SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 | Case No. 11762-2017

BETWEEN:

SOLICITORS REGULATION AUTHORITY | Applicant

and

ALEXANDER JOHN MARKS | First Respondent
PAUL ELLIOTT | Second Respondent

Before:

Ms A. E. Banks (in the chair)
Mr P. Lewis
Mrs L. McMahon-Hathway

Date of Hearing: 4th and 5th September 2018

Appearances

Rory Mulchrone, Counsel, employed by Capsticks Solicitors LLP, 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant.

The First Respondent and the Second Respondent did not appear and were not represented.

JUDGMENT

Allegations

First Respondent

1. The allegations against the First Respondent, Alexander John Marks, were that, while in practice as a solicitor and partner at Alexander Marks LLP ("the firm"), between approximately 29 August 2006 and 30 September 2015; and/or while in practice as a solicitor and director at AEM Solicitors Ltd ("the Successor Firm") between approximately 1 October 2015 and 29 March 2016:

1.1. He caused or allowed a cash shortage to arise in the firm's and/or the Successor Firm's client bank account(s), totalling up to or around £247,289.62, and therefore breached all or any of:

1.1.1. Rule 20.1 of the SRA Accounts Rules 2011 ("the SAR");

1.1.2. Principles 2, 4 and 6 of the SRA Principles 2011 ("the Principles").

1.2. He caused or allowed improper transfers of costs from client to office account(s) on one or more occasions and therefore breached all or any of:

1.2.1. Rules 1.2(a), 1.2(c), 20.1 and 20.3 of the SAR;

1.2.2. Principles 2, 4 and 6 of the Principles.

1.3. He caused or allowed improper inter-ledger transfers on one or more occasions and therefore breached all or any of:

1.3.1. Rules 1.2(c), 20.1 and 27.1 of the SAR;

1.3.2. Principles 2, 4 and 6 of the Principles.

1.4. He failed promptly to return an overpayment of around £178,821.00 received in relation to Client EY, and therefore breached all or any of:

1.4.1. Rules 7.1 and 14.3 of the SAR;

1.4.2. Principles 2, 4 and 6 of the Principles.

1.5. He acted dishonestly in respect of all or any of allegations 1.1 to 1.4 above but dishonesty is not an essential ingredient to prove those allegations.

Second Respondent

2. The allegations against the Second Respondent, Paul Elliott (unadmitted), were that, while employed or self-employed as the firm's bookkeeper between approximately 1 September 2006 and 30 September 2015:

2.1. He undertook and/or assisted in one or more of the improper transfers of costs referred to in allegation 1.2 above and therefore breached all or any of :

2.1.1. Rules 1.2(a), 1.2(c), 20.1 and 20.3 of the SAR;

2.1.2. Principles 2, 4 and 6 of the Principles;

2.2. He undertook and/or assisted in one or more of the improper inter-ledger transfers referred to in allegation 1.3 above and therefore breached all or any of:

2.2.1. Rules 1.2(c), 20.1 and 27.1 of the SAR;

2.2.2. Principles 2, 4 and 6 of the Principles;

2.3. He failed to identify and/or escalate the overpayment referred to in allegation 1.4 above and therefore breached all or any of:

2.3.1. Rules 7.1 and 14.3 of the SAR;

2.3.2. Principles 4 and 6 of the Principles.

2.4. He acted dishonestly in respect of allegations 2.1 and/or 2.2 above but dishonesty is not an essential ingredient to prove those allegations.

Documents

3. The Tribunal reviewed all the documents including:

Applicant

- Hearing Bundle volume 1 comprising Rule 5 Statement dated 5 December 2017 with exhibit RTM1
- Hearing Bundle volume 2 (Tabs 1-17)
- Applicant's Note on Service and Proceeding in the absence of the Respondents dated 3 September 2018
- Proof of delivery to the First Respondent dated 19 December 2018
- Proof of delivery to the Second Respondent dated 16 December 2018
- Email from Mr Mulchrone dated 9 August 2018 to the First Respondent
- Email from Mr Mulchrone dated 9 August 2018 to the Second Respondent
- Applicant's Statement of Costs as at date of issue dated 30 August 2018
- Applicant's Statement of Costs relating to investigation, preparation and presentation of the hearing on 4-6 September 2018

First Respondent

- Email to the Tribunal dated 9 August 2018
- Email to Mr Mulchrone dated 9 August 2018

Second Respondent

- Letter from the Second Respondent's GP dated 25 January 2018 (included in volume 2 of the hearing bundle)

- Letter from Mr Guy Berryman to the Applicant dated 20 August 2018

Preliminary and Other Issues

4. Neither the First Respondent nor the Second Respondent was present. For the Applicant, Mr Mulchrone applied to the Tribunal for it to proceed with the substantive hearing in their absence. He submitted that the First Respondent had expressly confirmed that he would not attend and was content for the Tribunal to proceed. He had done so by email dated 9 August 2018 timed at 16.44 in which he said that he did not intend to attend the hearing as he did not believe that he had anything to add in terms of the Answer filed with accompanying medical reports, along with his Statement of Means. At 17.24 on the same day, Mr Mulchrone had sent an email to the First Respondent asking him expressly to confirm whether he was content for the Tribunal to proceed in his absence. The First Respondent replied at 18.08 stating that his email was his consent. Mr Mulchrone submitted regarding the Second Respondent that he had not filed an Answer and had not engaged save for two letters. Mr Mulchrone referred to his Note on Service and Proceeding in the Absence of the Respondents dated 3 September 2018 as follows.

5. Regarding service, the proceedings were served by the Tribunal at the First Respondent's last known place of abode, pursuant to Rule 10 of the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR"):

> "10.—(1) Any application, Statement or other document required to be served under rules 6(5), 8(5) and 9(4) shall be served—
>
> (a) personally; or
>
> (b) by sending by guaranteed delivery post or other guaranteed and acknowledged delivery to the last known place of business or abode of the person to be served; and
> (c) in such other manner as the Tribunal may direct."

The documents were signed for by "Marks AJ" on 19 December 2017 according to the Track and Trace document which the Tribunal received from Royal Mail. The First Respondent subsequently indicated, by email dated 29 January 2018, that he had moved house the previous July and not received the papers. These were re-sent to him by secure email on 1 February 2018 although the Applicant was satisfied that good service had been achieved. He later filed an Answer dated 5 March 2018, which did not raise any dispute in relation to service (or indeed any dispute with the Applicant save that dishonesty was denied). Mr Mulchrone submitted that there has been good service on the First Respondent.

6. Proceedings were served by the Tribunal at the Second Respondent's last known place of abode on 16 December 2017, pursuant to Rule 10. From an abundance of caution, copy papers were also sent by secure email on 1 February 2018. The Second Respondent did not acknowledge service or file an Answer. However, he sent the Tribunal a letter from his GP dated 25 January 2018. It referred to the proceedings, including the preliminary hearing (listed in the directions) and discussed

the impact of proceedings upon his health. The Tribunal informed the Second Respondent at that time:

> "We will take no further action in respect of the letter until you advise whether you are seeking an order from the Tribunal based on the contents of the letter".

The Applicant understood that no such order had ever been requested. The Applicant contended that this letter indicated that service was successful but maintained there was good service under Rule 10 in any event. A letter had been received by the Applicant dated 20 August 2018 from a Mr B expressed to be written on the Second Respondent's behalf and from his last known address and the one at which proceedings had been served. It referred to a letter sent from his doctor "to the SRA in May of this year…" The Applicant had been unable to trace a letter dated May 2018 and thought that the reference was intended to be to the letter from the Second Respondent's GP of January 2018. The August letter had been written in the context of publication by the Applicant of the decision to refer the Second Respondent's conduct to the Tribunal rather than the proceedings before the Tribunal but it suggested that the Second Respondent remained at that address.

7. Mr Mulchrone submitted that as well as proving good service he was required to convince the Tribunal that it would be appropriate to proceed in the absence of each Respondent. Rule 16(2) of the SDPR provides:

> "If the Tribunal is satisfied that notice of the hearing was served on the respondent in accordance with these Rules, the Tribunal shall have power to hear and determine an application notwithstanding that the Respondent fails to attend in person or is not represented at the hearing."

This power was a discretion, applying the principles laid down in R v Hayward [2001] QB 862, as qualified and explained in R v Jones [2003] 1 A.C. 1. The principles, which applied to criminal proceedings, included the right to be present at the hearing but could be waived separately or together, wholly or in part by the Defendant. The trial Judge had a discretion as to whether a trial should take place or continue in the absence of the Defendant or his legal representatives. That discretion must be exercised with "the utmost care and caution" and it was only in rare and exceptional circumstances that it should be exercised in favour of a trial taking place or continuing particularly if the Defendant was unrepresented. Fairness to the defence was of prime importance but fairness to the prosecution must also be taken into account. The Judge had to have regard to all the circumstances. Mr Mulchrone referred to the detail of the judgment in the Jones case. He submitted that while these principles provided a useful starting point, in General Medical Council v Adeogba & Visvardis [2016] 1 W.L.R. 3867, the Court of Appeal said that it was important to bear in mind that there was a difference between continuing a criminal trial in the absence of the Defendant and a decision to continue a disciplinary hearing. The latter decision had also be guided by the context provided by the main statutory objective of the regulator and, in that regard, the fair, economical, expeditious and efficient disposal of allegations was of very real importance.

8. Mr Mulchrone also submitted that it went without saying that fairness fully encompassed fairness to the affected respondent (a feature of prime importance) but it also involved fairness to the regulator (referred to as the prosecution in Hayward and Jones). In that regard, it was important that the analogy between criminal prosecution and regulatory proceedings was not taken too far. Steps could be taken to enforce attendance by a (criminal) defendant; he could be arrested and brought to court. No such remedy was available to a regulator. There were other differences too. First, the regulator represented the public interest in relation to professional standards. It would run entirely counter to the protection of the public if a respondent could effectively frustrate the process and challenge a refusal to adjourn when that respondent had deliberately failed to engage in the process. The consequential cost and delay to other cases was real. Where there was good reason not to proceed, the case should be adjourned; where there was not, however, it was only right that it should proceed. Second, there was a burden on respondents, as there was with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That was part of the responsibility to which they had signed up when being admitted to the profession. The Second Respondent was not a solicitor but he was aware of the proceedings and ultimately as an employee of a solicitor fell within the jurisdiction of the Applicant. Adeogba went on to discuss the import of the mandatory obligation upon medical professionals to provide a current registered address. While those obligations might perhaps be more onerous than those incumbent upon these Respondents, Mr Mulchrone submitted that Adeogba nevertheless suggested that the fact that a respondent had not updated contact details with their regulator (particularly when he was aware that he was subject to disciplinary investigation) was unlikely to provide a reasonable explanation for failure to participate in the process, sufficient to require a panel to adjourn consideration of a fixed disciplinary hearing and this matter was listed in December 2017.

