The Respondent appealed the Tribunal's decision dated 19 November 2019. The appeal was heard by Simler LJ and Picken J on 8 and 9 December 2020 and Judgment handed down on 21 December 2020. The Respondent's appeal was dismissed. Martin v Solicitors Regulation Authority [2020] EWHC 3525 Admin.

The Respondent sought permission to appeal to the Court of Appeal against the Divisional Court's decision. This application was refused by Lord Justice Males on 15 April 2021.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 11886-2018

BETWEEN:

SOLICITORS REGULATION AUTHORITY — Applicant

and

VIDAL EULALIE MARTIN — Respondent

Before:

Mr B. Forde (in the chair)
Mrs J. Martineau
Mrs N. Chavda

Date of Hearing: 5 to 19 November 2019

Appearances

Giles Wheeler, barrister, of Fountain Court Chambers, Temple, London EC4Y 9DH, for the Applicant

Nicola Newbegin, Old Square Chambers, 10-11 Bedford Row, London, WC1R 4BU, for the Respondent

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JUDGMENT

Allegations

1. The allegations made by the Applicant against the Respondent were set out in a Rule 5 Statement dated 31 October 2018 are were that whilst in practice as a solicitor at Bright and Sons ("the Firm"):

1.1. On or after 4 January 2011, she:

1.1.1 procured a cheque from X in the sum of £4,700, made payable to herself ("the Cheque");

1.1.2 failed to pay the Cheque into client account;

1.1.3 caused or allowed the Cheque to be paid into her own bank account;

1.1.4 failed to document, justify or explain this transaction on file, adequately or at all;

1.1.5 dealt with the funds as her own;

and therefore breached all or any of:

1.1.6 Rules 1(a), 1(b), 1(c), 1(f) and 15(1) of the Solicitors Accounts Rules 1998 ("1998 SARs");

1.1.7 Rules 1.02, 1.04 and 1.06 of the Solicitors Code of Conduct 2007 ("the 2007 Code").

1.2 On or after 15 June 2017 she made the following representations to the Applicant's forensic investigation officer ("FIO") in relation to the Cheque, which were false and/or misleading:

1.2.1 that a sort code corresponding to the bank account referred to in allegation 1.1.3 above was not and never had been hers, or words to that effect;

1.2.2 that Nationwide Building Society had informed her that the Cheque had been returned, or words to that effect;

and therefore breached all or any of Principles 2, 6 and 7 of the SRA Principles 2011 ("the Principles").

1.3 On or before 28 September 2011 she raised a bill against the estate of Ms M in the sum of around £64.75 which was unjustified and/or improper and therefore breached all or any of:

1.3.1 Rules 19 and 22 of the 1998 SARs;

1.3.2 Rules 1.02, 1.04 and 1.06 of the 2007 Code.

1.4 She failed to dispose of a number of shareholdings belonging to the estate of Ms M before leaving the Firm on or around 3 June 2015 and therefore:

1.4.1 breached all or any of Principles 4, 5 and 6 of the Principles;

1.4.2 failed to achieve Outcomes 1.2 and 1.5 of the SRA Code of Conduct 2011 ("the 2011 Code).

1.5 In a number of cases she:

1.5.1 caused or allowed payments to be made from estates being administered by her to C & Co, a business owned and/or operated by one or more relatives of her children, without disclosing her personal connection to that business, adequately or at all;

1.5.2 failed to record any or adequate justification, explanation or breakdown of such payments, or evidence of any alternative quotations obtained and therefore breached all or any of:

1.5.3 Rules 1.02, 1.04, 1.05 and 1.06 of the 2007 Code;

1.5.4 Principles 2, 4, 5, 6 of the Principles.

1.6 On or about 6 August 2014 she caused or allowed a payment of around £5,400.00 to be made from the estate of Mr JEBS to a Mr H, under the pretext that Mr H was employed and/or recommended by Company B (Chartered Surveyors), in circumstances where he was not, and therefore:

1.6.1 failed to achieve Outcome 1.2 of the 2011 Code;

1.6.2 breached Rule 20.1(c) of the SRA Accounts Rules 2011 (2011 SARs);

1.6.3 breached Principles 2, 4, 6, and 10 of the Principles.

1.7 In or around June 2011, she purchased a motor car from the estate of Ms OCM:

1.7.1 without the approval of the partner in the Firm who was appointed as executor;

1.7.2 at an undervalue;

and therefore breached Rules 1.02, 1.04, 1.05, 1.06 and 3.01 of the 2007 Code or any of them.

1.8 In or around August 2014, she caused, allowed or facilitated the sale of a motor car belonging to Client Mr MEP to a third party, NC, in circumstances where:

1.8.1 Client Mr MEP was elderly, vulnerable and/or lacked capacity;

1.8.2 the Respondent was acting or proposing to act for him under a lasting power of attorney;

1.8.3 the third-party purchaser was a relative of her children;

She subsequently:

1.8.4 recorded information in the estate accounts to the effect that Client Mr MEP's car had sold for £8,500.00, when in fact NC had only paid around £6,400.00;

She therefore:

1.8.5 failed to achieve Outcomes 1.1 and 3.4 of the 2011 Code;

1.8.6 breached all or any of Principles 2, 4, 5, 6 and 10 of the Principles.

1.9 On one or more occasions she billed costs to the estate of Mr JEA which were:

1.9.1 unjustified or excessive on the basis of the work undertaken by her;

1.9.2 raised in order to conceal a payment made to C & Co and/or to balance the estate accounts;

and therefore:

1.9.3 failed to achieve Outcome 1.2 of the 2011 Code;

1.9.4 breached Rule 17.2 of the 2011 SARs;

1.9.5 breached all or any of Principles 2, 4, 6, and 10 of the Principles.

2. Dishonesty was alleged in relation to allegations 1.1 to 1.9, save for 1.4, but proof of dishonesty was submitted not to be necessary in order to establish those allegations or any of their particulars.

Documents

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

Applicant

- Electronic trial bundle containing the application, Rule 5 Statement and exhibits
- Reply to Supplemental Answer dated 4 October 2019 and exhibits
- Witness statement of Duncan Scott dated 20 December 2018
- Second witness statements of Christopher Hayward dated 30 September 2019 and exhibits
- Witness statement of Amanda Bright dated 30 September 2019
- Witness statement of Ms X dated 12 November 2019
- Schedule of costs to issue, time and expenses analysis and updated schedule to the hearing dated 29 October 2019

- Copy correspondence between the parties from October 2018 to October 2019 relating to disclosure with exhibits
- Skeleton argument dated 25 October 2019
- Copies of authorities relied upon

Respondent

- Answer dated 14 December 2018 and Supplemental Answer dated 20 September 2019 and exhibits
- Various testimonials
- Witness statement of Brian Mann dated 20 September 2019
- Witness statement of Ms SR dated 23 September 2019
- Witness statement of Mr DJC dated 29 September 2019
- Respondent's witness statement dated 30 September 2019
- Witness statement of Gideon Habel dated 30 September 2019
- Application for dismissal of certain allegations dated 11 November 2019
- Note raising concerns about the expansion of the Applicant's case dated 11 November 2019
- Copies of authorities relied upon and extracts from practitioner handbooks relating to interim applications
- Skeleton argument (updated to include closing submissions) dated 18 November 2019

Preliminary Matters

4. Following the conclusion of the Applicant's case, the Respondent applied for strike out of allegations 1.1, 1.2, 1.3 and 1.8. It was submitted on behalf of the Respondent that there was no case to answer for these four allegations. It was further submitted that to continue with allegation 1.1 would amount to an abuse of process and/or a breach of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). On behalf of the Respondent it was contended that the case as presented by Mr Wheeler, on behalf of the Applicant, went beyond that pleaded in the Rule 5 Statement.

5. The Tribunal dismissed the application. The key submissions made in the strike out application, and the reasons for the Tribunal's dismissal, are summarised under the relevant allegations below to minimise repetition.

Factual Background

6. The Respondent was admitted to the Roll of Solicitors on 3 May 2005. At the date of the hearing she was a sole practitioner and Notary at V Martin Legal Services, Arundel Business Centre, Romford and held a current practising certificate free from conditions.

7. The conduct alleged in this matter initially came to the attention of the Applicant on 12 November 2015, when it received a report from Christopher Hayward, then the Firm's Compliance Officer for Legal Practice ("COLP"). The report set out various concerns about the Respondent's handling of probate matters. A Forensic

Investigation was commissioned on 27 September 2016. The final report was received on 28 September 2017.

