The Respondent appealed the Tribunal's Order dated 14 June 2019 to the High Court (Administrative Court). The Respondent's appeal was subsequently withdrawn.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11874-2018

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ASHTON LLOYD DOHERTY Respondent

Before:

Mr R. Nicholas (in the chair)
Mr P.S.L. Housego
Dr P. Iyer

Date of Hearing:
23 to 26 April, 14 May and 14 June 2019

Appearances

Rory Mulchrone, counsel, of Capsticks Solicitors LLP of 1 St Georges Road, London, SW19 4DR, Instructed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant.

Tim Nesbitt QC, counsel, of Outer Temple Chambers, 222 Strand, London, WC2R 1BA, instructed by Murdochs Solicitors of 45 High Street, Wanstead, London, E11 2AA, for the Respondent.

JUDGMENT

Allegations

1. The allegations against the Respondent were set out in an amended Rule 5 Statement dated 21 November 2018. The allegations were that while in practice as a solicitor at Systech Solicitors Ltd ("the Firm") the Respondent:

In relation to "Property 1":

1.1 In or around November 2010, in relation to a loan of £30,000 from Company FE to Client B, secured against Client B's interest in Property 1 in priority to Client A's prior loan of £315,000, acted on behalf of or advised:

1.1.1 Company FE;
1.1.2 Client A;
1.1.3 Client B;

in circumstances where the interests of these parties were in conflict or there was a significant risk of conflict, and in doing so breached all or any of Rules 1.02, 1.03, 1.04, 1.06 and 3.01 of the Solicitors Code of Conduct 2007 ("the 2007 Code").

1.2. In or around November 2010, in relation to the loan described at allegation 1 above, gave legal advice to Client A, and failed adequately to explain to Client A the risks of allowing a second charge to take priority over her charge on Property 1, and in doing so breached all or any of Rules 1.02, 1.03, 1.04 and 1.06 of the 2007 Code.

1.3 In or around September to November 2010, when advising Client A in relation to the creation of Company X, a Panamanian company, failed adequately to explain to Client A the risks of this arrangement, and in doing so breached all or any of Rules 1.04 and 1.06 of the 2007 Code.

1.4 In or around November 2011, in relation to the assignment of Client A's loan secured on Property 1, failed adequately to explain to Client A the risks of the assignment, and in doing so breached Principles 4 and 6 of the SRA Principles 2011 ("the Principles").

1.5 In or around February 2012, when acting on behalf of Client A in relation to the distribution of the sale proceeds of Property 1, acted in a situation where there was an own interest conflict, in that the Respondent caused the distribution of the sale proceeds to three companies in which he was the sole director, and in doing so, breached Principles 2, 4, 6, and 10 of the Principles, and failed to achieve Outcome (O)3.4 of the SRA Code of Conduct 2011 ("the 2011 Code").

In relation to the "Swindon loan":

1.6 In or around January 2014, in relation to a loan of £193,195.50 from Client A to ALD3 Ltd, acted in a situation where there was an own interest conflict by reason of his position as a director of ALD3 Ltd, and in doing so breached Principles 2, 4, and 6 of the Principles and failed to achieve Outcome (O)3.4 of the 2011 Code.

1.7 Sought to take unfair advantage of Client A in relation to the loan agreement between Client A and ALD3 Ltd and in doing so breached Principle 2 of the SRA Principles 2011 and failed to achieve Outcome (O)11.1 of the SRA Code of Conduct 2011.

2. It was the Applicant's case that the Respondent acted dishonestly in respect of allegations 1.6 and 1.7. Dishonesty was submitted not to be an essential ingredient to these allegations which it was open to the Tribunal to find proved with or without a finding of dishonesty.

Documents

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

Applicant

- Trial bundles comprising 6 bundles containing the amended Rule 5 Statement
- Section B hearing bundle
- Correspondence relating to the witness statement of Mr FY
- Schedule of costs to issue and updated schedule to the hearing dated 11 June 2019

Respondent

- Skeleton argument dated 18 April 2019
- Respondent's witness statement (and witness statements of MD, ND, RH, CG, MW, PT and BQ which were not included in the trial bundle)
- Respondent's hearing bundle

Preliminary Matters

Respondent's application to exclude the witness statement of Mr PC

4. Mr Nesbitt invited the Tribunal to use its power, under Rule 21 of the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR") under which it may regulate its own procedure, to exclude the witness statement of Mr PC. Mr Nesbitt stated that as a solicitor who came to the matter after Client A's death as the representative of her estate, it was self-evident that he could not give direct evidence about the matters on which the Tribunal had to adjudicate. He submitted that the statement did not address any of the issues which the Tribunal had to determine, but set out Mr PC's clients' contentions and the processes between the parties in High Court litigation. Mr Nesbitt submitted that while it was proper for a forensic investigation officer to provide commentary on the documents and the reaction of others to them it was improper for this to be done by a lawyer giving (non-independent expert) hearsay evidence. Mr Nesbitt referred the Tribunal to the case of Chauhan v GMC [2010] EWHC 2093 (cited in Wingate v SRA [2018] EWCA Civ 366) in support of the submission that were it to hear evidence which purported to criticise the Respondent on matters not the subject of the allegations the Tribunal may put itself at risk making findings which may be liable to be vitiated and set aside. He submitted that there was no evidential benefit to hearing from a lawyer with a vested interest who had no direct personal knowledge of the subject matter of allegations.

His only evidence on matters within the allegations was submitted to be hearsay and the remainder of his statement was described as commentary.

5. In reply, Mr Mulchrone stated that the admissibility of the statement had only recently been raised and, more substantively, that the statement may assist the Tribunal. Mr PC summarised the contentions of the estate of Client A and included the conclusions reached after investigation that the Respondent had acted as solicitor for Client A, that she was vulnerable and that the Respondent had benefitted personally. Mr Mulchrone accepted that the statement also covered issues which were not part of the allegations, but he submitted that they were part of the broader factual matrix. He submitted that Rule 13(10) of the SDPR allowed the Tribunal to admit the statement notwithstanding the hearsay element. He submitted that rather than providing compelling grounds to exclude the statement, the submissions made on the Respondent's behalf were relevant to the weight that the Tribunal might attach to it.

6. The Tribunal noted that Mr PC had never met Client A. His statement expressed opinions akin to an expert witness which was based on information provided to him which was not contemporaneous. He had a vested interest in the matters on which he gave evidence to the extent he represented the estate of Client A in High Court proceedings. The matters which were the subject of the High Court litigation were not directly relevant to the allegations to be determined in the Tribunal, and by hearing evidence on these peripheral matters it seemed inevitable that the Respondent would be obliged to rehearse his own position on these matters. The Tribunal did not consider that this would be helpful or efficient. On the basis that the statement was hearsay, commentary or concerned matters outwith the allegations, the Tribunal determined that it should not be admitted into evidence.

Applicant's application to admit the witness statement of Mr FY

7. At the conclusion of the Applicant's case, Mr Mulchrone stated that the Applicant had been unable to raise Mr FY to attend to give evidence. He provided a copy of a report from an agent the Applicant had instructed to seek to trace Mr FY. He referred the Tribunal to the case of Bonhoeffer v GMC [2011] EWHC 1585 (Admin) as authority for the proposition that there was no absolute right for a party to be able to cross examine a witness. Mr Mulchrone submitted that the Tribunal should determine what was necessary for a fair trial, and that it had the discretion to admit the statement if it was persuaded that the Applicant had made all reasonable efforts to secure the witness' attendance (NMC v Ogbonna [2010] EWCA Civ 1216). Mr FY's statement covered areas, such as whether Client A could read, about which he could speak from direct personal experience and which may assist the Tribunal. Mr Mulchrone accepted that inevitably a statement from a witness who did not attend to be cross-examined would be given less weight but that this was distinct from the decision on whether it should be admitted. The Applicant had written to Mr FY twice and instructed an agent to contact him and Mr Mulchrone invited the Tribunal to admit the statement and then give it appropriate weight in due course.

8. In reply, Mr Nesbitt submitted that the evidence presented did not show that the Applicant had made the reasonable efforts to secure the witnesses attendance required by Ogbonna. The instruction of an agent in the week before the hearing after only one letter had been sent since November 2018 was submitted to fall short of reasonable

efforts. The tracing agent's report itself referred to a personal visit to the last known address and had the issue been addressed timeously this would have been attempted. Mr Nesbitt submitted that the Tribunal could look to the Criminal Justice Act 2003 for guidance about admitting hearsay evidence, which was summarised in Bonhoeffer at paragraph [26]. Mr Nesbitt submitted the statement had limited probative value; there was ample alternative evidence on the matters Mr FY covered; the statement covered significant background but not determining issues; the statement appeared to be in the words of a lawyer and the witness reached conclusions which were described as spurious. In summary, Mr Nesbitt submitted the evidence was not that important and alternative evidence existed on the matters covered.

9. The Tribunal noted that the Applicant had not taken steps to keep in contact with the witness from November 2018 until very shortly before the hearing. The Tribunal considered greater effort should have been made, but that given the terms of the SDPR this was not an automatic bar to the exercise of the Tribunal's discretion to admit the statement. The Tribunal noted Mr Nesbitt's submission that the statement was not the sole evidence on any question to be determined, that evidence from others existed and that the Respondent considered this to be peripheral evidence. As the statement was not submitted by either party to be decisive evidence the Tribunal decided that it would admit the statement and consider submissions on the appropriate weight it should receive in due course.

Factual Background

10. The Respondent was admitted to the Roll on 2 July 2001. At the time relevant to the allegations he practised as a consultant solicitor at the Firm. The Respondent was subsequently a consultant solicitor at Fletcher Day Ltd and at the date of the Rule 5 Statement held a practising certificate for the practising year 2017/2018 free from conditions.

11. These matters first came to the attention of the Applicant when it received a self-report on 31 August 2016 from the Firm's Director and COLP. The Firm alleged that the Respondent paid £329,000 proceeds of the sale of a client's property to three companies which he controlled. A Forensic Investigation was commenced which culminated in a report dated 28 March 2017 which gave rise to the allegations against the Respondent.

Witnesses

12. The written and oral evidence of witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the oral evidence of all witnesses. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

13. The following witnesses gave oral evidence:

- Ms SH, the Forensic Investigation Officer
- Mr JD, nephew of Client A
- Ms TW, sister of Client A
- Ms KG, second cousin of Client A
- The Respondent
- Mr KB, property manager who instructed the Respondent
- Mr IS, former solicitor for Client A and colleague of the Respondent
- Mr CH, solicitor who previously dealt with Client A and former colleague (and client) of the Respondent
- Mr ND, financial controller, formerly of the Firm
- Mr PN, solicitor and former colleague of the Respondent
- Mr NC, chartered certified accountant client of the Respondent

14. The Tribunal was invited to, and did, read five written testimonial witness statements from MD, RH, BQ, PT and MW.

Findings of Fact and Law

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

16. **Allegation 1.1: While in practice as a solicitor at the Firm, the Respondent in or around November 2010, in relation to a loan of £30,000 from Company FE to Client B, secured against Client B's interest in Property 1 in priority to Client A's prior loan of £315,000, acted on behalf of or advised:**

1.1.1 Company FE;
1.1.2 Client A;
1.1.3 Client B;

in circumstances where the interests of these parties were in conflict or there was a significant risk of conflict, and in doing so breached all or any of Rules 1.02, 1.03, 1.04, 1.06 and 3.01 of the 2007 Code.

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

16.1 The Respondent had informed the Applicant, by letter in January 2017, that he met Client A and her husband in around 1998 as they were clients of the firm with which he was a trainee. He had stated that over time they became friends. Client A was keen to invest diversely and use her capital for short term loans. The Applicant contended that Client A was vulnerable. In support of this contention the Applicant relied on statements from family members that Client A could not read words or numbers, write more than her name or use an ATM machine. She was said, for example, to be unable to distinguish between junk mail and business letters. She was described by family members as vulnerable and dependent on others. The Applicant

submitted that a client can be said to be vulnerable if they were incapable of making an informed decision about their affairs or did not understand the actual or potential consequences of actions they may be instructing their solicitor to take. The Applicant's case was that Client A was vulnerable and the Respondent should have, but did not, give proper regard to that.