9. Mr Mulchrone submitted that so far as relevant, Rule 19 of the SDPR also provided that:

> "(1) At any time before the filing of the Tribunal's Order with the Law Society under rule 17 or before the expiry of the period of 14 days beginning with the date of the filing of the order, the respondent may apply to the Tribunal for a re-hearing of an application if—
>
> (a) he neither attended in person nor was represented at the hearing of the application in question; and
> (b) the Tribunal determined the application in his absence
>
> ...
>
> (3) If satisfied that it is just so to do, the Tribunal may grant the application upon such terms, including as to costs, as it thinks fit. The re-hearing shall be held before a Division of the Tribunal comprised of different members from those who heard the original application."

10. Mr Mulchrone submitted that there was no useful purpose to be served by adjourning and no indication that an adjournment would secure the First Respondent's attendance at a future date. There was a clear public interest in the expeditious disposal of these allegations, which was also in the First Respondent's interests. Mr Mulchrone also

submitted that it was also clear that the Second Respondent was aware of the hearing. If he failed to attend, it was reasonable to conclude that he had voluntarily absented himself. The Jones case specifically raised the issue of a Defendant being too unwell to attend. Mr Mulchrone submitted that notwithstanding his GP's letter of 25 January 2018, there was no medical evidence that the Second Respondent was unfit to attend the hearing. There was no adjournment application and, while the Tribunal could nonetheless adjourn of its own motion, an adjournment was unlikely to secure the Second Respondent's future attendance or to serve any other useful purpose. There was a clear public interest in the expeditious disposal of these allegations, which was also in the Second Respondent's interests. The Tribunal was invited to proceed.

11. The Tribunal noted in respect of the Second Respondent that the GP's letter referred to a preliminary hearing that month and that there was nothing specific about the date of commencement of the substantive hearing. Mr Mulchrone submitted that Standard Directions with details of the hearing had been sent to him. Mr Mulchrone had raised the issue of the Second Respondent's engagement in March 2018 at a Case Management Hearing ("CMH"). The Tribunal's view was that he could not be forced to do so. Directions had included liberty to apply. Mr Mulchrone did not recall sending the hearing bundle to the Respondents as they already had the papers. The Second Respondent had been supplied with the First Respondent's Answer and the Applicant's Reply both redacted to remove sensitive personal data relating to the First Respondent. Also there had been emails from the Applicant to the Respondents (about their attendance). Mr Mulchrone had also circulated his Note to both Respondents and had sent the Costs Schedule on 25 August 2018 by email.

12. The Tribunal had regard to the authorities to which it was referred, to Mr Mulchrone's submissions and to the communications with the First and Second Respondent as well as their Article 6 rights. The Tribunal was satisfied that service of notice of the hearing had been served on the First Respondent under Rule 10 of the SDPR. He had signed for the papers; when an issue arose copies were sent out; he filed an Answer, and there had been correspondence. The First Respondent was clearly aware of the hearing date and had just before the commencement of the hearing indicated that he would not attend. He had also indicated to Mr Mulchrone in their exchange of emails on 9 August 2018 that he consented to the hearing proceeding in his absence. The Tribunal was satisfied that the First Respondent had deliberately absented himself from the hearing and that it would be appropriate to proceed in his absence.

13. In respect of the Second Respondent, he had been served with the proceedings on 16 December 2017 and they were signed for in his name. He had not otherwise acknowledged receipt of the documents. The Applicant informed the Tribunal at the CMH on 5 February 2018 that the papers had been re-served on him by secure email as there had been difficulties with the First Respondent receiving the papers but there had been no communication. He had been made aware of the hearing date by the Standard Directions enclosed with the papers. The January 2018 letter from the Second Respondent's GP referred to the proceedings. He had not participated in the CMH on 5 February 2018 but the Memorandum of the hearing had been sent to him including restating at paragraph 8.1 the hearing date, place and time. (Neither Respondent had participated in the CMH on 13 March 2018 but again copies of the Memorandum of the hearing had been sent to each) The recently served Schedule of

the Applicant's costs had restated the listed date. Mr Mulchrone had emailed the Respondents' together on 8 August 2018 about the Applicant's Certificate of Readiness and the hearing timetable which prompted the First Respondent's reply about non-attendance. The Second Respondent did not reply so Mr Mulchrone emailed him again on 9 August 2018 restating the hearing date. Furthermore the letter dated 20 August 2018 from an unknown but named individual on behalf of the Second Respondent had been sent to the Applicant although it was in the context of publication rather than the substantive hearing. It was expressed to have been sent from the address which had been used for service on the Second Respondent throughout. The Tribunal was satisfied that Rule 10 of the SDPR had been complied with and good service effected upon the Second Respondent. As to whether to proceed in his absence, the Tribunal determined that he had chosen not actively to take part in the proceedings. The Tribunal noted the reference to medical conditions from which he suffered. The January 2018 letter from his GP did not say that he was unfit to participate in the substantive hearing. The 20 August letter came from a named individual but the nexus between him and the Second Respondent was unknown and it was not supported by any medical evidence. It did not constitute an application to adjourn. The Tribunal determined that the Second Respondent had also deliberately absented himself from the proceedings and that it would be appropriate to proceed in his absence.

Factual Background

14. The firm commenced trading on 29 August 2006 and ceased trading on or about 30 September 2015. On 1 October 2015, the firm merged with two other firms, namely E LLP and BES & Company LLP, to become the Successor Firm.

15. Upon discovery of the facts and matters set out below, the First Respondent was excluded and resigned from the Successor Firm, which was subsequently renamed E SLP Solicitors Ltd.

16. The First Respondent was admitted to the Roll on 1 September 1980. He was a Principal of the firm prior to its closure on 30 September 2015 and of the Successor Firm until his resignation/exclusion as a director in or around March 2016. He remained on the Roll but did not currently hold a practising certificate.

17. The Second Respondent was an unadmitted person. He was the bookkeeper of the firm prior to its closure on 30 September 2015. He was or had been a member of the Institute of Legal Finance and Management.

18. The conduct in this matter was reported to the Applicant on 17 March 2016, when the compliance officer for legal practice ("COLP") at the Successor Firm, Mr E informed the Applicant of what he considered to be material breaches of the SAR by the firm pre-merger ("the first report"). The First Respondent had been asked but failed to explain these. Consequently, Mr E had removed the First Respondent's control over the Successor Firm's internet banking and removed him as a signatory to its bank accounts. The First Respondent had agreed to resign as a manager of the Successor Firm.

19. The report by the Successor Firm arose as follows. On or around 18 February 2016, it came to the attention of the firm's COFA Mr B that prior to the merger on 30 September 2015 the First Respondent made a payment of £40,000.00 into the office bank account of the firm. The monies were used to make five payments totalling £43,478.00 from the firm's office bank account to its client bank account.

20. The COFA and Mr E the COLP considered these to be unusual transactions and asked the Successor Firm's accountants who had also been the accounts of the firm to investigate the transactions. As a result the accountants produced a report. Mr E noted that the report detailed that only accounting errors were involved and these errors had been corrected and related to pre-merger events. The accountants asked the firm to make a number of client inter ledger transfers and whilst processing these transfers Mr B identified further matters of concern.

21. Further reports were received from the Successor Firm on 23 March 2016 and 15 April 2016, detailing further material breaches of the SAR and confirming the First Respondent's resignation. In light of these three reports, the Applicant commissioned a forensic investigation of the Successor Firm (the firm itself having closed), which commenced on 7 June 2016.

22. Following the forensic investigation, a report was prepared dated 14 November 2016. In summary, this identified a minimum cash shortage of £247,289.62, relating to three client matters conducted by the firm pre-merger. The minimum shortage had been caused by improper transfer of costs from client to office bank account and by improper inter-ledger transfers. As at 1 August 2016, the Successor Firm had replaced the minimum cash shortage in full.

23. As part of his investigation, the Forensic Investigation Officer ("FIO") invited the First Respondent to attend an interview but he declined on the basis that he was suffering from an identified health condition. The FIO did interview the Second Respondent who confirmed that the financial 'side' of the firm was controlled by the First Respondent and that he would make postings to the books of accounts on the instructions of the First Respondent. The FIO also interviewed the First Respondent's partner/co-principal at the firm, Mr L, who denied any wrongdoing. There was no direct evidence of wrongdoing by Mr L.

24. In response to the Applicant's Explanation With Warning letter ("EWW") dated 23 March 2017, the First Respondent admitted that there was a shortage on client account which arose whilst he was manager of the firm. He stated that this arose when he was suffering from the identified medical condition and he was unable to think clearly. The First Respondent stated that for health reasons he was not able to reply to the letter in detail. He accepted that he was responsible for making good the shortfall but in fact this had already been remedied by Mr E, Mr L and/or the Successor Firm. It was not known whether the First Respondent has indemnified/compensated his former partners for these losses. He stated that he was "not acting dishonestly" and did not realise that what he was doing "might be wrong".

25. In response to the Applicant's EWW letter dated 13 April 2017, the Second Respondent stated that he was acting under the instructions of the First Respondent. He had no knowledge of what monies received were for. The only

way he could have known about the overpayment was if a fee earner told him about it. He "did not act dishonestly at any time regarding transfers as I was only doing as I was instructed to" by the First Respondent.

Witness

26. Mr Sean Grehan FIO gave evidence.

Findings of Fact and Law

27. 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 Respondents' rights to a fair trial and to respect for their private and family life under, respectively, Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
(The submissions below include both those made in the documents and at the hearing.)
For convenience, throughout this judgment references are made to the Rule 5 Statement but it should be noted that the Statement was made pursuant to Rule 5 and Rule 8 of the Solicitors (Disciplinary Proceedings) Rules 2007.
The Principles and Rules referred to in the allegations are set out in Appendix 1 to this judgment.

The allegations against the First Respondent, Alexander John Marks, were that, while in practice as a solicitor and partner at Alexander Marks LLP ("the firm"), between approximately 29 August 2006 and 30 September 2015; and/or while in practice as a solicitor and director at AEM Solicitors Ltd ("the Successor Firm") between approximately 1 October 2015 and 29 March 2016:

1.1 He caused or allowed a cash shortage to arise in the firm's and/or the successor firm's client bank account(s), totalling up to or around £247,289.62, and therefore breached all or any of:

1.1.1 Rule 20.1 of the SRA Accounts Rules 2011 ("the SAR");

1.1.2 Principles 2, 4 and 6 of the SRA Principles 2011 ("the Principles").

1.2 He caused or allowed improper transfers of costs from client to office account(s) on one or more occasions and therefore breached all or any of:

1.2.1 Rules 1.2(a), 1.2(c), 20.1 and 20.3 of the SAR;

1.2.2 Principles 2, 4 and 6 of the Principles.

1.3 He caused or allowed improper inter-ledger transfers on one or more occasions and therefore breached all or any of:

1.3.1 Rules 1.2(c), 20.1 and 27.1 of the SAR;

1.3.2 Principles 2, 4 and 6 of the Principles.

1.4 He failed promptly to return an overpayment of around £178,821.00 received in relation to Client EY, and therefore breached all or any of:

1.4.1 Rules 7.1 and 14.3 of the SAR;

1.4.2 Principles 2, 4 and 6 of the Principles.

1.5 He acted dishonestly in respect of all or any of allegations 1.1 to 1.4 above but dishonesty is not an essential ingredient to prove those allegations.

