SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11708-2017

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

KAM CHEUNG MAK Respondent

Before:

Mr A. Ghosh (in the chair)
Mrs C. Evans
Mr M. R. Hallam

Date of Hearing: 24-25 April 2018

Appearances

Andrew Bullock, barrister of Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant.

Shaun Esprit, barrister of Church Court Chambers, Second Floor, Goldsmith Building, Temple, London, EC4Y 7BL, for the Respondent.

JUDGMENT

Allegations

The allegations against the Respondent made by the Applicant were set out in a Rule 5 Statement dated 29 August 2017. The allegations were that:-

1. between July 2011 and May 2016 the Respondent made 204 transfers totaling £511,618.80 from client to office account (99.2% by value were made in round sum transfers), when he could not be certain that the money was properly due to the firm, and thereafter made a series of corresponding round sum transfers to his personal account. In doing so he misappropriated clients' money in the minimum sum of £650. He thereby breached any or all of Principles 2, 4, 6, 8 and 10 of the SRA Principles 2011 ("the Principles") and Rule 1.2 (a) and (c), 17.7 and 20.1(a) of the SRA Accounts Rules 2011 ("SAR");

1.2 between July 2011 and May 2016 the Respondent entered onto a Suspense Ledger the monies transferred from client to office account at 1.1. above. He thereby breached either or both of Principles 8 and 10 and Rule 29.25 of the SAR;

[Allegation 1.3 was not an allegation against this Respondent]

1.4 the Respondent failed to maintain proper accounting records and in so doing breached Rules 1.2 (a), (c), and (f) and Rules 29.1, 29.4, 29.9 and 29.12 of the SAR;

1.5 the Respondent failed to have proper systems and processes in place for the firm's accounts and practice management and in doing breached Rule 1.2 (e) and Rules 17.1, 17.2, 17.3 and 17.5 of the SAR.

2. Dishonesty was alleged with respect to the allegation 1.1 but dishonesty was not an essential ingredient to prove that allegation.

Documents

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

Applicant

- application and Rule 5(2) Statement dated 29 August 2017 with exhibit "SEJ1"
- Forensic Investigation Report of David Payne dated 13 March 2017
- the Applicant's Schedule of Costs dated 29 August 2017 and 18 April 2018
- Mr Payne's Initial Interview Notes dated 18 July 2016

Respondent

- the Respondent's Answer dated 3 October 2017
- Witness Statement of the Respondent dated 23 April 2018
- letter from Ms LL dated 23 April 2018
- letter from Ms SW dated 14 April 2018
- letters of support from former clients of the Respondent

- letter from current employer of the Respondent dated 23 April 2018
- letter from the Centre for Counselling dated 14 April 2018
- the Respondent's Personal Financial Statement dated 23 April 2018

Factual Background

4. The Respondent was born in September 1962 and admitted to the Roll of Solicitors on 1 May 2001. At all material times the Respondent and Ms Susan Marziano were partners in the firm MKM Solicitors Limited ("the Firm") which had offices in East Ham, London. The Firm had commenced trading in April 2005 and the Respondent and Ms Marziano had held the only manager roles since 2009. The Respondent was the Firm's Compliance Officer Finance and Administration ("COFA") and Ms Marziano was the Firm's Compliance Officer Legal Practice ("COLP").

5. In June 2011 an SRA Investigation Officer had investigated the use of the suspense account. As a result of this investigation no report was made that the Firm did not have proper systems and processes in place. At that time the Respondent confirmed that all debit balances and the suspense account had been cleared by transfers from office account to client account. The Respondent had stated that they were historic debit balances which occurred when the Firm was formed and should have been addressed earlier. The Firm had said that these issues had arisen due to them not being property trained in the use of bookkeeping systems. The Suspense Ledger had been cleared in June 2011.

6. Following receipt of the Firm's qualified accountant's report for the period 1 July 2014 to 30 June 2015 (dated 23 June 2015) a Forensic Investigator, ("FIO") commenced a Forensic Investigation of the Firm's books of account and other documents on 18 July 2016. The inspection culminated in a report dated 13 March 2017 ("the FIR"). Recorded interviews took place with the Respondent on 4 August 2016 and 22 February 2017.

7. The FIR led to the Firm being intervened into on 30 March 2017 and the Respondent's Practising Certificate being suspended. The Respondent's name remained on the Roll of Solicitors. An Application to lift the suspension of the Respondent's Practicing Certificate was made on 19 April 2017. On 8 August 2017 a decision was made, with the agreement of the Respondent, to place conditions on his Practising Certificate.

8. The SRA wrote to the Respondent on 3 May 2017. The Respondent provided a response in a letter dated 19 May 2017.

9. On 5 April 2018 a different Division of the Tribunal approved an Agreed Outcome in respect of Ms Marziano. This hearing related to the Respondent only.

Witnesses

10. The FIO and the Respondent gave oral evidence to the Tribunal. The Tribunal found the Respondent to be an evasive witness who did not answer the questions put to him in a clear, direct and succinct manner.

11. The FIO gave detailed evidence as to the content of his report which he confirmed was true to the best of his knowledge and belief, with one typographical amendment from £10,000 to £11,000.

12. The written and oral evidence of the witnesses is quoted or summarised in the "Findings of Fact and Law" paragraph below. The evidence referred to will be that 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 to indicate that the Tribunal did not read, hear or consider that evidence.

Findings of Fact and Law

13. The Applicant was required to prove its allegations beyond reasonable doubt. In arriving at its decision the Tribunal gave due weight to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with the Respondent's rights to a fair trial and to respect for his private and family life under, respectively, Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

14. **Allegation 1.1 - Between July 2011 and May 2016 the Respondent made 204 transfers totaling £511,618.80 from client to office account (99.2% by value were made in round sum transfers), when he could not be certain that the money was properly due to the firm, and thereafter made a series of corresponding round sum transfers to his personal account. In doing so he misappropriated clients' money in the minimum sum of £650. He thereby breached any or all of Principles 2, 4, 6, 8 and 10 of the Principles and Rule 1.2 (a) and (c), 17.7 and 20.1(a) of the SAR;**

Allegation 1.2 - Between July 2011 and May 2016 the Respondent entered onto a Suspense Ledger the monies transferred from client to office account at 1.1. above. He thereby breached either or both of Principles 8 and 10 and Rule 29.25 of the SAR.

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

14.1 Between 1 July 2011 and 27 May 2016, 204 transfers were made from client account to office account in amounts varying between £16.00 and £10,750.00 which in total amounted to £511,618.80. The majority of transfers (99.2% by value) were in round sums and were allocated to SUS100/01 (the "Suspense Ledger") within the client ledger, in order to keep a record of the transfers, as they did not relate to any specific client matter or client bills. In interview on 4 August 2016, the Respondent confirmed that to be the case. The Suspense Ledger was overdrawn in excess of £15,000.00 from 31 January 2013 until August 2014, and overdrawn in excess of £20,000.00 from 6 March 2013 to 19 June 2014. The overdrawn amount exceeded £40,000.00 on six occasions, with a maximum debit balance on 28 May 2014 in the sum of £47,789.43.

14.2 Round sum transfers were then being made from office account to a personal bank account operated by the Respondent for the same or similar amounts to those transferred from client to office account and were made on the same day. The transfers were made to fund the First Respondent's gambling habit. The FIO's evidence was that 99.2% of the transfers by volume were made in round sum amounts. Round sum transfers were prohibited by the SAR.

14.3 Transfers were then later made from the First Respondent's personal account back to the office account and then to the client account. Between 7 July 2011 and 31 May 2016, 138 office to client transfers were made, which in total amounted to £500,253.00. These partially rectified the cumulative debit balance on the Suspense Ledger. These transfers appeared on the Firm's office account bank statements.