Witnesses

8. 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. The following witnesses gave oral evidence:

- Ms Amanda Bright, Head of Private Client at the Firm
- Ms X, residuary beneficiary of an estate administered by the Respondent
- Mr Christopher Hayward, Company Commercial Consultant (and formerly COLP) at the Firm
- Mr Richard Esne, FIO
- Mr Brian Mann, former "Solicitor's Assistant" in the Firm's Probate department
- Mr DJC, the Respondent's former partner
- The Respondent

The following witnesses were not required by the parties to attend and the Tribunal was invited to, and did, read their statements:

- Mr Gideon Habel, solicitor at Leigh Day
- Ms SR, former client of the Respondent's
- Mr Duncan Lewis, chartered surveyor

Findings of Fact and Law

9. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for her private and family life under Articles 6 and 8 of the ECHR.

10. **Allegation 1.1: On or after 4 January 2011, the Respondent:**

1.1.1 procured the Cheque from X in the sum of £4,700, made payable to herself;

1.1.2 failed to pay the Cheque into client account;

1.1.3 caused or allowed the Cheque to be paid into her own bank account;

1.1.4 failed to document, justify or explain this transaction on file, adequately or at all;

1.1.5 dealt with the funds as her own;

and therefore breached all or any of:

1.1.6 Rules 1(a), 1(b), 1(c), 1(f) and 15(1) of the 1998 SARs;

1.1.7 Rules 1.02, 1.04 and 1.06 of the 2007 Code.

The Applicant's Case

10.1 The first four allegations concerned the Respondent's work administering the estate of Ms M. Allegation 1.1 was of misappropriation of client money from the residual beneficiary of the estate, Ms X. The estate included ownership of a property.

10.2 On 30 December 2010 the Respondent was contacted by the estate agent who had been instructed to sell the property. She was told that the property had suffered a large amount of damage because a water tank appeared to have frozen and then collapsed into a bathroom. On 4 January 2011 the Respondent and Ms X visited the property to survey the damage. As well as visiting the property, Ms X also attended the Firm's offices on 4 January 2011. The Applicant's case was that during that visit, Ms X wrote a cheque in favour of the Respondent in the sum of £4,700. Ms X's evidence was that she wrote the cheque in response to the Respondent's request for funds to repair the damage to the property. No such repairs were in fact undertaken prior to the sale of the property and the estate accounts made no reference to the cost of repairs at the property.

10.3 Ms X's account was said by Mr Wheeler to have "emerged" in the course of a series of exchanges with her solicitor ("HSD") who was dealing with Ms X's claim against the Firm. Ms X initially recalled incurring costs in respect of a replacement boiler but then corrected herself to recall the damage caused by the burst water tank. Ms X told HSD of her recollection of making a payment at the request of the estate's solicitors in respect of water damage to the property. When HSD told Ms X that he had discovered that the property had been sold without the water damage being repaired, Ms X expressed surprise saying that "*she had been asked for and had paid £5,000 (she thinks in cash) to the solicitors to effect repairs*". In the absence of direct evidence of the payment (and doubting that a solicitor would have accepted a large cash payment), HSD asked Ms X to approach her bank to seek evidence of the payment. Ms X therefore conducted enquiries with various banks with which she held accounts at the time. These enquiries bore fruit when one of her banks informed her that she had written a cheque for £4,700 payable to the Respondent.

10.4 It was submitted that while it was plain that Ms X lacked a detailed recollection of events some five and a half years after the cheque was written, the essence of her account that she made payment at the request of the estate's solicitor in respect of water damage to the property had remained unchanged. The Applicant relied upon her recollection of events being corroborated by the clear evidence that the cheque was written by Ms X and paid into the Respondent's account on the same day that they met to survey the damage to the property.

10.5 It was said to follow from the documentary evidence of the Respondent's personal bank statements confirming her receipt of the funds that that they were not paid into the Firm's client account. At the time that the cheque was written, the estate was

holding ample funds and a £10,000 interim distribution had been made to Ms X. There was said therefore to be no necessity for Ms X to finance any repairs to the property herself. The transaction was not documented, justified or explained on the client file. Further, the Respondent's personal bank statements were said to show her dissipation of the funds and it was submitted that it followed that she dealt with them as her own. The Applicant's case was that the Respondent had provided no evidence to support her contention that she may have made payments on behalf of Ms X (i.e. that that the Cheque may have been reimbursement for those).

10.6 The Respondent accepted in her Supplemental Answer that the Cheque from Ms X was paid into her personal account, she continued to deny having any knowledge of it prior to these allegations first being put to her. The Applicant contended that it was inconceivable that Ms X wrote the cheque in favour of the Respondent for any reason other than that she had been asked to do so by the Respondent herself. It was submitted to be similarly inconceivable that the Respondent was unaware of the cheque being paid into her account.

10.7 Mr Wheeler invited the Tribunal to consider whether the Respondent's responses to the allegations regarding the Cheque reflect a genuine ignorance of it on her part (until the allegations were first raised), or whether they represented attempts to explain away or conceal her acceptance of the cheque from Ms X. The FIO asked the Respondent for her recollections about the Cheque and she indicated that she could not remember asking for a cheque; she could not remember taking a cheque; she may have asked for reimbursement of payments she made from her own money on the client's behalf; she did not and never had held the account that the Cheque was paid into; her name was spelt incorrectly on the Cheque; the writing on the Cheque was inconsistent; the bank had told her that the Cheque was returned; and this was an attempt by someone to discredit her personally and professionally.

10.8 The FIO asked to see any receipts or invoices that would show that the Respondent had used her own money on behalf of the client. None were provided, and none were contained in the Firm's legal file. The FIO also obtained payroll information from the Firm which showed that the Respondent did hold an account with those details, which was used to receive her monthly salary. The Respondent said that her enquiries with the bank led to them telling her that the Cheque was returned. However, before the cheque was paid in to her account it contained around £370.82. Once the cheque was paid in the Respondent went on to withdraw around £2,268.17 between 4 January and 24 January 2011, at which point her monthly salary was added.

10.9 Rule 1 of the 1998 SARs required a solicitor to: "... *(a) keep other people's money separate from money belonging to the solicitor or the practice; (b) keep other people's money safely in a bank or building society account identifiable as a client account (except when the rules specifically provide otherwise); (c) use each client's money for that client's matters only... (f) keep proper accounting records to show accurately the position with regard to the money held for each client and trust*." It was submitted that the Respondent's actions as set out above were in clear breach of this requirement. It was further alleged that the Respondent had breached Rule 15 of the 1998 SARs which required that: "*Client money must without delay be paid into a client account, and must be held in a client account, except when the rules provide to the contrary*".

10.10 The conduct alleged was also alleged to be in breach of Rules 1.02, 1.04 and 1.06 of the 2007 Code. Rule 1.02 required that solicitors must act with integrity. It was submitted to be well established that the word "integrity" connotes moral soundness, rectitude and steady adherence to an ethical code. The Applicant relied on the case of Wingate & Evans v SRA v Malins [2018] EWCA Civ 366 in which the Court of Appeal held that "*Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty.*" The Respondent's conduct was submitted to have lacked integrity on the basis she allegedly procured the Cheque made payable to herself from Ms X under false pretences, failed to pay it into client account, paid it instead into her own, personal bank account, contrary to the 1998 SARs and her fiduciary obligations to Ms X of trust and confidence, failed to document, justify or explain this transaction on file, adequately or at all and dealt with the funds as her own, instead of applying them to the purpose for which they were provided or returning them.

10.11 Rule 1.04 of the 2007 Code required solicitors to act in the best interests of each client. It was submitted to be plain that it was not in Ms X's best interests, or those of the estate, for the Respondent to misappropriate and then dissipate funds totalling £4,700 as was alleged. If the funds were properly required for a legitimate purpose then it was submitted that they ought to have been made payable to the Firm and dealt with in accordance with the 1998 SARs.

10.12 Rule 1.06 of the 2007 required that solicitors must not behave in a way that is likely to diminish the trust the public placed in them or the legal profession. It was submitted that the Respondent's alleged conduct was capable of undermining public trust and confidence in both her and the legal profession. It was said members of the public would expect solicitors to comply with the 1998 SARs and to safeguard client funds, including by documenting all transactions on the client file. The Respondent's conduct described was submitted to have fallen far below the public's expected standards for a solicitor with the care of client funds and she therefore breached Rule 1.06 of the 2007 Code.

