

**The Respondent appealed to the High Court against the Tribunal's decision dated 19 December 2018. On 26 June 2019 the appeal was dismissed. The Respondent was ordered to pay the Applicant's costs, assessed at £10,200. On 15 January 2020 the Court of Appeal refused the Respondent permission for a second appeal.**

## **SOLICITORS DISCIPLINARY TRIBUNAL**

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 11735-2017

### **BETWEEN:**

SOLICITORS REGULATION AUTHORITY

Applicant

and

JOHN MARTIN GAO

Respondent

---

Before:

Mr R. Nicholas (in the chair)

Mr J. C. Chesterton

Mr M. Palayiwa

Date of Hearing: 18 to 19 December 2018

---

### **Appearances**

Rory Mulchrone, counsel, of Capsticks Solicitors LLP, 1 St George's Road, London, SW19 4DR, for the Applicant

John Trussler, counsel, of Legis Chambers, Fitz Eylwin House, 25 Holborn Viaduct, London, EC1A 2BP, for the Respondent

---

## **JUDGMENT**

---

## **Allegations**

1. The Allegations against the Respondent made by the Applicant were set out in a Rule 5 Statement dated 20 October 2017 and were that:
  - 1.1 In or around September 2014, he misappropriated monies belonging to the late Client A totalling up to around £19,500 and therefore breached any or all of Principles 2, 4, 6 and 10 of the SRA Principles 2011 ('the Principles').
  - 1.2 Between approximately 20 January 2015 and 4 March 2015 he failed to return the monies promptly upon request and therefore breached any or all of Principles 2, 4, 6 and 10 of the Principles.
  - 1.3 Between approximately 5 March 2015 and 10 March 2016 he issued and maintained civil proceedings against Client A which were:
    - 1.3.1 without merit;
    - 1.3.2 brought in order to extract further monies from her in the sum of £1,500 plus interest;
 and therefore breached any or all of Principles 1, 2, 4 and 6 of the Principles.
2. Dishonesty was alleged in respect of the above allegations; however, dishonesty was submitted not to be a necessary ingredient to prove these allegations.

## **Documents**

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

### **Applicant**

- Rule 5 Statement dated 20 October 2017 and exhibit RTM1
- Schedule of costs at issue dated 20 October 2017 and updated schedule dated 12 September 2018

### **Respondent**

- Exhibit JG1
- Respondent's witness statement dated 15 May 2018
- Respondent's supplementary witness statement dated 15 May 2018
- Letter from HoneyPot Medical Centre dated 6 November 2017
- Patient discharge summary dated 16 May 2018
- Two character references

## **Factual Background**

4. The Respondent was admitted to the Roll on 1 September 2015 and held a current practising certificate free from conditions at the date of the hearing.
5. The conduct giving rise to the allegations came to the Applicant's attention when the Respondent made his own complaint to the Applicant about Client A's new solicitors on 16 September 2015. The Respondent's complaint was eventually closed with no further action but it prompted an investigation into his own conduct.
6. The Respondent had had a close relationship with Client A and had also been instructed by her at First Choice Solicitors ('the Firm'). The outline, and agreed, events which gave rise to the Applicant's investigation began with a claim lodged by the Respondent (acting in his personal capacity) against Client A (by then a former client) on 5 March 2015. The Respondent sought to recover £1,500 from Client A. This was a sum allegedly due for work as a personal assistant, in addition to payments totalling £20,500 which he stated in his claim had already been paid to him.
7. Client A's defence was that she denied she owed the Respondent the £1,500. She also counterclaimed on the basis that she was never indebted to the Respondent at all and she sought to recover £19,500 she claimed to have inadvertently paid to the Respondent. Client A stated in her counterclaim that the Respondent had requested two cheques from her: £19,000 for tax on work relating to the estate of a former partner and £500 on account for the Firm's costs. Her case was that the Respondent had told her she should leave the payee blank on both cheques.
8. In his reply dated 31 March 2015 the Respondent accepted that he had received the £19,500 personally and asserted that Client A had asked him to keep the money as a gift to avoid liability to HMRC. The proceedings were settled on or around 10 March 2016 by a consent order under which the Respondent agreed to pay £19,500 and costs of £20,500 to Client A.

## **Witnesses**

9. The Respondent gave oral evidence. Civil Evidence Act notices were served by the Applicant in respect of the Applicant's witnesses and they did not give live evidence. The written and oral evidence of witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the oral evidence of the Respondent. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

## **Findings of Fact and Law**

10. 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.

11. **Allegation 1.1: In or around September 2014, the Respondent misappropriated monies belonging to the late Client A totalling up to around £19,500 and therefore breached any or all of Principles 2, 4, 6 and 10 of the Principles.**