14.4 An example of the movement of the monies was:

- on 20 - 21 October 2013, £11,000.00 in 8 round sum amounts was transferred from client to office account;

- on 20 October 2013, £10,000.00 in 8 round sum amounts was transferred from the Firm's office account to the Respondent's personal account.

- on 21 October 2013 there were 13 transfers out from the Respondent's personal account to 'Ladbrokes Gibraltar' totaling £11,630.00 and 61 transfers into the account from 'Ladbrokes London' totaling £11,360.00.

- on 21 October 2013 a single payment of £10,000.00 was made back into the Firm's office account from the Respondent's personal account.

- on the 21 October 2013, £10,000.00 in 6 round sum amounts was transferred back from office to client account.

14.5 The Respondent's personal bank statements, covering the period 20 June 2011 to 24 September 2015, showed a high number of payments to and from online gambling websites and a casino, (for example: Ladbrokes Ltd London; Ladbrokes.com Internet, Ladbrokes Gibraltar, Grosvenor London and PP Online) in total amounting to approximately £2 million. This was funded by approximately £500,000.00 in round sum transfers from the Firm's client account, as detailed above.

14.6 The highest monthly activity took place between 20 August 2013 and 19 September 2013. There were 167 payments to and 630 payments from a gambling firm. The FIO had compared the total value of transfers in and out of the Respondent's personal account each month. The average amount paid in each month was £43,086.18 and the amount out was £43,079.37. Between 20 July 2013 and 20 July 2014 the average monthly payments in were £166,577.26 and payments out £166,651.04.

14.7 The highest size of the debit balance of the Suspense Ledger corresponded with the period of highest activity on the Respondent's personal account. The cumulative value of transfers in and out of the personal account also showed a correlation with the cumulative round sum transfers recorded on the suspense account.

14.8 In interview on the 4 August 2016 the Respondent explained that the transfers had been made "Cause I want to explain that, that you know, it was, I always held the belief that the money is fixed fees and I would just transfer to the office account, without billing them and, I mean, I now, I, I know it's incorrect we should, we should have billed before transferring but I, it was always our money, because it was at fixed fees, that's what I want to say". He went on to say "... it's the part of laziness, just transfer round figure and we deal with the bills later on which is, I accept is the incorrect way but it was never our intention to defraud anyone because it was our money." He later said that "I'd like to point out on fact that you know, we're not being dishonest here, we're not stealing clients money, at the end of the day these are fixed fees, it's, it's our money...." He agreed that the way he was using the suspense account was an incorrect use of a Suspense Ledger.

14.9 The Respondent had confirmed in interview on 22 February 2017 via his then solicitor that not all money in client account was office money, he said "He's made it clear the majority of the money in the client account, represented agreed fees, not all money. Can you confirm that or otherwise". The First Respondent said; "I can, yeah I confirm that".

14.10 When the Respondent was asked to explain how he knew there was sufficient office money being held in the client account to cover any given round sum transfers to the office account, the Respondent said he took "an educated guess".

14.11 During his initial visit the FIO asked the Respondent to transfer all office money being held in client account to the office account. On 1 August 2016 the Respondent transferred 29 client balances totaling £4,962.30, and confirmed that the amount represented all office money being held in the client account. The client ledger balance at the time was £14,125.70. The Respondent was unable to explain why there was a difference between these figures.

14.12 A review of 15 client files by the FIO, on 13 and 14 December 2016, being a sample of those approximately 60 matters where a ledger balance was held at 1 August 2016, (the date the remaining Suspense Ledger debit balance of £11,365.80 was rectified by the Respondent at the request of the FIO) indicated that none of the balances could be regarded as agreed fees, but rather as a mixture of client money paid on account and un-transferred costs. On the matters of Mr M D and Mr M N documents on the files showed that the balance of monies held in client account were client monies (£540.00 and £358.00 respectively) and not agreed fees. The FIO's understanding of an agreed fee was one that could not be varied up or down and was not dependent on whether or not the work was done.

14.13 The remaining files held unclear and contradictory cost information and whilst in many client care letters the term "agreed" was referred to, they also referred to hourly rates, time contingent charging, interim billing and requests for money on account in the event of disbursements arising. On the file of Mr M H there appeared to be client monies held in the sum of £1,000.00 as at 1 July 2016. In looking at specified files the FIO accepted he was not able to say with certainty whether or not there was an agreed fee.

14.14 The inspection showed there was a minimum client account shortage of £650.00 on 4 May, 27 May and 8 June 2014. The bank balance fell below £50.00 on these dates in the sums of £39.71, £4.71 and £43.61 respectively. A comparison was made of these dates to the balances shown on the client ledgers which the Respondent had provided to the FIO on 22 August 2016. The FIO had produced a table showing the balances of these ledgers at each of the three low-points. It was possible that other client matters also held balances on these dates that had closed by 1 August 2016.

14.15 Although it was unclear whether all of the balances just represented client money, documents on two files supported that client money should have been held in the client account in excess of the low-point balances on all three dates. This was exemplified in the FIR with respect to the files of Mr K A and Mr R A.

<u>The file of Mr K A</u>

14.16 There was a ledger balance of £450.00 across the three dates. The client care letter of 21 February 2014, stated: "We have received £450.00 money on account of our costs" and then provides the basis of how their costs are calculated "Our charges are based on the amount of time that is spent on your case...." There is no indication in the letter that it was an agreed fee matter. Thereafter there was a letter dated 17 October 2016, which attached an "interim bill" and statement of account for £250.00. Accordingly as at 4 May, 27 May and 8 June 2014 there was a clear indication that the minimum client account shortage was in excess of £400.00.

<u>The file of Mr R A</u>

14.17 There was a ledger balance of £300 across the three low point dates. The client care letter dated 20 March 2013, referred to the fact that "...Our charges are based on the amount of time spent on your case...." and referred to the charge rate of £120.00. The letter did not indicate that the matter was being carried out on a fixed rate basis. The letter also stated that "If, for any reason, this matter does not proceed to completion, we will charge you for all work done at these rate [sic] plus any expenses incurred".

14.18 The first transaction on the ledger after the Firm was put in funds was after an invoice sent to the client on 26 February 2016. The invoice had an itemised list of what appeared to be time-contingent costs, letters and disbursements in respect of a Home Office disclosure fee. The invoice, totaling £610.00, took into account that £300.00 had been "received on account". Accordingly as at 4 May, 27 May and 8 June 2014 there was a clear indication that the minimum client account shortage was in excess of £250.00.

14.19 The average debit balance on the Suspense Ledger on these three dates was £41,254.83. Some of the highest levels of gambling activity on the Respondent's personal account was during this period. In an interview with the FIO on 22 February 2017, the Respondent confirmed that the purpose of the round sum client to office account transfers and the subsequent transfers to his personal account were to fund his gambling habit. When the Respondent was asked; "Ok, but each time you pressed the button you did it with the intention of transferring that money into your personal bank account to fund your, your gambling situation, is that correct?" the Respondent replied; "That's correct" and when asked; "So on, on each occasion that,

that was your intention?" the Respondent replied; "Yeah, but like I said, the money I honestly held the belief that it was office money".

14.20 The Respondent had told the FIO that the transfers being recorded on the Suspense Ledger related to fees due to the Firm. Rather than raising bills for reasons of speed the amount would be recorded on the Suspense Ledger to assist with keeping an audit trail.

14.21 During the investigation the Respondent acknowledged that he had a drink problem and said at interview on the 22 February 2017 "Maybe my drinking influenced my decision making then."

14.22 Following the interview on 4 August 2016 it was apparent that when the FIO returned to the Firm on 22 February 2017, the Respondent had continued to make the round sum transfers as he had previously been doing. This was illustrated by transfers made in November 2016 and detailed in the FIR. The Firm's client and office bank statements and the Respondent's personal bank statements showed:

- on 26 November 2016, 2 payments of £1,000.00 and 2 payments of £2,000.00 were made from the client account to the office account.