16.2 Allegations 1.1 to 1.5 involved Property 1. Property 1 was owned by Client B. In 2010, the Respondent introduced the prospect of Client A lending bridging funds to Client B. The Respondent did not act for either party to this loan of £315,000 and no allegations related to this initial loan. Client A's loan was secured as a legal charge on Client B's property.

16.3 In November 2010, Client B required a further loan of £30,000. The Respondent had stated that Client A was "not available" and that he therefore contacted a Panamanian company, Company FE, of which he described himself as an agent and for whom he held a power of attorney. Company FE loaned Client B the additional funds on the condition their loan would be redeemed first on the sale of Property 1 (i.e. it would take precedence over Client A's loan).

16.4 Client B failed to repay the loans secured on Property 1, and repossession proceedings were commenced by the Respondent, for Client A against Client B. The Respondent acted in the repossession and sale of Client B's property; his client was Client A, as the mortgage lender in possession. Client B was unrepresented. Property 1 was auctioned and sold in December 2011 for £407,500.00.

16.5 On 9 February 2012, the second charge on Property 1 (to Company FE) totalling £45,310.00 (including interest), was redeemed first, therefore repaying Company FE in full. The full amount due under the first loan from Client A should have been £427,100.00, comprising the initial loan of £315,000.00 and exit fees and 17 months of interest payments. Due to a reduction in the property price, and the second charge being discharged first, there was a shortfall of £81,794.12 owed to Client A.

16.6 The sale proceeds of Property 1 were paid into the Firm's client account on 4 January 2012 and 7 February 2012. Costs and disbursements of £9,054.72 were deducted and £412.62 was transferred to another of Client A's matters, with £74.78 remaining on the client ledger. The balance of £390,325.47 was distributed as follows:

Amount	Payment made to:
£45,310.00	Company FE
£14,000.00	Brockenhurst Project Ltd
£15,000.00	Short Loan Company Ltd
£16,015.47	Client A
£300,000.00	Short Banker Ltd

The Applicant's case was that the Respondent was the sole director of Brockenhurst Project Ltd, Short Loan Company Ltd, and Short Banker Ltd. The Forensic Investigation officer ("FIO") found no evidence on the client file that showed Client A was advised by the Respondent that these companies were controlled by him.

16.7 Allegation 1.1 focused on the Respondent allegedly acting for three parties, Client A, Client B and Company FE, in relation to the further £30,000 loan secured in priority to Client A's initial loan in circumstances where there was a conflict or a significant risk of a conflict. In respect of Client A, the Respondent had a long-standing relationship with Client A under which Client A placed heavy reliance on his legal and financial advice. Although the Respondent referred one element of the transactions to another firm (the establishment of the first loan from Client A to Client B), he was alleged to have advised Client A on her position in respect of the grant of the second charge with higher priority to Company FE. He was alleged to have subsequently advised Client A on the assignment to a new Panamanian company of the benefit of the charge granted to Client A by Client B over Property 1. He kept a record of his dealings with Client A in respect of these transactions on a client file in the name of Client A held at the Firm. The sale proceeds of the sale of Property 1 were held in the Firm's Client Account before being distributed, including to Client A. It was the SRA's case that these matters gave rise to a solicitor/client relationship.

16.8 In respect of Client B, the Respondent acted in respect of the arrangement of the loan from Company FE. In respect of Company FE, the Respondent was alleged to have purported to act as an attorney in respect of the loan to Client B, but in a matter on which he was already acting as solicitor for Client B. The Applicant's case was that when seeking to effect a sale of Property 1, the Respondent told Client B in a letter of 1 November 2011 that he acted for Client A and Company FE.

16.9 The terms of the loan from Company FE provided that the loan amount would be settled in full, including interest, from any sale proceeds; and that Client A would settle any monies due to Company FE on demand if there was a shortfall in the sale proceeds. These terms had seemingly been confirmed by Client A and the relevant file notes appeared to be signed by her. A file note on the Respondent's client file was stated to record Client B confirming that the Respondent had not advised them on the second loan and that he had "declared an interest in the advance".

16.10 In the Respondent's letter to the Applicant dated 4 January 2017 he stated that Ms CG was a Colombian businesswoman and friend of his, for whom he had acted as local agent in his personal capacity for a number of years.

16.11 The Respondent stated in his letter to the SRA dated 4 January 2017 that he advised Client A to seek independent advice; however there was stated to be no evidence on the file of this having been done, and Client A had apparently "confirmed" agreement to the terms as noted above. The Applicant submitted that, given the apparent urgency of the situation and the fact that Client A was on holiday, in giving effect to the loan between Company FE and Client B so rapidly, the Respondent allowed little, if any, opportunity for Client A to take independent legal advice on the potential risk to her of the terms being proposed for the loan between Company FE and Client B, and particularly the potential detriment arising from the prioritisation of Company FE's loan.

16.12 It was alleged that consequently the Respondent acted in relation to a transaction on behalf of Client B (his client who required the loan) and Company FE (the lender, albeit in what he says was his personal capacity), where

- the interests of those two parties (borrower and lender) were clearly adverse; and

- the transaction gave rise to actual or potential detriment to Client A, the lender on the first loan, which had been initiated by the Respondent. Client A was a regular client, communications with whom about the transaction were recorded on a client file at the Firm, and who was known to be heavily reliant on the Respondent in respect of her financial affairs.

16.13 During the interview on 2 March 2017 the Respondent told the FIO that he was not acting as a lawyer for Company FE and that "it wasn't legal work". Responding to a question about whether he saw there being a conflict of interest, the Respondent stated: "at the time and looking at each situation in isolation I didn't see a conflict". As to why he had recognised a conflict regarding the first loan and had declined to act for Client A or Client B, but did not see the conflict when Company FE was "an added element of conflict" the Respondent stated: "it was in exactly the same terms as the first charge they'd all had independent advice on it already, the only thing that changed was the amount and lender". The Applicant's case was, as the FIO replied, was that "there was no other solicitor involved with this and it was just you dealing with it".

16.14 The Respondent stated in a letter to the FIO dated 4 January 2017 that he "did not consider that it [Company FE's loan] was in [Client A's] best interests", but that he had "advised her to seek independent advice". The Respondent stated that Client A "considered the risk to be low believing there to be ample security in the property and little risk" and that it was "her intention to redeem and acquire the second loan when she returned", therefore the "intention was that the second loan should only be very short term and that both loans would be fully redeemed".

16.15 The Applicant submitted that none of Client A, Client B or Company FE had a substantially common interest, nor were they competing for the same objective, and as such neither of the applicable exceptions applied such that the Respondent may have been able to act for all three notwithstanding the conflict of interest. It was submitted that the Respondent should not have acted on this matter due to the interests of the parties being in conflict or, alternatively, there being a significant risk of conflict in that their interests were adverse.

16.16 In acting on behalf of multiple parties to a transaction where he knew the parties' interests to be adverse, and which he knew to be operating to the detriment of one party, it was alleged that the Respondent allowed his independence to be compromised contrary to Rule 1.03 of the 2007 Code and acted where there was a conflict of interests contrary to Rule 3.01 of the 2007 Code. It was submitted not to be in the best interests of the clients for him so to act, and so he acted in breach of Rule 1.04 of the 2007 Code. It was submitted that a solicitor knowingly acting in such a situation would be likely to diminish public confidence in him and the profession in breach of Rule 1.06 of the 2007 Code.

16.17 It was further alleged that the Respondent's actions amounted to a failure to act with integrity in breach of Rule 1.02 of the 2007 Code. The Applicant relied upon Wingate v Solicitors Regulation Authority [2018] EWCA Civ 366, in which it was

said that integrity connotes adherence to the ethical standards of one's own profession. The Respondent was submitted to have failed to act with integrity in that:

- He acted in a transaction which he knew to be to the detriment of Client A without notifying Client A of such detriment or giving her the requisite advice, or opportunity to seek advice, before giving effect to the transaction;

- He so acted in the knowledge that Client A was vulnerable and placed a high degree of reliance on him and his advice in relation to her financial affairs;

- He knowingly acted for borrower and lender on a transaction giving rise to a high degree of risk to the lender and where the interests of the parties were clearly opposed.

The Respondent's Case

16.18 Mr Nesbitt, for the Respondent, provided some background information relevant to all of the allegations before addressing the individual allegations in turn. These general points are set out under this first allegation to minimise repetition. From the early 2000's the relationship between the Respondent and Client A was described as primarily one of close friends, with the Respondent occasionally acting for her on discrete issues. Despite their age differences (when they met Client A was around 60 and the Respondent in his 20's) they quickly got on well and socialised, usually via lunches, becoming close friends. To illustrate their relationship was primarily one of friendship rather than merely professional, Mr Nesbitt referred to them having socialised over 200 times after 2004 and the fact that Client A had met the Respondent's parents. In his evidence Mr PN had described Client A as being maternal towards the Respondent, something Mr Nesbitt submitted was supported by other uncontested evidence and which reflected a very close relationship. Mr Nesbitt submitted that whilst it may be understandable that the family's instinctive reaction was one of suspicion, the relationship between the Respondent and Client A was enduring and had deep affection on both sides and that this was the proper prism through which to assess the events.

16.19 The Respondent did not accept the Applicant's characterisation of Client A as vulnerable. It was said she had been a successful business woman in the fashion sector and, together with her husband, took an interest in property investing and had made money in this field. The Respondent's experience was that Client A often talked about business and had an appetite for business opportunities. They shared an interest in property. It was accepted that the witnesses from Client A's family stressed Client A's particular weaknesses in reading and writing and that their assessments of her abilities was at odds with the assessment made by various professionals. Commenting on the evidence given by family members, Mr Nesbitt submitted that a picture emerged of a fiercely independent, strong character; someone who knew her own mind and did not reveal the full picture of her affairs to anyone. None of her family suggested that she was not an intelligent woman or that she had not been successful, including in market trading, having a market stall shared with her sister. Mr Nesbitt invited the Tribunal to treat the evidence of Client A's family members with some circumspection; it was inevitable that they would have some initial suspicion and they were involved in High Court litigation involving the executors of

the estate and the Respondent. Mr Nesbitt also highlighted areas in which the evidence of family members was submitted to be inconsistent, for example the differing accounts of Mr JD and Ms KG about when an investment portfolio was set up.

16.20 Ms Nesbitt invited the Tribunal to review the evidence of Mr IS particularly closely. He was an experienced solicitor who had known Client A for an extended period of time and was submitted to have given straightforward and honest evidence. He had stated that he was confident that Client A understood all matters on which she gave him instructions. His evidence was that she took her own decisions, that she was not naïve and that he doubted anyone could have taken advantage of her or persuaded her to do something she was not entirely comfortable with. In his oral evidence Mr IS stated that whilst she may not have read specific letters, it was clear from his dealings with Client A that she had absorbed the contents and Mr Nesbitt submitted that whatever her difficulties with reading, there was no issue with her understanding. The evidence of Mr KB, who had dealt with Client A (solely by phone) over several years when managing her freehold interests, was that she understood the issues they discussed (a feeling he said that he picked up in his line of work). His evidence was that Client A was 'streetwise' and that she picked up 'soundbites' of advice from various sources. The evidence of Mr CH, who advised Client A about her initial loan to Client B, was that there was no issue of her not understanding the issues. Mr Nesbitt submitted that the evidence from the other professionals who had dealt with Client A were of a piece with those noted in this paragraph.

16.21 The Respondent's own evidence, which Mr Nesbitt submitted matched the account of the other professionals, was that throughout their relationship Client A was robust, lively and knew her own mind. His view was that the characterisation of her as vulnerable was ridiculous and something that she herself would have ridiculed. His evidence was that she had a keen interest in business. Mr Nesbitt submitted that given the evidence before it, the Tribunal should approach Client A in its deliberations as a canny and shrewd individual who sought advice widely and then made up her own mind.

16.22 As far as the Respondent was concerned, from the early 2000's he did not generally act as Client A's solicitor and he did not consider that either he or she regarded him as such. The Respondent thought that Mr IS, the solicitor who had introduced him to Client A when the Respondent was a trainee, remained her general solicitor.

16.23 The Respondent's case was that Client A raised the possibility of short term bridging loans as a business opportunity with him in around 2010. This resulted from her unhappiness with her returns from other investments following the financial crash of 2008. She asked him if he knew of any opportunities. She also mentioned around this time the possibility that they might go into some business venture together, likely to be in the property sector. The Respondent's evidence was that he was clear to Client A that she would need proper advice before embarking on investments of this kind.