The Applicant's Case

- 11.1 There was no dispute that the Respondent wrote his own name on the cheques (one for £19,000 and one for £500) after Client A had signed them and left the payee blank or that he had received the money.
- 11.2 Whilst Client A had died in 2016 the Applicant relied on the position she set out in her defence to the Respondent's claim and her counterclaim, witness statements and disclosure. Her position was that she never employed the Respondent as a personal assistant, never received or accepted invoices from him and she asserted that she gave the Respondent the cheques for £19,500 at his request to pay tax on the estate of a former partner and on account of the Firm's costs for work relating to the estate. The Applicant relied on the written evidence of Client A that she considered she had been 'swindled' when she learned that the Respondent had kept the money for himself. The Applicant submitted that Client A's account was corroborated by written evidence from Witnesses C and D which she relied on in her defence to the Respondent's civil claim. Witness C's evidence was that the Respondent and Client A were simply friends rather than employer/employee. Witness D's evidence was that Client A considered herself having been 'tricked' and 'taken advantage of' by the Respondent.
- 11.3 The Applicant's case was that the Respondent's claim for £1,500 from Client A was internally inconsistent, his position evolved in response to circumstances and he had no entitlement to the money he claimed. Mr Mulchrone, for the Applicant, noted that the Respondent's claim form of 5 March 2015 and Particulars of Claim of 16 March 2015 both contained statements of truth signed by the Respondent.
- 11.4 The £1,500 claimed was alleged by the Respondent to be the balance owed for his services as a personal assistant to Client A between 2009 and 2014. The Respondent relied on invoices for this work in his County Court claim. The Applicant's case was that the invoices included several mistakes, were inconsistent with the Particulars of Claim and included no invoice numbers. One invoice was prepared for each year from 2009 to 2013 after which one invoice was for January to February 2014 and one was for the beginning of 2015. The mistakes or inconsistencies highlighted by the Applicant included:
- 11.4.1 Whilst the Particulars of Claim stated that the first invoice (for 2009) was for £5,300, it was on the face of it for £4,500 because it gave credit for £800 already paid.
- 11.4.2 Whilst the Particulars of Claim stated that the second invoice (for 2010) was for £4,100 and that Client A paid £200 towards it, it was on the face of it for £8,400 as it included the previous year and gave credit for £200 already paid.

- 11.4.3 Whilst the Particulars of Claim stated that the third and fourth invoices (for 2011 and 2012) were for £4,900 and £5,000 respectively, in fact the invoices relied upon were for £13,300 and £18,300 respectively.
- 11.4.4 Whilst the Particulars of Claim stated that the fifth invoice (for 2013) was created in October 2013 the invoice relied upon ran to December 2013.
- 11.4.5 The 2011 invoice referred to the Respondent's 'services... during January 2009... £5,000' which was stated to be inconsistent with the balance carried forward on the invoice and the 2009 invoice itself.
- 11.4.6 The 2014 invoice was submitted to be vague and peculiar and was for 'service to you in relation to assisting you including some issue in your new home in Portugal... £1,000'.
- 11.5 The Applicant's case was that despite the Respondent stating he had made several requests for payment he was unable to produce any documentary evidence of such requests such as letters or emails asking for the invoices to be paid. Mr Mulchrone submitted that it was not credible that someone working under a contract for around £5,000 per year would allow a debt of £19,500 to accrue. The Respondent alleged in his Particulars of Claim that after 'several attempts' by him Client A wrote and signed the cheques on 25 September 2015 (whereas they were dated 25 September 2014). His case was that she had asked him 'to put his name' as payee. The Applicant's case was that there was no credible explanation from the Respondent of why there were two cheques rather than one and why the payee section was left blank. In contrast, Client A's evidence was that the Respondent had asked her to leave the payee section blank on the two cheques, one for tax and one on account of costs, and that she had done so as he was a friend whom she trusted.
- 11.6 Having received Client A's counterclaim of 26 March 2015 for the £19,500, the Applicant's case was that the Respondent's position changed fundamentally in a way which was inconsistent with his original claim for the £1,500. For the first time the Respondent asserted that Client A had asked him to keep the £19,500 'as a gift from her to avoid liability to HMRC'. The Applicant submitted that the Respondent did not explain why Client A opted to gift 100% of this sum rather than paying a percentage of it as tax.
- 11.7 Mr Mulchrone invited the Tribunal to consider the skeleton argument prepared by Client A's counsel in the County Court case dated 15 October 2015. This was produced two weeks before the trial date and set out the perceived deficiencies in the Respondent's case. It was alleged that after this skeleton argument was circulated the Respondent then produced for the first time a 'confirmation form' signed by Client A which purportedly confirmed that she had given the Respondent a gift of £19,500. The form was dated 25 September 2014 which Mr Mulchrone noted was the same day that the two cheques (for £19,000 and £500) were signed by Client A. Mr Mulchrone submitted that the Respondent had never previously disclosed the existence of this form and that it did not appear in the disclosure list he had previously prepared as part of the civil litigation process. Mr Mulchrone submitted that the Respondent's explanation, that he had been unable to find the form until the 28 October 2015 (the day before the trial) was not credible. He also noted that the handwritten statement

dated 29 October 2015 in which the Respondent sought to explain his discovery of the 'confirmation form' contained a statement of truth.