- on 28 November 2016, 3 payments of £1,000.00 and 2 payments of £2,000.00 were made from the office account to the Respondent's personal account.

- on 28 November 2016, 3 payments of £1,000.00 and 2 payments of £2,000.00 were made from the personal account to Paddy Power's online betting website.

- on 29 November 2016, a payment of £7,000.00 was made from the Respondent's personal account back to the office account.

- on 29 November 2016, transfers of £6,000.00 were made from the office account back to client account.

14.23 The FIO noted from the Respondent's bank statements for his personal account that on average he had paid £7,261.43 to betting firms each week, between 14 December 2016 and 31 January 2017. It followed that the Respondent misused clients funds by making withdrawals from client account to office account, the majority of which were round sum transfers expressly prohibited by the SAR, when he could not be sure that the money was properly due to the Firm or properly required for a payment to or on behalf of a client. This resulted in the minimum sum of £650 being misappropriated by the Respondent. The monies were thereafter placed in his personal account, which was done to fund his gambling habit. As far as the FIO could establish transfers recorded on the Suspense Ledger were recorded in the same way as for any other client ledger. The FIO accepted that this was an audit trail to an extent in that it recorded the values of the transfers.

14.24 Such conduct undermined the Respondent's integrity, the trust that the public placed in him and the provision of legal services and showed a failure to act in the best interests of each client and a failure to run the business and carry out his role in the business effectively and in accordance with proper governance and sound financial

and risk management principles and a failure to protect client money and assets. Such conduct was also in breach of Rules 17.7 and 20.1(a) of the SAR as round sum withdrawals were transferred out of client account on account of costs and monies were transferred when they were not properly required for a payment to or on behalf of the client.

14.25 Further, using a Suspense Ledger as a record of transfers made from client account to office account (for later transmission back to client account) was not a permitted use of a Suspense Ledger. Such conduct showed a failure by the Respondent to run the business and carry out his role in the business effectively and in accordance with proper governance and sound financial and risk management principles and a failure to protect client money and assets. Such conduct was also in breach of Rule 29.25 of the SAR in that it was an unjustified use of a Suspense Ledger. There were legitimate uses of a Suspense Ledger but the FIO's understanding was that the Respondent's use of the Suspense Ledger was not legitimate.

14.26 Mr Bullock referred the Tribunal to the recent Judgment of the Court of Appeal in Wingate & Anor v Solicitors Regulation Authority [2018] EWCA Civ 366. He summarised the relevant law as to what constituted lacking integrity as, having established that one could lack integrity without being dishonest; integrity required adherence to the ethical standards of one's own profession; and making improper payments out of client account could amount to a lack of integrity. In that case Jackson LJ stated:

> "In Hoodless v Financial Services Authority [2003] UKFSM FSM007 the applicant challenged decisions by the FSA to withdraw their approvals to perform the functions of investment adviser and investment management. The criteria for assessing the fitness of approved persons were set out in the FSA's handbook. They included "honesty, integrity and reputation". In considering these criteria, the Financial Services and Markets Tribunal referred to Ghosh and Twinsectra. At paragraph 19 the tribunal stated:
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> > "19. It may be asked whether the combined test is really appropriate in the present context, where one of the statutory objectives is the protection of consumers. It might be thought that a purely objective test would be a better protection. But we think it right to adopt the approach urged upon us, since it was not in dispute that we were required, as an additional matter, to consider the applicants' integrity, which both sides accepted involved the application of objective ethical standards. In our view 'integrity' connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)" "

14.27 The issues could be crystallised by asking whether the Respondent in his dealings with client money abided by the ethical standards of the solicitor's profession. Did he display moral soundness, rectitude and a steady adherence to a moral code? Dishonesty was alleged but denied in respect of allegation 1.1. It was impossible to

see how the Respondent could be dishonest and have acted with integrity. Even if the Tribunal decided that the Respondent acted honestly the Applicant submitted that this was a very serious case. The Respondent misappropriated substantial sums of money without proper enquiries as to whether he was entitled to take the money and without leaving a proper written trial, without billing or manual recording how and when he had taken the monies or where from.

14.28 In Weston v Law Society [1998] Times 15 July Bingham LCJ stated that the Tribunal: "were at pains to make the point, which is in my judgement a good one, that the Accounts Rules exist to afford the public maximum protection against the improper and unauthorised use of their money and that, because of the importance attached to affording this protection and assuring the public that such protection is afforded, an onerous obligation is placed on solicitors to ensure that the Accounts Rules are observed. That is a duty which binds solicitors, quite apart from a duty to act honestly and in accordance with the duties of a trustee."

14.29 Bingham LCJ quoted Bolton v Law Society [1994] 1 WLR 512 in which the court said:

> "In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order if suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors 'profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrust the proceeds to his solicitor pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

14.30 Bingham LCJ went on to state that "It is important to appreciate that in speaking of "trustworthiness" in that passage the court had in mind, of course, honesty, but also had in mind the duty of anyone holding anyone else's money to exercise a proper stewardship in relation to it. That is violated if one solicitor with a duty to see that the rules are observed fails to do so. The tribunal was in my judgment entitled to take the view that the situation in this firm was one which called for the close personal attention of Mr Weston as senior partner."

14.31 The seriousness of non-compliance with the SAR even absent dishonesty was clear. The Applicant took the Respondent's misconduct very seriously. He had been careless and reckless in his dealings with client money. One of the questions that the Tribunal would need to ask itself in due course was whether it was satisfied with the

Respondent's explanation for what was going on or whether there was any element of the Respondent deliberately not leaving an audit trail. The Applicant asserted that the Tribunal could be satisfied that there was a clear correlation between the payments made from client to office account and then into the Respondent's personal account. That proposition had never been controversial. The issue was whether the Respondent had good grounds for believing, as he asserted, that he was entitled to dip into client account as the monies represented agreed fees.

14.32 If the monies in client account did represent agreed fees they should have been in office account. The Respondent's explanation for the fact they were not was that the Firm's accounts package was inflexible and meant the monies had to be paid into client account. The Applicant submitted that it was incumbent on the Respondent and Ms Marziano to ensure that they had accounting software in place that was suitable to the demands of their particular practice. If the practice had software which did not do what the Firm needed it to do and monies had to be paid into client account as soon as the monies had cleared, the clients should have been billed and the monies transferred to office account.

14.33 Mr Bullock submitted that there could be no clear certainty that the monies transferred were for costs and within the level of office monies held in client account as bills were not raised, files were not examined and there was no record kept of the amounts being moved. In interview the Respondent had stated that most of the fees were fixed fees and had accepted that he had not undertaken any sort of reconciliation work to ascertain how much client money was being held in client account when making the transfers stating that he had taken "an educated guess". Even if the Respondent could be confident that he was dealing with his cases on the basis of agreed fees he was not necessarily going to know how Ms Marziano was dealing with her clients.

14.34 The Respondent's position had been that the monies were due to the Firm as they were agreed fees, he had accepted that he had breached the SAR in relation to the making of round sum transfers and the use of the Suspense Ledger. He had accepted that round sum transfers were principally used to fund his gambling but that the transfers were made in the genuine and honest belief that the monies belonged to the Firm. The Respondent had control of the Firm's bank account as he was the COFA. The Respondent had set out the tragic consequences of the Intervention for him. This was no surprise as Intervention had a devastating impact on any solicitor whose practice was terminated in this way.

14.35 Even if everything the Respondent said was accepted and it was accepted that he genuinely thought that the monies held in client account were the Firm's because the clients paid agreed fees on the vast majority of matters, the Respondent had clearly displayed a very serious disregard for the way solicitors should do business when dealing with client money. The Respondent had not billed and he had not checked he was entitled to take the money. A solicitor who took client money on the basis of a guess that he was entitled to the money was not adhering to the standards of his own profession and was not in the words of Hoodless displaying moral soundness, rectitude and steady adherence to an ethical code. A solicitor knows that client account is sacrosanct because client monies belong to the client and not the solicitor. If a solicitor is going to take money out of client account the solicitor needed to be

very careful and satisfy himself that he was entitled to take the money, not merely guess that he was entitled to take it. The Respondent had failed to acknowledge the sacrosanct nature of client money and had failed to make any checks. He had clearly not adhered to the required standards of the profession.