Dishonesty alleged in relation to allegation 1.1

10.13 The Applicant alleged that the Respondent's conduct was dishonest in accordance with the test confirmed by the Supreme Court in Ivey v Genting Casinos [2017] UKSC 67. This applies to all forms of legal proceedings and requires that the accused has acted dishonestly by the objective standards of ordinary, decent people:

> "*When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.*"

10.14 As the solicitor with conduct of this file and an experienced solicitor of at least five years standing, it was alleged that the Respondent must have known that she was not entitled to the Cheque which she procured from Ms X but that she nevertheless did procure it (under false pretences), failed to pay it into client account, paid it into her own account, failed to document the transaction on file, and then dealt with the money as her own. It was submitted that ordinary, decent people would consider this behaviour to be dishonest.

The Respondent's Case

Submission of no case to answer/abuse of process/breach of Article 6 ECHR

10.15 Ms Newbegin referred the Tribunal to the well-known test from of R v Galbraith [1981] 1 WLR 1039 which was applied by the Tribunal in SRA v Grindrod (case 11301-2012). If there was *no* evidence that the misconduct alleged had been committed by the Respondent the Tribunal should stop the case. If there was *some* evidence but it was of a tenuous character then if the Tribunal concluded that the prosecution evidence, taken at its highest, was such that the allegations could not be proved to the requisite standard, then its duty was to stop the case. If the Applicant's case was such that its strength or weakness depends on the view to be taken of a witness' reliability, or where on one view of the facts the Tribunal could conclude the allegations against the Respondent were proved, then the Tribunal should not dismiss the allegation at the conclusion of the Applicant's case. Relying on the Tribunal's decision in Grindrod, Ms Newbegin submitted that an application of no case to answer at the conclusion of the Applicant's case must be decided on the balance of probabilities. Ms Newbegin also referred the Tribunal to the formulation of the Galbraith test approved by the High Court in R (Tutin) v GMC [2009] EWHC 553.

10.16 Ms Newbegin also referred to the High Court decision in Soni v GMC [2015] EWHC 364 (Admin) that the panel in that case had been wrong to reject a submission of no case to answer after the prosecution case. In that case Holroyde J stated that "*a finding against Mr Soni of a failing of administration, even of negligent administration, does not without more justify a finding of dishonesty*". He also stated that the panel "*must have confused grounds for suspicion with evidence sufficient to prove*" the allegations.

10.17 Ms Newbegin submitted that the Applicant needed to prove all elements of allegation 1.1. An essential element of the allegation was that she "*procured a cheque from X in the sum of £4,700 made payable to herself*". It was submitted that the Galbraith test was not satisfied as the evidence to support this was inherently unreliable. It relied upon X's evidence which was described as being wholly unsatisfactory and unreliable (for reasons expanded upon below in the summary of the substantive response to the allegation). It was submitted that documentation from Ms X's former solicitors clearly demonstrated that she had no actual recollection (in 2015 and 2016) of having written a cheque or what it was written for. Her evidence was also at odds with that of other witnesses, for example about where she said she met the Respondent, which was said to further undermine her credibility. The Applicant's FIO gave evidence that he was concerned to be alone with Ms X in case she made false accusations against him. For these reasons, and those fuller reasons set out in the substantive response below, it was submitted that such evidence could not found the basis for a dishonesty charge against a solicitor.

10.18 Other than Ms X's evidence, it was submitted there was no other evidence of the Respondent having "procured" a cheque "made payable to herself". Ms Newbegin submitted that it was insufficient that the Cheque existed when there was no reliable evidence of how it came to exist. She further submitted that in any event:

- there was no evidence that the Respondent knew about the cheque (beyond Ms X's unreliable evidence);
- there was no evidence that she caused or allowed it to be paid into her account (which lack of evidence the Respondent attributed to the Applicant's delays);
- the passage of time meant evidence from the Respondent's electronic diary showing that she was not present when Ms X said she took the Cheque to the Firm's office was unavailable;
- there was no evidence that the Respondent was aware the money had been paid into her account; and
- the Respondent's bank card was being used elsewhere on the relevant day by her partner which suggested she was less likely to be aware of the payment and could not have paid the Cheque into her account.

It was submitted that there was no evidence to support the remaining parts of the allegation which must accordingly fail under the first limb of the Galbraith test.

10.19 It was further submitted by Ms Newbegin that it would be an abuse of process to permit allegation 1.1 to continue. She referred to comments from Singh J in R (Baker Tilly UK Audit LLP) v FRC [2015] EWHC 1398 that "*There is no doubt that any tribunal has the power to stay its proceedings if there had been an abuse of its process*". She referred the Tribunal to similar authority from Johnson v Gore Wood [2002] 2 AC 1 and R v Maxwell [2010] UKSC in which it was said at paragraph [13] that the court has the power to stay proceedings "*where it will be impossible to give the accused a fair trial*" and "*where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case*".

10.20 Ms Newbegin made submissions on what she described as failures in the Applicant's investigation:

- The Applicant was sent a copy of the Cheque on 15 August 2016;
- Despite this the Applicant did not ask Ms X about the circumstances surrounding the Cheque until 22 May 2017;
- The Applicant did not disclose the existence of the Cheque to the Respondent until 13 June 2017;
- As per the oral evidence of Mr Esney, the FIO, he took no steps to investigate the circumstances in which the Cheque came to be paid into the Respondent's bank account. He did not ask for any paying-in slips from Nationwide or any copies of paying-in documentation from the Firm;

- It was submitted that it appeared from Mr Esney's evidence that the existence of the Cheque was enough from his point of view to establish the Respondent's guilt and therefore he need look no further;

- By the time that the Respondent was shown the cheque, more than six years had passed and she was denied the opportunity to try to obtain a copy of the paying-in documentation from the bank, information that Mr Esney/the Applicant was in time to obtain, having been provided with a copy of the Cheque within the six-year time frame;

- As a result, it was submitted that the Respondent had been denied the opportunity of finding out who did in fact pay in the Cheque and the circumstances surrounding that payment;

- By the date of the hearing it was too late to do so and the Respondent had been denied a key potential defence.

10.21 Ms Newbegin made further submissions on the manner in which the investigation was conducted. She submitted that misleading information was put to the Respondent in her investigatory interview on 22 May 2017 which wrongly suggested that Ms X was very clear about the relevant chain of events concerning the Cheque when she was not. Ms Newbegin also submitted that the FIO report was misleading by virtue of the inclusion of the incorrect original statement from Ms X and the exclusion of Mr Esney's note of his meeting with Ms X (and her new lawyer HSD) of 22 May 2017 coupled with what Ms Newbegin submitted was a misleading summary of that missing note in his FIO report. That the Applicant's Rule 5 Statement was based on that misleading report compounded the unfairness as did the very late disclosure of the relevant note (which was only disclosed after the substantive hearing had been adjourned once). It was submitted that in the light of these alleged failures it amounted to an abuse of process to rely on what was described as the entirely unreliable evidence of Ms X (which it was submitted was further tainted by racist comments).

10.22 It was also submitted in the alternative that continuing with allegation 1.1 would amount to a breach of Article 6 of the ECHR on the basis of delay and investigatory failures. The right to a fair trial under this article is "within a reasonable time". The case of Attorney-General's Reference (No 2 of 2001) [2001] EWCA Crim 1568 was relied up as authority for it being appropriate to stay or dismiss proceedings if a fair hearing was no longer possible or it would be, for any compelling reason, unfair to try the defendant. It was submitted that evidence that might have been available was no longer available (the paying-in slip and the Respondent's Outlook calendar being two examples cited), in addition to which it was submitted that significant delays in investigating the case had impacted on the ability of those involved, not least the Respondent herself, to recall events. This was said to have been compounded by the Applicant's failure to comply with its disclosure obligations in a timely manner. It was submitted that a fair trial was no longer possible in respect of allegation 1.1.

10.23 It was also submitted on the Respondent's behalf that the allegations (not limited to allegation 1.1) presented on behalf of the Applicant in the case opening and skeleton argument were inconsistent with, and in some respects went beyond, what was set out

in the Rule 5 Statement. It was submitted that the Tribunal's jurisdiction was limited to the allegations and alleged facts set out in the Rule 5 Statement.