Submissions for the Applicant on the facts underlying the allegations

28. For the Applicant, Mr Mulchrone relied on facts and matters in the Rule 5 Statement and supporting documents. He submitted that the FIO conducted his inspection of the Successor Firm on 29 April 2016 and confirmed in the Forensic Investigation ("FI") Report that, as at that date, there was a minimum client cash shortage of £247,289.62. In summary, it arose due to shortages on three unrelated client matters, which were conducted by the firm and transferred to the Successor Firm following the merger on 1 October 2015: the matters of Client EY – minimum shortage of £15,994.17; the estate of Mr MRM –£214,385.45; and the matter of the estate of Mrs NN -£16,910.00. In turn, these shortages were caused by improper transfers of costs from client to office bank account and improper inter-ledger transfers to unrelated client matters. The circumstances in which these improper transfers and consequential cash shortages came about were as follows.

29. Client EY

29.1 The FIO identified that the firm acted for Client EY in relation to the purchase of a property in West London. The purchase price was £1,325,000.00 and this was part funded by a £795,000.00 mortgage from C Bank, which also instructed the firm to act on its behalf. The firm's client ledger confirmed that the First Respondent was the fee earner in this case. A client care letter held on file but unsigned by the client also confirmed that the First Respondent had conduct of the matter. It estimated costs at £3,900.00 plus disbursements. The firm reserved the right to increase these charges in the event of any unforeseen matters arising but only with the client's prior agreement. The letter referred to a standard charge of £600.00 for dealing with anti-money laundering ("AML") regulatory matters. The purchase completed on 1 May 2015 when the purchase monies were sent from the firm's client bank account to the vendor's solicitors; however, the purchase had been due to complete on 30 April 2015. The FIO identified that, prior to completion, three bills of costs had been raised against the matter between 30 December 2014 and 23 February 2015 totalling £8,250.00. The FIO identified that these bills were settled by four client to office account transfers totalling £8,250.00; however, the FIO could find no evidence that the client had agreed to any additional costs beyond the £3,900.00, plus AML fee, estimated in the client care letter.

29.2 Because the purchase completed one day late, an interest penalty of £179.27 was payable. The firm made a payment of the interest penalty to the vendor's solicitors by way of cheque on or around 1 May 2015. An email from Mr C of the firm to Client EY dated 30 April 2015 asked her to pay this amount to the firm and explained why it was required. On 19 May 2015, the firm made a payment of £76,250.00 in relation to Stamp Duty Land Tax ("SDLT"). The FIO identified that, at this date, the client ledger account showed a balance of £435.93 and that the balance on the office side of the ledger was £0.00. The FIO could see no reason why the interest charge of £179.27 could not have been paid at the time from the balance of £435.93 held on the client ledger account, rather than asking the client for further monies. On 20 May 2015, Client EY sent an email to the First Respondent in which she stated:

> "I just gave the order to [C] BANK to transfer to you the amount of 179 £,27 [sic] to your account number"

On 21 May 2015 the firm received £179,000.27 into the client bank account. The bank statement narrative for the payment indicated that this was from Client EY. This was clearly a significant and mistaken overpayment because only £179.27 had been requested by the firm. The FIO noted that the client ledger balance on this date was £179,436.20 (£179,000.27 + £435.93). An email from the First Respondent to the Second Respondent dated 26 May 2015 queried whether the £179.27 had been received as the firm's accounting system indicated that it had not. It followed that (i) both Respondents were looking for this payment around this time; (ii) they ought to and must have then noticed the overpayment. Mr Mulchrone submitted that a solicitor acting in accordance with their duties would have paid it back immediately.

29.3 On 18 June 2015, the firm completed the registration of the property in the name of Client EY. The FIO identified that, thereafter, several bills of cost totalling £63,733.80 were raised against the matter. Only four of these were retained on the matter file. The client ledger shows monies totalling £63,730.80 being transferred from client account to office account. But for the overpayment on 21 May 2015, the firm would not have been able to make these client to office account transfers as it would not have held sufficient funds to do so. The FIO also identified credit notes posted to the client ledger account totalling £10,369.80. Mr Mulchrone submitted that the First Respondent continued working on the file after the registration. The client matter file contained correspondence which detailed that it continued to chase a property management agent for an executed license to assign a lease, a rent deposit deed, a service charge agreement and a share certificate.

29.4 The firm's client ledger account indicated that a transfer of £124,617.65 was made to the Successor Firm on or around 5 October 2015. The Successor Firm's ledger showed that on 1 October 2015 a slightly different amount, £125,604.20 was transferred from the firm to the Successor Firm in relation to this matter by the First Respondent or at his behest. This was around £53,216.80 less than the amount overpaid by Client EY in May 2015.

29.5 A letter dated 7 October 2015 from the First Respondent to a landlord's management agent detailed the work allegedly conducted by the firm and/or the Successor Firm up to this date post completion. An attendance note dated 7 October 2015 recorded that the First Respondent spent an estimated 17 hours and 30 minutes on the matter since

July 2015 but gave no particulars of work done. Mr Mulchrone submitted that he drew the Tribunal's attention to this note out of fairness to the First Respondent but that his creating the note showed that there was conscious attention being paid to what was happening on the file. At around the same time the First Respondent was making the transfers to the Successor Firm and so he could not have failed to notice that there were tens of thousands of pounds more than he was supposed to have. Mr Mulchrone submitted that this was probative and went to whether the First Respondent's behaviour was conscious and deliberate.

29.6 On or around 7 March 2016, the Successor Firm was instructed by its accountants to make an inter-ledger transfer of £37,040.00 from the unrelated matter of the probate of Mr MRM to the matter of Client EY. It appeared that this instruction was made because, at this time, the firm's accountants thought there had been a posting error which had arisen in the firm's books of account. On 16 March 2016, the First Respondent wrote to Client EY and confirmed that he was still holding funds on her behalf. The letter included:

> "I am required by the Regulatory Rules to let you know that I am still holding funds to the credit of your account, and if you wish me to return them, please tell me and let me have your bank details or the address to send a cheque."

On 21 March 2016, the First Respondent wrote again to Client EY, purporting to have noticed the overpayment for the first time since it was made around 10 months previously. As at 29 April 2016, the Successor Firm held £162,826.83 in respect of Client EY's matter. The letter enclosed a copy of the earlier letter of 16 March and included:

> "I have a question, having looked at the file to try to see why we are holding a large sum for you, I have seen that I asked you for a shortfall in May 2015 of £179.27 and you told me that you gave instructions to [C] Bank to make the transfer, and I attach a copy of your email.
>
> I have just now looked and I see that [C] sent the wrong amount entirely. I am now holding a substantial sum for you. I assume this was a mis-communication between you and [C], or else [C] made a mistake. I wonder if you know how it is that they came to send a different amount? Will you also confirm the bank details to which any refund should be made as there is now no need for me to maintain client funds for my charges, since the on-going disputes, appear to be becoming resolved."

Mr Mulchrone reminded the Tribunal that the above letter was sent very shortly after the first report made by Mr E to the Applicant and two days before he made the second report. This was in circumstances where the client care letter estimated costs at £3,900.00. In his report of 23 March 2016, Mr E reported the overpayment and the improper use to which it appeared to have been put and referred to the timing of the First Respondent's actions. He stated:

> "It is also of interest that [the First Respondent] informed the client of this minutes before his suspension…"

29.7 The FIO concluded that because Client EY had made an overpayment of or around £178,821.00 to the firm on 21 May 2015, she was due repayment of the same amount (there being no evidence she had agreed to the £53,216.80 in net fees charged to her thereafter in excess of the £3,900.00 plus AML fee of £600.00 estimated in the client care letter). As at 29 April 2016, the Successor Firm did not have sufficient funds to repay the overpayment in full, therefore a minimum shortage of £15,994.17 (£178,821.00 owed minus £162,826.83 actually held) existed in respect of this matter as at that date. The FIO's conclusion was supported by a costs report dated 26 August 2016 by P Legal Costs Ltd. This found:

> "The work on file consisted of only a handful of letters and a few attendance notes, one of which recorded an estimated time of 17.5 hours spent between July 2015 and 1 October 2015. I do not know whether this included letters/emails written during this time so I have included these in addition to the 17.5 hours..."

and

> "there is no evidence that the client agreed to the further charges and, as such, is not liable for the same. In any event, the work on file does not support the level of charges claimed... £8,773.33 plus VAT [was]... the maximum that the client should be charged for any post completion work."

30 The estate of Mr MRM

30.1 The FIO identified that the firm acted for Client EM in the probate of MRM. The matter had previously been conducted by another firm which had taken eight years over the matter and had admitted liability in relation to this. There were seven beneficiaries and each was entitled to a share of the estate. Client EM, one of the executors, wished to take action against the previous firm. A client care letter held on file dated 28 June 2012 from the firm to Client EM detailed that the First Respondent would be conducting the work on the matter. At this stage of the matter the First Respondent could not give Mr EM an estimate of costs. A further letter, dated 20 August 2012 indicated that the First Respondent would deal with the finalisation of winding up the estate in accordance with the terms of the Will and that Mr L would identify areas of negligence which had caused loss to the estate and/or beneficiaries. For reasons which remained unclear, the firm operated two client ledger accounts in respect of this matter numbered 6805 and 6869 respectively, both of which identified the First Respondent as the fee earner.

30.2 Regarding client edger account 6805, on 1 October 2012, the firm received the following funds from the estate's previous solicitors which were posted to client ledger account 6805:

- €117,668.71 (treated as sterling for the purposes of the firm's book keeping system and kept in a separate account);
- £238,145.86.

On 1 October 2015, €117,668.71 were transferred from the firm to the Successor Firm; however, as at this date, the firm held only £60,800.41 of the £238,145.86 received on 1 October 2012 (a difference of £177,345.45). This sum was also transferred to the Successor Firm. The FIO therefore identified that, between 1 October 2012 and 1 October 2015, the sterling held on behalf of the estate by the firm had reduced by £177,345.45 (£238,145.86 - £60,800.41). During the same period the firm had not distributed any of the estate monies to any of the beneficiaries. The FIO identified that six inter client ledger transfers totalling £136,560.25 had been made by the firm on client ledger account 6805, from the funds held in respect of the estate of Mr MRM to five unrelated client matters between 23 April 2013 and 14 April 2014.

30.3 The FIO reviewed the client ledger accounts and matter files for each of the five client matters and found no evidence that they were related to the estate of MRM. The FIO concluded that funds from the MRM estate had been used to rectify shortfalls on the matters to which they had been transferred. In respect of at least three of the five matters, those shortages had in turn arisen due to bills of costs being raised against them by the firm.

30.4 Mr Mulchrone referred, as an example, to the matter of Mr and Mrs Q, ledger number 6876, in which a property purchase was completed on 3 January 2013. Following completion, the client ledger account showed that the firm held a client balance of £33,901.00. Between 3 January 2013 and 22 April 2013, the balance held by the firm reduced primarily due to two bills of cost totalling £29,124.00 being raised against the matter on 17 January 2013. As at 22 April 2013, the client ledger account held only £4,041.00 and SDLT was still outstanding. On 23 April 2013, following an inter client ledger transfer of £34,996.00 from the estate of MRM the firm made payment of SDLT totalling £34,996.00 (which included a penalty for late payment). The FIO noted that the firm would not have been able to make payment of SDLT without the funds received from the estate of MRM. The FIO's full analysis to support his conclusions regarding these six inter-ledger transfers was set out in the FI Report. The FIO also identified that:

- for reasons unknown, fifteen inter ledger transfers totalling £92,072.20 had been made by the firm between the two client ledger accounts held in relation to the MRM estate that is from ledger 6805 to ledger 6869.