The Respondent's Case

14.36 The Respondent admitted allegation 1.1 apart from the alleged breach of Principle 2. The Respondent admitted allegation 1.2.

14.37 Prior to the issue of these proceedings the Respondent had stated the Firm had electronic and computerised systems in place and that monthly reconciliations were carried out, checked by the Firm's accountants. The Respondent genuinely and honestly believed that the monies paid to the Firm were agreed fees. Transfers were being made from the client account to the office account as he held the belief that the Firm was entitled to the money. The funds were then either used to pay office expenditures or transferred to his own personal account. Monies were then transferred back to the client account for an invoice to be raised to follow accounting rules. The Respondent accepted that this was in breach of the SAR. He also accepted that the SAR had been breached in respect to round sum transfers and the use of a Suspense Ledger. However, the Respondent stated that no client was at risk and that a shortage of £650.00 could not amount to a risk to clients. He accepts that the funds transferred to his personal account were primarily used to fund gambling websites.

14.38 In his witness statement dated 23 April 2018 the Respondent explained that the Firm had a Legal Aid contract from the Legal Service Commission and the legally aided clients' bills were paid directly into the office account. The privately paying clients were mostly illegal immigrants who needed to regularise their status in the UK. Nearly all the immigration clients wanted a fixed fee. Those matters that did not start as fixed fee cases almost always ended up as fixed fee case as immigration cases took a long time to be considered by the Home Office and fees charged at an hourly rate were not economical for the clients. The fees the clients paid to the Firm were for the Firm to do their cases and it was the Respondent's honest belief that it was money that belonged to the Firm.

14.39 The Respondent accepted that the SAR were not complied with as they should have been but he did not accept that he had been dishonest as he honestly held the belief that the funds he was using were the Firm's money, otherwise he would not have used them. The reason that the Firm did not transfer the funds straight to the office account was that the Firm wanted to see how much work would need to be done for a case and would transfer it after the case had concluded. The Respondent accepted that round sum transfers were allocated to the Suspense Ledger as he did not always have time to post transactions on specific client ledgers. He confirmed that the majority of the money in the client account represented agreed fees.

14.40 The Respondent accepted that the running of a suspense account was wrong but that the Accountants' had previously advised that if he could not balance the funds then he should put money in a suspense account instead of billing it and putting in client account. The FIO had listed cases in the allegations stating that from the files these matters were not agreed fees. The Respondent re-iterated that some clients started out

not opting for agreed fees but ended up requesting fees to be agreed because of the rising costs. The Respondent's evidence was that a lot of the Firm's clients would not be able to pay the fees in the long run. Clients paid the Firm to do their cases and the Respondent understood the monies to be the Firm's money. With the privately paying (rather than legally aided clients) the clients would come to the Firm and ask if the Firm could help them and would say what they could afford or the Firm would specify the fee and the clients would pay the sum or pay as they went.

14.41 The Firm's client care letter referred to agreed fees and also hourly fees, as it was more of a general client care letter. The letter was a template letter, it should be altered for the individual clients but this did not always happen. Certain paragraphs in the examples before the Tribunal, but not all, were changed and this could lead to inconsistencies in the letter. It was time consuming to change things and people were lazy. That was why it was not always changed. Clients would change their minds half way through and if the Firm had not done as much work as monies held, the Firm would give them some monies back. That was why an hourly rate was also included.

14.42 The use of the Suspense Ledger allowed the Respondent to know how much he had transferred out and therefore how much he should have billed. Without the Suspense Ledger the accounts would not have balanced. Every amount on the Suspense Ledger could be correlated with the bank statement. If what was on the Suspense Ledger was not on the bank statement they would not have balanced. If it did not reconcile the system would not allow the Respondent to move to the next month. The Respondent denied that he had used the Suspense Ledger so that the books appeared to balance to avoid Ms Marziano asking questions when she looked at the reconciliations.

14.43 The Firm's accounting system was Partnership Suite and this required monies to be paid into client account and not office account. There was evidence from the systems provider by way of an email to the Respondent to support this assertion. The FIO had said that this was wrong and that monies had to be paid into office account. The Respondent had contacted the SRA helpline who had said the FIO was wrong and that the Firm had fourteen days to transfer the monies from client account to office account.

14.44 The Respondent had not raised bills, and he accepted that they should have been raised. At the time they were not done for various reasons. The Respondent did the best for his clients. If they came in and did not have the money but needed his advice he would take the case. The Firm had incurred significant costs in 2011 at the end of its lease. The Respondent was busy and whilst he knew that costs should not just be transferred out he recorded them in the Suspense Ledger to be dealt with at a later date. Everything fell on the Respondent, the Firm did not make enough money. The Respondent had to manage the Firm and represent his clients. Entering things on the system was time consuming. He put the client first and acted in their best interests. Once he started not billing he thought he could do it "next week".

14.45 The Respondent explained that 80% of the Firm's work was legally aided. The rest he knew how much to bill, the Firm was only a small Firm and he knew what was coming in and going out. In 99% instances he knew how much of the monies in client account were due to the Firm without checking. Educated guess was the wrong choice of words.

14.46 The Respondent denied that he had lacked moral rectitude or a steady adherence to an ethical code. He had not fallen below the standards expected of a solicitor. Lack of integrity went beyond breach of professional duties. His actions did not reach the level of lacking integrity. Looking back he had let his clients down. In looking at the references the clients had provided the Respondent was a bit emotional as to how highly his clients thought of him. The Respondent did not accept that client money had gone missing.

14.47 Somewhere down the line the gambling started, the Respondent did not know why. In the middle of the night it was a way out of the real world, into another world. Come the morning he would put on his suit and go and do his job, not one client had complained that he did not do his job properly for them. The Respondent had not thought that he had a problem with gambling or drinking at the time but now recognised that he had.

The Tribunal's Findings - Allegation 1.1

14.48 The Respondent had partially admitted this allegation.

14.49 Rule 1.2 of the SAR required the Respondent to comply with the Principles set out in the Handbook, and the outcomes in Chapter 7 of the SRA Code of Conduct in relation to the effective financial management of the Firm. In particular he was required to keep other people's money separate from money belonging to him or the Firm and to use each client's money for that client's matters only.

14.50 The Respondent's own case was that monies belonging to the Firm had been kept in client account. He had not kept clients monies separate to the monies belonging to the Firm. There was clear evidence that on at least three dates the balance in client account was lower than the amount of client money that the Firm should have held on those dates. The irresistible inference was that the Respondent had not used each client's money for that client's matter only.

14.51 Under Rule 17.7 of the SAR the Respondent was required to deliver a bill or other written notification of costs before transferring monies out of client account and round sum withdrawals on account of costs were a breach of the rules. The Respondent had admitted not delivering bills or written notification before making the transfers, many of which were round sum transfers. Rule 20 of the SAR provided that client money may only be withdrawn from a client account when it was properly required for a payment to or on behalf of the client (or other person on whose behalf the money is being held). The Respondent had admitted this allegation. He had withdrawn monies from client account without delivering bills and having made an educated guess as to what monies were owed to the Firm.

14.52 The Tribunal accepted all of the Respondent's admissions in relation to the SAR. In not ensuring that client money was safe and used only for each client's matter the Respondent had not acted in the best interests of each client and he had not behaved in a way that maintained the trust that the public placed in him and in the provision of legal services. Nor had he run his business or carried out his role (both as a partner and as COFA) in the business effectively and in accordance with proper governance and sound financial and risk management principles. He had not protected client

money and assets. The Respondent had admitted these allegations and the Tribunal accepted the admissions.