16.24 Shortly after this conversation, Client B, whom the Respondent had been helping resist bankruptcy proceedings, sought bridging funding in relation to a property they owned and were looking to sell ("Property 1"). Consequently the Respondent

connected the two of them and told them both to get, which they did get, separate legal representation. The Respondent did not act for either in relation to the loan. Mr CH acted for Client A. The Respondent's case was that the terms reached gave a very favourable rate of return to Client A whilst also benefitting Client B as they were (said to be) better than would be available from commercial bridging lenders. No allegations were brought by the Applicant in relation to this initial loan.

16.25 When, a short time later, Client B wished to borrow a further £30,000 secured on Property 1, the Respondent stated that he saw no reason not to connect Client B with Client A again as he was not acting for them in relation to that matter. Client A was said to be away and unable to deal with the request there and then but to be keen to advance the extra funds on her return. The Respondent stated he was asked by Client A to help with Client B securing interim funding. He had a friend who owned a company abroad, Company FE, who agreed to loan the extra funds to Client B (on the understanding that Client A would subsequently take over the borrowing). To help progress things to the mutual benefit of the parties, all of whom the Respondent knew, he stated that he helped put the deal together. His evidence was that he told Client A that she did not have to consent and could wait to seek independent legal advice. However, on the basis that there was understood to be substantial equity above the level of the loans in the property, Client A was happy to consent to Company FE having a prior charge.

16.26 Mr Nesbitt stated that at the time he got involved in this transaction the Respondent did not think of himself as acting for any of the relevant parties in relation to it (Client A, Client B or Company FE). He accepted that the steps he took involved inserting some amendments into the draft agreement previously used for the first loan to make it suitable for use by the parties in relation to the second loan. The Respondent subsequently accepted that that this did involve him in legal work for Company FE. The Respondent's case was that he was only trying to help people he knew in what seemed to be something to their mutual benefit, and given the casual way it had arisen he did not see himself as acting nor see any conflict, but later recognised that he should have thought it through more carefully before getting involved as he did at that point.

16.27 The Respondent's evidence was that at the time of the loan of the £30,000 from Company FE he did not see that the parties' interests were adverse in relation to this. Client B was in need of the extra borrowing; Company FE stood to benefit for a short period of time from the beneficial rate of interest that Client B was willing to pay; and as regards Client A, there was a belief that the equity in the property was ample to cover the debt to her, and it was proposed that she would take over the short term loan from Company FE on her return from holiday, so that she would then gain the benefit of further favourable returns of interest. The Respondent stressed that if the short term loan was not made by Company FE to cover the interim position then the chance to make this further profitable loan would be lost to Client A.

16.28 At the time therefore, the Respondent did not see that the interests of the parties were adverse in relation to this or that the transaction was to Client A's detriment – on the contrary it was creating a further opportunity for her, which she consented to. It was submitted that it was not obvious why the parties' interests were adverse, or why the further loan was not creating a potentially profitable opportunity for Client A given

what was expected. However, Mr Nesbitt submitted that even if that was wrong, on the evidence, the Respondent did not see the adverse interests or detriment – so it could not be established that he "knew" the interests were adverse or the transaction was to one party's detriment.

16.29 As noted above, the Respondent accepted that the correct analysis was that he did some legal work for Company FE in relation to this loan, but his case was that two of the three parties (Client A and Client B) had explicitly confirmed in writing that he was not acting as their solicitor or advising them. He also relied on the absence of the "usual" paperwork – such as client care letters, and in due course bills – which would have been generated had any instruction for him to act as a solicitor been given.

16.30 At the hearing Mr Nesbitt stated that having considered the matter further, whilst he (the Respondent) did not consider that he was acting for any of the parties involved at the time, the Respondent accepted that by acting for Client A and Client B in other distinct, but not wholly unrelated, matters and giving full spirit to the conflict rules set out in the 2007 Code, he accepted that acting for Company FE was not in the spirit of those rules. This was submitted to have been an inadvertent mistake which the Respondent had not spotted at the time, but which he now accepted. Accordingly, the Respondent accepted the alleged breaches of Rule 1.03, 1.04 and 3.01 of the 2007 Code (maintaining independence, acting in the best interests of the client and acting in a conflict situation respectively).

16.31 The alleged breaches of Rule 1.02 (acting with integrity) and Rule 1.06 (maintaining public trust) were denied. Mr Nesbitt reminded the Tribunal about the burden and standard of proof and that the criminal standard of proof applied to the allegations and also the factual propositions in the Applicant's case. If the Tribunal was in doubt about Client A's vulnerability, he submitted that the Respondent was entitled to the benefit of that doubt and that the Tribunal should approach the individual allegations on the basis that Client A was not vulnerable. Mr Nesbitt referred the Tribunal to the Wingate case and in particular paragraphs [105] and [106] where it was stated that professional negligence should not be characterised as manifest incompetence. He submitted that accordingly there was a high threshold for negligence or an error of judgment to be classified as manifest incompetence such that the alleged breaches were made out.

16.32 The Respondent considered he was assisting Client A, that the second loan represented an opportunity for her, he had explained the issues to her and she had confirmed she was content. His case was that he did not see the conflict at the time. It was submitted that the Respondent's default was an error of judgment that he did not see at the time and this was not an error such that the threshold for Rules 1.02 or 1.06 were met. The inadvertent error was submitted not to amount to acting without integrity or being something which would diminish the trust placed in the Respondent or the profession.

The Tribunal's Decision

16.33 Allegation 1.1 was admitted with regards to the alleged breaches of Rules 1.03, 1.04 and 3.01 of the 2007 Code. The Tribunal considered the admissions were properly made and the allegations were proved beyond reasonable doubt.

16.34 The admissions involved an acknowledgment by the Respondent that he had breached professional obligations to prevent his independence being compromised, to act in the best interests of each client and the duty not to act if there is a conflict of interests (none of the exceptional limited circumstances being applicable). The Tribunal considered that the rules relating to conflict of interest were absolutely fundamental to the trusted role of solicitor. Breaching these mandatory and fundamental rules would almost always inevitably diminish the trust the public placed in the solicitor and the wider legal profession. The position in which the Respondent had acted for three parties was not complex; three clients of his were involved with or affected by the additional loan of £30,000 advanced by Company FE to Client B (which took priority over Client A's interest in Property 1). The Tribunal rejected the submission that failing to identify at least a significant risk of conflict was an error which did not reach the threshold required to establish the alleged breach of Rule 1.06. The conflict rules were fundamental, unambiguous and should be uppermost in the mind of all solicitors. Furthermore, the risk of conflict in this situation was obvious. While the Respondent said that he saw no risk, thinking the equity was ample for both loans, in fact there was loss to Client A. It was not to the point that this meant that she made less profit rather than a loss. Client B was the one in need of £30,000: by arranging for Company FE to be inserted as a new first charge (in effect, for there never was a deed of postponement) he had preferred Client B over Client A. The Tribunal found beyond reasonable doubt that by acting or advising Clients A, B and Company FE in relation to the further advance, the Respondent's conduct had breached Rule 1.06 of the 2007 Code and would diminish the trust the public placed in him and the wider legal profession.

16.35 The advance of the further loan of £30,000 benefitted Client B as it prevented, at that stage, the need for the sale of Property 1 and was on terms more advantageous than would be available from institutions offering commercial bridging loans. The advance benefitted Company FE as it provided an advantageous rate of return with the security which came from the loan taking priority over Client A's prior, larger, loan.

16.36 Client A did not benefit from the further loan; she was inevitably disadvantaged to some extent by it taking priority over her larger prior loan. Whatever assumptions may have been made in good faith about the available equity in Property 1, allowing another lender to take priority over Client A's loan of £315,000 inevitably introduced an additional element of risk. The Tribunal did not consider that the phone call that the Respondent described with Client A, and informing her that she could take independent advice, was adequate to discharge the Respondent's obligations. The Tribunal did not accept the Applicant's contention that Client A was vulnerable according to the general dictionary definition. The witness evidence indicated that Client A was capable and independent. However, the overwhelming evidence was that her literacy was at best very limited, and this created its own vulnerability and increased her reliance upon others. In such circumstances the Tribunal considered that any solicitor, in particular one with a long association with Client A and from whom she had taken advice on her financial affairs, must be alive to the need to ensure that suitable, accessible, independent advice was made available which clearly highlighted the risk of allowing another loan to take priority over her existing loan. The phone call described by the Respondent, uncorroborated by contemporaneous attendance notes, was not adequate. The Tribunal did not find the Respondent's

account of this conversation persuasive; the Respondent stated in evidence that the intention was that on her return Client A would take over the further loan, and that the Respondent saw this as a further opportunity for her to make profit, but there was no evidence presented of any steps being taken to this end.

16.37 The Tribunal rejected the submission that the Respondent's acknowledged error of judgment did not meet the threshold for a failure to act without integrity. The mistake itself, allowing himself to act in a position he recognised with hindsight was in breach of various conduct rules, was a serious moral mistake. The Respondent had failed to have proper regard to ensuring that Client A received appropriate advice about an issue which created additional risk for her in circumstances where two other parties with whom he was involved gained an advantage. His failure to arrange for a proper deed of postponement, or to arrange for Client A to take over the loan was, at best, cavalier. By reference to the test in Wingate, the Tribunal found that by acting in a transaction to Client A's detriment without ensuring that she received appropriate advice, in circumstances where the interests of borrower, lender and prior lender were clearly opposed, the Respondent did not adhere to the ethical standards of the profession. The Tribunal found beyond reasonable doubt that the Respondent had breached Rule 1.02 of the 2007 Code.

17. **Allegation 1.2: In or around November 2010, in relation to the loan described at allegation 1 above, the Respondent gave legal advice to Client A, and failed adequately to explain to Client A the risks of allowing a second charge to take priority over her charge on Property 1, and in doing so breached all or any of Rules 1.02, 1.03, 1.04 and 1.06 of the 2007 Code.**

17.1 The Respondent was stated to have had a power of attorney for Company FE and Company FE was described in the loan agreement with Client B as being Company FE care of the Firm. An undated letter from Ms CG at Company FE recorded the terms of the loan. Handwritten notes on this letter signed by Client A record the loan as being confirmed by Client A on 4 November 2010 and reconfirmed on 7 December 2010.

17.2 The Respondent's explanation to the Firm in an email dated 26 August 2016 as to why the second charge was paid off first, was that Client B had "lied about the extent of the debt they had to pay off to mitigate their bankruptcy" and the loan advanced by Client A was "not sufficient to settle all the debts payable". The Respondent stated he believed Client A "was on holiday at the time that further funds were required and Company FE advanced funds on the sole condition that they would not be left wanting if there was a shortfall". The Respondent stated that Client A "was happy for that smaller charge to be redeemed first". He allegedly did not explain how he was able to obtain confirmation from Client A that she was content with this arrangement when she was described as being otherwise unavailable.

17.3 In a letter to the Firm's insurers dated 3 October 2016 the Respondent stated that Client A "agreed that this smaller charge could have priority" and "it was not considered that there would be any risk or shortfall". He did not explain the basis for the conclusion as to the level of risk. The Respondent stated that Client A's "agreement to the second charge and authorisation of the payment of the second charge is documented in [the Firm's] file". The client file contained an undated

handwritten authority from Client A consenting to the second charge being registered on Property 1. It was alleged that there was no evidence on the file of the Respondent explaining to Client A the risks of allowing a second charge to take priority. Given the risk to Client A, and Client A's vulnerability, it was submitted by the Applicant that full advice regarding the risks of this approach should have been given to her and documented on the file.

17.4 The key risk to Client A was submitted to be that if Property 1 was sold, the beneficiary of the first charge would be repaid in full before any payment was made in satisfaction of the debt secured by the second charge. As noted above in relation to allegation 1.1, when Property 1 was sold there was negative equity and the relegation of Client A's charge to rank below Company FE's loan resulted in a financial loss to Client A. In allowing a transaction to proceed which he knew to be to the detriment of Client A, without advising Client A of the risks of that transaction properly or at all, the Applicant alleged that Respondent allowed his independence to be compromised contrary to Rule 1.03 of the 2007 Code. It was submitted not to be in the best interests of Client A for him so to act in breach of Rule 1.04 of the 2007 Code. It was further submitted that a solicitor knowingly acting in such a situation would be likely to diminish public confidence in him and the profession and so he had thereby breached Rule 1.06 of the 2007 Code.

