on behalf of clients. Many of the ledgers and bank statements did not record the true position. The payments to the Respondent's girlfriend referred to "Counsel" when actually the payments had nothing to do with Counsel. This was in breach of Rule 29 as the records were not properly written up to show dealings with client money.

57.23 By improperly paying client funds to his own and third party bank accounts the Respondent had failed to protect client money and assets in breach of Principle 10 of the SRA Principles 2011. Indeed, even after the Respondent had paid £41,000 back into client account, there had still been a shortage on client account of £62,512.46. The shortfall was evidence that the Respondent had 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. He had thereby breached Principle 8 of the Principles.

57.24 The Tribunal was satisfied that the Respondent had acted with a lack of integrity. He had improperly paid client funds to his own account and to third parties (who included his girlfriend and an employee of the practice) in breach of the SAR. These payments had taken place over the course of nearly 4 months and totalled over £73,000. He had thereby put client funds at risk. This did not connote moral soundness or show adherence to a steady ethical code. It was also conduct that failed to maintain the trust the public had placed in the Respondent and in the provision of legal services. It was therefore in breach of Principles 2 and 6 of the Principles.

57.25 The Tribunal then considered the allegation of dishonesty and the test set out in the case of Ivey v Genting Casinos (UK) Ltd t/a Crockfords. Firstly the Tribunal was required to ascertain the actual state of the Respondent's knowledge or belief as to the facts. Having done so, the Tribunal had to consider whether the Respondent's conduct was dishonest by the standards of ordinary decent people.

57.26 It was clear from the documents before the Tribunal that the Respondent had attempted to hide the true nature of the payments/transfers he had made. Payments which were made into his own personal bank account were given descriptions in the bank statement narrative such as "[S] Fixed Fee", "Fixed Fee", "22/[S] place" and "LSC" when it was quite clear that the payments were not being made for these purposes. Equally, payments made to the Respondent's girlfriend contained ledger narratives which all referred to "Counsel", when it was quite clear that the payments were not being made in relation to any matters concerning Counsel. The transfers were repeated on multiple occasions over a period of almost 4 months. The Respondent was concealing his actions

because he was using client funds to make transfers to himself and to other unauthorised third parties when he knew they were not entitled to those funds. The Tribunal was satisfied that, by this concealment, the Respondent knew the funds belonged to clients and should not be paid to his own personal account, or to the accounts of unrelated third parties. The Tribunal was further satisfied that this conduct would be regarded as dishonest by the standards of ordinary decent people who would expect solicitors to accurately record their dealings with client money, deal with it in accordance with the rules and protect that money at all times.

57.27 The Tribunal found Allegation 1.1 proved.

58. **Allegation 1.2: The Respondent made or caused the improper payments/transfers/withdrawals referred to in Allegation 1.1 while his practising certificate was suspended and/or in breach of a practising certificate condition on his practising certificate and thereby breached all, or any, of the following:**

1.2.1 Principle 2 of the Principles by failing to act with integrity;

1.2.2 Principle 6 of the Principles by failing to maintain the trust the public placed in him and in the provision of legal services.

58.1 Mr Gibson, on behalf of the Applicant, submitted the Respondent had continued to act as an equity partner at the firm and accessed the client account even though he knew he was not entitled to do so.

58.2 The Respondent, during his interview with Mr Grehan on 24 November 2014, confirmed he had had conditions imposed on his practising certificate and that he had signed cheques during that time. He stated he had been given verbal advice by the firm's accountant that he was "ok to sign the cheque".

58.3 The Respondent stated that during the time he had had conditions on his practising certificate he had been accessing the firm's online banking and had made payments. He also confirmed he remained a signatory on the firm's client and office bank accounts. He said he had not "touched client money" and that he could not recall authorising client to office account transfers. He did not deny he had breached his practising certificate conditions.

58.4 The Respondent during his interview with the FIO had clearly accepted he had breached his practising certificate conditions. His practising certificate was suspended on 27 May 2014. On 10 July 2014, the Respondent had sent an email to the SRA confirming he had resigned from the partnership and had no dealing with client money. This was a clear indication that he understood he should not have been practising or dealing with client funds whilst his practising certificate was suspended. This was further evidenced by his subsequent application to lift the suspension on his practising certificate.

58.5 It was clear to the Tribunal that certainly by 5 August 2014, when the Respondent's application to lift the suspension on his practising certificate was granted, he knew he had conditions of practice on his certificate from that date. He also knew that by this time he had rather more flexibility to work than he did when he was subject to a

suspension but he knew by the nature of the conditions that he could not deal with the client bank account.