14.53 The Respondent had denied that he had lacked integrity. For the reasons set out below in paragraphs 15.23 to 15.25, the Tribunal found that it had been substantiated beyond reasonable doubt that the Respondent had acted dishonestly. Clearly, it therefore necessarily followed that he had also lacked integrity.

14.54 Allegation 1.1 had been admitted in part and the Tribunal found it proved in full beyond reasonable doubt.

The Tribunal's Findings - Allegation 1.2

14.55 The Respondent had admitted the allegation. Rule 29.25 of the SAR provided that Suspense Ledger accounts may be used only when the solicitor could justify their use; for instance, for temporary use on receipt of an unidentified payment or if time is needed to establish the nature of the payment or the identity of the client. The Respondent had used a Suspense Ledger to record transfers instead of raising bills. This was not a proper use of a Suspense Ledger. In not complying with the SAR the Respondent had not run his business or carried out his role in the business effectively and in accordance with proper governance and sound financial and risk management principles and he had not protected client money and assets. Allegation 1.2 was admitted and the Tribunal found it proved in full beyond reasonable doubt.

15. **Allegation 2 - Dishonesty in respect of Allegation 1.1**

The Applicant's Case

15.1 In the Rule 5 Statement the Applicant had alleged that the Respondent's actions in respect of allegation 1.1 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.

15.2 In the Supreme Court case of Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67, it was said by Lord Hughes (with whom all the other Justices who heard the case agreed) 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."

15.3 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."

15.4 The Applicant invited the Tribunal to apply the test in Ivey. The question for the Tribunal was whether the Respondent was objectively dishonest by the standards of ordinary decent people having regard to his state of knowledge and belief as to the facts at the relevant time.

15.5 In misusing clients monies by making unallocated round sum transfers (without the client's authority) from client to office account when the Respondent could not be sure that the money was properly due to the Firm and in doing so misappropriating client's money in the minimum sum of £650 the Respondent acted dishonestly. This conduct was dishonest by the standards of ordinary decent people.

15.6 At the time of the matters giving rise to the allegation of dishonesty the Respondent was an experienced solicitor with approximately 10 years post qualification experience, and who had practised as a partner since 2005. It was inconceivable that a solicitor of such experience would not have understood the nature of his professional and fiduciary obligations towards client money and the sacrosanct nature of the client account. The Respondent admitted that some of the monies in client account were client monies and were not all office monies.

15.7 When the Respondent was asked how he calculated what could be transferred, he said he made "an educated guess". Despite this the Respondent engaged in an extended systematic course of conduct which was concealed, from July 2011 to at least May 2016, of transferring monies from client account to the office account and then on to his personal account to funds his gambling habit when he could not be sure the monies were made up of only office monies. In doing so the Respondent misappropriated the minimum sum of £650.00.

15.8 The FIO accepted in evidence that one of the client care letters before the Tribunal might be consistent with an agreed fee. However, the information it contained as to the way in which costs were calculated was inconsistent with an agreed fee, as was the reference to a charging rate which suggested the matter was being charged on a time spent basis.

15.9 The Respondent had explained that he honestly believed that the monies transferred from client account to office account were office monies. The FIO had reviewed fifteen client files and none of these were agreed fees. In light of that the Tribunal

might question whether the Respondent did genuinely believe that the monies withdrawn from client account were in truth office monies. The Respondent was not the only fee earner in the Firm and he could not know what others were doing on their files. He had no certainty that he was taking money that belonged to the Firm and the Tribunal may consider this dishonest. Solicitors do not take money from client account because they think that they can, they transfer money from client account when they are sure they can.

15.10 The Respondent had concealed what he was doing, he had not left any audit trail. He was not billing, an explanation that might possibly stand scrutiny if it was accepted that this was a long winded process and he was busy. He was also not recording the transfers despite large sums of money being moved. He did not have a record of how much had gone and exactly where it went. The obvious reason was that he did not want anyone to know what he had done. Mr Bullock submitted that no villain leaves a paper trail.

15.11 Even if the Respondent had experienced a busy time there was no reason why he could not have kept a handwritten note as to the movement of monies with a view to writing it up afterwards. The inference the Tribunal might draw reasonably from the absence of a paper trail was that the Respondent was concealing what was going on.

15.12 Ms Marziano was the Respondent's life and business partner. He did not want her to know about his gambling problem. The focus had been on the Respondent's dishonesty in relation to clients, however Mr Bullock highlighted another aspect of dishonesty in that the Respondent was in a partnership and was it honest for him to treat these monies as if they were his own? Even if the Tribunal found that the Respondent had a genuine belief that the monies were office money and the Tribunal concluded that this was sufficient to acquit him of dishonesty this would not mean that he could not lack integrity.

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

15.13 The Respondent had control of the accounts and knew how much funds were in the client account as the funds were from privately paying clients and the Firm's main source of income was from legally aided work, which was paid directly into the office account. In relation to the sum of £650.00, the allegation was that the Respondent was not sure that the money was properly due to the Firm but equally the FIO could not say it was not the Firm's money. It was always the Respondent's genuine belief that this money was due to the Firm. The Firm was a niche Immigration Firm and what clients paid the Firm was for the work that the Firm carried out.

15.14 The Respondent was asked about how he calculated what could be transferred and replied it was "an educated guess". What the Respondent meant was because all fees came to him for banking he would know how much of the funds were fees due to the Firm. An honest person would not think what the Respondent did was dishonest as the money paid by the clients to the Firm were fees for the work that the Firm had been instructed to do.

15.15 The Firm was a small high street firm that specialised in Immigration Law and unlike other firms, for example, that dealt with conveyancing, trusts and probate, did not hold large sums of clients' funds. On average money held in the Firm's client account was around £18,000.00 per month. The fees the Firm charged its clients were mainly agreed fees as with immigration cases, this type of clients does not have much money and often they have no status in the UK.

15.16 The Respondent genuinely and honestly held a belief that the monies were paid to the Firm as agreed fees for the work to be done by the Firm or alternatively for the works already done by the Firm, and that the equitable interest of the monies was also with the Firm. The round sum transfers were made in the genuine and honest held belief that the funds belonged to the Firm.

15.17 Whilst the Respondent accepted and took full responsibility for the breaches of the SAR, he submitted that no clients were put at risk because of this. No client lost any money in the period between 2011 to the date of the intervention. The clients paid their fees and their work was carried out to the highest standard. The Firm had a high rate of success with applications and appeals.

15.18 Mr Esprit said that when the SRA referred to the lack of audit trail being the hallmark of villains one had to be carefully not to get carried away with the rhetoric. By having the Suspense Ledger and using it as he did the Respondent breached the SAR but the existence of this Ledger was evidence that he did not seek to conceal the transfers. There was no evidence of deliberate dishonest concealment. There was a significant difference between concluding that the Respondent fell short of the standards expected of a solicitor in relation to the SAR and a finding that he was acting dishonestly.

15.19 The Respondent explained that he had transferred the monies back from his own account to the office account to the client account in order to make the system work when he billed the matters. The Firm also wanted to know how much the case had cost it to run. However, the monies were for agreed fees and were the Firm's monies. The Respondent had had to transfer the monies back as when he raised the bill it needed to tally on the system with the date and the bank statement. It would show when he had raised the bill and he could not make a correcting entry to avoid making the transfers. He did not know why this was the case; it was how the system worked. The fact that he transferred the monies back did not mean that at any point he did not think that the money did not belong to him/the Firm. He had never concealed the payments.

15.20 The breaches of the SAR were serious and the Respondent did not make excuses but the payments could be traced. The Respondent was aware of the source of the fees and the basis on which they were paid, he knew the cases and could identify the fees from clients. The Respondent had let himself and his clients down but he had not been dishonest.

15.21 The Respondent accepted that he had not told Mrs Marziano what was going on. He said that this was because sometimes he found it hardest to tell the people closest to him about his problems.