17.5 The Respondent's actions were also submitted to amount to a failure to act with integrity (stated to equate with acting with moral soundness, rectitude and steady adherence to an ethical code) in breach of Rule 1.02 of the 2007 Code. The Respondent was submitted to have failed to act with integrity in that:

- He acted in a transaction which he knew to be to the detriment of Client A without notifying Client A of such detriment or giving her the requisite advice, or opportunity to seek advice, before giving effect to the transaction; and

- He so acted in the knowledge that Client A was vulnerable and placed a high degree of reliance on him and his advice in relation to her financial affairs.

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

17.6 As with the previous allegation, it was stressed that at the time the Respondent did not consider that he was acting for Client A (or any of the parties). He saw himself putting together the parties for their mutual benefit and did not see that the additional £30,000 loan to Client B was contrary to Client A's interests. It was stressed again that Client A was not vulnerable.

17.7 The Respondent's evidence was that he discussed the matter with her and that it was clear that Client A understood the risks involved and given the potential upside for her (the second loan would create an opportunity for her to make a further advance herself) she wished to consent. He stated that he had told Client A that it was not in her interests to grant a priority charge and that she could say no. He stated that she considered the risk low and that acquiring the second charge in due course would provide an opportunity to her to increase her own gains. The Respondent's evidence was that it was Client A's request that the Respondent should find a lender who would take a temporary second charge which was something Client A intended to take over.

17.8 The Respondent had accepted in relation to allegation 1.1 that he had acted in not wholly unrelated matters for Client A, but he stressed that at the time he did not consider Client A to be his client in this matter (and neither did she). His case was that both he and Client A considered Mr CH to be her solicitor in this matter (the solicitor who had advised Client A on the loan she made to Client B). As noted above however, his case was that he had discussed the second loan with Client A and was satisfied she understood the risks and consented. He stated that no lender would have made a small second charge next to a larger bridging loan without assurance that the smaller loan would be redeemed first. He stated that Client A reconfirmed the arrangement about the smaller loan's charge taking priority over her initial, larger loan. The Respondent accepted that he failed to document his advice or make it as explicit as he would have done had he thought he was advising a client. He therefore accepted that the "advice" he gave would in that sense have been insufficient. It was submitted that given the Respondent's knowledge and belief at the time, the proper analysis would therefore be that at worst any failure to give advice would really be a failure of degree: to document advice and be more explicit in a context in which the client in fact understood the position.

17.9 It was submitted that if the Tribunal considered that the Respondent had failed in this way, a failure of degree of that kind would amount (at worst) to negligence in failing to make advice more explicit or documenting it. Mr Nesbitt referred the Tribunal to the observations of the Court of Appeal in Wingate that mere negligence will not be sufficient to establish allegations of misconduct such as breaches of integrity or acting in a way which would diminish the public's trust and confidence in a solicitor or the profession. He submitted that the proper analysis in relation to this allegation was that if the Tribunal found that the Respondent given any inadequate advice to Client A this would not establish the more serious misconduct of breaches of duty of public trust and confidence and integrity that were alleged.

17.10 Mr Nesbitt submitted that it was not obvious in which way the advice that the Respondent gave the Client A (even though he did not at the time consider she was his client) was inadequate. Client A knew the risks involved and confirmed she wished to go ahead. The Respondent's evidence of this conversation was not contradicted. Mr Nesbitt further submitted that even if the Tribunal considered the advice inadequate in some way, in order to amount to professional misconduct it would have to be deplorable rather than being, at most in his submission, an error of degree and an inadvertent error of omission. He submitted that any such shortcoming was very far short of a failure to act with integrity or conduct which would diminish the public's trust in him or the profession. All alleged breaches (of Rules 1.02, 1.03, 1.04 and 1.06 of the 2007 Code) were denied.

The Tribunal's Decision

17.11 The Tribunal considered that at various points in his evidence the Respondent displayed a lack of familiarity with the conduct rules and regulations with which the onus was on all solicitors to be familiar. The Tribunal considered his knowledge of the fundamental ethical underpinnings to the rules, as demonstrated by his cavalier approach to conflict, to be woefully lacking. Failing adequately to explain risk to a client, particularly this client who had a history of taking advice from him in financial matters, was a fundamental failure of the most basic obligations towards a client.

17.12 The Respondent had accepted in relation to allegation 1.1 that having advised Client A on 'not wholly unrelated matters' he had acted in a conflict situation. The Tribunal found that he had provided legal advice to Client A. The Respondent's own account was that he had discussed the proposal for a further loan with Client A, that she understood the risks and wished to consent. His account was that he advised, orally, that the arrangement would not be in her interest, that she could say no and that she had subsequently reconfirmed her consent. The Respondent had retained and made reference to a letter written by a representative of FE which had been signed by Client A. The letter set out the terms on which Company FE was prepared to make the loan of £30,000, including (in effect) that this loan would take priority over Client A's loan. The Tribunal considered these steps to be inadequate given the risks of the additional lending taking priority over her loan described above. The oral advice, about which no corroborating evidence existed, and the subsequent signing of a letter (written by a representative of Company FE rather than the Respondent) which provided no detail about the risks of her interests being subordinated to Company FE's, failed to adequately advise Client A about the risks involved. The Tribunal considered that as a minimum the Respondent should have ensured that full details of the additional risk were provided and recorded on the file. Accordingly, in circumstances where he acknowledged a conflict situation existed, the Respondent had provided the advice on which Client A had relied and this had been inadequate. He had also failed to ensure that she took alternative legal advice.

17.13 The Tribunal considered the failure to advise adequately, or ensure alternative advice was taken, was a fundamental breach of the obligations on the Respondent. Ensuring that a client, even one who had not formally instructed him on the matter of the Property 1 loans but whom he had advised on financial matters over an extended period of time and with whom he had had some limited discussions about the further loan, was fully and clearly advised about the risks of a transaction which was not in her interests was a vitally important obligation on him as a solicitor. The Tribunal found beyond reasonable doubt that by providing legal advice which did not adequately explain the risks involved the Respondent had failed to act in Client A's best interests in breach of Rule 1.04 of the 2007 Code. By failing to provide adequate advice in a matter which benefitted two of the Respondent's other clients, Client B and Company FE, the Tribunal also found that the Respondent allowed his independence to be compromised in breach of Rule 1.03 of the 2007 Code. The Tribunal found beyond reasonable doubt that a solicitor failing to adequately explain the risks of a transaction to one client when he was closely involved with other clients with an interest in the transaction would inevitably diminish the trust the public placed in them and the legal profession generally in breach of Rule 1.06 of the 2007 Code.

17.14 The Tribunal considered that by failing to adequately explain the risks involved in Client A allowing a further loan to take priority over her larger loan to Client B, the Respondent effectively demoted her interests to third of the three parties involved or affected by the transaction. In the light of the Respondent's connections with Client B and Company FE, the Tribunal rejected the submission advanced on his behalf that the failure was one of degree which fell short of any failure to act with integrity. As noted in the preceding paragraph, given the reliance placed by Client A on his advice in financial matters and the long period over which he had advised her, the Tribunal found the failure to adequately explain the risks involved to be a fundamental failure.

In circumstances where the transaction benefitted two other clients, and applying the integrity test set out in Wingate, the Tribunal found that by providing legal advice which inadequately explained the risks of allowing a second charge to take priority over her charge on Property 1, in circumstances where the interests of borrower, lender and prior lender were opposed and where he had involvement with the other parties, the Respondent did not adhere to the ethical standards of the profession. The Tribunal found beyond reasonable doubt that the Respondent had breached Rule 1.02 of the 2007 Code.

18. **Allegation 1.3: In or around September to November 2010, when advising Client A in relation to the creation of Company X, a Panamanian company, the Respondent failed adequately to explain to Client A the risks of this arrangement, and in doing so breached all or any of Rules 1.04 and 1.06 of the 2007 Code.**

The Applicant's Case

18.1 A letter on the client file dated 18 October 2010 from the Respondent to Client A purportedly recorded Client A's instructions regarding Company X, stating: "you have started to provide bridging finance where appropriate security exists" and that "you would like us to act as your local agent". The letter further stated that the Respondent had "instructed a company agent in Panama to set up a company there", and its purpose was to "maintain confidentiality and essentially to prevent people to whom you lend money from turning up on your doorstep to seek extra time in the event that we have to take some form of action should they be late in paying what is due". The Respondent stated in the letter that setting up the company would also have tax benefits for Client A (but recorded that he could not give tax or investment advice).

18.2 The letter further stated that the Respondent was "simply acting as a local agent for you to attend and approve necessary documents", and that he would "help to document the offer of funding which you wish to make or formulate any amendments", but that he would "not be advising upon the content of this, but are merely creating the document to reflect your instructions". The letter stated that neither the Respondent nor the Firm could give advice on investments. The letter was signed by Client A. Company X was incorporated as a Panamanian company in September 2010. A further client care letter was sent to Client A on 1 November 2011.

18.3 In a letter to the FIO dated 4 January 2017, the Respondent said that the first instructions he had from Client A at the Firm were "to set up a Panama company for her" and that "we simply processed the matter on her instructions". The Respondent stated that Client A "had received advice elsewhere about offshore structures" but could not confirm where the client had received such advice stating that "this was not a matter on which we gave any advice".

18.4 The Applicant submitted that Client A was clearly the Respondent's client – by virtue of the fact that three client care letters had been sent to her – and therefore full written advice should have been given on the risks and implications of setting up an offshore company. In general, such issues were submitted to have included: how the income

would be remitted back to the UK; how the company assets and income would be distributed; whether the funds would be taxed; how to prove ownership of the offshore company; advising on the stability of the offshore jurisdiction, and whether this would increase the risk of any financial loss to Client A. It was submitted that these issues and risks should have been documented on Client A's client file, including any potential risks to Client A's assets arising from the establishment of, and any transfer of assets to, a company established in Panama to be used as a vehicle for investment or the provision of loans.

18.5 In facilitating the establishment of a Panamanian company for Client A without providing advice as to the potential risks of doing so, and in seeking artificially to narrow the scope of his instructions so as to exclude the provision of such advice, the Applicant alleged that the Respondent acted contrary to the best interests of Client A, in breach of Rule 1.04 of the 2007 Code. It was further alleged that a solicitor knowingly acting in such a situation would be likely to diminish public confidence in him and the profession in breach of Rule 1.06 of the 2007 Code.

The Respondent's Case

18.6 Mr Nesbitt submitted that this allegation turned on whether the Respondent gave an inadequate explanation of the risk of setting up the Panamanian holding company for Client A, Company X, and if so, whether any such failure was at a level that amounted to a breach of the two rules cited by the Applicant.

18.7 Mr Nesbitt stated that the Respondent's evidence on this point was not contradicted by any other evidence. The Respondent's evidence was that Client A came to him with the idea of setting up the off-shore company, and that it so happened that the Respondent had a contact in Panama who could arrange this. The Respondent had charged just £200 for all of his work on this matter, which indicated the limited extent of his involvement. The Respondent had explained to Client A that he was not a specialist in the area of off-shore advice, and he had recommended that she seek advice from an accountant.

18.8 As to whether this advice was inadequate, Mr Nesbitt submitted that the Applicant had asserted that this was so without producing any expert advice about what a competent solicitor should have advised. He submitted that when a solicitor does not have expertise in a specific area, it was not clear why it was said to be inadequate to direct a client elsewhere to someone who does have the specialist knowledge. Of the matters raised by the Applicant on which it was said that the Respondent did not advise, summarised in paragraph [18.4] above, it was submitted that two of the five issues listed were specialist and two were not really legal questions. Mr Nesbitt submitted that it was not clear why directing a client to a specialist for relevant advice was inadequate, and that if the Tribunal considered that the Respondent's actions were in some way inadequate, this did not begin to approach the level of default required to justify a misconduct finding. The general points in relation to diminishing the public's trust in him or the profession were repeated. Both alleged breaches were denied.