- Three bills of costs had been raised against client ledger account 6805 which totalled £11,880.00 between 30 August 2013 and 29 May 2015.

30.5 Regarding client ledger account 6869, the FIO identified that sixteen bills of cost had been raised by the firm against client ledger account 6869 between 8 March 2013 and 29 May 2015 which totalled £91,590.70. Bills of cost numbers 3598, 4398 and 4303 could not be located. The FIO also identified corrections/credit notes posted against this client ledger account totalling £64.278.50. On 17 December 2015, the First Respondent wrote to Client EM claiming to have done £29,000.00 worth of work on the matter, adding:

> "I am not intending to invoice you £29,000. That is just how much time I have invested"

Mr Mulchrone submitted that this was a double edged sword; the First Respondent must have done some work on the file but it showed he was paying attention to it and so the movement of money must have been executed consciously and deliberately.

30.6 The inter-ledger transfer of £37,040.00 made post-merger by the Successor Firm on 7 March 2016, upon the instructions of their accountants from the estate of MRM to the matter of Client EY further diminished the funds held on behalf of the MRM estate to £23,760.41 (£60,800.41 - £37,040.00) as at the date of inspection on 29 April 2016. This transfer did not, however, affect the overall minimum shortage on client account.

30.7 On 7 October 2016, the FIO obtained a witness statement from Client EM which confirmed (i) that he did not know any of the individuals to whom inter-ledger transfers had been made from his father's estate and that (ii) he did not authorise any of these transfers. Client EM also confirmed that he had not received any bills of costs raised against his father's estate. There was no evidence that he agreed to or was properly notified of these costs, still less that they could be paid out of the estate funds without prior consultation. Mr Mulchrone pointed out that the evidence of Mr EM was uncontested; the Applicant had served a Civil Evidence Act notice regarding Mr EM's evidence and it bore a statement of truth.

30.8 In any event, a costs report by P Legal Costs Ltd assessed the "true value" of the work done on behalf of the estate at not more than £32,660.00 plus VAT, and indicated that this would likely be discounted on assessment to between £20,000.00 to £22,000.00. Mr Mulchrone submitted that whatever figure was accepted for work done, the total amount invoiced £127,410.70 (comprising £11,880 (ledger 6805) and £115,530.70 (ledger 6869)) was far in excess of it. This was in circumstances where the First Respondent had estimated his costs at £29,000.00 but added "I am not intending to invoice you £29,000.00".

31. The estate of Ms NN

31.1 The FIO identified that the firm also acted in relation to this estate. The firm's client ledger account identified the First Respondent as the fee earner. On 1 October 2015, following the merger, the balance of £1,311.58 held by the firm in relation to this matter was transferred to the Successor Firm. A letter dated 19 August 2013 from the First Respondent to Mr JN quoted a fee of £3,000.00, not to be exceeded without prior agreement, on the basis that he had known the family for 33 years. He also advised:

> "in addition I will be charging 0.5% of the gross sale price of any property sale."

The letter stated that this was not a commercial fee and that the usual fee for an estate of this value would be around £30,000.00. A client care letter bearing the same date confirmed that the First Respondent would have conduct and stated, among other matters:

> "In this matter we have agreed a fee of £3,000.00 plus VAT and disbursements although we do reserve the right to increase these charges in the event of any unforeseen matters arising but only with your prior agreement,

> and to charge for abortive work at the fee earner rate set out on page 1, but subject to the following provisions of this letter."

Notwithstanding the above assurances, the FIO identified that nine bills of cost had been raised by the firm against the client ledger account between 28 August 2013 and 31 March 2015 which totalled £22,190.00. Bill numbers 4204 and 5014 could not be located on the client matter file. The FIO identified that one credit note, number C/N 4511, totalling £960.00 had been posted against the client ledger account.

31.2 On 7 July 2016, the Successor Firm wrote to Mr JN and other executors including as follows:

> "We discussed specifically the invoices that were created and, apparently, delivered in connection with the Estate to ascertain those you had seen and approved and those which you did not. It is my understanding that the following fee accounts were not received and approved by you:-
>
> 1. 17 November 2014 - Invoice No: 4446 - £3,600.00
> 2. 20 January 2015 - Invoice No: 4531 - £2,160.00
> 3. 25 February 2015 - Invoice No: 4571 - £9,000.00
> 4. 31 March 2015 - Invoice No: 5014 - £2,150.00
>
> The total of all these accounts is £16,910...
>
> ... I would be most grateful if you would all sign, date and return one copy of this letter (enclosed) as proof of the situation as you understand it."

The letter was signed by all three addressees but the FIO was not able to obtain witness statements from them as they did not wish to give evidence. Mr Mulchrone submitted that there was no material dispute of fact about what they said. Nevertheless, the firm's client ledger showed that at least three of the above four invoices (1, 3 and 4) were settled by way of a transfer from client to office account. Invoice 4531 was partially settled in the sum of £1,200.00 in the same manner. Mr Mulchrone submitted that the ledger was broadly supportive of the summary Mr E gave in his letter to the executors. A report dated 13 July 2016 from P Legal Costs Ltd to the Successor Firm calculated that the clients' total liability for costs of all the work carried out by the firm was no more than £7,875.00 plus VAT.

32. **Allegation 1.1**

32.1 For the Applicant, Mr Mulchrone relied on facts and matters in the Rule 5 Statement and supporting documents. Mr Mulchrone submitted it was apparent from those facts and matters that: (i) the First Respondent caused or allowed a cash shortage to arise in the firm's and/or the Successor Firm's client bank account(s) totalling up to around £247,289.62; and that (ii) this shortage was caused by improper transfers of costs from client to office account and/or improper inter ledger transfers between unrelated client matters. Rule 20.1 of the SAR set out the circumstances in which money might be withdrawn from a client account. Insofar as they exceeded agreed costs and disbursements, none of the circumstances applied to the improper transfers made and the First Respondent had failed to advance any evidence to the contrary. In causing or

allowing them to be made, the First Respondent therefore breached Rule 20.1 of the SAR. Mr Mulchrone submitted that in addition to being in breach of Rule 20.1, the conduct alleged against the First Respondent was also in breach of all or any of the following Principles.

32.2 In respect of Principle 2, Mr Mulchrone submitted that by causing or allowing a cash shortage to arise in the firm's and/or the Successor Firm's client bank account totalling up to around £247,289.62, the First Respondent failed to act with integrity, in that, objectively, he failed to demonstrate moral soundness, rectitude and steady adherence to an ethical code. The cash shortage was caused by transfers of costs and inter-ledger transfers which were objectively improper and, in particular, had not been authorised by the clients in question. These transfers were all caused or allowed by the First Respondent. It was well established in the case of Newell-Austin v SRA [2017] EWHC 411 (Admin) that a "solicitor who dips into the client account... lacks integrity because a client account is sacrosanct and regardless of the risk of the money not being repaid." This was the case even if the solicitor intended to repay the money. The evidence in this case suggested that he did not but, in any event, the First Respondent breached Principle 2.

32.3 In respect of Principle 4, Mr Mulchrone submitted that the conduct alleged also amounted to a failure by the First Respondent to act in the best interests of each client which would require the First Respondent to safeguard their money and not to transfer it to office account, or to other client matters, save as permitted by the SAR and/or agreed by the client. It was apparent from the evidence that the First Respondent was using client monies to rectify shortages in other client accounts and/or for office side purposes which were unrelated to the client matter. This was not a proper use of client monies.

32.4 In respect of Principle 6, Mr Mulchrone submitted that the conduct alleged further amounted to a failure by the First Respondent to behave in a way that maintained the trust the public placed in him and in the provision of legal services. Members of the public expected solicitors to safeguard monies entrusted to them and not to use it for unrelated office account purposes or to benefit other clients. Public confidence in the First Respondent and in solicitors generally was likely to be seriously undermined by the First Respondent's behaviour in causing or allowing a client cash shortage of such significant size, regardless of the reasons for that shortage, but particularly where those reasons included improper transfers of costs and improper inter-ledger transfers.

32.5 The Tribunal had regard to the evidence and to the submissions for the Applicant as well as the First Respondent's Answer and other documents from him including his response of May 2017 to the EWW letter in considering all the allegations against him. Generally the First Respondent had admitted the allegations save for dishonesty but the Tribunal still had to satisfy itself whether the allegations were proved. In respect of allegation 1.1, the Tribunal found as facts that the First Respondent accepted there was a cash shortage; there was documentary evidence of the movement of money and three examples had been given concerning clients EY, the estate of MRM and NN. The activity was alleged to have spanned 9 years and 7 months and went into the new firm. The evidence showed the activity went beyond those three ledgers which highlighted examples of the First Respondent's behaviour regarding client money and which demonstrated teeming and lading accounting practices. By

way of example from the three matters referred to in the Rule 5 Statement, in the estate of MRM the existing cash shortage was moved across to the new firm and then the First Respondent began to cover his tracks. On 1 October 2015, €117,668.71 were transferred from the firm to the Successor Firm; however, as at this date, the firm held only £60,800.41 of the £238,145.86 received on 1 October 2012 (a difference of £177,345.45). This sum was also transferred to the Successor Firm. The First Respondent accepted that he was the manager at the material time. He gave the directions. In his Answer he said had he known how unwell he was he "would never have retained management". The front page of the FI Report described him as "Former Manager of Alexander Marks LLP" and the First Respondent had not challenged it. The Tribunal was satisfied on the evidence to the required standard that client money had been withdrawn from client account in circumstances other than those allowed for by Rule 20.1 and that rule was thereby breached (allegation 1.1.1). Having determined the allegation of dishonesty in respect of allegation 1.1 (see below), the Tribunal was satisfied that the First Respondent had failed to act with integrity that is he failed to demonstrate moral soundness, rectitude and steady adherence to an ethical code and was thereby in breach of Principle 2. His behaviour also constituted a failure to act in the best interests of each client and he had thereby breached Principle 4 and his actions were a failure to maintain public trust and thereby breached Principle 6 (allegation 1.1.2). The Tribunal found allegation 1.1 proved on the evidence to the required standard.

33. **Allegation 1.2**

33.1 For the Applicant, Mr Mulchrone relied on facts and matters in the Rule 5 Statement and supporting documents. Mr Mulchrone submitted that it was apparent that the First Respondent caused or allowed improper transfers of costs on multiple occasions. In addition to being in breach of Rule 20.1 of the SAR for the reasons given above, these transfers were also in breach of all or any of the following provisions of the SAR for the following reasons.