- 11.8 The handwritten statement dated 29 October 2015 also stated that the 'confirmation form' was signed by Client A at the Respondent's home on 25 September 2014. In her second statement, produced after the Respondent's handwritten statement, Client A stated, and supported with documentary evidence, that she had in fact been in Portugal on 25 September 2014. In response to this, in a further supplementary statement dated 4 December 2015, the Respondent's position changed and he stated that that the meeting had occurred two days previously. The Applicant submitted that these two statements from the Respondent were inconsistent as to who asked whom to produce the document; the first stated that Client A requested it whereas the second stated that the Respondent had asked her.
- 11.9 The Applicant contended that the handwriting expert relied upon by the Respondent was not significant. Referring to the 'confirmation form', Client A's evidence was that 'she may well have signed it blank' because she trusted the Respondent. The Applicant submitted that this was credible and was consistent with earlier evidence she had given that the Respondent 'got her to sign some blank pieces of paper'. Witness C's statement referred to Client A as 'very trusting and gullible'.
- 11.10 The Applicant also made reference to Client A describing the Respondent as a 'practising solicitor' in her counterclaim and his failure to correct this error. She stated in her counter claim that the Respondent was never employed by her for reward but that around April 2014 she had instructed him 'as her solicitor'. In his response to her counterclaim the Respondent had simply stated that he had 'instructed his firm to act' on Client A's behalf but did not clarify that between 2009 and 2014 he was unadmitted. His SRA student enrolment was authorised around 1 January 2013 and his training contract registered around 20 February 2014.
- 11.11 Mr Mulchrone submitted that the inconsistencies in the Respondent's account and the way it was submitted to have evolved in order to meet circumstances impacted catastrophically on his credibility.
- 11.12 Mr Mulchrone referred the Tribunal to the test for conduct lacking integrity set out in the case of Wingate and another v SRA [2018] EWCA Civ 366. By misappropriating monies from Client A the Respondent was submitted to have acted without integrity and failed to demonstrate moral soundness, rectitude and steady adherence to an ethical code. Without entitlement to the monies, the Respondent was alleged to have procured cheques with the payee line blank, written his name as payee and then cashed the cheques. This was alleged to be in circumstances where the Respondent had told the elderly and vulnerable client of the Firm that he required the cheques to pay tax on an estate and on account of the Firm's costs for work pursuing Client A's claim against that estate. It was also alleged that Client A had never intended the Respondent to have the monies for himself. Taking such unfair advantage in order to obtain a pecuniary advantage was submitted to be a serious breach of trust and failure to act with integrity in breach of Principle 2 of the Principles.

11.13 It was further submitted that the Respondent had also failed:

- 11.13.1 to act in the best interests of Client A in breach of Principle 4 as he had failed to safeguard monies entrusted to him and to use them only for purposes consistent with his instructions;
- 11.13.2 to behave in a way that maintained the trust the public placed in the profession and the provision of legal services in breach of Principle 6 as misappropriating money was likely to undermine such trust; and
- 11.13.3 to protect client money in breach of Principle 10 as he was alleged to have taken the money for himself in circumstances where he was not entitled to do so.

#### The Respondent's Case

- 11.14 The Respondent denied the allegation. He described Client A as being a close friend from 2005. He also referred to dealing with a 'huge volume of work for her on a daily basis'. His evidence was that Client A had agreed that there would be a fee for the work. Initially he told her how much he needed on an ad hoc basis and later began to give her invoices by hand. He said that there was no need to post or email the invoices as he saw Client A frequently every week. He said that on one occasion Client A gave him £800 in cash. Mr Trussler, on behalf of the Respondent, described their relationship as drenched in informality.
- 11.15 The Respondent referred to various personal legal and financial circumstances of Client A's in respect of which she asked him to deal with all letters, correspondence and related issues. He stated that Client A did not trust her family in these matters. He described becoming a trainee solicitor at the Firm and stated that Client A was well aware he was a trainee solicitor and not a solicitor at the time. The Respondent's evidence was that in 2014 Client A instructed the Firm on a probate matter relating to a former partner. She believed that there may be monies in the UK and overseas and she sought to recover these. The Respondent stated that his fellow directors were aware of his friendship with Client A and that this new instruction was unrelated to his non-legal paid work for Client A and so the question of a conflict was not raised.
- 11.16 The Respondent submitted that the witnesses, referred to by the Applicant as Witness C and Witness D, provided very limited corroboration as they were not independent from Client A. He stated that the former, Client A's niece, rented a flat from her and the latter rented a room in another of Client A's properties. Both were submitted to be close and beholden to her. The Respondent further submitted that the statements of both contained factual errors. Mr Trussler stated that whilst a Civil Evidence Act Notice was served with the witness statements, the Respondent had been representing himself in the proceedings and the contents of Witnesses C and D's statements were not accepted.
- 11.17 The Respondent's case was that Client A came to see him on 23 September 2014 on one of her trips to London from Portugal. He stated that she offered to write him a cheque for £19,000 for part of his personal fees over the years. He described her writing the amount on a cheque and then asking the Respondent to fill in his name as

she could not see without her glasses. This was why he wrote his name on the cheque. His evidence was that Client A intended him to have the money for the work he had done for her over several years.