The Tribunal's Decision

18.9 The Respondent sent a client care letter to Client A in respect of the work undertaken setting up the Panamanian company, Company X. The Respondent made clear that he was unable to give tax advice and recommended that this be taken from an accountant. He also stated that he was unable to provide investment advice. The Tribunal accepted that the £200 fee indicated that the work completed by the Respondent and his role were limited. No advice was provided or recommended on any risks involved in setting up an offshore company in order to provide bridging finance in the UK. Client A was a financially relatively unsophisticated client experience of successful market trading does not amount to sophistication such as the setting up a Panamanian loan company would require. The Tribunal accepted the Applicant's submission that as a minimum, advice on whether the arrangements increased the risk of any financial loss to Client A should have been provided. The Tribunal considered that Client A required advice on whether the enterprise involved additional risk and that the need for this advice was obvious. Further, since the aim of the Panamanian company was bridging finance in the UK, there was no advice about whether there was any regulatory requirement in the UK, as there should have been.

18.10 The Tribunal did not consider that it was appropriate or acceptable simply to execute the instruction with no regard to the surrounding circumstances. These circumstances included a client who had relied on his advice on financial matters over an extended period of time, who had certain vulnerabilities as a result of very limited literacy skills and what was an unusual arrangement involving an offshore jurisdiction. As a solicitor, the Tribunal considered that it was incumbent on the Respondent to highlight the need for this client to take this advice. The failure to provide this advice, or even highlight the need to take it, was not in Client A's best interests. Accordingly, the Tribunal found beyond reasonable doubt that the Respondent had thereby breached Rule 1.04 of the 2007 Code.

18.11 If the Respondent was himself unable to provide this advice, in addition to the tax advice and investment advice he had highlighted in his client care letter that he could not provide, the Tribunal did not consider that it was appropriate for the Respondent to act in the matter. The Tribunal considered that solicitors should not accept instructions in areas about which they were unable to advise meaningfully. Simply acting as a post-box and carrying out narrow instructions without providing advice on, or even highlighting, the potential risks of the enterprise was something which was particularly inappropriate where the client was relatively unsophisticated, the instructions were inherently unusual and the client had relied upon the solicitor on financial issues over an extended period of time. The Tribunal accepted the submission made by the Applicant that such conduct would be likely to diminish public confidence in the Respondent and in the profession and found beyond reasonable doubt that he had breached Rule 1.06 of the 2007 Code.

19. **Allegation 1.4: In or around November 2011, in relation to the assignment of Client A's loan secured on Property 1, the Respondent failed adequately to explain to Client A the risks of the assignment, and in doing so breached Principles 4 and 6 of the Principles.**

The Applicant's Case

19.1 By way of a deed dated 21 June 2011 Client A agreed to assign her legal and beneficial right to the £315,000 bridging loan made to Client B to Company X. The deed was executed by Client A in the Respondent's presence.

19.2 In an attendance note dated 1 November 2011 the Respondent recorded that Client A "had assigned the benefit of the charge with [Client B] to [Company X]" as she "does not want the money going back to HSBC". The Respondent noted "whilst we knew about [Company X] and the general plan to ring fence items securely we did not know about the assignment and none of the land registry side had been done so that would still appear as [Client A] personally". The Respondent advised Client A of the need to correct the Land Registry charges. The Respondent agreed "to get started with the sale as if it were [Client A] selling". The Respondent's statement in this attendance note that he was not aware of the assignment was submitted to be plainly false, on the basis that he had witnessed Client A's signature on the deed four months prior to the attendance note being made.

19.3 In interview with the FIO on 2 March 2017 the Respondent said that he had told Client A "to go and get independent advice" but he wasn't "sure that my duty extended much beyond that". During the interview the Respondent was also asked whether his "duty extended to informing her of potential risks, or saying you wouldn't act because of your conflict with [Company FE]?" The Respondent stated "at the time I didn't see any conflict in this" as "everyone was amicable" and "it didn't seem like a contentious situation". The Respondent was asked whether he saw a conflict now and said "I don't think there was one, I can see how looking at it from the outside there might be a perception that way". The FIO raised that there might be "a significant risk" of a conflict and the Respondent answered: "but I don't think that there was one".

19.4 In the Respondent's response to the Applicant dated 20 December 2017 he stated that Client A "entirely understood the nature and purpose of the loan" and that "she did not want a tax liability arising", and was "strongly recommended to seek independent tax advice". The Applicant submitted that the client should have been advised to obtain independent tax advice on the assignment of a loan, particularly as assignment can give rise to a stamp duty liability since it can be regarded as a transfer of property. There was said to be no evidence on Client A's legal file of her receiving independent tax advice or being advised to do so. There was further stated to be no evidence on the client file of the Respondent explaining the terms of the deed, or what it meant for Client A to assign her rights, title, interest and benefit. The Applicant's case was that Client A could not read and write, and therefore was incapable of reading and understanding for herself the terms of the complex written assignment agreement.

19.5 In facilitating the assignment of a benefit from Client A to a Panamanian company which was (according to the Respondent's subsequent account in a letter to the Applicant in January 2017) incapable of holding a bank account, without providing advice as to the potential risks of doing so, and in seeking artificially to narrow the scope of his instructions so as to exclude the provision of such advice, the Respondent was alleged to have acted contrary to the best interests of Client A in breach of Rule 1.04 of the 2007 Code. It was submitted that the Respondent should have given

advice to Client A and documented his advice on the client file, as to the manner in which the loan would be assigned, and why this was preferable in contrast with other mechanisms (such as novation), as well as the risks of assignment of assets to a Panamanian company. It was alleged that the Respondent also did not give advice on the different types of assignment (legal and equitable) and the differences between these types. It was alleged that a solicitor knowingly acting in such a situation would be likely to diminish public confidence in him and the profession in breach of Rule 1.06 of the 2007 Code.

The Respondent's Case

19.6 Mr Nesbitt submitted that two questions arose on this allegation: was the advice on the risks of the assignment of the loan to Company X inadequate, and if so, was this such that the relevant Principles were breached as alleged? As noted in relation to the previous allegation, the Respondent's evidence was that the idea for the off-shore company was Client A's. He stated that her idea was specifically that it should hold the funds returned from Client B when her loan was repaid. The trust document provided a life interest for Client A and also benefitted the Catholic Church. Mr Nesbitt submitted that there was no benefit to the Respondent and there was no way on the evidence to attribute the document to him. He submitted that it was striking that the Catholic Church was the beneficiary, something which indicated that Client A had wanted to enter into this arrangement and that it reflected her wishes.

19.7 The way that the allegation had been put was that Client A should have received tax advice. Mr Nesbitt submitted that it was alleged that the advice provided was inadequate on the basis that it omitted the tax implications of the assignment. Mr Nesbitt submitted that to find the allegations proved the Tribunal would need to find that no reasonable solicitor would have omitted tax implications from their advice (in circumstances where they had already made the point clearly that the client should seek tax advice from a chartered accountant). Mr Nesbitt submitted that it may well be sufficient for a competent 'generalist' solicitor to direct a client in need of tax advice to a chartered accountant in order to obtain it. He submitted that even if the Tribunal considered that signposting his client to an accountant for tax advice was inadequate, such a failing was insufficient for a finding that he had he had breached Principles 4 and 6. Again by reference to Wingate, he submitted that any such negligence would be insufficient to amount to a failure to maintain the trust placed by the public in him and in the provision of legal services (Principle 6) and also that in the circumstances outlined it did not amount to a failure to act in Client A's best interests (Principle 4).

The Tribunal's Decision

19.8 This allegation related to assigning a substantial loan from Client A to the vehicle, Company X, the creation of which was the subject of the previous allegation. The Tribunal found, in relation to the previous allegation, that the Respondent did not provide adequate advice on the risks of setting up an off-shore company in Panama for the purpose of making bridging loans. The Tribunal considered that the Respondent had similarly failed to provide adequate advice about the risks involved in assigning the substantial loan to Company X.

19.9 The Respondent had been present when the deed assigning her legal and beneficial right to the £315,000 bridging loan to Company X was executed by Client A in June 2011. The Tribunal considered nothing turned on the Respondent's statement in an attendance note dated November 2011 that he was not aware of the assignment; this was plainly false as the Respondent acknowledged during his oral evidence. The Tribunal considered that asserting that Client A understood the nature and purpose of the loan failed and that he had advised her to take independent tax advice was not sufficient to discharge the Respondent's obligations. The Tribunal accepted, for similar reasons to those set out under the previous allegation, that the Respondent should have addressed the terms of the deed, what it meant to assign her rights, benefit and interest, why assignation was preferable to other mechanisms (such as novation) and any risks inherent in an assignment to a Panamanian company. The Tribunal found that the Respondent did not address these issues; his evidence was that this was not required and it was submitted on his behalf that the failure to address the tax implications was the thrust of the allegations. The Tribunal considered that the Respondent's failure was broader than this. In circumstances where a financially unsophisticated client, with very limited literacy skills who could not read the assignment deed herself, who had relied on his advice in financial matters over an extended period of time, gave instructions on what was an unusual transaction, he should have provided the advice summarised above.

19.10 The Tribunal found that it was not in Client A's best interests for the Respondent simply to help give effect to the narrow instructions, as was indicated by his witnessing of the deed, without adequately explaining, or even pointing out, the potential risks of the assignment, or that there might be other risks of which he was unaware, it being an area in which he had no expertise. On that basis the Tribunal found beyond reasonable doubt that the Respondent had breached Rule 1.04 of the 2007 Code. The Tribunal accepted the submission made by the Applicant that failing to offer adequate advice about the risks of the assignment of her loan to the Panamanian company would be likely to diminish public confidence in the Respondent and in the profession. The Tribunal found beyond reasonable doubt that he had breached Rule 1.06 of the 2007 Code.

20. **Allegation 1.5: In or around February 2012, when acting on behalf of Client A in relation to the distribution of the sale proceeds of Property 1, the Respondent acted in a situation where there was an own interest conflict, in that he caused the distribution of the sale proceeds to three companies in which he was the sole director, and in doing so, breached Principles 2, 4, 6, and 10 of the Principles, and failed to achieve Outcome (O)3.4 of the 2011 Code.**

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

20.1 The Respondent wrote to Client B on 1 November 2011 confirming he acted for Client A and Company FE stating if the outstanding sums under the loan agreements were not paid, the property would be repossessed and sold. A file note dated 4 November 2011 signed by Client B confirmed that the lenders had taken possession of Property 1 and were authorised to sell it as mortgage lenders in possession.

20.2 An initial offer was made for Property 1 of £499,950.00, but the prospective buyers identified historic subsidence issues and made a revised offer of £450,000. A file note dated 18 November 2011 recorded the Respondent noting that at this sale price there would be "a shortfall in the money due to [Client A] and it did not cover her costs and would be nothing left over to return to [Client B]". In fact the potential buyer dropped out and Property 1 was sold at auction in December 2011 for £407,500. The sale proceeds (less auction fees) were paid into the Firm's client account on 4 January and 7 February 2012. The balance (after costs and disbursements and a transfer to another of Client A's matters) was then distributed. The client file provided to the Applicant by the Firm was stated to contain an undated typed instruction, apparently signed by Client A, authorising the distributions. However, there was no evidence on the client file of written instructions from Client A to set up and incorporate these companies. When the Firm had asked whether written instructions existed, the Respondent stated: "probably not".

20.3 The Applicant referred the Tribunal to correspondence between the Respondent and the Firm's financial controller (taken from one of the Firm's client files):

- An email dated 30 January 2012 from the Respondent to the financial controller stating "when you get completion monies in for [Client A] please retain £500 in client and bounce to her [Company X] file and pay the attached invoice from there";

- An email dated 7 February 2012 from the financial controller to the Respondent confirming receipt of £300,000.00, and that he would "pay funds out tomorrow morning";

- An email dated 7 February 2012 from the Respondent to the financial controller stating "pay the second charge but nothing else until I get back";

- An email dated 9 February 2012 from the Respondent to the financial controller with an amended completion statement;

- An email dated 9 February 2012 from the Respondent to the financial controller stating Ms CG had "called to let me know money had turned up" and to "make sure the other monies get sent out by bacs today";

- An email dated 13 February 2012 from the Respondent to the financial controller asking for the money to be sent to Client A.