The Applicant's reply to the submission of no case to answer/abuse of process/breach of Article 6 ECHR

10.24 Mr Wheeler made detailed submissions for the Applicant in reply. His main reply was that the case he had outlined had disclosed a case to answer and it is not recorded at length in this judgment or repeated under the other three allegations where submissions of no case to answer were made. In extreme summary, beyond the factual matters set out under the relevant allegations, Mr Wheeler submitted that the judge of fact, as the Tribunal was, unlike a judge in a criminal trial, should not ordinarily be asked to give a view on the evidence when it was incomplete. He relied on Graham v Chorley BC [2006] EWCA Civ 92 as authority for this being an exceptional step to take. He submitted that where a Respondent had relevant evidence to give, the threshold for showing a case to answer was low. The Applicant's application had been certified by the Tribunal as showing a case to answer. The Tribunal was able to draw an inference from a decision by the Respondent not to give evidence; conversely Mr Wheeler submitted that her credibility may look different if she elected to give evidence.

10.25 Mr Wheeler submitted that in respect of all four of the allegations where no case to answer submissions had been made, the evidence called for an explanation. He stated that the Applicant was realistic about the credibility of Ms X, but that despite not initially recalling writing the cheque her oral evidence was unequivocal (and which he submitted was plainly corroborated by the existence of the cheque written by her). Mr Wheeler stated that the Tribunal must take into account the number of allegedly false explanations provided at different times by the Respondent. He submitted that it was not enough for the Respondent's representatives to show that other explanations were potentially possible, the Tribunal needed to assess whether they were inherently credible. Mr Wheeler submitted that any delay or imperfections in the investigation could not be characterised as an abuse of process or offend article 6 of the ECHR. A fair trial was submitted to be possible which was the primary relevant consideration. His opening and skeleton argument were summaries produced to assist the Tribunal and were not purporting to be a complete summary of the Rule 5 Statement.

The Tribunal's Decision on the submission of No Case to Answer/Abuse of Process/Breach of Article 6 ECHR

10.26 The Tribunal Chairman confirmed that the case it would be determining was that set out in the Rule 5 Statement. The Tribunal accepted that the test to be applied on a submission of no case to answer following the conclusion of the Applicant's case was as summarised by Ms Newbegin from the case of Galbraith.

10.27 The Tribunal did not accept that there was no evidence supporting the allegation or that it was such that taken at its highest the Applicant's contentions could not be found proved. The Tribunal considered that the Applicant's case fell within the second limb of Galbraith (its strength or weakness being dependant on the view to be taken of witness reliability and on one view of the facts the Tribunal could conclude the allegations against the Respondent were proved).

10.28 The Cheque, written by Ms X, had been paid into the Respondent's account. The Nationwide bank statements showed that the Cheque was not returned unpaid and that the money had been spent reasonably quickly. Ms X's evidence, the submissions as to credibility notwithstanding, was, to some extent at least, corroborated by physical evidence. Her evidence was also consistent with her having visited the Firm's office to see the Respondent. Whilst the Respondent may have a credible explanation, the Tribunal accepted that the evidence raised questions to be answered. The Tribunal similarly accepted that the Respondent's evolving account in relation to her Nationwide account and her insistence that she was given plainly incorrect information by employees of Nationwide raised questions to be answered.

10.29 The Tribunal considered that following the Applicant's case, the position was analogous to that described in paragraphs [26] and [27] of R (Tutin) v GMC [2009] EWHC 553 (Admin). Notwithstanding the points raised on the Respondent's behalf, in particular about Ms X's evidence, the Tribunal considered that the Applicant's case was "*not undermined in sufficient extent for it to be unsafe to leave it for final consideration on the facts in respect of some of the charges and to allow the matter to be assessed at the end of the day*". The Tribunal considered that all elements of allegation 1.1 were arguable.

10.30 The Tribunal did not consider that the identified delays in the investigation, and the other alleged failures including the failure to secure specified evidence or the presentation of an allegedly misleading FIO report, were sufficient to contend that allowing the case to continue would amount to an abuse of process. The threshold in Maxwell was not met. Similarly, the identified aspects of the Applicant's handling of the investigation and proceedings were not such that the Respondent's article 6 EHCR rights had been or would be breached if the allegation proceeded. The allegations were of serious misconduct, a case to answer had been demonstrated; it was in the interests of justice and the public interest for the case to proceed. The Tribunal was satisfied that the Respondent would receive a fair hearing and that the submissions made on her behalf about the credibility of the evidence relied upon by the Applicant would be considered and assessed at the conclusion of the case. Accordingly the Tribunal rejected the submission that there was no case to answer and that allowing the allegation to proceed would abuse of process and/or a breach of her article 6 ECHR rights.

The Respondent's substantive case

10.31 The allegation was denied. The Respondent's case was that she did not procure the Cheque and had no knowledge of it until the matter was raised with her by the FIO in their meeting of 13 June 2017. It was submitted by Ms Newbegin given the way the allegation was pleaded, all elements had to be proved. This was on the basis that the various elements of the allegation were not been pleaded in the alternative. It was submitted, with reference to Fish v GMC [2012] EWHC 1269 per Foskett J at paragraphs [67-70], that the Applicant could not seek to go behind the wording of the Rule 5 Statement and rely upon the case in the alternative.

10.32 Regarding allegation 1.1.1, that the Respondent "procured the Cheque made payable to herself from X under false pretences", it was submitted that the evidence showed that Respondent had no knowledge of the Cheque until the matter was raised with her

by the FIO in their meeting of 13 June 2017. The Respondent's evidence was that she was shocked and surprised first informed meeting that a cheque was made out to her personally by Ms X. The FIO himself noted that she seemed "shell shocked". The Respondent maintained that she did not know whether Ms X did in fact complete and sign the Cheque, in what circumstances or why she would have completed and signed it.

10.33 It was submitted that Ms X had repeatedly given inconsistent evidence in respect of the circumstances in which she came to write the Cheque. In 2016 she had stated that she had delivered £5,000 in cash to the solicitors' office. In a witness statement dated 3 January 2017 Ms X had stated that she "made the cheque out to [the Respondent] personally at her request". An attendance note of Ms X's then solicitor dated 22 May 2017 noted that she "could not now recall" if the Respondent had asked for the cheque to be made payable to her personally. In cross-examination Ms X repeatedly stated that she was unable to remember events of 2010 and 2011. It was submitted on the Respondent's behalf that Ms X's evidence, in which she simultaneously denied any memory of the contents of any of her meetings or telephone calls with the Respondent during the relevant period whilst claiming to have a clear recollection of the circumstances in which she came to write the cheque in the Respondent's favour and at her specific request was simply not credible.

10.34 Ms Newbegin stated that Ms X's evidence live to the Tribunal was the first time she had alleged a positive and specific recollection of having been asked directly by the Respondent for a cheque to be made out to her personally for the sum of £4,700. Ms X was taken to two attendance notes of the same meeting, both dated 22 May 2017, one prepared by her then solicitor and one by the FIO. The meeting was to discuss Ms X's recollection of events subject to the Applicant's investigation. Ms X was taken to passages in each note which demonstrated that she was, at that time, uncertain of her recollection of the circumstances in which she came to write the cheque. This included being taken to a passage which stated that "*the obvious exception [to limited aspects of her evidence that could be challenged] was whether [the Respondent] requested the cheque be paid directly to her. HSD interjected and said that was likely to be something that would have to be conceded on the basis that [Ms X] couldn't recall the exact mechanics of the situation*." Ms X was invited by the Tribunal Chairman to explain whether she accepted the two notes to be accurate but instead she maintained her new account of events, with, it was submitted, the obvious corollary of that being that both of the attendance notes, prepared by a very senior solicitor (qualified in 1981) and one of the Applicant's own FIOs must be wrong in how they had recorded the meeting, in very similar ways, without apparent cause.

10.35 Ms X's evidence during the hearing was also stated to be inconsistent with her most recent witness statement, from November 2018. In this sworn statement, prepared for her by the Applicant's solicitors, Ms X stated "*I do not specifically remember [the Respondent] asking me to write the cheque in her name, but she must have as there is no other reason I can think of as to why I would have done this.*" In giving live evidence Ms X was described as specifically disavowing her previous statement on the basis that she "*hadn't read it*". The FIO had concerns expressed in his note of 22 May 2017 about Ms X's reliability as a witness which he expanded upon in oral evidence where he stated that he would not want to be left alone with her for both their protections. He stated in his oral evidence when asked about what the risks were

that: "*she might say X and X becomes Y...*" It was submitted that in a situation where the Applicant's own FIO was concerned to be alone with an individual in case she makes false accusations against him, that same person's evidence could not found the basis for dishonesty and other charges against a solicitor. Other than Ms X's assertions, there was said to be no evidence that the Respondent "procured" a cheque "made payable to herself" as alleged.