- 11.18 He stated that he then asked for the full amount that she owed him and she wrote a further cheque for £500 (again asking him to write his name as payee). The Respondent described feeling uncomfortable with this and therefore said he would prepare a 'piece of paper to explain that the money she paid was part of [his] fees'. He said that Client A had asked him to write that the money was given as a gift. Whilst he described her reasons for doing so as 'unreasonable' he said that as he wanted to get the money to which he was entitled, along with evidence of the reason for the payment, he agreed.
- 11.19 He also stated that Client A had post-dated the cheques two days after her visit to his flat (i.e. she had dated them 25 September 2014). This was stated to be because she did not have funds in the account on the day she visited.
- 11.20 The Respondent described Client A as suddenly disappearing and then receiving a letter from her new solicitors claiming that the money she had paid him was intended for the Firm. As a result of this about face by Client A the Respondent's evidence was that he decided he would not waive the additional money he was owed and that was why he brought his claim for £1,500. He stated that Client A initially denied writing her name and address and signing the 'confirmation form' but that a handwriting expert subsequently demonstrated that she had done so. The Respondent submitted that Client A's position was inconsistent: she claimed that the £19,500 had been intended for the Firm and yet her counterclaim for this sum was against the Respondent personally.
- 11.21 The Respondent stated that he was aware Client A was ill and for this reason, and what he described as potentially serious reasons if he lost, the civil claim was settled.
- 11.22 Mr Trussler submitted that the Applicant's description of Client A as vulnerable was not warranted. She was described by the Respondent as an effective business lady, she owned property, produced wine in Portugal and was able to find £19,000 at short notice. He also submitted that the Respondent accepted that there were mistakes on the invoices that he had produced, but the Respondent's evidence was that these were honest mistakes. The Respondent's evidence about the timing of the production of the 'confirmation form', alleged by the Applicant to have been produced to 'plug' a gap in his money claim, was that the Respondent understood that the disclosure obligation extended to those documents in his possession. His case was that it was not disclosed earlier as it was not in his possession and only came to light when it was found by his young daughter when she was playing. Mr Trussler submitted that the Applicant sought to argue both that the Respondent's case was manufactured to fit the circumstances also that his disclosures revealed glaring inconsistencies. He submitted the Applicant could not have it both ways.
- 11.23 Mr Trussler submitted that there was a fundamental lack of credibility about the Applicant's case. The case amounted to an allegation that just as the Respondent was about to become a solicitor he decided to swindle a lady he had known for years in a way where discovery was nothing short of inevitable. He said that a cursory question



from Client A to anyone at the Firm would have revealed such a fraud and that it was highly implausible. He submitted that the alternative explanation, that Client A changed her mind about the payment she had made to the Respondent, was every bit as likely and raised doubt as to the Applicant's case. He submitted that the Respondent was entitled to the benefit of any such doubt. Mr Trussler also invited the Tribunal to consider whether launching proceedings to recover the additional sums was the action of someone who had misappropriated money? Bringing such a claim was submitted to be bound to turn the spotlight on to the Respondent and was not the action of a guilty man. Similarly, his reporting of Client A's new solicitor to the Applicant was submitted to be inconsistent with the Respondent having perpetrated a fraud.

### The Tribunal's Decision

- 11.24 The Tribunal accepted the Respondent's evidence that he had carried out a lot of non-legal work for Client A over several years and that they had been close friends. There was no dispute that he had received the £19,500 or that he had written his name on to cheques where Client A had left the payee section blank.
- 11.25 The Tribunal did not find it remotely credible that an individual who reported receiving job seekers' allowance at the time would allow arrears of £22,000 to accrue had there been an agreement for payment for the work. Client A's written evidence was that she considered the Respondent undertook these tasks as her friend. In his live evidence the Respondent had described a period of living rent free with Client A and being short of money. The Tribunal found it implausible he would not take at least some steps to pursue payment if he genuinely thought that was the arrangement. The Tribunal noted that the Respondent had settled the civil claim for the full amount of Client A's counterclaim and a very significant amount for her legal costs.
- 11.26 The Tribunal accepted Mr Trussler's submission that Client A did not appear from the evidence available to be a vulnerable individual.
- 11.27 The Tribunal considered the errors on the invoices to be significant. The same typo that had appeared in his Particulars of Claim (referring to the cheques being signed on 25 September 2015) seemingly appeared on the invoice purporting to cover the period January to February 2014. This invoice inexplicably contained a figure for the remaining balance as at 25 September 2015. This strongly indicated to the Tribunal that the invoices had been produced for the purposes of his claim rather than at intervals of around a year. The Respondent's Particulars of Claim had stated that the invoice for January to December 2013 had been created in October of 2013 and yet it covered the period to the end of that year. The Applicant had highlighted further inconsistencies and apparent errors. The Tribunal did not accept the Respondent's evidence that he provided these invoices to Client A. The errors were so marked that the Tribunal considered any recipient would have challenged or queried the invoices. The Tribunal found it was not plausible that earlier invoices were not re-sent or chaser letters sent, however informal the arrangement was stated to be. Not to send one letter or produce one formal request for monies owed in five years was not plausible. The Tribunal found that the invoices had been created retrospectively by the Respondent to support his entitlement to the £19,500 he had received.