20.4 The Respondent explained in his letter to the Applicant dated 4 January 2017 aspects of the distribution of the sale proceeds as follows:

- Brockenhurst Project Ltd (of which the Respondent was the sole director) – the Respondent stated that he had previously helped Client A buy a car, and that the payment of £14,000 to his company was the reimbursement of these funds.

- Short Banker Ltd (of which the Respondent was the sole director) – minutes dated 20 November 2013 of a meeting between the Respondent and Client A show that it was agreed that "the outstanding loan balance of £300,000 due to Company X

would be capitalised and converted into 100 new shares in Short Banker Limited". These shares were a 33% shareholding. A typed note dated 15 February 2012, and signed by Client A, recorded her confirming that "neither [the Respondent] nor any other individual has provided me with investment advice in relation to this matter. I have been advised that I seek independent investment advice". The Respondent stated in his letter to the Applicant dated 4 January 2017 that "no authorities were required but [Client A] approved all transfers until her death".

20.5 The completion statement, prepared by the Respondent, showed Company FE was repaid its full loan and interest to the sum of £45,310.00. The full amount due under the first loan from Client A to Client B was £427,100. The reduction in the property price (and discharge of the loan from Company FE) meant there was a shortfall of £81,794.00 owed to Client A. An undated typed note on the file signed by Client A asked for the second charge to be discharged from any deposit monies received, and a handwritten note on the same document stated: "second charge repayment confirmed as £45,100 from sale proceeds at £407,500 sale price". It was said to be unclear who wrote this handwritten note but that it was signed by Client A.

20.6 The Applicant's case was that there was no evidence identified of the Respondent explaining to Client A that she had not received the full repayment of the loan and interest due to her. The FIO did not identify any evidence of the Respondent making Client A aware of the fact that he was a director of the three companies which were beneficiaries of the payments. The Respondent stated in his letter to the FIO dated 4 January 2017 that Client A was aware of the companies but could not demonstrate any written evidence to support this in his further letter dated 23 January 2017.

20.7 In distributing the proceeds of sale to entities other than his client, without a written record of the instructions to undertake such transfers, and in circumstances in which the Respondent had an interest in the recipient entities, it was alleged that the Respondent acted contrary to the best interests of Client A in breach of Principle 4 of the Principles. It was further alleged that a solicitor knowingly acting in such a situation would be likely to diminish public confidence in him and the profession in breach of Principle 6 of the Principles. The Respondent was further alleged to have failed to protect Client A's assets in breach of Principle 10 of the Principles.

20.8 The Respondent's actions were alleged to amount to a failure to act with integrity (lacking moral soundness, rectitude and steady adherence to an ethical code) in breach of Principle 2 of the Principles. The Respondent was submitted to have failed to act with integrity by transferring sums due to Client A to entities in which he held an interest, without a proper record of instructions to do so. He was further alleged to have breached Outcome (O)3.4 of the 2011 Code by acting where there was an own interest conflict or a significant risk of such a conflict.

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

20.9 The Respondent accepted that he was the director of the three companies mentioned in the allegation to which sale proceeds were distributed. His evidence was that he had written directions from Client A about where she wished the sale proceeds to go. The Respondent's evidence was that where she had signed such a document, he had taken her through it. By the date of the hearing the Respondent accepted that by

following her instructions he was carrying out legal work and that accordingly he was in a conflict situation. His case was that he had not recognised this at the time and that the error was entirely inadvertent. On this basis he admitted the alleged breaches of Principles 4, 6 and 10 and that he had failed to achieve Outcome (O)3.4 of the 2011 Code.

20.10 As regards the allegation of a breach of integrity, it was submitted that the Respondent's failure in relation to this allegation was entirely inadvertent, and he was acting in specific instructions from his client. Whilst he accepted that the situation was one of conflict, and that other alleged breaches properly flowed from that, it was submitted that an inadvertent failure of this kind did not give rise to a breach of the integrity principle. Mr Nesbitt submitted that on this sole disputed question, the issue for the Tribunal was whether the payment of money, on instruction, to the three named companies lacked integrity.

20.11 As to the factual position, it was submitted that nothing had been presented by the Applicant to contradict the Respondent's evidence that two of the companies were set up at Client A's request. As noted above, Client A and the Respondent were by this time very close friends, and his case was that Client A had asked him to be director of the two companies. At the time the Respondent did not recognise that he was doing more than mechanistically following Client A's instructions. The third company was the Respondent's but his evidence was that the money paid to this company was to reimburse him for the money he had spent purchasing a new car for Client A; money which was always due to be repaid. His case was that he had written instructions to distribute the funds and that he acted in accordance with those instructions. Mr Nesbitt invited the Tribunal to consider the witness evidence about Client A being strong willed and knowing her own mind when assessing the Respondent's actions.

20.12 The evidence of Mr NC was that of the money distributed with which this allegation was concerned, £300,000 was to be ring-fenced to Client A. She was to be entitled to its return. Beyond that, the first £15,000 of profit generated by the companies to which the money was paid was to be entirely Client A's. Mr Nesbitt submitted that any failing there may be in the way that the money was 'ring fenced' for Client A by others was not a failing by the Respondent. He had followed Client A's instructions and his evidence was that he understood the Firm's financial controller (Mr NC) had discussed these issues with Client A. The Respondent did not appreciate at the time that acting as he did was wrong and he failed to appreciate that the distribution amounted to legal work (and so as a director there was a conflict). Mr Nesbitt submitted that there was no evidence of any conscious error nor that the Respondent knew at the time that it was wrong. The fact that the payments were all made transparently and were included clearly in the ledger, in circumstances where the Respondent's status as a director was a matter of public record, was submitted to indicate that he had not appreciated at the time that there was anything wrong with making the payments. It was submitted that in those circumstances the mistake did not reach the threshold for acting without integrity.

The Tribunal's Decision

20.13 Allegation 1.5 was admitted with regards to the alleged breaches of Principles 4, 6 and 10 and the alleged failure to achieve Outcome (O)3.4. The Tribunal considered

the admissions were properly made and the allegations were proved beyond reasonable doubt. The admissions involved an acknowledgment by the Respondent that he had acted in an own-conflict situation, which was not in Client A's best interests, which would not maintain the trust placed by the public in him and in the provision of legal services and that he had not protected his client's money.

20.14 The Tribunal found that there was no documentary evidence that Client A's money would be protected in the way the Respondent and Mr CH had described in their evidence. The Respondent acknowledged this in his oral evidence. In December 2017 the Respondent's then solicitors had stated on his behalf that 99.93% of the share capital in Short Banker Limited (one of the companies the Respondent was the sole director of to which sale proceeds were distributed) belonged to Client A. He had made the same point personally to the FIO in March 2017. In fact, the 300 shares in the company were all pari-passu (of equal value); the Respondent owned 200 shares valued at £1 each whereas Client A had obtained her 100 shares through the payment of £300,000. Since the only asset of this company was that £300,000, the effect of this was that as Client A owned only one third of the shares, her shares, and on immediate purchase, would be worth only £100,000. The Tribunal considered that the failure to keep a proper written record of steps taken to protect Client A's financial interests and evidence that Client A understood these steps and had provided relevant instructions, was a serious one.

20.15 The Respondent had confirmed to the Applicant that there were "probably not" written instructions from Client A to set up the three companies of which he was the sole director to which sale proceeds were distributed. Client A had signed a document seemingly authorising the distribution, but this did not include or amount to evidence that she was aware that she had not received the full sums due to her as loan repayment and interest or that she was aware of the nature of the Respondent's interest in the three companies or the failure to take steps to safeguard her financial interest.

20.16 Given the critical importance of the rules relating to own-interest conflict, and the absolute terms of the prohibition against acting in such a position, the Tribunal found the lack of documentation to be very concerning. The Respondent asserted that there was an audit trail covering the distribution, which the Tribunal accepted inasmuch as the payments were visible in the Firm's accounts and Client A had signed the document mentioned above, but the Tribunal considered that as a solicitor acting with integrity the Respondent was obliged to provide advice about, and take steps to effect, the protection of Client A's financial interests. He should have been able to provide evidence that his had been done. In circumstances where Client A had acquired a third stake in a company through the payment of £300,000 and the Respondent had acquired a two-third stake for £200, this obligation was even more pronounced. He had no answer to the obvious question as to why there was not a purchase of one third of the shares for £100 and a loan or debenture for £299,900. The money was originally destined for the Panamanian company, where, to his knowledge, there was a trust deed requiring any investment from that company to be protected in the way the Respondent said was intended, but he did not effect it. Later he asserted to the executors of Client A that she did indeed only own one third of the company, which is to negate the explanation proffered. The Tribunal found the own interest conflict in this situation to be clear and obvious and that any solicitor acting with integrity would

ensure, as a minimum, that Client A had received independent legal advice about the distribution of the Property 1 sale proceeds (including the apparent acquisition of 100 pari passu shares for £300,000). The Tribunal rejected the submission that the Respondent's conduct, in the context of failing to recognise that distributing the sale proceeds amounted to legal work, did not meet the threshold of acting without integrity. Applying the test in Wingate again, the Tribunal found that acting in the own-interest conflict situation as described above was comparable in terms of seriousness and tone to the examples in paragraph [101] of the judgment. The Tribunal found beyond reasonable doubt that the Respondent had failed to adhere the ethical standards of the profession in what was a basic and fundamental way. Accordingly, the Tribunal found beyond reasonable doubt that the Respondent had acted without integrity in breach of Principle 2.

21. **Allegation 1.6: In or around January 2014, in relation to a loan of £193,195.50 from Client A to ALD3 Ltd (the "Swindon loan"), the Respondent acted in a situation where there was an own interest conflict by reason of his position as a director of ALD3 Ltd, and in doing so breached Principles 2, 4, and 6 of the Principles and failed to achieve Outcome (O)3.4 of the 2011 Code.**

The Applicant's Case

21.1 Allegations 1.6 and 1.7 concerned a loan of £193,195.50 from Client A to ALD3 Ltd, a company of which the Respondent was the sole director. The loan deed was signed by Client A and the Respondent. The purpose of the Swindon loan was to enable the Respondent to buy a property in Swindon, and the agreement was for Client A to be paid 90% of the rental income less letting costs. A registered charge dated 3 January 2014 in the name of Client A was entered onto the official copy for the Swindon property on 17 February 2014. The capital of the loan was written down (without any payment being made in addition to the 90% of rent receivable) by 5% of the original advance every year.

21.2 A firm of solicitors (HJWS), who had previously acted for Client A, represented ALD3 Ltd in this matter. The loan funds were transferred from Client A's accounts to the client account of HJWS in two instalments on 17 and 19 September 2013. The terms of the Swindon loan were submitted to be clearly in the Respondent's own personal and financial interest. The Respondent, although separately represented himself, was alleged to have taken no steps to ensure that Client A had independent legal representation. There was stated to be no evidence of Client A being advised to or taking independent legal or financial advice on the loan. The Respondent confirmed to the FIO that he did not know if Client A had legal representation.

21.3 The prohibition on acting in an own interest conflict was submitted to be absolute. Merely informing the client that independent advice should be taken, which the Applicant did not accept had happened in this case in any event, was submitted to be insufficient to discharge the solicitor's duties to the client. If the client does not take independent legal advice, the solicitor should not proceed with the transaction.

21.4 The Respondent accepted in interview with the FIO on 2 March 2017 that he was aware of the "general requirement" not to act in situations of own interest conflict, but stated that he "didn't see any conflict at the time". The Applicant contended that the

Respondent's conduct, in accepting a loan from Client A without ensuring that she took independent advice, and in circumstances in which the loan was alleged to have several unusual features and no commercial rationale for Client A, was a serious matter heightened by the fact the Respondent had, over a protracted period, advised Client A on related matters, namely her making of loans as a commercial enterprise in reliance on his advice.

21.5 The terms of the Swindon loan, recorded in the loan agreement dated 3 January 2014 were submitted to be unusual in many respects, and to have no commercial benefit to Client A whilst being highly advantageous to the Respondent:

- There was no provision for the accrual or payment of interest;
- The only payment obligation on the Respondent was to pay 90% of the net rental income (after deduction of insurance, letting fees, household expenses, and maintenance costs);
- There was provision for the capital sum repayable by the borrower to be reduced by £9,659.78 annually regardless of net rental payments;
- The charge and loan agreement were dated 3 weeks prior to the death of Client A in January 2014 (when she was aged 74). The loan was stated to be for a 20 year term, with provision for early repayment. If Client A had still been alive at the end of the term, she would have been 96 and the capital sum would have been exhausted;
- The Respondent acquired the Swindon property (worth £193,000) at the cost of only paying 90% of the net rental income (if any), and at no risk to the Respondent, and with the benefit of retaining 10% of the net annual rental income;
- Client A did not obtain independent legal or financial advice in connection with the Swindon loan.