10.36 Further concerns were submitted to arise about the reliability of Ms X's evidence on the basis that she was said to have exhibited racial prejudices about the Respondent (which Ms X strongly denied). The submission was based on an attendance note dated 28 February 2019 which made reference to Ms X saying: "*... she is not racist but says that [the Respondent] is black (although notes the rest of her family are white as far as she is aware) and wonders if perhaps she might have gang links or knows someone who could have her beaten up for giving evidence. [Ms X] fears being intercepted my [sic] [the Respondent's] lot on the way to or from the hearing and being attacked*". Ms X had previously sought payment "big time" if she gave evidence which it was submitted further undermined her credibility. In addition, concerns about possible mental health issues, based on comments made by Ms X's former solicitor were submitted to further undermine the credibility of her evidence.

10.37 It was submitted that it was not believable that the Respondent would jeopardise her entire career (and main source of income of her young family) for the sake of a cheque for £4,700. In addition, Ms X claimed in her oral evidence that she was asked for money for repairs. This was submitted to make no sense as she was clearly aware that no repairs were undertaken the property having been sold "as is". It was submitted that Ms X must have been aware that there were funds in the estate for any repairs such that there would be no need for a cheque to be written for this purpose. It was submitted that it was far more likely that – unknown to the Respondent – Ms X, possibly due to a misunderstanding of what was required in respect of the estate, or indeed for reasons known only to herself, wrote out the Cheque to the Respondent which, again unknown to the Respondent, someone else then cashed.

10.38 With regards to the meeting between the FIO, Mr Esney, and the Respondent on 13 June 2017, the Respondent's evidence was that her recollection was at odds with both the audio recording and the transcript. Various reasons why the Respondent had lost confidence in Mr Esney, and the Applicant, were cited on the Respondent's behalf, including the failure to take steps to investigate the circumstances in which the Cheque came to be paid into the Respondent's bank account. Ms Newbegin highlighted that he did not ask for any paying-in slips from Nationwide or any copies of paying-in documentation from the Firm, which it was submitted suggested that he had assumed the Respondent's guilt from the outset, and which had the effect of denying the Respondent the opportunity to prove her innocence in relation to the Cheque. Mr Esney's report was described as misleading and his questioning of the Respondent was described as putting her under significant pressure to try to think of a reason why Ms X might have written out the cheque in respect of which she was criticised by Mr Esney. For example, he stated in the 13 June 2017 interview "*To answer I suppose you can either talk to me about it now or it might be the type of case that goes forward to Tribunal and you can answer at the Tribunal. ..... Neither of us are fools so if you want to tell me about it, tell me about it now or it goes further forward obviously*". The Respondent was described as being put under considerable

pressure to provide a reason why a cheque might have been made out to her personally, despite having no recollection at all of the Cheque. The Respondent also considered that the (unapproved) transcript was inaccurate and incomplete and in support of this contention she relied upon the acknowledged exclusion of comments made by Mr Esney about Mr Hayward prior to the formal meeting.

10.39 The further elements of the allegation, all of which it was submitted must be proved by the Applicant, were also denied. The Respondent's evidence was that she had no paying-in book for the relevant personal account, and that it was in any event used almost exclusively by her then partner. The transactions on 4 January 2011, the day on which the cheque was paid into the account, according to the statements to which the Tribunal was referred, were from Romford (where the Respondent's partner was) rather than Witham (where the Respondent was). In his evidence Mr DJC, the Respondent's then partner, confirmed he used the Respondent's bank card and that entries on the statement for 4 January 2011 were most likely to be a trip to the cinema with his young children. It was submitted that the use of the funds shown on the statement was consistent with the Respondent being unaware of them. There was no evidence that the Respondent checked her statements and no immediate dissipation of the funds or significant change in the way the funds were used.

10.40 The Respondent's evidence was that given her work as a notary public, the finances of which were separate from those of the Firm, cheques were regularly paid into her relevant personal bank account by employees of the Firm without her knowledge. Her evidence was that when clients, who included large commercial clients from whom she received large cheques for batches of work, did not include the full payee details (i.e. included just her name rather than "Vidal Martin – Notary Public") the cheques would be paid into the personal account into which the Cheque had been paid. The Respondent's case was that it appeared that this had happened in this case. Ms X had stated "I cannot recall" when asked in cross examination whether she may have given the Cheque to someone at reception at the Firm. Mr Newbegin stated that the paying-in book for the account may have clarified who paid in the cheque and that through her solicitors the Respondent sought to obtain it. It was noted on the Respondent's behalf that the Applicant had received the copy cheque within the six year period during which copy documents would be retained by Nationwide whereas these documents had been destroyed by the time the Respondent's solicitors came to investigate. It was submitted that the Respondent's efforts were the actions of an innocent person and the Applicant's unexplained delays denied her important opportunities to obtain evidence with which to rebut the allegations. The Respondent also maintained that the events of 4 January 2011 were consistent with someone other than the Respondent paying the cheque into her account. Her evidence was that she met Ms X at the property on that day and not at the office.

10.41 Ms Newbegin stated that there were outstanding queries and concerns about the Cheque and what happened to it. As the Respondent had told Mr Esney in 2017, there was no explanation for why RBS (and not Nationwide, the paying in bank) had the cheque or evidence about why the cheque did not have the stamp "paid" on it. There was said to have been no steps taken to ascertain the relevant banking systems in place in 2011. It was submitted that the allegations could not be said to have been proved beyond reasonable doubt when clear lines of enquiry were not followed up.

10.42 It was submitted that given the Respondent was said to be unaware of the payment of the Cheque into her account she could not be said to have committed any misconduct. The Applicant was obliged to prove the allegations and the essential issues of disputed fact beyond reasonable doubt. It was sufficient for the Respondent to raise a doubt as to the allegations, she did not need to satisfy the Tribunal of her innocence (Woolmington v DPP [1935] AC 462). It was submitted that not every breach of a professional rule (if proved) would amount to professional misconduct. Relying on Sharp v The Law Society of Scotland 1984 WC 129 it was submitted that whether any such failure should be treated as professional misconduct depended on the gravity and all of the circumstances.

10.43 Ms Newbegin referred the Tribunal to comments from Morris J in Newell-Austin v SRA [2017] EWHC 411, to the effect that it is relevant to consider a person's subjective knowledge of the facts underlying the conduct which is said to give rise to that lack of integrity (paragraph [48]). Further at paragraph [50]: "*the person's state of knowledge or intention in relation to the underlying conduct (said to demonstrate lack of integrity) is a relevant consideration in assessing whether, in carrying out such conduct, a person demonstrated a lack of integrity. At one extreme, if the person is unaware of the relevant conduct, there can be no lack of integrity…*". The Respondent accepted the test for acting with integrity set out by the Court of Appeal in SRA v Wingate [2018] 1 WLR 3696 at paragraph [100]: "*Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty*". Ms Newbegin noted that the Court of Appeal clarified that statement at paragraph [102] holding that: "*Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public.*" It was submitted that the Applicant's case did not come close to establishing beyond reasonable doubt the alleged breach of Rule 1.02 of the 2007 Code.

10.44 With regards to Rule 1.04 of the 2007 Code (acting in the best interests of each client), it was similarly submitted that the Applicant's case did not approach proof to the requisite standard. Ms Newbegin referred the Tribunal to comments in Connolly v The Law Society [2007] EWHC 1175 that "… *generally the honest and genuine decision of a solicitor on a question of professional judgment does not give rise to a disciplinary offence.*"

10.45 With regards to Rule 1.06 (the maintenance of the trust that the public places in the provision of legal services) it was again submitted that the Applicant had not come close to establishing this. Comments from the Court of Appeal in Wingate at paragraphs [105-106] were cited: "*In applying principle 6 it is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the principles of professional conduct are a different order*".