- Rule 1.2(a) of the SAR made clear that solicitors must keep other people's money separate from money belonging to them or their firm. In practice this meant that client money must be kept in a designated client account and office money must be kept in a different account. By causing client money to be transferred to office account in circumstances where it remained client money (for example because clients had not agreed to additional costs), the First Respondent failed to keep it separate from his / the firm's money.

- Rule 1.2(c) made clear that solicitors must use each client's money for that client's matters only. Client money might not be applied to office expenses or deployed in respect of matters outside the terms of the retainer, save with the clear agreement of the client. Such agreement was lacking in all or any of the above cases and as such it was clear that, by causing or allowing the improper transfers of costs from client to office account, the First Respondent used those clients' money for purposes unrelated to their matter.

- Rule 20.3 set out the circumstances in which office money might be withdrawn from client account. On the face of it, none of those circumstances were applicable to the improper client to office account transfers and the First

Respondent failed to produce any evidence to the contrary. In particular, Rule 20.3(b) provided that office money might only be withdrawn from a client account when it was properly required for payment of costs under Rule 17.2. Insofar as they exceeded agreed fees and disbursements, there was no evidence that the transfers discussed above were properly required for payment of the firm's costs.

33.2 Mr Mulchrone submitted that the conduct alleged was also in breach of all or any of the following Principles for the following reasons.

- In respect of Principle 2, by causing or allowing improper transfers of costs from client to office account, the First Respondent has failed to act with integrity, in that, objectively, he has failed to demonstrate moral soundness, rectitude and steady adherence to an ethical code. The transfers of costs were objectively improper and, in particular, had not been authorised by the clients in question. These transfers were all caused or allowed by the Respondent.

- In respect of Principle 4, the conduct alleged also amounted to a failure by the First Respondent to act in the best interests of each client. Acting in each client's best interests would require the First Respondent to safeguard their money and not to transfer it to office account save as permitted by the SAR. It was apparent from the evidence discussed above that the First Respondent was using client monies for office account purposes which were unrelated to the client matter. This was not a proper use of client monies.

- In respect of Principle 6, the conduct alleged further amounted to a failure by the First Respondent to behave in a way that maintained the trust the public placed in him and in the provision of legal services. Members of the public expected solicitors to safeguard monies entrusted to them and not to use it for unrelated office account purposes. Public confidence in the First Respondent and in solicitors generally was likely to be seriously undermined by the First Respondent's behaviour in causing or allowing improper transfers of costs from client to office account.

33.3 The Tribunal found as facts that improper transfers of costs had been made out of client ledgers as alleged. The matters described in the Rule 5 Statement were all from a particular period but the ongoing cash shortage was undeniable and these were just examples and the First Respondent did not challenge that this was how he had dealt with client money. The Tribunal noted that his conduct spanned both the firm of Alexander Marks LLP and he continued in the merged Successor Firm as evidenced by his letter of 7 October 2015 to a landlord's management agent detailing the work allegedly conducted by the firm or the Successor Firm up to this date post completion for EY. The case of the estate of NN involved the executors of an estate not receiving and approving bills of costs totalling £16,910.00. The Tribunal accepted that the evidence constituted examples indicative of the First Respondent's behaviour as to how he chose to manage client monies and operate a teeming and lading system. Based on the evidence the Tribunal was satisfied that Rule 1.2(a) was breached because the First Respondent did not keep other people's money separate from money belonging to him or his firm; he breached Rule 1.2(c) because he failed to use each client's money for that client's matters only; he breached Rule 20.1 because he

transferred money from client account other than in the permitted circumstances; and he breached Rule 20.3 because he withdrew office money from client account when he was not permitted to do so. The Tribunal found allegation 1.2.1 proved on the evidence to the required standard by reason of the Rule breaches found. The Tribunal also found proved that as the behaviour under allegation 1.2 was part of the overall teeming and lading scheme the First Respondent was in breach of Principles 2, 4 and 6. The Tribunal found allegation 1.2.2 proved on the evidence to the required standard.

34. **Allegation 1.3**

34.1 For the Applicant, Mr Mulchrone relied on facts and matters in the Rule 5 Statement and supporting documents from which he submitted it was apparent that the First Respondent caused or allowed the improper inter-ledger transfers on multiple occasions. In addition to being in breach of Rule 20.1 of the SAR, these transfers were also in breach of all or any of the following provisions of the SAR for the following reasons.

- Mr Mulchrone's submissions about the nature of Rule 1.2(c) of the SAR are set out above. By using money belonging to one client, such as the estate of MRM, to rectify shortages arising against other clients' matters, such as that of Client EY, the First Respondent failed in his duty to use each client's money for that client's matters only. The available evidence indicated that, with the exception of the transfers between the two MRM ledgers, the inter ledger transfers were between completely unrelated client matters and took place without the knowledge or permission of the client.

- Rule 27.1 of the SAR set out the circumstances in which a paper transfer of money held in a general client account from the ledger of one client to the ledger of another client might be made. On the face of it, neither of those circumstances were applicable to the improper inter-ledger transfers and the First Respondent failed to advance any evidence to the contrary.

34.2 Mr Mulchrone submitted that the conduct alleged was also in breach of all or any of the following Principles for the following reasons.

- In respect of Principle 2, by causing or allowing improper inter-ledger transfers between unrelated client matters, the First Respondent failed to act with integrity, in that, objectively, he failed to demonstrate moral soundness, rectitude and steady adherence to an ethical code. The inter-ledger transfers were objectively improper and, in particular, had not been authorised by the client in question (EM). These transfers were all caused or allowed by the First Respondent and were made for the improper purpose of rectifying shortages on unrelated client matters.

- In respect of Principle 4, acting in each client's best interests would require the First Respondent to safeguard their money and not to transfer it to other client accounts, save as permitted by the SAR or agreed by the client. It was apparent from the evidence that the First Respondent was using client monies to rectify

shortages arising in unrelated client matters. This was not a proper use of client monies.

- In respect of Principle 6, members of the public expect solicitors to safeguard monies entrusted to them and not to use them to benefit other clients by rectifying shortages arising on their matters. Public confidence in the First Respondent and in solicitors generally was likely to be seriously undermined by the First Respondent's behaviour in causing or allowing improper inter-ledger transfers not permitted by the SAR and without the knowledge or permission of the client.

34.3 The Tribunal noted the evidence showing transfers between ledgers, which the email exchanges between the First and Second Respondents supported. The allegation was also strongly supported by the unchallenged witness statement of the executor of MRM's estate Mr EM who confirmed (i) that he did not know any of the individuals to whom inter-ledger transfers had been made from his father's estate and that (ii) he did not authorise any of these transfers; he had not received any bills of costs raised against his father's estate. There was no evidence that he agreed to or was properly notified of these costs or authorised their being paid out of the estate funds without prior consultation. The letter dated 7 July 2016 signed by NN's executors was to the same effect. The Tribunal found as facts that the activities underlying the allegation were true. The Tribunal found, based on the evidence that by his activities in causing or allowing the inter ledger transfers the First Respondent had failed to use each client's money for that client's matters only and thereby breached Rule 1.2(c); he had withdrawn client money where not permitted to do so and thereby breached Rule 20.1; and had made paper transfers of money held in a general client account from the ledger of one client to the ledger of another client in circumstances where it was not permitted and thereby breached Rule 27.1. These breaches amounted to proof on the evidence to the required standard of allegation 1.3.1.

34.4 In respect of allegation 1.3.2, the Tribunal also found proved on the evidence to the required standard that by the behaviour found proved the First Respondent was in breach of Principle 2, 4 and 6.

35. **Allegation 1.4**

35.1 For the Applicant, Mr Mulchrone relied on facts and matters in the Rule 5 Statement and supporting documents. It was apparent from those documents that the firm received a significant overpayment from Client EY and the First Respondent was looking for the correct amount very shortly afterwards. In the circumstances, it was highly unlikely that the First Respondent could have failed to notice the overpayment, not least because, without it, he would not have been able to raise and/or settle the bills of costs referred to above. The First Respondent retained and even billed against the mistaken overpayment until at least 21 March 2016, some 10 months after it was made and therefore breached either or both of the following SAR:

- Rule 7.1 made clear that that any breach of the rules must be remedied promptly upon discovery. This included the replacement of any money improperly withheld or withdrawn from a client account. It was improper for the First Respondent to withhold (let alone withdraw and fail to replace), monies in the sum of £179,000.27, in circumstances where (i) the firm had only requested

(unnecessarily) £179.27 and (ii) the overpayment was plainly made in error. The First Respondent failed to return this money promptly to Client EY.

- Rule 14.3 made clear that client money must be returned to the client (or other person on whose behalf the money was held) promptly, as soon as there was no longer any proper reason to retain those funds. There was never any proper reason for the First Respondent to retain (let alone withdraw then fail to replace) the funds mistakenly paid over to him in the sum of £179,000.27 yet he nevertheless did so during a period of approximately 10 months. There was no justification for this.

35.2 Mr Mulchrone submitted that in the circumstances, the First Respondent's conduct was also in breach of all or any of the following Principles for the following reasons.

- In respect of Principle 2, by improperly retaining (and indeed billing against) a mistaken overpayment in the sum of around £178,821.00, the First Respondent failed to act with integrity as defined above. He had no right to retain these monies, let alone withdraw and fail to replace them, and yet he did so during a period of approximately 10 months. Not only this, this First Respondent also failed to inform Client EY of the overpayment even though he must have been aware of it. Instead, he used the funds mistakenly entrusted to him to raise bills of costs to which the client had not agreed and which he would not have been able to raise and/or settle but for the overpayment.

- In respect of Principle 4, Mr Mulchrone submitted that acting in Client EY's best interests would require the First Respondent to alert her to the overpayment and take prompt steps to rectify it. It would not include retaining, let alone withdrawing and failing to replace, those funds mistakenly entrusted to him. The First Respondent nevertheless did exactly that during a period of approximately 10 months, without informing the client, who was therefore unaware not only of her mistaken overpayment, but also of the significant bills of costs raised and/or settled against it.

- In respect of Principle 6, Mr Mulchrone submitted that members of the public would rightly expect that a solicitor in receipt of a significant overpayment from a client, however wealthy, would take prompt steps to alert that client to the overpayment and to correct it on the client's instructions as soon as possible. The First Respondent neither alerted the client or corrected the overpayment but instead retained those monies and even dissipated them by raising bills of costs to which the client had not agreed and then failing to replace the monies improperly withdrawn against them.

35.3 The Tribunal had regard to the evidence, the submissions for the Applicant and the Answer filed by the First Respondent and other documents. The Tribunal found as facts that the firm, in the person of a solicitor assisting the First Respondent, requested a payment of £179.27 on 30 April 2015 by way of penalty interest for late completion of a property purchase. As a result of an error of some kind £179,000.27 was paid to the firm instead. The First Respondent was on the lookout out for the payment as evidenced by an email to the Second Respondent of 26 May 2015. Only a little work was done subsequently on the file but when the First Respondent transferred money

from EY's file to the Successor Firm on or around 5 October 2015 (the merger having taken effect on 1 October) over £53,000.00 had been paid out of the account. After completion of registration bills totalling over £63,000.00 were raised and an equivalent amount transferred to office account. The Tribunal noted that the First Respondent took no steps to return the overpayment until he was about to be removed from the practice. The Tribunal found the facts underlying allegation 1.4 were proved. As soon as he discovered the overpayment, which the Tribunal found occurred very quickly, there was no longer any proper reason for the First Respondent to retain those funds and he was obliged to return the monies to the client but he did not do so. He was thereby in breach of Rule 14.3. Having committed a breach of the rules the First Respondent was obliged to remedy it promptly upon discovery. This included the replacement of any money improperly withheld or withdrawn from a client account which was applicable to these funds. The Tribunal found the First Respondent thereby also to have breached Rule 7.1. Allegation 1.4.1 was therefore found proved on the evidence to the required standard.