15.22 Mr Esprit referred to the case of Fish v GMC [2012] EWHC 1269 and the fact that if the Tribunal was to find dishonesty it needed to be sure that the Applicant had established its case on solid grounds. He urged the Tribunal to take into account all of the evidence when considering whether the Respondent was dishonest and/or lacked integrity as opposed to be being somebody within a small Firm, who was working with two other fee earners, who was trying to do his best for clients and who did not comply with the SAR. He had genuinely believed the monies were the Firm's money not the clients' money. In terms of the Respondent's belief that the monies were the Firm's this was relevant when considering the test in Ivey. If the Tribunal concluded that the Respondent did believe that he was entitled to the monies this would be a relevant factor in determining dishonesty.

The Tribunal's Findings

15.23 The Tribunal applied the test for dishonesty set out in the judgment of Lord Hughes in Ivey. The Tribunal found that the Respondent knew that the SAR prohibited him from doing what he was doing both in terms of taking monies for costs without delivering a bill or other written notification and by recording the transfers on a Suspense Ledger. The Respondent knew that the fees were not all agreed fees, he accepted that the fees could be varied up and down and that not all matters started as agreed fees. He was an equity partner and he was the COFA. He must have known the importance of the SAR and the sacrosanct nature of client monies. The Respondent knew that he had made the transfers both form client to office to his own account and back. He said he transferred the monies back so that they could be properly billed.

15.24 The Respondent had described the basis of the transfers as an educated guess in interview and in evidence had said what he meant was that because all fees came to him for banking he would know how much of the funds held for clients were fees due to the Firm. He knew that he had not made any checks as to what sums were actually due to the Firm. The Respondent knew that he had used the money as if it was his own.

15.25 The question for the Tribunal, having established the Respondent's actual state of mind as to knowledge or belief, considered whether his conduct was honest or dishonest by the (objective) standards of ordinary decent people. The Tribunal was sure that ordinary decent people would find a solicitor who took money in the circumstances that the Respondent had and had recorded transfers in a suspense account and who had not been absolutely sure that the money was his was dishonest. Allegation 2 was proved beyond reasonable doubt.

16. **Allegation 1.4 - The Respondent failed to maintain proper accounting records and in so doing breached Rules 1.2 (a), (c), and (f) and Rules 29.1, 29.4, 29.9 and 29.12 of the SAR.**

Allegation 1.5 - The Respondent failed to have proper systems and processes in place for the firm's accounts and practice management and in doing breached Rule 1.2 (e) and Rules 17.1, 17.2, 17.3 and 17.5 of the SAR.

The Applicant's Case

16.1 The Respondent failed to have proper accounting records and systems and processes in place so as to prevent the conduct detailed above.

16.2 The client reconciliation as at 31 May 2016, produced to the FIO at the commencement of the investigation on 18 July 2016, did not include a figure for client liabilities. It did include a comparison of the bank statement balance with the cashbook balance at 31 May 2016. Copies of client account reconciliations sent to the FIO prior to the interview on 22 February 2017 were two way reconciliations, comparing the cash book with the bank balance. There was no mention of the client ledger balance or of client liabilities.

16.3 The FIO stated: "This was something that I'd noticed when I first visited" and asked the Respondent, "is there any reason why client liabilities are still not being presented in the client account reconciliations?" The Respondent stated; "That's always, always been done. That's how the system reconciled the accounts ever - right ever since from the start that's been done and if we were doing anything wrong, the accountants never mentioned that" The Respondent was asked if he was "aware of the requirements in the rules under 29.12, to undertake three way reconciliations, which include the client liabilities?"

He replied:

> "Right from the start when we bought the package in 2005 ....., we were told this is the way to, to do it and we had a weeks training."

16.4 The FIO again referred to the issue later in the interview. He stated "just going back to first visits when of course um I wanted to look through the client reconciliation based on the extraction date, ...I noticed straight away that there was no mention of client liabilities or a client matter listing. .....and I discussed that with you, and you accessed your computer, exported a list of the client matter balances from your systems. .....and gave them to me, and that is when I first discovered that there were client debit balances. .....yet when I asked for client reconciliations recently, the ones provided yet again didn't include a list of client balances or the total of client liabilities. Why weren't steps taken to correct that after my first visit?" The Respondent said that "This is the first time you mentioned it to me." The Respondent confirmed in the same interview that he presented the reconciliations to Ms Marziano to look at.

16.5 The FIO identified a number of issues:

- The client matter list requested by the FIO was incomplete because it did not include any matters with a nil or debit balance;
- Ledgers were not being correctly maintained to show the amount of client monies being held for each client;
- Procedures for identifying client money and for identifying money which should not be in client account and transferring it without delay were not in place;

- Systems for the transfer of costs from client account to office account in compliance with the Accounts Rules and systems to pay fixed fees directly into office account were not in place;

- Clear procedures for ensuring that all withdrawals from client account were properly authorised, including appropriate safeguards and controls for withdrawals from client account were not in place; and

- Systems for checking the balances on client account to ensure that no debit balances occurred were not in place.

16.6 A payment for fixed fees (agreed fees) must be paid into office account. The Respondent confirmed that the majority of funds held in the client account were agreed fees (i.e. office money). He explained that the Firm's software used by the Firm did not allow agreed fees received from a client to be credited directly to the 'office' side of a client ledger. Funds from a client could only be credited to the client side of a 'client' ledger, and transferred to the 'office' side of the ledger once an electronic bill had been raised. An email from the Respondent's software provider supported this. The procedure was in contravention of the SAR.

16.7 Because of the identified issues the FIO was unable to determine the true position of whether there was a short fall in client account as at 31 May 2016. The FIO was unable to calculate the full position as to whether there was sufficient funds held in client bank account to meet client liabilities as at that date. There was a debit balance on the Suspense Ledger as of this date in the sum of £17.065.80 and this would ordinarily have given rise to a shortage. Due to the inadequacies in the books of account in that some of the transactions on the Suspense Ledger could have actually related to office money (agreed fees) a true cash shortage could not be precisely quantified. The debit balance on the Suspense Ledger was not therefore recorded as a shortage. The overall debit balance did not remain consistent and changed overtime. Round sum transfers in and out were recorded on the ledgers.

16.8 Agreed fees by their nature could not be varied up or down. The Respondent's evidence was that some clients started on hourly rates and transferred to agreed fees and that fees were not transferred as sometimes the work done was not completed due to changed instructions and the clients were refunded. Mr Bullock submitted that the Respondent's own evidence meant that Rule 17.5 had been breached.

16.9 It followed that proper books of account were not maintained and that there was a failure to have proper systems and processes in place for the financial management of the Firm. Such conduct was in breach of Rules 1.2 (a), (c), (e) and (f) and Rules 29.1, 29.4, 29.9 and 29.12 and Rules 17.1, 17.2, 17.3 and 17.5 of the SAR.

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

16.10 The Respondent admitted allegation 1.4 but did not admit allegation 1.5. However, in relation to Rule 17.1 and the fact that office money had been in client account the Respondent in evidence accepted that office money was not paid out of client account within 14 days. Mr Esprit confirmed to the Tribunal that the Respondent's evidence on this point was an acceptance of a breach of Rule 17.1.

16.11 The Respondent did not accept that the Firm did not have a proper accounts and practice management system in place. The system the Firm had was 'The Partnership Suite' which was bought back in May 2005, and complied with the SRA regulations. The Firm's Accountants never questioned the system when they came in to do the annual accounts. In fact, the SRA attended the office in June 2011 and checked the system, including the client and office reconciliation ledgers.