Response to the allegation of dishonesty in relation to allegation 1.1

10.46 The appropriate test from Ivey as summarised by Mr Wheeler was accepted. Applying that test to the examples given in Ivey at paragraph [60], it was submitted that there was no dishonesty where a person does not pay to use the bus because he or she genuinely believes that public transport is free or a person misreads their bus pass and does not realise that it does not operate until after 10am. It does not matter whether that person's belief as to the facts is reasonable or not.

10.47 It was submitted that extreme care should be taken before upholding a finding of dishonesty against a professional. The Tribunal was invited to consider the reasoning of the High Court in Soni which upheld Mr Soni's appeal against a finding of dishonesty in that case against him. In upholding Mr Soni's appeal, the High Court, per Holdroyde J, noted that:

- there was no evidence that Mr Soni had deliberately withheld fees from the Trust (paragraphs [60-61]);
- the panel had failed to take into account both the deficiencies in the system of recording private patients and the powerful evidence of Mr Soni's good character (paragraph [62]);
- Mr Soni was known to be seeing patients on Fridays. Those appointments were not "below the radar" (paragraph [63]);
- it was very difficult to sustain an argument that Mr Soni was deliberately jeopardising his career and reputation in order to obtain an extra £60 from each of the attendances of these particular private patients (paragraph [64]);
- the panel seemed to have started from the finding of lack of records, assumed (without sufficient evidence) a deliberate failure to account to the trust for the sums and then made a finding of dishonesty. They were wrong to do so because "a finding against Mr Soni of a failing of administration, even of negligent administration, does not without more justify a finding of dishonesty" (paragraph [67]).

It was submitted that those findings were of significant relevance in the Respondent's case. It was submitted that in a number of respects failures in administration (if they were substantiated) seemed to be being equated by the Applicant with dishonesty which amounted to an error of law.

10.48 As with the response to the allegation that she had acted without integrity, the allegation of dishonesty was denied on the basis that the Respondent had no knowledge of the Cheque or its payment into her account until the FIO raised it with her in the investigatory interview. As set out above, dishonesty was based upon the subjective beliefs of the person facing the accusation and without knowledge of the Cheque the Respondent could not be said to have acted dishonestly.

The Tribunal's Decision

10.49 The Cheque was made out to the Respondent. The Respondent accepted meeting Ms X on 4 January 2011 (the day the cheque was written and on which it was paid into the Respondent's account). The Respondent acknowledged meeting Ms X at the property which was to be sold but denied that they also met at the Firm's offices on the same day. The Respondent gave evidence that cheques received from her notarial clients were occasionally paid into her personal bank account (the account with the Nationwide Building Society into which the Cheque was paid). The Respondent's evidence was that her paying-in book was at the Firm's offices for this purpose and that the Firm's staff would occasionally pay these cheques in for her without reference to her.

10.50 As the residual beneficiary who wrote the Cheque, Ms X's actions were central to the allegation. The Tribunal considered Ms X's evidence to be generally unreliable. She presented as a somewhat vulnerable witness and her account had changed over time. She had made comments with racial overtones, whilst strongly denying any such attitude or intent. Ms X disputed contemporaneous notes made by her own solicitor, HSD, and the Applicant's FIO, Mr Esney. It was not credible that two experienced professionals would mis-record meetings in the same way. During cross-examination Ms X had disavowed comments made in a previous witness statement stating that she "*hadn't read it*". Nevertheless, whilst the Tribunal approached her evidence with a great degree of caution and care, the Tribunal did not consider that everything that Ms X had said should inevitably be disbelieved in its entirety. Her evidence was to some extent corroborated by other evidence and she was resolute and clear on key elements of her evidence. The date on which she had stated she met the Respondent (4 January 2011) was corroborated by the Firm's visitor book and the Respondent acknowledged meeting her at the property on that date; the Cheque was dated 4 January 2011 and had been paid into the Nationwide that day. The Tribunal accepted that what Mr Wheeler described as the essence of Ms X's account, that she made payment at the request of the estate's solicitor in respect of damage to the property, had remained unchanged. To that limited extent, and to the extent it was corroborated to that extent by other evidence as mentioned above, the Tribunal found the core of Ms X's account credible.

10.51 The Tribunal considered the Respondent's evidence to be hesitant, evasive and lacking credibility. Her own account had also changed over time; in ways the Tribunal considered significant. The day after she had met with the FIO, Mr Esney, the Respondent had written to him and stated "*to the best of my recollection, as more than 6 years have passed since then, the cheque was made out to me personally because the money was owed to me personally*". It was submitted on her behalf that the Respondent was under pressure and trying to think of a reason why Ms X might have written out the Cheque. However, this statement was not made in the heat of the meeting with Mr Esney, but the following day and the Tribunal did not accept this submission. The position was subsequently disavowed by the Respondent. Even allowing for the six years which had passed since relevant events by the time of the interview with Mr Esney, this was a troubling account for the Respondent to have given at any stage. There would never have been circumstances in which money should have been owed to her personally by a client (or in this case residuary beneficiary) for whom the Firm held significant funds at the time.

10.52 The Respondent subsequently informed Mr Esney that Nationwide had no records they could refer to, but based on an inspection of the Cheque had told her that it had been rejected. She also informed him that Nationwide had confirmed that she had never held any account with details matching the one into which the Cheque was paid. Mr Esney sought details from the Respondent in order to investigate further and it was subsequently established that Nationwide did have relevant records, the Cheque had not been rejected and the account in question was the Respondent's. The Tribunal did not find the Respondent's account of being provided with plainly incorrect information by Nationwide to be credible or capable of being believed. The Tribunal considered that statements were made by the Respondent to fit the available information and her perception of her immediate interests before being abandoned when it was clear they were unsustainable. The Respondent had also stated to Mr Esney that she stopped using the relevant account in 2011 whilst her statements demonstrated that a payment of £20,000 was made into the account in 2014. These were not minor matters. The Tribunal found that the Respondent's evidence lacked credibility and her account was not accepted. Whilst not central to its findings on the allegations brought, the Tribunal did not consider there was any persuasive evidence to support the Respondent's contention that the recording of the meeting she had had with Mr Esney had been tampered with.

10.53 The Tribunal had careful regard to all of the authorities to which it was referred. In particular, the Tribunal reminded itself that the Applicant must prove its case beyond reasonable doubt; the Respondent simply had to raise a doubt, she was not bound to prove that she did not commit the alleged acts (Woolmington) and that great care must be taken to avoid starting from limited physical evidence (or its absence) and assuming (without sufficient evidence) any deliberate failure or act on the Respondent's part (Soni). In January 2011 the Firm held money for the estate of which Ms X was the residuary beneficiary. This was clear from the financial ledger. There was no reason for a cheque to be made payable to the Respondent on account of any work needed on the property, which was suggested at different times by both Ms X and the Respondent. Both parties accepted that no repair works were in fact completed on the property and that it was sold "as is". The Tribunal considered that it was inconceivable that anyone at the Firm would invite Ms X to write a cheque payable to the Respondent and pay it into her personal account even with the Respondent's knowledge or direction, much less without it. Any such request would have plainly been improper.

10.54 It had been submitted on the Respondent's behalf that Ms X may have written the Cheque of her own volition, out of some misunderstanding about what was required in relation to the damage to the property or indeed for some other reason of her own. Again, the Tribunal considered such an explanation highly implausible. The Tribunal did not find it credible that some form of gift of £4,700 was written out to the Respondent but provided by Ms X to someone else at the Firm (who paid the money into the Respondent's personal account without reference to her). Similarly, the Tribunal did not find it remotely credible that that Ms X, who by the Respondent's own account knew the financial position of the estate in some detail at all times, had written out the Cheque for £4,700 unbidden in respect of damage to the property and provided it to someone else at the Firm (who paid the money into the Respondent's personal account without reference to her and without taking any steps to ascertain what the payment related to).

10.55 Having found the essential element of Ms X's account to be credible, and supported to some extent by the physical evidence of the Cheque which was credited to the Respondent's personal account, having found the Respondent's own account to lack credibility and having found any other explanation for why the Cheque came into existence to be highly implausible, the Tribunal accepted the submission that it was inconceivable that Ms X had written the Cheque for any reason other than she had been asked to do so by the Respondent. Accordingly it found this had been proved beyond reasonable doubt; based on its assessment of the evidence presented the Tribunal was sure the Respondent had asked Ms X to write the Cheque out payable to her.