58.6 The improper payments commenced on 4 July 2014 and continued until 26 October 2014. The Tribunal was satisfied that the Respondent had made improper payments, or transfers or withdrawals during the period that his practising certificate was suspended. Thereafter he had done so in breach of the practising condition on his certificate which clearly stated he could not hold, receive or have access to client money, or act as a signatory to any client or office account, or have the power to authorise electronic transfers from any client or office account.

58.7 By making these transfers during this period, the Respondent had failed to act with moral soundness or adhered to a steady ethical code. He had therefore acted with a lack of integrity in breach of Principle 2 of the Principles.

58.8 By continuing to deal with client money during the period of his suspension and subsequent practising conditions, the Tribunal was satisfied that the Respondent had failed to maintain the trust placed by the public in him and in the provision of legal services. Members of the public did not expect solicitors who were subject to a suspension or practising certificate conditions to continue to access the client account and make improper payments from it while the suspension was in place or in breach of the conditions. The public would expect a solicitor to comply with an requirements imposed on that solicitor by its regulator.

58.9 The Tribunal found Allegation 1.2 proved.

59. **Allegation 1.3: The Respondent submitted false and misleading information to the firm's professional indemnity insurer and thereby breached all, or any, of the following:**

1.3.1 Principle 2 of the Principles by failing to act with integrity;

1.3.2 Principle 6 of the Principles by failing to maintain the trust the public placed in him and in the provision of legal services.

It was alleged the Respondent had acted dishonestly.

59.1 Mr Gibson submitted the Respondent had known, at the time that he completed the firm's professional indemnity insurance proposal form, that he had been subject to a suspension, and subsequently conditions on his practising certificate but he had failed to declare this. He had also signed documents when he was not authorised to do so.

59.2 The Respondent, during his interview on 7 January 2015, stated he had not given any thought to whether the bankruptcy on 23 May 2014 was something the firm's professional indemnity insurers needed to know about. He confirmed he had not notified them of the conditions on his practising certificate. He stated that he may have signed the proposal form as:

> "…. it was just something shoved under my nose, sign this Mark and then I thought about it and I phoned him and said 'look that cannot go in'…….

> .....often people were shoving stuff under your nose to sign etc, because I'm never in the office, the minute I used to walk through that door people would pounce on me, can you sign this Mark, can you do this Mark ...."

59.3 The Tribunal was in no doubt that the Respondent knew when he signed the professional indemnity insurance renewal proposal form on 16 September 2014, and subsequently the Statement of Fact document, that he was not a Principal, Partner, Member, or Director of the firm. Indeed, the Tribunal had been referred to a schedule of the Respondent's SRA status history report from which it was clear that on 26 May 2014 the SRA had been informed the Respondent was a Consultant at the firm. Given that this was the Respondent's personal record, it was unlikely that anyone other than the Respondent had provided this information to the SRA. Notwithstanding this, the Respondent signed the relevant documents knowing full well he did not have authority to do so. This was clearly false and misleading.

59.4 The Tribunal was also satisfied that the Respondent knew, at the time that he completed these forms, that he had been subject to a suspension and he was also subjected to conditions on his practising certificate. Despite this the Respondent indicated on the form that he had never been refused a practising certificate or granted a conditional practising certificate. This was also clearly false and misleading.

59.5 The Tribunal was satisfied that by providing false and misleading information the Respondent had failed to act with moral soundness or adhere to a steady ethical code and had thereby acted with a lack of integrity in breach of Principle 2 of the Principles. This was conduct that failed to maintain the trust the public placed in him and in the provision of legal services in breach of Principle 6 of the Principles. Members of the public, and indeed insurers, would expect solicitors to provide accurate information when applying for professional indemnity insurance.

59.6 The Tribunal then considered whether the Respondent had acted dishonestly. The Tribunal had already established that at the time the Respondent signed the professional indemnity insurance renewal proposal form, and the Statement of Fact document, he knew full well that he was a Consultant at the practice, and not a Principal, Partner, Member or Director. He must have known that as a Consultant he was not entitled to sign such documents as the word "Consultant" was not specified as one of the people authorised to sign the forms. He also knew that he was subject to conditions on his practising certificate and had previously been subject to a suspension. He therefore knew that the information he had given on these documents was not true. As an experienced solicitor, he must have known that any information given on the proposal form would be relied upon by the insurers in deciding whether to provide indemnity insurance. The Tribunal was satisfied that such conduct would be regarded as dishonest by the standards of ordinary decent people who would expect solicitors to provide accurate information when applying for indemnity insurance.

59.7 The Tribunal found Allegation 1.3 proved.

Previous Disciplinary Matters

60. None.

Mitigation

61. The only mitigation before the Tribunal was the information the Respondent had given to the FIO during the course of his interviews. He had made reference to personal problems which had impacted on his financial situation. There had also been staff issues at work.