21.6 It was submitted that the Respondent should have insisted Client A sought independent advice, or refused to act if she did not do so, in order to protect her position. In taking a loan, to a company he controlled, from Client A, having previously advised Client A on her commercial lending activity, on terms adverse to Client A, the Respondent was alleged to have acted where there was a conflict of interests contrary Outcome O(3.4) of the 2011 Code. It was submitted not to be in the best interests of Client A for him so to act in breach of Principle 4 of the Principles. It was submitted that such conduct would not maintain public confidence in the provision of legal services in breach of Principle 6 of the Principles.

21.7 The Respondent's actions were submitted to amount to a failure to act with integrity, contrary to Principle 2 of the Principles, in that:

- He was the beneficiary of a transaction which he knew to be to the detriment of Client A without notifying Client A of such detriment or giving her the requisite advice, or opportunity to seek advice, before giving effect to the transaction;

- He so acted in the knowledge that Client A was vulnerable and placed a high degree of reliance on him and his advice in relation to her financial affairs.

The Respondent's Case

21.8 This allegation was that the Respondent 'acted' in an own interest situation (against which there is a complete prohibition). Mr Nesbitt submitted that as pleaded, the Applicant had to establish: that Client A was a current client of the Respondent at the time he was acting, that if so that the alleged breaches followed, and (at least so far as dishonesty was concerned) that the Respondent knew that a conflict existed.

21.9 Mr Nesbitt submitted that the Applicant's own conflict rules referred to 'current clients' and that the proper construction of the prohibition of acting in an own conflict situation was that it applied when such a conflict existed with a current client. He submitted that the evidence demonstrated that whenever the Respondent was 'acting' there was always, for example, a client care letter generated. The Respondent's case was that around 2010/11 he had informed Client A that as they had decided to go into business together he would be unable to act as her solicitor. Mr Nesbitt submitted that there was no evidence presented that he had done so and, further, that there was no evidence that Client A considered that the Respondent had acted for her after then.

21.10 Mr CH, the solicitor who acted for the Respondent's company ALD3 Limited to which client A lent the Swindon Loan, gave evidence that he discussed the terms of the loan with Client A and that she dictated to him. He further stated that he recommended she take independent advice on the loan to which she had said "just get on with it young man". He stated that the Respondent played no part in the creation of the loan documentation which was created by Mr CH to meet "the clear and direct requirements" of Client A. Mr Nesbitt submitted that it would be bizarre to conclude that the Respondent was acting as Client A's solicitor in those circumstances. He submitted that the allegation amounted to a suggestion that he acted for Client A on a matter where he himself had independent legal representation which was submitted to be unsupported by any evidence and to be entirely misjudged.

21.12 Mr Nesbitt submitted that this lack of 'acting' disposed of allegation 1.6 in its entirety as it was predicated on an own conflict situation (which he had submitted could only exist with a current client when a solicitor was acting). He submitted that if the Tribunal did not accept this submission, then finding a lack of integrity (and dishonesty) required findings, to the requisite standard of proof, that the Respondent knew about the conflict situation. The evidence, behind which Mr Nesbitt submitted there was no basis for the Tribunal to go, was that the Respondent did not believe Client A was his client at this time. He further submitted that if the Respondent had got this judgment wrong, then it would be easy to see why; it was not an obvious question. In those circumstances the allegations, including acting without integrity, were denied.

The Tribunal's Decision

21.13 The Tribunal noted that the Respondent himself was separately legally represented in the loan from Client A to his company ALD3 Limited. As Mr Nesbitt had submitted, the relevant prohibition against acting in an own-interest conflict situation in the SRA

Handbook was expressed in terms of "current clients". The Respondent's evidence was that he had told Client A in 2010 or 2011 that he could no longer act for her as they were going into business together.

21.14 Client A's instructions had been provided by her to Mr CH, a solicitor. He drew up the documentation for the loan and his evidence was that Client A dictated and understood these terms. Mr CH was acting for the Respondent's company in this matter, and Mr CH's evidence was that Client A had robustly dismissed his recommendation that she take independent legal advice. There was no evidence presented, unlike in earlier allegations, that the Respondent was acting for Client A at this time in other matters, whether wholly unrelated or not. In these circumstances, the Tribunal was not persuaded to the requisite standard that the Respondent was 'acting' for a current client in this matter and as such found that that the breaches of the relevant Principles and the Outcome included in the allegation were not proved.

22. **Allegation 1.7: The Respondent sought to take unfair advantage of Client A in relation to the loan agreement between Client A and ALD3 Ltd and in doing so breached Principle 2 of the SRA Principles 2011 and failed to achieve Outcome (O)11.1 of the SRA Code of Conduct 2011.**

The Applicant's Case

22.1 As noted above, Client A entered into the Swindon loan (of £193,195.50 to ALD3 Ltd, a company of which the Respondent was the sole shareholder and director) three weeks before she died. The Applicant's case was that the loan agreement was unusual in many respects, with no commercial benefit to Client A whilst being highly advantageous to the Respondent as summarised in paragraph 21.5 above.

22.2 Ms TW's witness evidence was that she had a meeting with the Respondent after Client A's death, at which he said Client A "was not a client" and was a friend. This was the first time that Ms TW (a sister of Client A) knew Client A had loaned money to the Respondent and the Respondent had said to Client A's brother that "he would pay the money back after he had re-mortgaged", but that it "was nothing to do with my brother as he had not loaned him the money".

22.3 The executors of Client A's estate brought High Court proceedings against the Respondent which at the time of the Tribunal hearing were continuing. The Respondent stated in his letter to the FIO dated 4 January 2017 that as part of the High Court proceedings, he had "agreed a redemption figure and costs with the estate and have arranged a re-mortgage to settle this", and that this would "remove a large part of their claim against" him.

22.4 Outcome 11.1 of the 2011 Code states that solicitors must not take unfair advantage of third parties in either their professional or personal capacity. The 2011 Code makes clear that this includes actions in the solicitor's personal capacity. The Respondent stated that he was acting in a personal capacity, rather than Client A's solicitor, for many of the business deals Client A conducted. It was the Applicant's case that the Respondent breached Outcome 11.1 by using Client A's financial backing to enable him to purchase the property for his own personal and financial benefit (as the sole director of ALD3 Ltd). The Respondent's actions were submitted to amount to a

failure to act with integrity, contrary to Principle 2 of the Principles for the reasons summarised in paragraph 21.7 above.

The Respondent's Case

22.5 Mr Nesbitt stressed that the allegation focused on the Respondent having "sought" to take advantage of Client A (and this being aggravated by his having done so dishonestly). The Applicant had stressed the unusual features of the loan and the alleged un-commerciality and the pleaded case noted that the Respondent's position was that he was acting in his personal capacity (rather than as Client A's solicitor). Outcome O(11.1) referred to taking unfair advantage of third parties and was contained within the section of the 2011 Code headed 'relations with third parties'. Mr Nesbitt submitted this was telling as it recognised that this was not in fact an own client situation, but was rather about "use [of] your professional title to advance your personal interests".

22.6 Mr Nesbitt submitted that there were no examples within the 2011 Code which stated that a solicitor could not enter into business with a non-lawyer or do so in a way which was to the solicitor's benefit. He submitted this was unsurprising as that would be unworkable and that there was no rule which prevented a solicitor being the beneficiary of an agreement (from a non-client). He submitted that for the Tribunal to find that the Respondent had taken advantage of Client A, there needed to be something more than a beneficial transaction (for example, some evidence of manipulation or undue influence).

22.7 The Respondent's evidence, which Mr Nesbitt submitted was not contradicted by any other evidence, was that by the time of the Swindon Loan he had been close friends with Client A for many years and that other than odd occasions where he acted for her on specific matters since 2004 their relationship was defined by this friendship rather than being a solicitor/client one. The Respondent's evidence was that being unhappy with the return on investments with a high street bank Client A's specific concern was to secure a monthly income for herself for the rest of her life. Client A had raised the possibility of going into business of property rental together, and had no interest in being involved in the management of the property. The Respondent was to receive some reward for his work in the business, but he noted that Client A had no liability for maintaining or repairing the property.

22.8 Mr Nesbitt submitted that the evidence, including that Client A had intended to include the Respondent in her will, was that she had an interest in benefitting the Respondent. Whilst the arrangement may have been to the Respondent's benefit, this reflected Client A's wishes. The evidence of Mr CH was that Client A dictated the terms of the loan to him and was very clear about them. Mr Nesbitt submitted that this clear evidence from a solicitor indicated that Client A understood fully what she was doing with the terms of the loan. Mr Nesbitt submitted that the evidence of Mr IS and Mr KB corroborated the Respondent's account and demonstrated Client A's history of dealing with property in a capable manner and that she would have understood the implications of the terms she dictated to Mr CH. Mr Nesbitt submitted that it was unsurprising that Client A wished to benefit the Respondent in some way given the relationship between them, which had been described as maternal. In addition, the

Respondent's evidence was that he did not believe he was acting at Client A's solicitor at this time.

22.9 Mr Nesbitt submitted that benefitting from the transaction alone was insufficient to warrant a conclusion that he had failed to achieve the cited outcome or acted without integrity. Were that the case a solicitor could never receive a gift. Mr Nesbitt submitted that the law required evidence of manipulation or undue influence and that it was not the law that people (including solicitors) could not be intended to benefit from transactions willingly entered into by competent adults. The Respondent's case was that Client A, for whom he was not acting, knew exactly what she was doing and whilst the transaction was advantageous to the Respondent in the long run, in the meantime Client A received the monthly income she sought. Mr Nesbitt invited the Tribunal to consider how it would react had Client A been alive and able to attend the hearing and confirm "this was exactly what I intended". He submitted that in those circumstances the allegation would not have been brought and the features of the arrangement alone would be insufficient for the Tribunal to find the alleged breaches.

22.10 Mr Nesbitt also invited the Tribunal to consider that the arrangement was conducted entirely transparently, to the extent that after Client A's death the Respondent drew her family's attention to the agreement. It was transparent as it was recorded in the registers of title. He submitted that this suggested the Respondent did not consider that he was doing anything wrong which further undermined any suggestion that he had acted without integrity.

The Tribunal's Decision

22.11 The Tribunal accepted, and it was not disputed, that Outcome 11.1 relating to taking unfair advantage of third parties applied to solicitors in their professional and personal capacity.

22.12 The loan from Client A to the Respondent, in the guise of his company ALD3 Limited, was manifestly very substantially in his financial interest. Without risk the Respondent stood to acquire the Swindon property (worth £193,000) for the payment of 90% of the rental income (if any) received during the term of the loan. Client A's capital sum would be exhausted by the end of the 20 year term. Client A would receive taxable rent (if the property was let and the tenant paid the rent) at the cost of writing off 5% of her investment every year. The Respondent conceded during his oral evidence during the hearing that this arrangement was advantageous to him, having stated in his written witness statement that he did not consider it contrary to Client A's interests. The Tribunal considered the arrangement very clearly to be to Client A's considerable financial detriment. It was not necessary, indeed it was very surprising, to dispose of capital in order to secure a modest monthly income which, according to the Respondent's evidence, was Client A's objective. The Tribunal was satisfied beyond reasonable doubt that the loan was greatly to the Respondent's advantage and greatly to Client A's disadvantage.