10.56 Having found that the Respondent had requested the Cheque, and that in response Ms X had written it, the Tribunal was also satisfied beyond reasonable doubt that the Cheque had been provided to the Respondent on 4 January 2011 (the date on the Cheque, the date the Respondent acknowledged they met, and the date that the Cheque was paid into the Respondent's account) and that the Respondent either paid it into her account or knew that this had happened. The Tribunal found any other explanation to be highly implausible.

10.57 The Tribunal heard evidence from the Respondent and Mr DJC that the Respondent was the main earner within the family at the relevant time. With her salary at the time, the Tribunal did not find it credible that the Respondent was unaware of the Cheque being paid into her account. Over £2,200 of the sum credited had been spent before the Respondent's next monthly salary was paid into her account. Given the Respondent's evidence that sizeable payments from commercial clients for her notarial work were paid into her personal Nationwide account from time to time, the Tribunal found it inconceivable that she would not have checked the account balance or statements at any stage before the interview in June 2017, not least for tax purposes relating to her notarial income. Further, the Tribunal did not consider it credible that a receipt of £4,700 could have been overlooked in an account which had had a balance of £370.82 before the Cheque was credited and where over £2,200 was spent between 4 and 24 January 2011 when her salary was paid into the account. As stated above, the Tribunal found the Respondent's evolving explanations to be unreliable and to lack credibility. The Tribunal was satisfied beyond reasonable doubt that the funds had been spent as the Respondent's own.

10.58 It was self-evident and not contested that the Respondent had failed to pay the £4,700 into the Firm's client account. The Tribunal was also satisfied, and the Respondent did not contest, that she had not documented the payment or explained it adequately on the file. The Tribunal rejected her case that she was unaware of the Cheque, how it came to be credited to her account and that the money was spent from her account without her knowledge. The Respondent's partner had given evidence that he used the Respondent's account and that he believed that he had done so on the day on which the Cheque was paid into the Respondent's account. For the reasons summarised above, the Tribunal found that the Respondent was aware that the money had been paid into her account and it found that allowing the money to be spent from her account by her then partner amounted to dealing with the funds as her own.

10.59 The Tribunal referred to the test for conduct lacking integrity set out in Wingate. The Tribunal considered that procuring a cheque to which she was not entitled, failing to document the transaction and spending (or allowing to be spent) the funds as her own was a stark example of a failure to adhere to the ethical standards of the profession. Once the findings of fact had been made as set out above, the Tribunal considered that a finding that the Respondent had acted without integrity in breach of Rule 1.02 of the 2007 Code inevitably followed. Similarly, procuring a cheque to which she was not entitled from Ms X was self-evidently not in Ms X's best interests and accordingly the conduct amounted to clear breach of Rule 1.04 of the 2007 Code. The Tribunal considered that such conduct was very clearly capable of undermining public trust in the Respondent and the legal profession and that she had therefore acted in breach of Rule 1.06 of the 2007 Code. The Tribunal found that all three alleged breaches of the 2007 Code were proved beyond reasonable doubt.

10.60 Rule 1 (a), (b), (c) and (f) of the 1998 SARs required that the Respondent: keep money belonging to others separate from money belonging to her or the practice; keep other people's money in an identifiable client account; use each client's money for their matter only and keep proper accounting records respectively. The Tribunal found that it was proved beyond reasonable doubt that by procuring the Cheque, it having being paid into her account and the funds having been spent as the Respondent's own the Respondent had breached the four elements of Rule 1 of the 1998 SARs as alleged. Given that the funds were paid into the Respondent's personal account and not a client account, and that none of the limited exceptions applied, the Tribunal found beyond reasonable doubt that the Respondent had also breached Rule 15 (1) of the 1998 SARs.

The Tribunal's Decision on Dishonesty

10.61 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:

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

- secondly, once that was established, the Tribunal then considered whether her conduct would be thought to have been dishonest by the standards of ordinary decent people.

10.62 The Tribunal had found that the Respondent had asked Ms X to write the Cheque payable to her personally, that it had been paid into the Respondent's personal account and spent as her own funds. In reaching that finding the Tribunal had rejected the Respondent's version of events, that the Cheque had been written and paid into her account, and the funds spent, entirely unbeknownst to her. The Tribunal had found the Respondent to lack credibility and to have given information and evidence according to her perceived interests at different times. Having found that she had requested the Cheque and had knowledge of what followed it was inevitable that the Tribunal found that the Respondent was not genuinely unaware of the subject matter of the allegation. Given that no repairs were in fact carried out on the property, neither

did the Respondent have any belief she was entitled to the funds. The Tribunal had no doubt that ordinary decent people would regard such conduct as dishonest and accordingly the Tribunal found the allegation proved beyond reasonable doubt.

11. **Allegation 1.2: On or after 15 June 2017 the Respondent made the following representations to the Applicant's FIO in relation to the Cheque, which were false and/or misleading:**

1.2.1 that a sort code corresponding to the bank account referred to in allegation 1.1.3 above was not and never had been hers, or words to that effect;

1.2.2 that Nationwide Building Society had informed her that the Cheque had been returned, or words to that effect;

and therefore breached all or any of Principles 2, 6 and 7 of the Principles.

The Applicant's Case

11.1 The Applicant relied in particular on evidence from the FIO, Mr Esney. On 15 June 2017, the Respondent and Mr Esney exchanged emails in relation to the account number into which the Cheque was paid. The Respondent stated that the relevant account number belonged to her but that the sort code on the cheque next to the account number "*does not and never has belonged to me*". On the following day Mr Esney contacted the Firm and sought details of the bank account into which the Respondent's salary was paid. The Firm responded on the same day and provided a copy document confirming that the Respondent's salary was paid to a bank account with the relevant account number and the sort code she had stated did not and had never belonged to her. Mr Wheeler submitted that Nationwide could not conceivably have provided the Respondent with the incorrect information which she claimed to have received from them. He submitted that, on the contrary, when the Respondent's solicitor raised the matter with Nationwide, Nationwide confirmed (correctly) that the Respondent's account did have the relevant sort code and account number in 2011. He submitted that there was no reason to think that the Respondent would have received a different answer, had she asked the question as she claimed to have done.

11.2 On 23 June 2017 Mr Esney received an email from the Respondent stating that she had attended a branch of the Nationwide Building Society and discussed the matter. She stated the Building Society had inspected the copy cheque and told her that it did not clear as the wrong sort code was included, and that the Cheque was returned to the paying bank (RBS) on 5 January 2011. This contention was inconsistent with her bank statement, when obtained, showing receipt and dissipation of the funds. The Respondent stated that she accepted the relevant account number belonged to her but maintained the sort code did not. Mr Wheeler submitted that there was no basis whatsoever for the suggestion that the cheque had been returned. Ms X's account had ample funds to honour the cheque and the Respondent's bank statements show that the payment of the cheque was never reversed and there was submitted to be no reason why it should have been.

11.3 The conduct alleged was submitted to have breached Principle 2, 6 and 7 of the Principles. Principle 2 requires solicitors to act with integrity, and the definition set out above was again relied upon. The Applicant also relied on the following example from Wingate of how integrity connotes adherence to the ethical standards of one's own profession and involves more than mere honesty: "*... a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.*" By allegedly misleading the FIO as to material facts during the course of a regulatory investigation into her professional conduct, it was submitted that the Respondent fell far short of the ethical standards of the profession and therefore acted without integrity, in breach of Principle 2. Such conduct was submitted to fall far short of the standards expected of solicitors by members of the public and to be capable of undermining public trust and confidence in the Respondent and the profession, contrary to Principle 6. The Respondent was also alleged to have failed to comply with her regulatory obligations and to deal with her regulator in an open and cooperative manner, in breach of Principle 7.

Dishonesty alleged in relation to allegation 1.2

11.4 The test for dishonest summarised in paragraph 10.13 above was again relied upon. With regards to allegation 1.2 specifically, it was alleged that as the solicitor with conduct of this matter and an experienced solicitor of by then around 12 years standing, the Respondent must have known that either or both of her representations to the FIO were false and/or misleading, but she nevertheless made them and did so during the course of a regulatory investigation. It was submitted that ordinary, decent people would consider this behaviour to be dishonest.

The Respondent's Case

Submission of no case to answer

11.5 The submission relied on the same background legal position summarised in paragraphs 10.15 to 10.16 above. The submission was based on the contention that there was no evidence that the Respondent provided false or misleading statements to the Applicant and that if the allegation was that she did so accidentally, then the case could not proceed as that cannot amount to misconduct.