- 11.28 The Tribunal considered the Respondent's explanation of the discovery of the 'confirmation form' by his daughter playing on the day before the civil trial to be deeply implausible. The Tribunal was sure that even if he could not find it, he would have made some reference to it before the morning of the trial (and before Client A's counsel had set out the deficiencies of his claim in a skeleton argument).
- 11.29 The Tribunal found the Respondent's evidence about the money being gifted to him from Client A to be confusing and unpersuasive. It did not make sense for Client A to seek to minimise any tax exposure by gifting the entire amount to the Respondent. The timing of this explanation (raised for the first time following Client A's counterclaim) appeared to be a reaction to new developments and this further undermined his credibility. That the Respondent had failed to correct Client A when she described him in her counterclaim as a solicitor was considered by the Tribunal to further undermine his reliability and credibility.
- 11.30 Client A was essentially successful in her claim to recover the money she had paid to the Respondent (the settlement level was for her full counterclaim and £20,500 in respect of her legal costs). The Tribunal found her written evidence, submissions and disclosure to be plausible and corroborated to some extent by the evidence of witnesses C and D. In light of the Respondent's own implausible, inconsistent and inconstant account, and the Tribunal's assessment of him as a witness who lacked credibility, the Tribunal was sure beyond reasonable doubt that the Client A's account of the circumstances of the payments was genuine.
- 11.31 The Tribunal noted that the Respondent was admitted to the Roll on 1 September 2015. The Tribunal accepted, and it was common ground between the parties at the hearing, that the Principles applied to the Respondent prior to his admission.
- 11.32 The Tribunal had found that the Respondent had had no entitlement to the £19,500 he had received. It further found that he had obtained the cheques with the payee section blank by telling Client A that tax was payable on the estate in respect of which the Firm was carrying out probate work and that a further sum on account of costs was required. Having regard to the test in Wingate and the ethical standards of the profession, the Tribunal found that such conduct very clearly displayed a lack of integrity. The Tribunal found that the breach of Principle 2 of the Principles had been proved beyond reasonable doubt. It further found beyond reasonable doubt that such behaviour must inevitably undermine public trust in the Respondent and the provision of legal services in breach of Principle 6 of the Principles.
- 11.33 In the light of the above findings of fact, that he had taken steps to obtain money from Client A personally to which he had no entitlement, the Tribunal considered that the Respondent had inevitably failed to act in Client A's best interests and to protect client money. It found beyond reasonable doubt that the Respondent had accordingly breached Principles 4 and 10 of the Principles.
12. **Allegation 1.2: Between approximately 20 January 2015 and 4 March 2015 the Respondent failed to return the monies promptly upon request and therefore breached any or all of Principles 2, 4, 6 and 10 of the Principles.**

## The Applicant's Case

- 12.1 The Applicant's case was that Client A consulted alternative solicitors some months after giving the Respondent the two cheques having lost faith in him. On 20 January 2015 her new solicitors wrote to the Firm seeking an account of the money she had paid.
- 12.2 A full response was received on 17 February 2015 which set out the Respondent's account of why he had retained the £19,500 personally. The Firm also demanded further costs of £4,064 to release Client A's file. The Applicant alleged that Client A reluctantly paid those costs in order to secure her file. By letter dated 4 March 2015 Client A's new solicitors wrote to the Firm with a formal complain about the Respondent's conduct.
- 12.3 The Applicant submitted that rather than returning the monies at this point (some six months after he had received them in September 2014) the Respondent issued his proceedings (on 5 March 2015) against Client A to recover the further £1,500 he maintained he was owed personally for the non-legal services. The Applicant further noted that it would be approximately one more year before the Respondent and Client A came to terms (on 10 March 2016) and the Respondent began to make repayments.
- 12.4 The Applicant alleged that by failing to return the £19,500 when Client A's new solicitors wrote to the Firm seeking an account of that sum, in circumstances where the Respondent was not entitled to retain the monies, the Respondent had failed to act with integrity. The Applicant submitted that viewed objectively, in accordance with the test set out in Wingate, he had failed to demonstrate moral soundness, rectitude and steady adherence to an ethical code. The Applicant's case was that having no entitlement to the monies, the Respondent was duty bound to return them upon request and that a failure to do so lacked integrity in breach of Principle 2. The Respondent did not return the monies for many months, and was admitted to the Roll during this period (on 1 September 2015).
- 12.5 As a result of the failure to return the monies promptly when requested, the Applicant also submitted that the Respondent had failed:
- 12.5.1 to act in the best interests of Client A, contrary to Principle 4, because this required him to return, or at least account for, the monies promptly on request;
  - 12.5.2 to behave in a way which maintained the trust the public placed in him and in the provision of legal services, contrary to Principle 6, because failing to return client money promptly on request was likely to undermine such trust (especially where the failure was dishonest by nature); and
  - 12.5.3 to protect client money, contrary to Principle 10, because this required the monies to be returned promptly on request or at least for them to be placed in client account and accounted for to the Client A or her new solicitors.

### The Respondent's Case

- 12.6 The Respondent denied the allegation. In large part this was for the reasons set out in his response to allegation 1.1: his case was that he was entitled to retain the money and so no default for any delay in repaying in those circumstances would arise.
- 12.7 In his witness statement dated 15 May 2018 the Respondent described Client A disappearing after which the Firm received a letter from Client A's new solicitors maintaining that the £19,500 was paid to the Firm. The Respondent described an initial and deep investigation during which the Firm's Head of Legal Practice contacted the SRA Ethics Helpline. He stated that no certain advice had been received. The Respondent described electing not to waive the money he considered he was owed by Client A at this point, which he sought to recover in the claim he issued. He denied that he improperly delayed repaying or accounting for the monies on the basis that they were not owed.
- 12.8 Several of Mr Trussler's submissions in respect of allegation 1.1 also applied to this allegation. In particular, he had submitted that beginning proceedings to recover £1,500 from Client A at the point she had requested the return of £19,500 was not the action of someone who had misappropriated money. Accordingly no duty to return the money would arise. He submitted that if Client A believed that the Respondent had misappropriated the money it was extraordinary that her new solicitors did not report him to the Applicant when they were instructed. It was the Respondent himself who made the referral to the Applicant. Again Mr Trussler submitted that this was not the action of an individual who had misappropriated money.