35.4 In respect of allegation 1.4.2, the Tribunal found proved to the required standard on the evidence that by his actions the First Respondent had also breached Principles 2, 4, and 6.

36. **Allegation 1.5**

36.1 Mr Mulchrone submitted that the First Respondent denied dishonesty in his Answer but relied on his medical condition. The Applicant accepted that the First Respondent and a close family member had medical conditions and had considered whether it should obtain an expert medical report of its own regarding the First Respondent but for the reasons set out in the Applicant's Reply to the Answer had not done so. Those reasons included that such an examination would serve no useful purpose because, even if, which was not admitted, it was possible to make a retrospective diagnosis without collateral history, such a diagnosis would not undermine the Applicant's case. (Incidentally the Applicant submitted that the Standard Directions did not necessarily extend to permission to adduce expert evidence.) The Applicant noted the narrowness of the issues. The First Respondent had admitted the relevant facts, that is that he: caused or allowed the cash shortage to arise (Allegation 1.1); caused or allowed improper transfers of costs and improper inter-ledger transfers (Allegations 1.2 and 1.3); and failed to return Client EY's overpayment (Allegation 1.4). In the premises, it was clear that the First Respondent had actual knowledge as to the relevant facts and the Second Respondent said that the First Respondent ordered the transfers. Mr Mulchrone submitted that the First Respondent's actions were dishonest in accordance with the test for dishonesty stated by the Supreme Court in Ivey v Genting Casinos [2017] UKSC 67, which applied to all forms of legal proceedings, namely that the person has acted dishonestly by the ordinary standards of reasonable and honest people. In addition, the circumstances of the case showed that he must have realised that by those standards he was acting dishonestly but proof of such realisation was not necessary to prove dishonesty. The First Respondent acted dishonestly by the ordinary standards of reasonable and honest people because:

- He deliberately caused or allowed transfers of costs from client to office account and/or inter-ledger transfers in circumstances where those transfers were objectively improper and against the rules;

- The improper transfers of costs from client to office account were not merely procedurally improper – they were improper because, in making them, the First Respondent was materially overcharging clients and doing so without their knowledge or agreement;

- The First Respondent either used those client monies for office side purposes, in which case he effectively stole them, or to cover up shortages arising on other client matters – a process aptly described by the FIO as "theft with a bill on top" and by Mr L as "an internal Ponzi scheme";

- In any event, this practice, known as 'teeming and lading', was a notorious form of bookkeeping fraud also known as 'short banking' or 'delayed accounting'. No honest person would engage in this practice, particularly if they were a solicitor entrusted with the safekeeping of client monies;

- Furthermore, the First Respondent took unfair advantage of Client EY's mistaken overpayment to raise and settle bills of costs which (i) Client EY had not agreed to, (ii) he was not entitled to and (iii) he would not have been able to pay but for Client EY's overpayment. The First Respondent failed to inform Client EY of her overpayment for approximately 10 months, a delay which, in all the circumstances, could only be regarded as deliberate and calculated. During this time her funds were significantly dissipated by him.

36.2 In the Reply to the Answer, Mr Mulchrone submitted for the Applicant that in light of his condition, the First Respondent contended that he "should not have been managing the practise [sic] or the client account because [he] was so ill." The Respondent added that he "did not realise this and didn't think at the time that [he] might be doing anything wrong" While the Applicant noted the First Respondent's apparent poor health and indeed that of a close family member, it was firmly denied that any of the facts and matters set out in the Answer disclosed a defence to dishonesty.

36.3 In respect of the allegation of dishonesty against both Respondents Mr Mulchrone also drew attention to a section of the FI Report, which he submitted, had not been drawn out in the Rule 5 Statement as much as it might have been. The section related to exchanges of internal emails between the First and Second Respondents. For example on 7 September 2015 the First Respondent sent an email to the Second Respondent which stated:

> "Dear P
> ...
> On 6639 [MRM] I wish to prepare a bill and want to remove the issued bills from the time recording part. Can they be moved or moved to a second or different file numbered 6839 (1) so I can send out the time recording without showing the bills issued
> Thanks
> Alex"

The Second Respondent replied on the same date:

"Hi Alex
You can't mess around with the time recording, the only thing you can do is credit back of write of time (sic).
The only other way would be to start up a new file for (sic) and put in all the time again.
P"

On 26 August 2014, the First Respondent sent an email including:

"I will if you need it bill [MRM] until it is rebalanced next week should it prove necessary."

On 25 September 2014 the First Respondent sent an email to the Second Respondent which stated in part:

"I have reserved a bill in [MRM] 6869 to allow you to cover Lloyds tomorrow and set off against the bill [CP and F] next week as it is a timing matter not an amount matter.

You can confirm details Monday when I am back and I will give you the bill for your file but I will be able to replace it next week."

On 23 March 2015 the First Respondent sent an email to the Second Respondent, which stated in part:

"I have £7800 t (sic) transfer to bbva now on [MRM] (bill dictated and done today [AP] is typing now).
When done please pay [AG] [Mr G his consultant] his last bill £2400 approx and put what you can and to my Halifax account I did not pay my mortgage last month I wish to pay it this month.
I have at least £6000 coming it (sic) this week to straighten- at least and more by the month end."

On 12 May 2014 the First Respondent sent an email to the Second Respondent which stated:

"Nothing urgent certainly not for today but I am now coming under a lot of pressure from hmrc for my personal tax. This will be a splendid month one way or another (vat aside!!) and so as and when you can please drip something to hmrc to avoid bailiffs knocking at my door again. Fortunately I don't owe anywhere near as much as I did last time."

On 30 April 2014, the Second Respondent sent an email to the First Respondent which stated:

"Morning Alex
We need £1000.00 to cover Lloyds today and another £1000.00 to cover tomorrow. Also for the month end this is how we stand;
I need a bill on something to cover the £4020.00 taken on file …. [V] House
[S] didn't do a bill on file …. (1595.97) so I have had to cover that with other

transfers, he had made a (sic) effort to clear some of his balances though but not this one.
[R] (File …) I have covered the over transfer of £1236.00 so only £4200.00 to put back on the [MRM] file now.
P"

The First Respondent responded by email to the Second Respondent on the same date as follows:

> "Thanks P
> Please transfer from [A] and I will do the bill to cover later when in.
> The [V] House is temp the cheque is probably at 55 and I will have about £11,000.00 in the next week on 2 exchanges for [KB] – one bill done yesterday the other today."

Mr Mulchrone submitted that these were examples of the First Respondent's instructions to the Second Respondent on various transfers and showed deliberate and conscious actions. In interview with the FIO on 5 July 2016, the Second Respondent said that whenever he would raise issues in relation to the estate of MRM with the First Respondent "all he kept saying was yes, I've got lots of time on [MRM]". Mr Mulchrone submitted that while there might be medical evidence that on balance his symptoms would have interfered with his professional judgment, errors of professional judgment were different from stealing.

36.4 The Tribunal had regard to the evidence and the submissions for the Applicant and the First Respondent's Answer and other documents. The Tribunal followed the test for dishonesty in the case of <u>Ivey</u>:

> "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."

The Tribunal had found the facts underlying allegations 1.1 to 1.4 proved against the First Respondent. It determined that the facts found demonstrated a pattern of behaviour in using client money to bolster office account and even to make payments in personal matters (for example the First Respondent's mortgage). As an experienced solicitor the First Respondent knew that such actions would inevitably cause a client account shortage. In order to deal with that the First Respondent gave clients estimates of costs and then raised bills far in excess of that estimate without reference to the client. This was demonstrated by the evidence including the reports of the legal costing firm which analysed the work done on the files. There were examples of the First Respondent preparing an attendance note on the file of EY in very general terms

in an attempt to justify that work was being done. The Tribunal also had the evidence of client EM regarding the estate of MRM that he had never seen the bills, did not know the recipients of inter ledger transfers and had not authorised the payments. The same situation applied to the executors of the estate of NN. In the case of the estate of MRM the First Respondent said that he was not intending to bill work asserted to be worth £29,000.00, while the estimate originally given was £3,900.00 plus £600.00 for AML; the costs firm assessed the work done at its most generous as £32,000.00 likely to be assessed down to £22,000.00 and over £127,000.00 was billed. In NN £3,000.00 was estimated for costs and over £22,000.00 was taken. At the last moment as he was about to be suspended the First Respondent wrote two letters to the client EY dated 16 and 21 March 2016 in an attempt to cover himself, 10 months after the overpayment was made. The Tribunal found, based on the facts that the First Respondent's behaviour in respect of allegations 1.1 to 1.3 was all part of a process of teeming and lading. The payment which triggered the First Respondent's conduct in respect of allegation 1.4 was serendipitous but once he realised the money had been received his behaviour towards it was identical to that in respect of the client monies referred to above. It was calculated and indicative that he did not think that the client would ask for the money to be returned. Against an estimate of £3,900.00 plus £600.00 for anti-money-laundering procedures, and after receipt of the payment and completion of registration the Tribunal found that the First Respondent dipped into the pool of money available on client account for a number of different transfers totalling nearly £64,000.00. There were also two credit notes on the ledger dated 22 July (£4,009.80) and 30 September 2015 (£6,360.00), the latter on the last day of his firm's existence and the first of which referred to a bill 1500 which was an error for 5100 in exactly the same amount. The second credit note referred to the number of an invoice not found on the client file. (This was not the only ledger showing credits; the files of EY and NN also showed them.) The Tribunal found that this clearly evidenced the First Respondent manipulating the ledger. The Tribunal considered that the First Respondent knew that the overpayment had been received and took advantage of it. His behaviour in causing or allowing the cash shortage (allegation 1.1) and then teeming and lading to conceal it (allegations 1.2 and 1.3) was repeated, calculated and consciously carried out over a long period of time in the full knowledge of the facts of what he was doing. His behaviour in retaining the mistaken overpayment was part of the same process and made in full knowledge of the facts. The Tribunal found that by the objective standards of ordinary decent people what the First Respondent had done was dishonest and that dishonesty was found proved on the evidence in respect of allegations 1.1, 1.2, 1.3, and 1.4.

Second Respondent

37. Allegations 2.1 and 2.2 against the Second Respondent mirrored allegations 1.2 and 1.3 respectively against the First Respondent save that the Second Respondent was alleged to have undertaken/ assisted in the improper activity as opposed to causing or allowing it.