22.13 The Tribunal had accepted in relation to allegation 1.6 that the Respondent was not acting for Client A in this matter. The Tribunal accepted the evidence that the Respondent and Client A had become close friend over the years. However, the longstanding friendship began with a solicitor/client relationship, and over several

years the Respondent had provided legal advice to Client A. Notwithstanding the evidence and submissions that Client A may have had some maternal feelings for Client A and may have wished to confer an advantage, the Respondent's status as a solicitor was a linchpin of their relationship and as well as being the origin was an ever-present backdrop to it. As stated above, the Tribunal did not accept the Applicant's contention that Client A was 'vulnerable' according to the dictionary definition, but did find that her very limited literacy skills exposed her to additional risks and increased her reliance on others. The Tribunal considered that given this context, and given the significant advantage he was gaining, by not insisting that Client A take independent legal advice the Respondent had taken unfair advantage of her. He had not acted for her but he had had control of the circumstances giving rise to the loan. The Respondent instructed as his solicitor someone he had worked with for 15 years, and who previously had acted for Client A at the Respondent's suggestion. The fact that Client A spoke with that solicitor now representing the Respondent in the matter, and who had known and worked with the Respondent for 15 years and had previously acted for her did nothing to cure this position. The Tribunal found beyond reasonable doubt that the Respondent had taken unfair advantage of Client A and had failed to achieve Outcome (O)11.1 of the Code.

22.14 The Tribunal considered that given the advantage conferred by the terms of this loan, any solicitor acting with integrity would have insisted that Client A took independent legal advice. For the reasons summarised in the preceding paragraph, the Tribunal considered that the Respondent had taken unfair advantage of Client A. Applying the test in Wingate, the Tribunal found that, given their relationship, failing to ensure that Client A had taken independent advice before embarking on a loan which was to her clear disadvantage and his advantage, amounted to a failure to adhere the ethical standards of the profession. Accordingly, the Tribunal found beyond reasonable doubt that the Respondent had acted without integrity in breach of Principle 2.

23. **Allegation 2: It was the Applicant's case that the Respondent acted dishonestly in respect of allegations 1.6 and 1.7 (dishonesty not being an essential ingredient to these allegations which it was open to the Tribunal to find proved with or without a finding of dishonesty).**

The Applicant's Case

23.1 The Applicant alleged that the Respondent's actions as set out at allegations 1.6 and 1.7 above were dishonest in accordance with the test for dishonesty laid down in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 in that the conduct alleged was dishonest by the standards of ordinary decent people.

23.2 In particular, the Applicant alleged that the Respondent:

- Acted when as an experienced solicitor he must have known that there was a conflict of interests or a significant risk of a conflict of interests between his own interests and those of Client A. Being involved in two sides of the same transaction was submitted to be a straightforward situation in which such a conflict or risk of one will exist.

- Must have known that there are no circumstances where a solicitor could act for a client whose interests conflict with the solicitor's own interests and that the client must be required to obtain independent legal advice. The conflict he was in was submitted to be obvious and the prohibition in the 2007 Code unambiguous and something of which he must have been aware. The Applicant submitted that it was to be inferred that his decision to act was motivated, at least in part, by his financial interest in obtaining the property.

- Assisted Client A to enter into a complicated commercial transaction, carrying significant risk and with no obvious commercial rationale, for his own financial benefit. He thereby abused the trust placed in him by Client A, demonstrated by the reliance which she placed on his advice in respect of her prior commercial lending activity.

- Acquired a property at reduced cost and little risk, with the benefit of retaining 10% of the net annual rental income by way of a loan agreement with an elderly client for a 20 year term, which would have expired when Client A was in her nineties by when the net capital sum would entirely have been exhausted.

- So acted in respect of a client known to be vulnerable by reason of her illiteracy and so potential inability to comprehend documents produced in relation to transactions which she was being advised to enter.

23.3 Although, under the Ivey a finding of "subjective" dishonesty was not required, the Applicant submitted that the Tribunal could in any event be satisfied that on a subjective basis, the Respondent acted dishonestly in that he was an experienced solicitor and must have known what conduct would be regarded as dishonest by ordinary decent people.

The Respondent's Case

23.4 Mr Nesbitt agreed that when considering the allegation of dishonesty, following Ivey, the Tribunal first had to consider the state of the Respondent's mind and then what an ordinary decent observer would make of the conduct. He reminded the Tribunal that the Respondent was entitled to the benefit of any doubt.

23.5 As set out above, the Respondent's primary contention was that he was not "acting" in relation to the Swindon Loan and that Client A was his friend and business partner in this matter rather than his client. Mr Nesbitt submitted that any observer who reviewed the actions with which the allegation was concerned would conclude than any shortcomings were at worst a mistake, in an area where the concepts of acting and client were far from clear and where the Respondent considered that he was not acting, which did not begin to approach dishonest conduct.

23.6 The Respondent also relied, as set out above, on more being required to show any misconduct or dishonesty than merely benefiting from a transaction. It was submitted there was no evidence of any undue influence or manipulation whatsoever, and that in the context of a very close friendship involving a strong willed character who knew exactly what she was entering into with the loan, an ordinary decent observer would not find the Respondent's actions to be dishonest.

The Tribunal's Decision

23.7 When considering the allegation of dishonesty, the Tribunal applied the test in Ivey. The test for dishonesty was set out at paragraph [74] of the judgment in that case, and accordingly the Tribunal adopted the following approach:

- first the Tribunal established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held;

- secondly, once that was established, the Tribunal then considered whether his conduct was honest or dishonest by the standards of ordinary decent people.

23.8 As noted above in relation to allegation 1.7, the Tribunal accepted that the Respondent had taken unfair advantage of Client A. The Tribunal considered that throughout his evidence, and conduct, the Respondent displayed a cavalier approach to the professional rules relating to conflicts of interest. His account of whether the 'loan' of £193,195.50 was in Client A's interests changed; in his written witness statement he stated that he did not see it as contrary to her interests whilst in his oral evidence he conceded this to be the case. The Tribunal found that that the Respondent must have known that an arrangement whereby the entire capital amount loaned would be exhausted had the agreement run its 20 year course was not in Client A's financial interests. His concomitant risk-free acquisition of the property was self-evidently in his own interests and it was inconceivable that the Respondent did not recognise this. The property would be his absolutely in 20 years (if she lived so long) as there would be no redemption figure by then. It was a transfer of value from Client A to the Respondent of £9,659.78 every year. As a 90% owner it would be expected that she would receive 90% of the income generated from the investment anyway. There was no commercial rationale for her also writing off her capital over 20 years, and the only evidence that she knew what she was doing was that the solicitor acting for the Respondent said that she did, based on one telephone conversation he said that he had with her.

23.9 The Tribunal had found in relation to allegation 1.7 that any solicitor acting with integrity in circumstances where a client wished to benefit them financially (if indeed this was Client A's intention) would ensure that their client took independent legal advice. Client A did speak with a solicitor, Mr CH, in relation to the 'loan' but he was representing the Respondent in the matter and he was accordingly not independent. Further he had, in the past (at the Respondent's suggestion) acted for Client A. There was no independent advice for Client A. In various client care letters on other matters to which the Tribunal was referred, the Respondent had explained various constraints on his ability to act resulting from potential conflicts of interest. The Tribunal considered that he therefore had an appreciation of the importance of avoiding acting in such situations, this being a basic and fundamental principle underpinning the profession. The Tribunal considered that the Respondent's attempts to distance himself from the transaction by permitting Client A to be advised by the solicitor he himself had instructed to represent him in the matter were inadequate and that the Respondent must have been aware of this. The Tribunal considered this disingenuous.

23.10 The Tribunal had found in relation to allegations 1.1 and 1.2 that the Respondent had effectively prioritised the interests of other clients (Client B and Company FE) above those of Client A. The Tribunal considered that this allegation of dishonesty in relation to the loan was made in the context of a previous failure to adequately safeguard Client A's interests.

23.11 The Tribunal found that the origin of the Respondent's relationship with Client A was his status as a solicitor and that this remained an underpinning of it throughout their friendship. This origin and status gave the Respondent a position of trust in relation to Client A, all the more so given her very limited literacy and the fact she had relied on his advice on financial matters for several years. The Tribunal found it inconceivable that the Respondent was not aware that as a solicitor in such circumstances, as a minimum, he owed an obligation to Client A to ensure that she fully understood the terms of the arrangement and had independent advice upon it.

23.12 The Tribunal noted all that was said by and on behalf of the Respondent about the transparency of the documentation. But in the light of all the above, the Tribunal was sure to the requisite standard of proof that the Respondent could not have considered that he had taken adequate steps to protect Client A's interests or that the arrangement was in her financial interests. The terms of the arrangement were very clearly to the Respondent's benefit. The Tribunal found beyond reasonable doubt that ordinary decent people would view such conduct as dishonest.

Previous Disciplinary Matters

24. There were no previous Tribunal findings.

Mitigation

25. On the Respondent's behalf Mr Nesbitt submitted that the Respondent had had a long career to date marked by good service to others. Mr Nesbitt stated that given the findings made by the Tribunal the Respondent was sanguine about the likely consequences. He did not submit that there were, or invite the Tribunal to consider, exceptional circumstances relating to the conduct found proved. The Tribunal was referred to various positive character references provided on the Respondent's behalf.

Sanction

26. The Tribunal referred to its Guidance Note on Sanctions (6th Edition) when considering sanction. The Tribunal assessed the seriousness of the misconduct by considering the level of the Respondent's culpability and the harm caused, together with any aggravating or mitigating factors.

27. In assessing culpability, the Tribunal found that the motivation for the Respondent was a desire for the various transactions to be completed and, in the case in which dishonesty was found proved, a wish to enter into an arrangement which was to his benefit. The Tribunal found that he had subordinated the interests of Client A to his own. The misconduct was not spontaneous and had required planning and taking all allegations together had extended over several years. The Tribunal considered that the Respondent had been in a position of trust, particularly given the very limited

literacy of Client A and the heightened extent to which she inevitably relied on her trusted advisers. He was an experienced solicitor. The Tribunal assessed the Respondent's culpability as high.

28. The Tribunal considered the harm caused by the misconduct to have been foreseeable. Even if the loan which was to the Respondent's advantage had been Client A's considered intention, the lack of appropriate advice was a cause of concern to Client A's family. Client A's estate was involved in litigation with the Respondent which, whatever the outcome and merits of those proceedings, could have been simplified or avoided if full documented independent advice relating to Client A's interests was available as it should have been. These were significant consequences of the misconduct and the Tribunal considered that the reputation of the profession would also be harmed given the personal benefit to the Respondent and the very obvious own-conflict situation in which the benefit arose. The Tribunal assessed the harm caused as moderately high.

29. The Tribunal then considered aggravating factors. A finding of dishonestly taking advantage of Client A in relation to a loan which benefitted the Respondent significantly had been found proven. Other serious findings had been made which extended over a significant period of time. The Tribunal had not accepted that Client A was 'vulnerable' in general terms as alleged, but she had vulnerabilities arising from her very limited literacy. The Respondent had not only failed to take the extra care that advising in such circumstances required but had fallen below the standard required for advising any client where a potential conflict exists.

30. The Tribunal also considered mitigating factors. The Respondent had an otherwise unblemished record and had produced positive testimonials which spoke about his professionalism and integrity.

31. The overall seriousness of the misconduct was high: it could not be otherwise given the dishonesty finding. In addition, there were multiple findings that the Respondent had lacked integrity and failed to uphold public trust in the provision of legal services in various different ways. Even without dishonesty the Tribunal would regard the misconduct as very serious. As the Respondent had been found to have been dishonest, the Tribunal had regard to the case of SRA v Sharma [2010] EWHC 2022 and the comment of Coulson J that, save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck of the Roll. The Tribunal was not invited to consider any factors submitted to be exceptional was not persuaded that any were present such that the normal penalty would not be appropriate.

32. Having found that the Respondent had acted dishonestly, and in view of the other serious findings made against him, the Tribunal did not consider that a reprimand, fine or suspension were adequate sanctions. The Tribunal had regard to the observation of Sir Thomas Bingham MR in Bolton v Law Society [1994] 1 WLR 512 that the fundamental purpose of sanctions against solicitors was:

> "to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth".

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

Costs

33. The total costs claimed in the Applicant's schedule of costs was £ £30,299.69. The parties reached agreement that costs of £25,000 (inclusive of VAT) should be paid by the Respondent.

34. The Tribunal assessed the costs for the hearing. In all of the circumstances the Tribunal considered that the figure agreed between the parties was reasonable and ordered the Respondent to pay the Applicant's costs of and incidental to this application fixed in the sum of £25,000.

Statement of Full Order

35. The Tribunal ORDERED that the Respondent, ASHTON LLOYD DOHERTY, 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 £25,000.

Dated this 11th day of July 2019
On behalf of the Tribunal

R. Nicholas
Chairman