### The Tribunal's Decision

- 12.9 The Respondent's case was that he had retained the money in his personal capacity. The Firm had not received the £19,500 with which allegation 1.1 was concerned. The Tribunal had found in relation to allegation 1.1 that the Respondent had no entitlement to the £19,500 he had received.
- 12.10 The Tribunal carefully reviewed the letter from the Firm of 17 February 2015 (incorrectly dated 2014) which summarised the response to the request to account for the £19,500 paid by Client A. The letter set out in some detail the position adopted by the Respondent in his civil claim and in these proceedings. During his oral evidence the Respondent confirmed that he explained the circumstances to the Firm's COLP who then responded to the letter from Client A's new solicitors. The Tribunal found that the bulk of the Firm's reply originated with the Respondent, referring as it did to his alleged role as a personal assistant between 2009 and 2014 and the payment in respect of those services direct to the Respondent on 25 September 2014.
- 12.11 The Tribunal accordingly also found that the Respondent knew about the letter from Client A's new solicitors requesting that the money be accounted for. The Respondent was aware that the Firm had not received the £19,500. The Tribunal had found in relation to allegation 1.1 that the Respondent had no entitlement to the money he had received personally. The Respondent was a Director of the Firm and, at that time, a trainee solicitor. The Tribunal applied the test set out in Wingate. In the circumstances, the Tribunal found beyond reasonable doubt that a solicitor acting

with integrity would have returned the money promptly upon receipt of the letter from Client A's new solicitors. The failure to do so, and instead responding on a basis the Tribunal had found to be false, amounted to a failure to uphold the ethical standards of the profession in breach of Principle 2.

- 12.12 The Tribunal also found beyond responsible doubt that the failure amounted to a breach of Principles 4, 6 and 10. The failure to return or account for money to which he was not entitled was a clear failure to act in Client A's best interests and to protect client money. It was also a failure which would undermine the trust placed by the public in the Respondent and in the provision of legal services.
13. **Allegation 1.3: Between approximately 5 March 2015 and 10 March 2016 the Respondent issued and maintained civil proceedings against Client A which were:**
- 1.3.1 without merit;**
- 1.3.2 brought in order to extract further monies from her in the sum of £1,500 plus interest;**
- and therefore breached any or all of Principles 1, 2, 4 and 6 of the Principles.**

#### The Applicant's Case

- 13.1 It was not disputed that the Respondent had issued proceedings to recover the £1,500 or that he had ultimately settled his claim as described above in relation to allegation 1.1. The Applicant again relied upon the matters summarised above in relation to allegation 1.1 (in paragraphs 11.2 to 11.8) which were submitted to demonstrate that the Respondent had no entitlement to the £19,500 he had received personally from Client A. It was submitted that the same rationale applied to the proceedings he issued to recover the further £1,500. The basis for the further claim was the same as for the £19,500 he had already received: the Respondent claimed it was owed as a result of the work he completed as personal assistant to Client A. The Applicant submitted that it was significant that the Respondent's claim was only issued when Client A's new solicitors demanded an account of the money already received by the Respondent and made a formal complaint against him and the Firm.
- 13.2 The Applicant submitted that by issuing and maintaining civil proceedings which were without merit and/or brought in order to extract further monies from Client A, the Respondent had failed to act with integrity in breach of Principle 2. This was on the basis that it was alleged he had failed to demonstrate moral soundness, rectitude and steady adherence to an ethical code by issuing proceedings where he was not entitled to the monies he had already received or the additional monies he sought to recover. The Applicant submitted that the Respondent knew he was not entitled to the further monies sought yet nevertheless maintained proceedings to seek to do so for just over a year before compromising them on the day of the trial.
- 13.3 As a result of issuing and maintaining civil proceedings which were without merit and/or brought in order to extract further monies from Client A it was also alleged that the Respondent had also failed:

- 13.3.1 to uphold the rule of law and the proper administration of justice, contrary to Principle 1, because he deliberately issued and maintained civil proceedings which were without merit in order to extract the additional £1,500;
- 13.3.2 to act in the best interests of Client A, contrary to Principle 4, because he unnecessarily subjected her to stressful litigation which was without merit and intended to extract a further £1,500 from her;
- 13.3.3 to behave in a way that maintained the trust the public placed in the profession and in the provision of legal services, contrary to Principle 6, because he deliberately issued and maintained civil proceedings which were without merit in order to extract further money from a vulnerable, elderly client of the Firm.