38. **Allegation 2 - The allegations against the Second Respondent, Paul Elliott (unadmitted), were that, while employed or self-employed as the firm's bookkeeper between approximately 1 September 2006 and 30 September 2015:**

2.1 He undertook and/or assisted in one or more of the improper transfers of costs referred to in allegation 1.2 above and therefore breached all or any of:

2.1.1 Rules 1.2(a), 1.2(c), 20.1 and 20.3 of the SAR;

2.1.2 Principles 2, 4 and 6 of the Principles;

2.2 He undertook and/or assisted in one or more of the improper inter-ledger transfers referred to in allegation 1.3 above and therefore breached all or any of:

2.2.1 Rules 1.2(c), 20.1 and 27.1 of the SAR;

2.2.2 Principles 2, 4 and 6 of the Principles;

2.4 He acted dishonestly in respect of allegations 2.1 and/or 2.2 above but dishonesty is not an essential ingredient to prove those allegations.

38.1 Mr Mulchrone submitted that the Second Respondent did not work at the Successor Firm. The cash shortage was primarily the responsibility of the First Respondent as solicitor and partner but that did not diminish the culpability of the Second Respondent for assisting in the undertaking. When the allegations were put to him in 2017, by his reply of 4 May 2017, the Second Respondent complained of the effect the investigation was having on him and his health. The Applicant relied upon the facts and matters set out in the Rule 5 Statement and supporting evidence and additionally on the following material admissions made by the Second Respondent in interview:

- The Second Respondent would make all of the postings to the accounts system and was responsible for maintaining the books of account. Neither the First Respondent nor Mr L would make postings to the accounts system;

- The First Respondent had overall responsibility/control of the books of accounts and ran the administrative side of the business;

- Either he or the First Respondent would make the online bank payments;

- There were "quite a few" instances where the firm would take money from client bank account in anticipation of a receipt, before it was received. It would cause a shortage but it would always be rectified before month end;

- The Second Respondent used to raise this issue with the First Respondent who would tell him that the firm's accountants were aware and satisfied as long as it was corrected by the end of the month;

- He should have reported this issue to the Applicant;

- He would follow instructions from the First Respondent both verbally and by way of email;

- The inter client ledger transfers posted to the client ledger accounts in respect of the MRM estate were posted by him on the instructions of the First Respondent.

38.2 In respect of Rules 1.2(a), 1.2(c), 20.1, 20.3 and 27.1, as the firm's bookkeeper, the Second Respondent was required to comply with the SAR. By undertaking and/or assisting in the improper transfers of costs referred to in allegation 1.2, and/or the improper inter-ledger transfers referred to in allegation 1.3, the Second Respondent breached all or any of the SAR alleged for the same reasons given above in respect of the First Respondent. The Second Respondent additionally breached all or any of the following Principles for the following reasons.

38.3 In respect of Principles 2, 4 and 6, the Principles applied to "all" persons working for Applicant-regulated entities, not merely to solicitors. By undertaking and/or assisting in the improper transfers of costs and/or the improper inter-ledger transfers, the Second Respondent breached the Principles alleged for the same reasons given above in respect of the First Respondent.

38.4 The Tribunal had regard to the evidence and the submissions for the Applicant. The facts found by the Tribunal applied to all the allegations against the Second Respondent as much as they did to the allegations against the First Respondent. The Second Respondent had not filed an Answer to the allegations. He had emailed the Applicant complaining he was being bullied by it and that the matter had nothing to do with him but he had been more forthcoming in the interview with the FIO. The Tribunal found based on the evidence that the Second Respondent assisted the First Respondent in all the accounting matters that the Tribunal had been taken to. He specifically stated that he had carried out the instructions which the First Respondent had given to him. His method of working with the First Respondent was graphically illustrated by the email exchanges between them which the FIO recorded in the FI Report. The Second Respondent's advice to the First Respondent in his email of 7 September 2015 showed the level of his involvement in the teeming and lading process. The First Respondent's email of 23 March 2015 was particularly telling as an example of what the First Respondent asked him to do; to take from the estate of MRM when things became tight financially at the end of the month. The Second Respondent's email of 30 April 2014 containing considerable detail about the operation of the process showed that what he did went beyond merely obeying orders. He was engaging in a creative discussion with the First Respondent. The emails constituted evidence that the Second Respondent carried out the improper transfers of costs (allegation 2.1) and that he was also involved in carrying out the inter-ledger transfers (allegation 2.2). The Tribunal found the facts underlying allegations 2.1 and 2.2 proved against the Second Respondent. The Tribunal found proved on the evidence to the required standard that the Second Respondent's conduct amounted to breaches of the SAR alleged in allegations 2.1 and that thereby he had breached Principle 2; the Tribunal was satisfied that to assist the First Respondent as he did and even to go beyond assisting to full participation constituted a breach of the duty to act with integrity. Such conduct could not possibly be in the best interests of clients (Principle 4) and would certainly fail to maintain public trust (Principle 6) (allegation 2.2). Allegations 2.1 and 2.2 were therefore found proved against the Second Respondent on the evidence to the required standard.

39. **Allegation 2.4 - He [the Second Respondent] acted dishonestly in respect of all or any of allegations 2.1 and/or 2.2 above.**

39.1 Mr Mulchrone submitted that the Second Respondent's actions were dishonest in accordance with the Ivey test for dishonesty. In addition, the circumstances of the case showed that he must have realised that by the ordinary standards of reasonable and honest people he was acting dishonestly but proof of such realisation was not necessary to prove dishonesty. The Second Respondent acted dishonestly by the ordinary standards of reasonable and honest people because:

- He deliberately aided and abetted the First Respondent's objectively improper transfers;

- He did so knowing them to be improper and against the rules and in circumstances where he (i) ought to have reported them to the Applicant and (ii) realised this;

- The Second Respondent therefore deliberately enabled the First Respondent to engage in the notorious form of bookkeeping fraud known as 'teeming and lading' to which Mr Mulchrone applied the same comments as he did in respect of the allegation of dishonesty against the First Respondent above; he described it as a practice in which no honest person would engage 'particularly if they were a professional legal bookkeeper entrusted with the proper accounting for client monies.

39.2 The Tribunal applied the test in the case of Ivey. It had regard to the evidence and the submissions for the Applicant. It also noted that the Second Respondent referred to having been a member of a professional body the Institute of Legal Finance and Management previously known as the Institute of Legal Cashiers and Administrators at some time previously. He worked in the field for many years and must therefore have been well versed in the SAR – indeed he demonstrated this by his advice to the First Respondent in the email exchanges. It was clear that he was well aware of the facts about how the firm's accounts were being operated; he played a full part in giving effect to that improper operation. In interview, the Second Respondent stated that the First Respondent and his partner never made postings or accessed the computer system. He stated the he made "all the postings" and agreed he was "maintaining the books". He also agreed that there were instances where the firm was taking money from client account in anticipation that money was going to come in. He agreed that would cause a shortage "but it was always corrected before the end of the month…" In respect of the email dated 26 August 2014 from the First Respondent to him in interview the FIO summarised the Second Respondent's comments as follows:

> "He confirmed that the email was [the First Respondent] telling him that if he did not have the available funds on the matter then to bill the funds against the estate of [MRM]."

In respect of the email dated 25 September 2014 from the First Respondent, his comments in interview were summarised by the FIO to include:

> "This email was [the First Respondent] asking [the Second Respondent] to take money against the estate of [MRM] when things became tight at the end of the month"

The Second Respondent said that he was worried about the teeming and lading activity and was told the bills were being done "and then the bills used to come through over the next few days or something....or by the end of the month..." The Tribunal determined that the email exchanges demonstrated that he went beyond obeying orders and undertook some of the creative transactions independently and advised the First Respondent afterwards. The Tribunal found proved on the evidence to the required standard that the Second Respondent was fully involved in the teeming and lading activity and that by the objective standards of ordinary decent people what he had done was dishonest and dishonesty (allegation 2.4) was proved in respect of allegations 2.1 and 2.2.

40. **Allegation 2.3 - He [the Respondent] failed to identify and/or escalate the overpayment referred to in allegation 1.4 above and therefore breached all or any of:**

2.3.1 Rules 7.1 and 14.3 of the SAR;
2.3.2 Principles 4 and 6 of the Principles.

40.1 The Applicant relied upon the facts and matters set out in the Rule 5 Statement and supporting evidence. It was apparent from those facts and matters that the firm received a significant overpayment from Client EY and that the First Respondent asked the Second Respondent whether the correct amount had been received very shortly afterwards. In the circumstances, it was highly unlikely that the Second Respondent could have failed to notice the overpayment because without it, he would not have been able to make the postings and/or transfers post-dating its receipt. If he identified it, then he clearly failed to escalate it because, as noted above, the firm retained and then dissipated the overpayment during a 10 month period lasting until around 21 March 2016. In respect of Rules 7.1 and 14.3, as the firm's bookkeeper, the Second Respondent was required to comply with the SAR. By failing to identify and/or escalate the overpayment from Client EY the Second Respondent breached the SAR alleged for the same reasons given above in respect of the First Respondent. The Second Respondent additionally breached all or any of the following Principles for the following reasons:

- In respect of Principle 4, again, the Principles apply to "all" persons working for Applicant- regulated entities, not merely to solicitors. Acting in Client EY's best interests would require the Second Respondent, as a professional bookkeeper, to identify and escalate the overpayment to the First Respondent and/or Mr L, who would then decide the appropriate action to take as the solicitors holding that money in their client account. The Second Respondent either failed to identify the overpayment in circumstances where it was obvious or he did identify it but failed to escalate it.

- In respect of Principle 6, members of the public would rightly expect that a professional legal bookkeeper in receipt of a significant and obvious overpayment from a client, however wealthy, would take prompt steps to identify and escalate

that payment to his superiors as soon as possible. The Second Respondent either failed to identify the overpayment in circumstances where it was obvious or he did identify it but failed to escalate it. In doing so he enabled the First Respondent improperly to retain and/or dissipate those funds by raising bills of costs to which the client had not agreed and then failing to replace the improperly withdrawn funds.

40.2 The Tribunal had regard to the evidence and the submissions for the Applicant. The First Respondent had asked the Second Respondent if the correct amount had been received and so the Second Respondent would have been looking at EY's account to check for its arrival and would therefore have seen the overpayment. In his email of 4 May 2017 to the Applicant while the Second Respondent said he could not remember when he would have known that the erroneous amount had been received and that he would only have known about the payment if the fee earner had told him he also said "I would imagine it was picked up by looking at the bank statements which could have (sic) a few days after it arrived." The Tribunal found it was not credible that the Second Respondent would not have been aware of the overpayment and had no doubt that he was. The Tribunal found as a fact that the Second Respondent failed to identify, and also failed to escalate the issue as alleged and that he thereby breached Rules 7.1 and 14.3 (allegation 2.3.1) and that he was in breach of the Principles 4 and 6 (allegation 2.3.2). The Tribunal found allegation 2.3 proved on the evidence to the required standard.