Sanction

62. The Tribunal had considered carefully the documents provided. The Tribunal referred to its Guidance Note on Sanctions when considering sanction. The Tribunal also considered the aggravating and mitigating factors in this case.

63. The Tribunal first considered the Respondent's level of culpability. He was entirely responsible for his conduct which had been planned and over which he had direct control. The motivation for his conduct had been the use of client funds for his own personal benefit, and for the benefit of third parties. The Respondent had acted in breach of the trust placed in him by clients who expected him to act as guardian of their funds. Due to his conduct, he had caused losses of £62,512.46 due to the shortage in client account. The Respondent had, at the time of the conduct, had some 12 years of experience. His level of culpability was therefore high.

64. The Respondent's conduct had caused a great deal of harm to members of the public, as well as to the reputation of the legal profession. There had been a shortfall of £62,512.46 and the Tribunal had been informed that payments had been made by the Compensation Fund. The Tribunal also assessed the level of harm caused as high.

65. The Tribunal then considered the aggravating factors in this case and identified those as follows:

- The Respondent had acted dishonestly on a number of occasions in relation to two allegations.
- His conduct had been deliberate, calculated and repeated over a significant period of time.
- The Respondent attempted to conceal his wrongdoing by disguising the nature of the payments being made. He also informed his regulator that he was not dealing with client funds when it was quite clear that he was.
- He had breached his practising conditions and thereby shown little regard for his regulator.
- His conduct had caused a shortfall on the client account of £62,512.46.
- His conduct had caused a great deal of distress to his salaried partners who had provided the regulator with statements giving details of the impact on them.
- There was no evidence of genuine insight or remorse on the part of the Respondent.

- The Respondent ought reasonably to have known that his conduct was in material breach of his obligations to protect the public and the reputation of the legal profession.

66. The Tribunal then considered the mitigating factors in this case. The only mitigating factors that the Tribunal could identify were that the Respondent had attempted to rectify some of the losses by making a payment of £41,000 into client account from his own funds on 3 November 2014. He also had a previously unblemished record.

67. The Tribunal decided that this was not a case where it was appropriate to make no order, or order a Reprimand, or order a Fine as these would be insufficient to reflect the serious nature of the Respondent's conduct. His culpability and the harm caused had been assessed as high and he had caused losses to clients.

68. The Tribunal also decided that it would not be appropriate to impose a Restriction Order as the Respondent had already failed to adhere to previous conditions placed on his practising certificate by the SRA. He had shown his utter disregard for his regulator and the Tribunal considered the risk of him repeating this was high.

69. The Tribunal then considered whether the Respondent should be suspended. This was a case where the Tribunal had found the Respondent had acted dishonestly in relation to two allegations. His conduct had been repeated on numerous occasions and had caused losses to clients. In the absence of any engagement from the Respondent, the Tribunal concluded the Respondent continued to pose a risk to members of the public. As such, a suspension was not a sufficient sanction to protect the public and the reputation of the legal profession from future harm from the Respondent. Such a sanction would not maintain public confidence in the legal profession.

70. These were extremely grave circumstances where the Respondent had shown a cavalier disregard for his professional obligations and had driven a coach and horses through the Solicitors Accounts Rules with which he should have complied. He had used client funds to finance his own outgoings when those funds should have been sacrosanct. His conduct had been disgraceful and he was not fit to be a member of the profession.

71. The Tribunal also took into account the case of SRA v Sharma [2010] EWHC 2022 (Admin) in which Coulson J stated:

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

72. The Tribunal was satisfied that there were no exceptional circumstances in this case and Ordered the Respondent be Struck Off the Roll of Solicitors.

Costs

73. Mr Gibson requested an Order for the Applicant's costs in the total sum of £16,938.64. He provided the Tribunal with a Statement of Costs which contained a breakdown of those costs. He confirmed he had reduced the amount claimed on his Statement of Costs to take into account the slightly shorter length of the hearing. He reminded the Tribunal that there was no Statement of Means from the Respondent.

74. The Tribunal considered carefully the Statement of Costs provided. The Tribunal concluded that the costs claimed were reasonable taking into account that there had been two Forensic Investigation Reports. The Tribunal made an order that the Respondent pay the Applicant's costs in the sum of £16,938.64.

75. The Respondent had not engaged with the proceedings and had failed to provide any information about his means. The Tribunal had particular regard for the case of SRA v Davis and McGlinchey [2011] EWHC 232 (Admin) in which Mr Justice Mitting had stated:

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

76. In the absence of any information from the Respondent, the Tribunal saw no reason to restrict enforcement of the costs order.

Statement of Full Order

77. The Tribunal Ordered that the Respondent, MARK ANTONY WHITTAKER, 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 £16,938.64.

Dated this 20th day of June 2018
On behalf of the Tribunal

S. Tinkler
Chairman