### The Respondent's Case

- 13.4 The Respondent denied the allegation. He did so on essentially the same basis that he denied allegation 1.1: his case was that he was entitled to the additional £1,500 on the same basis he submitted he was entitled to the initial £19,500. The further £1,500 represented the balance due for the services he had provided to Client A in his personal capacity (and had no connection to work completed in his role at the Firm). The basis for this contention is summarised above in paragraphs 11.14 to 11.20.
- 13.5 The Respondent's evidence was that after Client A's new solicitors had lodged a complaint about his conduct with the Firm, he considered that Client A had reneged on their understanding about the payment he would receive for the work he carried out for her over several years and he then decided that he would not waive the further £1,500 that was due. His evidence was that during the civil proceedings Client A contested issues on a demonstrably false basis. He stated that Client A had initially denied writing her name and address on the 'confirmation form' and signing and dating it. He stated that an independent handwriting expert had subsequently confirmed that she had done so
- 13.6 The Respondent stated that part of the reason that he ultimately settled his claim was that Client A was ill at the time. He had also been advised by colleagues of potentially serious consequences should he lose the case.
- 13.7 Mr Trussler repeated his submissions summarised in paragraphs 11.23 and 11.24 above as to why it was contended that the Applicant's case lacked credibility. In particular, he repeated the submission that initiating civil proceedings, which would inevitably invite detailed scrutiny of his entitlement to the sum claimed, was not the action of someone who had misappropriated money. Bringing the claim, along with reporting Client A's new solicitors to the Applicant, were actions Mr Trussler submitted were guaranteed to turn the spotlight on the Respondent and were not the actions of a guilty man. He further submitted that no evidence had been produced by the Applicant indicating that the Respondent was struggling financially which further undermined the plausibility of the case. As he had in relation to allegation 1.1, Mr Trussler submitted that the Respondent was entitled to any element of doubt the Tribunal found about the Applicant's case.

### The Tribunal's Decision

- 13.8 The Tribunal had found in relation to allegation 1.1 that the Respondent had no entitlement to the £19,500 he had received. Accordingly he had no entitlement to the further £1,500 he sought as this rested on the same basis that the Tribunal had found to be false. The Respondent did not deny bringing the claim, and the Tribunal found beyond reasonable doubt that he had no entitlement to the further money claimed.
- 13.9 Having regard to the test in Wingate and the ethical standards of the profession, the Tribunal found that bringing a civil claim to recover money in circumstances where there was no entitlement to it was conduct clearly displaying a lack of integrity. The Tribunal found that the breach of Principle 2 of the Principles had been proved beyond reasonable doubt. It further found beyond reasonable doubt that the Respondent's behaviour undermined public trust in the Respondent and the provision of legal services in breach of Principle 6 of the Principles.
- 13.10 Whilst the monies were said by the Respondent to relate to work completed for Client A in his personal capacity rather than as an employee of the Firm, Client A was a client of the Firm and he himself had undertaken legal work for her. The Tribunal was accordingly satisfied that Principle 4 was engaged. The Tribunal found that initiating proceedings to recover money from Client A to which he had no entitlement amounted a failure to act in Client A's best interests. The Tribunal found the breach of Principle 4 of the Principles had been proved beyond reasonable doubt.
14. **Allegation 2: Dishonesty was alleged in respect of the above allegations; however, dishonesty was submitted not to be a necessary ingredient to prove these allegations.**

### The Applicant's Case

- 14.1 The Applicant's case was that the Respondent had acted dishonestly by misappropriating the £19,500. Mr Mulchrone referred the Tribunal to paragraph [74] of Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 which set out the objective test for assessing dishonesty. He summarised the test as being an objective application of the standards of ordinary, decent people once the Respondent's knowledge and belief have been ascertained.
- 14.2 The Applicant's case was that the Respondent must have known he was not entitled to the money. However, Mr Mulchrone submitted that this was not a necessary part of the test for dishonesty, rather the Applicant submitted that this alleged knowledge was an aggravating factor.
- 14.3 The Applicant's case was that the Respondent had deliberately acted dishonestly in that he had:
- misappropriated £19,500;
  - failed to return the money promptly upon request;

- issued and maintained proceedings which were without merit and/or brought into order to pursue an additional £1,500.

The Applicant submitted that such conduct would be considered dishonest by the ordinary standards of reasonable and honest people.

### The Respondent's Case

- 14.4 The Respondent had denied allegations 1.1 to 1.3 and he denied that he had acted dishonestly. His case was that he was entitled to the £19,500 he had received and that Client A had reneged on their agreement in this regard when she sought to recover it. Accordingly, there was no delay in repaying any monies when demanded as he was entitled to the money he had received. He sought to recover the balance of £1,500 due to him when it became clear that Client A had reneged on their agreement.
- 14.5 In resisting the allegation of dishonesty with respect to allegations 1.1 to 1.3, the Respondent relied upon all of the evidence and submissions made in relation to each individual allegation as summarised above.

### The Tribunal's Decision

- 14.6 When considering the allegation of dishonesty, the Tribunal applied the test in Ivey. The test for dishonesty was set out at [74] of the judgment in that case and accordingly when considering the issue of dishonesty in allegations 1.1 to 1.3, the Tribunal adopted the following approach:
- firstly the Tribunal established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held.
  - secondly, once that was established, the Tribunal then considered whether his conduct was honest or dishonest by the standards of ordinary decent people.
- 14.7 For the reasons summarised above, the Tribunal had found that the Respondent was aware he was not entitled to the £19,500 he had obtained, or the further £1,500 he issued proceedings in order to obtain. The Tribunal found he had deliberately produced invoices after the event in order to bolster his claim to the money he had already received and that he sought to obtain through his civil claim. The Tribunal had found that his explanations varied in response to developments and that his evidence lacked credibility. The Tribunal had found in relation to allegations 1.1 to 1.3 that the Respondent knew he was not entitled to the monies from Client A but nevertheless took steps to obtain and retain the £19,500 and obtain a further £1,500.
- 14.8 Applying the standards of ordinary decent people to such conduct the Tribunal was sure to the requisite standard, beyond reasonable doubt, that the Respondent's actions in allegations 1.1 to 1.3 would be regarded as dishonest and the allegation was proved.