Previous Disciplinary Matters

41. None in respect of either Respondent.

Mitigation

42. Neither the First Respondent nor the Second Respondent was present and so no formal mitigation was offered.

Sanction

43. <u>First Respondent</u>

43.1 The Tribunal had regard to its Guidance Note on Sanctions. It assessed the seriousness of the First Respondent's misconduct. As to culpability, it was clear that he had a very hands-on role in what had happened. His motivation was a financial benefit to himself. He was raising false bills and using client money to prop up the firm which was clearly in a parlous state. The partners were using business credit cards to cover drawings and there were multiple loans which came due at the end of every month. The First Respondent's actions were planned save for the receipt of the erroneous payment but he adopted a deliberate course of action in respect of it once it was received. He acted in breach of a position of trust in respect of both the estate of MRM and NN. He breached the trust of people who had died and had entrusted their last wishes expecting that they would be honoured. The position regarding MRM was exacerbated because this was an estate which had already been mishandled. He then continued to abuse his position of trust in the most despicable way. The harm to the beneficiaries who had already been prejudiced once and now faced the problem for a

second time was considerable. In the case of EY, he exploited the substantial overpayment. The fact the client who had overpaid was financially comfortable did not mean that she should be without her rightful funds for a period of 10 months and at the point at which the First Respondent wrote to her about the overpayment there was not the money in her account to make the refund because of the shortfall he had transferred to the Successor Firm. Had he been able to cover his tracks successfully that firm would have faced additional financial loss. There was also harm to the Successor Firm which was left to pay a massive bill and which would also have been exposed to reputational damage. The email exchanges with the Second Respondent showed a determination to conceal the true financial position from the Successor Firm by paying in £40,000.00 into the office account of the firm on 30 September 2015, the day before the merger. It was calculated and despicable to pass on his liabilities from a 9 year exercise of teeming and lading to another firm. The First Respondent also damaged his partner. The harm caused to the reputation of the profession was extreme. There were aggravating factors; dishonesty had been alleged and found proved in respect of all the allegations. It had occurred over 9 years and 7 months with the First Respondent taking advantage of vulnerable people. He had attempted to conceal what he had done right up to the point when he was suspended. He knew or ought reasonably to have known that he was in material breach of his obligations to protect the public and the reputation of the legal profession and so he sought to cover up what he had done. The impact on those affected was serious.

43.2 The Tribunal considered whether there were any mitigating factors; the First Respondent had admitted all the allegations save dishonesty and should have some small credit for that but in the context of such a long period of deception it could weigh very little and was late in the day. The First Respondent had shown no insight into what he had done and simply blamed adverse personal circumstances. The Guidance Note set out that the most serious misconduct involves dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances (SRA v Sharma [2010] EWHC 2022 (Admin)). As to personal mitigation; the First Respondent relied on his medical evidence and personal circumstances. The evidence was that on balance his symptoms would have interfered with his professional judgment but the Tribunal did not consider what he had done had involved professional judgment; he cited illness as an excuse for what happened but that did not correlate with a sophisticated and prolonged teeming and lading scheme that operated throughout his time at the firm. The Tribunal could find no exceptional circumstances. The Tribunal determined that nothing short of strike off would protect the public and maintain the reputation of the profession.

44. Second Respondent

44.1 Again the Tribunal had regard to its Guidance note. As to culpability, the Second Respondent did on occasion act on instructions but the email exchanges with the First Respondent indicated that he was also a driving force and a willing and active participant in the teeming and lading. His conduct was planned and the emails showed it. He was in breach of a position of trust regarding the estate of MRM and NN. He knew that he was dealing with client money and he knew the circumstances of the overpayment by EY. He was looking for a much smaller payment but did nothing to rectify the situation when the much larger amount was received. He had a

degree of direct control; only he accessed the accounting system. He said in interview that he had been a member of the Institute of Legal Finance and Management since 1980. The harm caused was the same as that for the First Respondent and he impacted on the reputation of people carrying out similar financial roles in the legal profession. Again there were aggravating factors. He had been deliberate in his dishonesty. His actions were calculated and took place over a long period of time. He took advantage of vulnerable people and concealed his wrongdoing. The emails showed that he colluded in replacing money to conceal what was happening. He must have been aware of his breach of his obligations. He had made no admissions and showed no insight but challenged the Applicant as to its jurisdiction to "bully" him and said he did not expect to hear from them again. The Second Respondent sought to rely on his medical situation but he had not provided adequate supporting evidence. The Tribunal was satisfied that a section 43 order should be made but it also wished to take steps to protect the public by reporting the Second Respondent to his professional body. It was for the Applicant to determine what body that should be.

Costs

45. Mr Mulchrone applied for costs in the amount of £26,785.50. He referred to the Applicant's Statement of Costs as at date of issue. The costs of the investigation were shown as £6,878.25 but the amount claimed totalled £4,585.50 because the investigation had extended to Mr L and his involvement in the firm as a partner. He had not been brought to the Tribunal and the costs of the investigation were reduced by one third on that account. Mr Mulchrone advised the Tribunal that Capsticks worked to a fixed fee arrangement for the Applicant, in this case £18,500.00 plus VAT (arrived at taking into account the complexity of the case) which when added to the initial costs amounted to £26,785.50. An updated schedule had been provided to show a breakdown of time spent by Capsticks which as at date of issue was 68.3 hours from 4 August to 6 December 2017. It had included perusing all the papers and advising the Applicant as well as drafting documents, particularly the Rule 5 Statement. There had been three potential Respondents including two solicitor Respondents. It was not known if the case would be contested. The amount of time spent on perusing and considering papers and preparing for the hearing had been estimated at date of issue at 68.3 hours but this had to be escalated. The total time spent amounted to 87.2 hours including consideration of the First Respondent's Answer and the medical evidence annexed, dealing with the Applicant's Reply and undertaking all the preparation for the hearing. Mr Mulchrone submitted that the total hours shown for Capsticks at 130.6 was not unreasonable. Dividing the fixed fee by the time spent arrived at the national hourly rate of £142.65 per hour. The Tribunal assessed the Applicant's costs; the hearing time had to be reduced to allow for shorter than estimated time. The Tribunal would allow 9 hours instead of 18 at a rate of £140.00 an hour. Travel would be reduced from the estimated 6 hours to 4 hours. Costs were assessed at £25,285.50.

46. The Tribunal then considered what costs should be paid by each Respondent. The Tribunal determined that while the Second Respondent benefited by retaining his job through the firm's continued existence he did not benefit in the same way as the First Respondent whose firm it was. There was something of a chain of command shown in the emails and he was a bookkeeper not a finance director. The Tribunal determined that the First Respondent should pay a fixed sum of two thirds of the costs

and the Second Respondent one third. The Tribunal then considered if the costs award to be paid by each Respondent should be reduced in respect of their means. The First Respondent was in an IVA. These costs would fall outside it. The information about the IVA gave no information about his real financial circumstances. He had been able to put a considerable amount of money into the firm before the merger to conceal the true position. The Second Respondent had indicated that he had no wish to work in the law again but had given no evidence of his financial position. In all the circumstances and bearing in mind that the Applicant was well used to dealing with costs matters with Respondents of uncertain means the Tribunal would make no reduction for either Respondent.

Statement of Full Orders

First Respondent

47. The Tribunal Ordered that the Respondent, ALEXANDER JOHN MARKS, solicitor, be Struck Off the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £16,857.00.

Second Respondent

48. The Tribunal Ordered that as from 5th September 2018 except in accordance with Law Society permission:-

(i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor PAUL ELLIOTT;
(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice the said Paul Elliott
(iii) no recognised body shall employ or remunerate the said Paul Elliott;
(iv) no manager or employee of a recognised body shall employ or remunerate the said Paul Elliott in connection with the business of that body;
(v) no recognised body or manager or employee of such a body shall permit the said Paul Elliott to be a manager of the body;
(vi) no recognised body or manager or employee of such a body shall permit the said Paul Elliott to have an interest in the body;

The Tribunal further Ordered the Solicitors Regulation Authority to refer Paul Elliott's conduct to his professional regulator.

The Tribunal further Ordered that the said Paul Elliott do pay the costs of and incidental to this application and enquiry fixed in the sum of £8,428.50.

Dated this 4th day of October 2018
On behalf of the Tribunal

A. E. Banks
Chair

Judgment filed
with the Law Society
on 04 OCT 2018

SOLICITORS DISCIPLINARY TRIBUNAL

<u>IN THE MATTER OF THE SOLICITORS ACT 1974</u> Case No. 11762-2017

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ALEXANDER JOHN MARKS First Respondent

PAUL ELLIOTT Second Respondent

APPENDIX

Relevant Rules and Regulations

SRA Principles 2011

You must:

2. act with integrity;

4. act in the best interests of each client;

6. behave in a way that maintains the trust the public places in you and in the provision of legal services;

SRA Accounts Rules 2011

Rule 1.2

You must 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, and in particular must:

(a) keep other people's money separate from money belonging to you or your firm;

...

(c) use each client's money for that client's matters only;

Rule 7.1

Any breach of the rules must be remedied promptly upon discovery. This includes the replacement of any money improperly withheld or withdrawn from a client account

Rule 14.3

Client money must be returned to the client (or other person on whose behalf the money is held) promptly, as soon as there is no longer any proper reason to retain those funds. Payments received after you have already accounted to the client, for example by way of a refund, must be paid to the client promptly.

Rule 20.1

Client money may only be withdrawn from a client account when it is:

(a) properly required for a payment to or on behalf of the client (or other person on whose behalf the money is being held);
(b) properly required for a payment in the execution of a particular trust, including the purchase of an investment (other than money) in accordance with the trustee's powers;
(c) properly required for payment of a disbursement on behalf of the client or trust;
(d) properly required in full or partial reimbursement of money spent by you on behalf of the client or trust;
(e) transferred to another client account;
(f) withdrawn on the client's instructions, provided the instructions are for the client's convenience and are given in writing, or are given by other means and confirmed by you to the client in writing;
(g) transferred to an account other than a client account (such as an account outside England and Wales), or retained in cash, by a trustee in the proper performance of his or her duties;
(h) a refund to you of an advance no longer required to fund a payment on behalf of a client or trust (see rule 14.2(b));
(i) money which has been paid into the account in breach of the rules (for example, money paid into the wrong separate designated client account) - see rule 20.5 below;
(j) money not covered by (a) to (i) above, where you comply with the conditions set out in rule 20.2; or
(k) money not covered by (a) to (i) above, withdrawn from the account on the written authorisation of the SRA. The SRA may impose a condition that you pay the money to a charity which gives an indemnity against any legitimate claim subsequently made for the sum received.

Rule 20.3

Office money may only be withdrawn from a client account when it is:

(a) money properly paid into the account to open or maintain it under rule 14.2(a);
(b) properly required for payment of your costs under rule 17.2 and 17.3;
(c) the whole or part of a payment into a client account under rule 17.1(c);
(d) part of a mixed payment placed in a client account under rule 18.2(b); or

(e) money which has been paid into a client account in breach of the rules (for example, interest wrongly credited to a general client account) - see rule 20.5 below.

Rule 27.1

A paper transfer of money held in a general client account from the ledger of one client to the ledger of another client may only be made if:

(a) it would have been permissible to withdraw that sum from the account under rule 20.1; and

(b) it would have been permissible to pay that sum into the account under rule 14;

(but there is no requirement in the case of a paper transfer for a written authority under rule 21.1).