16.12 The Applicant stated that the bank reconciliations were materially deficient because they did not include a figure for client liabilities; that was not correct because the system did provide a figure. In June 2011, an SRA Investigation Officer investigated the use of a suspense account. He came and spent two days checking the Firm's systems, including the monthly reconciliations and the suspense account. He requested that the suspense account be brought back to nil, which was done, but at no time did he make a report that the Firm did not have a proper system and processes in place for the Firm's accounts and practice management. The system was checked by the SRA in 2011 and by the Firm's Accountants every year for their annual report to the SRA. If adequate accounting systems were not in place it should have been flagged up by both the SRA and the Firm's Accountants back in 2011.

16.13 The system was questioned by this FIO who said that the Firm should undertake a three way reconciliation. The Respondent confirmed that three way reconciliations could be done on the systems but no one had ever asked him to produce them, not even the SRA. Copies of the monthly reconciliations were sent to the SRA with the Accountants' Reports on a yearly basis since 2005. No issue was pointed out to the Firm in this regard throughout the period of twelve years. All monies received, be it into client account or the office account, were recorded and provided accurate and reliable client ledgers. There was a clear reason why the monies were paid direct into client account.

<u>The Tribunal's Findings - Allegation 1.4</u>

16.14 The Respondent had admitted the allegation. The evidence was overwhelming that he had failed to keep proper accounting records. He had not kept other people's money separate from money belonging to him or the Firm; he had not used each client's money for that client's matters only; and he had not kept proper accounting records to show accurately the position with regard to the money held for each client and trust.

16.15 Further he was required to keep accounting records properly written up to show his dealings with client money received, held or paid by him or the Firm, including client money held outside a client account under rule 15.1(a) or rule 16.1(d); and any office money relating to any client or trust matter. All dealings with office money relating to any client matter, or to any trust matter, had to be appropriately recorded in an office cash account and on the office side of the appropriate client ledger account and the current balance on each client ledger account must always be shown, or be readily ascertainable, from the records kept in accordance with rule 29.2 and 29.3 of the SAR. He had not complied with any of these requirements.

16.16 Some reconciliations had been undertaken. Rule 29.12 required that at least every five weeks the Firm had to compare the balance on the client cash accounts(s) with the balances shown on the statements and passbooks (after allowing for all unpresented

items) of all general client accounts and separate designated client accounts, and of any account which was not a client account but in which it held client money under Rule 15.1(a) or Rule 16.1(d), and any client money held by it in cash; and as at the same date prepare a listing of all the balances shown by the client ledger accounts of the liabilities to clients (and other persons, and trusts) and compare the total of those balances with the balance on the client cash account; and also prepare a reconciliation statement; this statement must show the cause of the difference, if any, shown by each of the above comparisons. The reconciliations that had been done did not include a figure for client liabilities. It did include a comparison of the bank statement balance with the cashbook balance at 31 May 2016. Copies of client account reconciliations sent to the FIO prior to the interview on 22 February 2017 were two way reconciliations, comparing the cash book with the bank balance. There was no mention of the client ledger balance or of client liabilities.

16.17 The Respondent had admitted allegation 1.4 in full and the Tribunal found the allegation proved in full, beyond reasonable doubt.

The Tribunal's Findings - Allegation 1.5

16.18 At the outset of the hearing the Respondent had denied allegation 1.5 in full. During his evidence he made some partial admissions in relation to this allegation.

16.19 The underlying basis of the allegation was that the Respondent failed to have proper systems and processes in place for the Firm's accounts and practice management. The Tribunal noted that the Firm did have Partnership Suite in place and took that into account when considering the alleged breach of Rule 1.2 (e) of the SAR as set out below. However, in the Tribunal's view having proper systems and processes in place for the Firm's accounts and practice management was far wider than having an accounting system in place. Additionally, proper systems and process required that accounting system to be used properly for all accounting transactions.

16.20 Rule 1.2 (e) of the SAR required that the Firm establish and maintain proper accounting systems and proper internal controls over those systems, to ensure compliance with the rules. The Tribunal did not find that the Firm had failed to establish proper accounting systems. The Firm had Partnership Suite in place. However, the Tribunal did find that the Firm did not have proper internal controls over those systems. The Respondent's own evidence was that because it was time consuming he had not put things into Partnership Suite. To that extent the Respondent had not complied with Rule 1.2 (e) of the SAR.

16.21 The Respondent accepted that he had breached Rule 17.1 of the SAR. He had paid monies that he said were for his fees into client account and he had not transferred them out of client account within fourteen days. This was a clear breach of Rule 17.1.

16.22 There was no evidence that the Respondent had complied with Rule 17.2 which required that if he properly required payment for his fees from money held for a client or trust in a client account, he must first give or send a bill of costs, or other written notification of the costs incurred, to the client or the paying party. Likewise there was no evidence that having complied with Rule 17.2 above, and because the money earmarked for costs then became becomes office money that it had been transferred

out of the client account within fourteen days as required by Rule 17.3. Bills/written notification had not been delivered and monies that the Respondent said were earmarked for costs had not been paid out of client account within fourteen days. Rules 17.2 and 17.3 of the SAR had been breached.

16.23 Rule 17.5 required that a payment for an agreed fee be paid into an office account. The Rule defined an "agreed fee" as one that was fixed – not a fee that could be varied upwards, nor a fee that was dependent on the transaction being completed. An agreed fee must be evidenced in writing. On the Respondent's own case the fee could be varied upwards or downwards and if the transaction was not completed the fee might be refunded in part so was dependent on the transaction being completed. The Tribunal could not be sure that what the Respondent described as "agreed fees" were actually agreed fees as defined by Rule 17.5. Given this the Tribunal did not find that the Respondent had breached Rule 17.5 of the SAR.

16.24 Allegation 1.5 was proved in part to the requisite standard of beyond reasonable doubt. The Respondent had breached Rule 1.2 (e) in so far as it related to proper internal controls over the accounting systems and Rules 17.1, 17.2 and 17.3 of the SAR. He had not breached Rule 1.2(e) of the SAR in so far as it related to establishing and maintain proper accounting systems and nor had he breached Rule 17.5 of the SAR.

Previous Disciplinary Matters

17. None.

Mitigation

18. The Respondent and Ms Marziano started the Firm in April 2005 together with a third partner, who left the partnership in 2009. The Firm were a niche Immigration firm and about 80% of its income came from legally aided clients.

19. The Respondent stated that it was difficult running a small high street firm when the main source of income was from Legal Aid and when legal aid funding on cases was being reduced on a yearly basis. The stress and pressure of the business had taken its toll and he began drinking heavily, albeit in secret, to the point of being an alcoholic. He then began gambling online and he did not really know why.

20. The Respondent confirmed that he had control of the Firm's bank accounts, being the COFA and that Ms Marziano, who was also his life partner, did not operate these accounts. He stated that he abused the trust she had placed in him. Given their relationship as both business and life partners, there was no reason for Ms Marziano not to trust the Respondent. She had complete trust in him and he had abused that trust. Had Ms Marziano not been his life partner, she would have scrutinised the accounts and brought the matter to the SRA herself. She had left the running of the Firm to him.

21. Following the intervention into the Firm, the Respondent had lost his business, his livelihood due to the suspension of his Practising Certificate (since reinstated subject to conditions) and his relationship with Ms Marziano. These were the consequences

of the situation that the Respondent had created for himself. He had sought help from his GP, been referred to counselling and had, through a mentor, been introduced to Law Care, who encouraged him to attend meetings at Alcoholic Anonymous and Gamblers Anonymous to address his problems.

22. The Respondent had been working at a firm of solicitors since 18 October 2017 in the Immigration Department. His Practising Certificates had restrictions placed on it that he may not act as a manager or owner of an authorised body, may not act as a COLP, may not hold or receive client money or act as a signatory to any client or office account, or have the power to authorise transfer from client or office account. His employer was satisfied with his work since he started and had provided a supporting letter to the Tribunal.

23. The Respondent had produced a number of references from clients. These provided a snapshot of what the Respondent was capable of in terms of client work. His clients were vulnerable and relied on his experience.