### **Previous Disciplinary Matters**

15. There were no previous Tribunal disciplinary findings.

### **Mitigation**

16. The Respondent had been subject to some very difficult personal circumstances concerning his close family for an extended period of time. Mr Trussler noted that given the finding of dishonesty involving misappropriation the relevant legal authorities were against the Respondent notwithstanding the severe pressure of circumstances to which he had been subject.
17. The Respondent relied upon two character references he had provided. He also sought to resist any financial penalty on the basis of his current financial means.

### **Sanction**

18. The Tribunal referred to its Guidance Note on Sanctions (5th Edition) when considering sanction. The Tribunal assessed the seriousness of the misconduct by considering the level of the Respondent's culpability and the harm caused, together with any aggravating or mitigating factors.
19. In assessing culpability, the Tribunal found that the motivation for the Respondent's conduct was financial, and that his actions were planned. The Respondent had taken steps to ensure that Client A provided him with cheques with the payee left blank and had then cashed the cheques in circumstances where he had no entitlement to the monies. His misconduct extended over a significant period of time as it involved not only the initial obtaining of the money but the subsequent steps designed to bolster the evidence for his entitlement to it and to obtain further monies. Whilst he was unadmitted at the start of the relevant period, the Respondent was employed by the Firm and the need to avoid misappropriating funds was so fundamental that the Respondent must have been aware his actions were unacceptable. The Tribunal assessed the Respondent's culpability as high.
20. The Tribunal then turned to assess the harm caused by the misconduct. The Tribunal had found that the Respondent had dishonestly misappropriated money from Client A and then initiated proceedings against her which lasted for a year. The harm to Client A was therefore very significant. The harm to the profession from such conduct was also potentially significant.
21. The misconduct found to be proved was aggravated by the fact that the allegations included dishonest conduct. The misconduct also extended over a considerable period of time and was deliberate. The seriousness of the conduct was also aggravated by the fact that even prior to admission as a solicitor, the Respondent knew, or ought to have known, that such actions were potentially very harmful to the reputation of the legal profession. The misconduct was aggravated by the elaborate steps taken by the Respondent to seek to conceal his lack of entitlement to the monies.

22. The Tribunal was very conscious of the personal circumstances relating to his family that the Respondent had outlined. These were taken into account as mitigating factors, and the character references supplied were carefully read and considered. The Tribunal noted that the Respondent had no prior disciplinary findings against him.
23. The Tribunal had regard to the case of SRA v Sharma [2010] EWHC 2022 (HC), and the comment of Coulson J that, save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the Roll. The Tribunal was not invited to consider exceptional circumstances but was not persuaded that any exceptional factors were present, such that the normal penalty would not be appropriate.
24. Having found that the Respondent acted dishonestly the Tribunal did not consider that a reprimand, fine or suspension were adequate sanctions. The Tribunal had regard to the observation of Sir Thomas Bingham MR in Bolton v Law Society [1994] 1 WLR 512 that the fundamental purpose of sanctions against solicitors was:

“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”.

The Tribunal determined that the findings against the Respondent including dishonesty required that the appropriate sanction was strike off from the Roll.

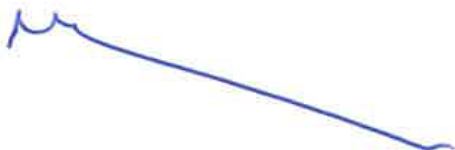
### **Costs**

25. Mr Mulchrone applied for costs on behalf of the Applicant in the sum of £23,075 as set out in the Schedule of Costs dated 12 September 2018. Mr Mulchrone submitted that the costs were modest and included no Financial Investigation costs. He submitted that the use of in-house counsel, who was also the case-holder, had eliminated the risk of any duplication and had limited costs. He stated that the case had been adjourned twice, for unavoidable reasons, but that this had inevitably increased the costs incurred by the Applicant. He submitted that the time spent on the case, which when the fixed fee was applied generated a notional hourly rate of £147, was modest and reasonable.
26. In reply Mr Trussler accepted that the notional hourly rate was reasonable. He stated that the Respondent wished to challenge the award of costs on the basis of his current inability to pay. He confirmed that the Respondent did not have any evidence of means available to provide to the Tribunal.
27. The Tribunal assessed the costs for the hearing. The Tribunal considered that the costs were reasonable given the complexity of the case. The Tribunal had regard to paragraph [58] of its Sanctions Guidance and the requirement for supporting evidence if a Respondent wishes to claim that they are impecunious and unable to meet a costs order. The Respondent had provided no adequate evidence of his means. In all of the circumstances the Respondent was ordered to pay the costs of and incidental to this application and enquiry fixed in the sum of £23,075.

**Statement of Full Order**

28. The Tribunal ORDERED that the Respondent, JOHN MARTIN GAO, 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 £23,075.

Dated this 6<sup>th</sup> day of February 2019  
On behalf of the Tribunal

A handwritten signature in blue ink, consisting of a stylized initial 'R' followed by a long, sweeping horizontal line that tapers to the right.

R. Nicholas  
Chairman