24. The Respondent did not make excuses for his conduct but he had taken steps to address what were illnesses. At the time of the misconduct he found it difficult to accept that they were illnesses. The Respondent recognised that he had fallen so far short of what was expected of him. He had let himself down.

25. Mr Esprit referred the Tribunal to the judgments of the Divisional Court in the cases of Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin) and Solicitors Regulation Authority v Imran [2015] EWHC 2572. In Sharma it was held that save in exceptional circumstances a finding of dishonesty would lead to strike off but that there would be a small residual category where striking off would be disproportionate. In deciding whether or not a particular case fell into that category, relevant factors included the nature, scope and extent of the dishonesty itself, whether it was momentary or over a lengthy period of time; whether it was a benefit to the solicitor and whether it had an adverse effect on others. The Respondent had been in a position of trust and the transfers were an ongoing course of conduct. However, his actions were different to the forgery of a document that amounted to a criminal offence. In Imran it was held that the nature and scope of the dishonesty in that case did not require the Respondent to be struck off in order to maintain the reputation of the profession, as the case fell within the small residual category where, notwithstanding a finding of dishonesty, striking off would be disproportionate. The Tribunal needed to step back and look at the Respondent's overall conduct and the effect on the public. The Respondent had been ill and the dishonesty found was linked to that. The public might empathise with him.

26. The Respondent had been under stress due to running the Firm. His gambling was a way of transporting himself to another place, it was a rather desperate and unsuccessful attempt to try and maintain a busy practice and try and prevent himself going under, under cumulative pressure. This was atypical behaviour on his behalf. He was not making personal gain. His misconduct had not had an adverse effect on specific individuals. There was no evidence his behaviour had had a negative impact on his clients. His relationship with his previous life partner had ended.

27. Mr Esprit submitted that this was a case which fell within the rare category of exceptional circumstances. His clients considered him highly and the Respondent hoped one day to return to practice or if he was not struck off to return to work under a Restriction Order. The Tribunal should focus on the good work that he had hitherto provided to people in need to whom he was devoted when considering the question of public confidence.

28. Finally the Respondent wished to apologise to the Tribunal for the case been brought by the SRA. He accepted that breaching the SAR was wrong and apologised to the Tribunal.

Sanction

29. The Tribunal referred to its Guidance Note on Sanctions (Fifth Edition) when considering sanction

30. The Tribunal assessed the seriousness of the misconduct. The Tribunal assessed the Respondent as totally culpable for the misconduct. His motivation had been to fund his gambling habit. His actions were planned, the transfers concerned were frequent. He transferred monies to and from the client and office accounts; made transfers to his personal account and used a Suspense Ledger in the client account so that the accounts appeared to reconcile. He was in a position of trust. Not only did he hold client money but he was the Firm's COFA. He was an experienced solicitor who was a partner in his own Firm. He had direct control of and responsibility for the circumstances giving rise to the misconduct. There was harm caused by the misconduct. However, the Respondent did not deliberately mislead the regulator.

31. The Tribunal considered that the Respondent's misconduct directly harmed the reputation of the profession and the public. He had been expected to keep client money safe and had not done so. Although there was no evidence of significant direct harm to any individual client there had been a shortage on client account and the clients would not have expected the monies that they thought were safely in a solicitor's client account to be used to fund his out of work activities. The harm was not intended but was reasonably foreseeable.

32. The misconduct was deliberate, calculated and repeated and continued over a significant period of time. The Respondent knew or ought reasonably to have known that the conduct complained of was in material breach of his obligation to protect the public and the reputation of the profession. He had described his clients as needing his help and assistance because of their immigration status and to this extent they were vulnerable. These were all significant aggravating factors. The Respondent had put most of the money back and had acknowledged his addictions. These were mitigating factors but did not outweigh the aggravating factors. The Tribunal were not convinced that the Respondent had genuine insight. The seriousness of the misconduct was at the highest level.

33. The Respondent had been found to have been dishonest. In the judgment of the Divisional Court in Sharma it had been held by Laws LJ, with the concurrence of Coulson J., that "save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll….that is the normal and necessary penalty in

cases of dishonesty... There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances… In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary… or over a lengthy period of time …whether it was a benefit to the solicitor, and whether it had an adverse effect on others." For the reasons set out below, the Tribunal were of the view that this case was very far removed from the residual category referred to by Laws LJ in Sharma and it therefore followed that in accordance with the principles in the judgment in Sharma, the Respondent should be struck off the Roll.

34. The Tribunal considered whether there were any exceptional circumstances that meant that the sanction should be reduced. The Tribunal considered the nature, scope and extent of the misconduct, whether it was momentary or over a lengthy period of time; whether it was a benefit to the solicitor and whether it had an adverse effect on others. The misconduct involved substantial sums over a considerable period of time (July 2011 until May 2015) and the transfers were made frequently. The misconduct was serious and was repetitive. There were times when the amount held in client account was virtually zero and less than the amount of client monies that should have been held at the time. The Respondent had guessed at the amounts he could take and had taken a cavalier approach to the SAR and client money. He had benefited in that he was able to access monies to fund his gambling habit. He used the money as his own and was able to access funds with no notice and without exceeding his overdraft limit. The SAR were stringent and prescriptive to avoid this sort of practical problem and whilst no identifiable client lost money there was an adverse effect on the reputation of the profession. The Respondent had breached the position of trust he was in. The Respondent's actions had had a devastating effect on his partner (in life and business) whom he had deceived. There were no exceptional circumstances.

35. The Tribunal carefully read all of the references that the Respondent had submitted and the letter from his current employer and the Centre for Counselling. It took into account the personal mitigation. The Respondent had not provided detailed medical evidence that the misconduct arose at a time when he was affected by physical or mental ill-health that affected his ability to conduct himself to the standards of a reasonable solicitor. He had had issues with gambling and drinking but his own evidence was that come the morning he would put on his suit and go to work. The issues were with the Firm's finances and not the advice provided to clients. The Respondent appeared to have given his clients a good standard of service despite his personal issues. There was no personal mitigation that served to reduce sanction and the Tribunal determined that the appropriate sanction was for the Respondent's name to be struck off the Roll of Solicitors.

Costs

36. Mr Bullock applied for his costs in the sum of £17,312.31 as set out in a costs schedule dated 18 April 2018.

37. Mr Esprit accepted that as a principle the Respondent should pay costs but he asked the Tribunal to look at the quantum and take into account the Respondent's means and the fact two allegations had been found not proved when assessing the amount of costs he should pay. The Respondent was reliant on selling his house in order to meet

the costs of the Intervention and the cost of these proceedings. In the circumstances he would ask for time to pay to allow him to realise the asset.

38. The Tribunal had heard the matter and decided to assess costs. The Applicant had proved a number of allegations against the Respondent. The partial allegations that had not been found proved did not add significantly to the costs of preparing for or attending the hearing. There did not need to be a reduction in the costs awarded to reflect the fact that partial allegations that had not been found. The Tribunal considered the costs schedule carefully and reduced it by the amount claimed for publication of the decision in respect of the proceedings. The Tribunal noted that the Applicant's costs at the date of issue had already been halved. The Tribunal assessed the costs of and incidental to this application and enquiry in the sum of £17,290.65.

39. The Tribunal then considered whether or not this sum should be reduced due to the Respondent's means. The Tribunal considered his personal financial statement and what it had been told about the Respondent needing to sell his house to meet the costs of the Intervention and the proceedings. The Tribunal decided that the costs did not need to be reduced due to the Respondent's means. In respect of time to pay the costs, the payment of the costs was between the Applicant and the Respondent. The Tribunal ordered that the Respondent do pay costs fixed in the sum of £17,290.65.

Statement of Full Order

40. The Tribunal Ordered that the Respondent, KAM CHEUNG MAK, solicitor, be STRUCK OFF the Roll of Solicitors and it further Orders that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £17,290.65.

Dated this 6th day of June 2018
On behalf of the Tribunal

A. Ghosh
Chairman