11.6 The Rule 5 Statement alleged that: "*the Respondent must have known that either or both of her representations were false and/or misleading, but she nevertheless made them and did so during the course of a regulatory investigation*". There was submitted to be no evidence that (a) the representations were false or misleading or (b), if they were, that the Respondent knew that. With regard to the sort code, the Respondent relied upon the sort code on her bank card. It was her genuine belief that that was the sort code for her account and had no basis for realising that her bank might have changed it over the years. The difficulties in finding out such information were said to be shown by the witness statement of Mr Habel and the lengths he had to go to when trying to find out from Nationwide's legal department why a sort code might differ between a bank card and a bank statement. With regard to what she had been told by Nationwide, it was submitted that there was no basis for alleging that the Respondent

did not provide the information that she understood that Nationwide was giving her. Mr Esney did not check with Nationwide what the Respondent had been told. That the Respondent was trying to cooperate was submitted to be shown by her constant communication with the Applicant, her direction of the Applicant towards the Nationwide account details held and used by the Firm and her provision of the statements that showed the transfer of the funds from Ms X.

The Tribunal's Decision on the submission of No Case to Answer

11.7 The Tribunal considered the position to be similar to the submission of no case to answer in relation to allegation 1.1. Regarding this allegation 1.2, the Respondent had made statements which were seemingly at odds with evidence which later emerged. She maintained that an employee of the Nationwide had told her something which was blatantly incorrect. Whilst this may be the case, it was inherently somewhat unlikely and at least raised issues which required an answer. The Tribunal made no determination of whether the Respondent had made the comments innocently and simply conveyed the information she was given by Nationwide or based on her bank card. The Tribunal considered that without explanation and in the absence of any further evidence or explanation, taking the Applicant's case at its highest, as per the Galbraith test, there was an arguable case and evidence based on which findings against the Respondent could be made. Accordingly the Galbraith test was not satisfied and the submission of no case to answer failed.

The Respondent's substantive response to allegation 1.2

11.8 The allegation was denied. This was on the basis that the Respondent provided honest answers based on her understanding. It was submitted that the accidental provision of information based on a genuine misunderstanding could not amount to misconduct. In order to prove the allegation the Applicant must prove that the Respondent knowingly provided false or misleading evidence, something it was submitted the evidence did not support.

11.9 As set out in the response to allegation 1.1, the Respondent's evidence was that she only became aware of the Cheque when told about it by the FIO in the investigatory interview on 13 June 2013. The FIO did not have a copy of the cheque with him. Based on the sort code on her debit card, which did not match the sort code printed on the Cheque, the Respondent informed the FIO on 15 June 2013 that the account was not hers, which reflected her genuine belief.

11.10 The Respondent's evidence was that she visited Nationwide with a copy of the Cheque and was told that it was processed and not cleared as it had the wrong sort code on it and was returned to RBS, the paying bank on 5 January 2011. There was said to be no evidence to suggest that a customer services person in 2017, when the Respondent made enquiries, would know that there had been a different sort code for the Respondent's account in 2011. The Respondent was described as having reasonably accepted the explanations from Nationwide and to have conveyed them to the FIO.

11.11 The Respondent subsequently, on 26 June 2017, provided the FIO with copies of her bank statements which did indeed, contrary to what Nationwide had hold her, show the funds being credited to her account. She stated that Nationwide had been unable to explain how or when her account details changed. The Respondent's evidence was that she just wanted to get to the bottom of what happened as quickly as possible, as demonstrated by her communications with the FIO and Nationwide, and was open and transparent in her dealings. It was the Respondent who, having made an appointment with Nationwide to see them and then paid to receive copies, provided the copy statements to the FIO. As stated in Mr Habel's statement, the Respondent's solicitors were informed by Nationwide that the Respondent's sort code changed in 2013 due to changes made by the building society. It was submitted that this was not something of which the Respondent could have been expected to be aware.

11.12 Neither of the allegedly false and/or misleading representations on which the allegation was based were submitted to amount to a breach of any of the Principles as alleged or at all, let alone to misconduct. This was on the basis that it was submitted:

- The Respondent did not fail to act with integrity (Principle 2). The test for integrity (set out above) was based upon a person's subjective belief and the Respondent's subjective belief was that the information she passed on to the Applicant was correct;

- Her actions in passing on information to the Applicant which she genuinely believed to be correct was consistent with behaving in a way that maintained the trust that the public placed in her and the provision of legal services (Principle 6);

- Her open, honest and timely approach to cooperating with the Applicant was demonstrated by the correspondence summarised above and which could not be said to amount to a failure to cooperate or be open and transparent with her regulator (Principle 7).

Response to allegation of dishonesty in relation to allegation 1.2

11.13 For the same reasons it was submitted that the Respondent's behaviour was not dishonest. The starting point was the Respondent's subjective believe as to the facts (Ivey) and she genuinely believed that the information that she was providing to the Applicant was correct. There was accordingly submitted to be no dishonesty.

The Tribunal's Decision

11.14 As indicated in the Tribunal's decision on allegation 1.1, the Tribunal did not find the Respondent's evidence about what she had been told by Nationwide to be credible. The Tribunal found the Respondent a generally unimpressive witness and unreliable historian. As indicated above, her evidence was vague and hesitant. The Respondent's account was that she had been told by an employee of her bank that the Cheque, a copy of which the Respondent had shown them, did not clear into her account as the sort code was wrong. The Tribunal found it wholly implausible that an employee of the building society would state something fundamentally inaccurate and simple to check and debunk. During an exchange of correspondence with Mr Esney on 15 June 2017, the Respondent had stated that the sort number on the cheque "*does not*

and never has belonged to me". The following day Mr Esney received confirmation from the Firm that the Respondent's salary was paid into an account with the sort code she had stated was not and never had been hers.

11.15 The Respondent had informed Mr Esney by email that "*having discussed the matter with Nationwide they have confirmed to me that I have never had such an account…*" It was subsequently established that the account number and sort code quoted by Mr Esney, relating to the account into which the Cheque was paid, was the Respondent's account. The sort code had changed by virtue of changes made by Nationwide. The Tribunal accepted the submissions made by Mr Wheeler that Nationwide could not conceivably have provided the Respondent with the incorrect information she stated she had received from them. When the Respondent's solicitor contacted the Nationwide he received confirmation that the relevant sort code and account number belonged to the Respondent at the relevant time, and the Tribunal accepted the further submission that there was no reason to think the Respondent would have received a different answer had she asked the same question as she claimed to have done.

11.16 When providing her personal bank statements to Mr Esney, which confirmed that the funds from the Cheque had been credited to her account, the Respondent stated in an email of 26 June 2017 that Nationwide "*cannot explain why the amount was only credited and not reversed, since the cheque copy you provided to me appears to have been returned to RBS uncleared as the details were incorrect*". The Respondent provided no evidence to support the suggestion that the Cheque was returned. It plainly was not, the funds having been credited to her account, and there was nothing presented on the Respondent's behalf which suggested it was remotely credible that she would have been told something (repeatedly) so demonstrably false by an employee of Nationwide. The Tribunal was satisfied beyond reasonable doubt that the Respondent's account was untrue and was contrived to obscure her own conduct in relation to the Cheque. The Tribunal considered carefully the many glowing testimonials which were presented on her behalf in support of the submission that she had no propensity for such conduct. In assessing the evidence the Tribunal was not required to make conclusions as to the Respondent's motivation in procuring the Cheque, but that it was sure that the Respondent had made misleading statements to Mr Esney concerning the sort code and having been informed by Nationwide that the Cheque had been returned.

11.17 By reference to the test in Wingate, the Tribunal was satisfied beyond reasonable doubt that making misleading statements to the Applicant's FIO during an investigation was an unambiguous failure to adhere to the ethical standards of the profession and that the Respondent had thereby breached Principle 2 of the Principles. Such conduct would inevitably undermine the trust placed by the public in the Respondent and the provision of legal services and accordingly the Tribunal found beyond reasonable doubt that the Respondent had breached Principle 6 of the Principles. Principle 7 required open cooperation with the regulator and by knowingly making misleading statements the Tribunal was satisfied beyond reasonable doubt that the Respondent had acted in breach of this requirement.

The Tribunal's Decision on the allegation of Dishonesty in relation to Allegation 1.2

11.18 The Tribunal applied the same two stage approach to the Ivey test in relation to allegations of dishonesty summarised in paragraph 10.13 above. The Tribunal had found that the Respondent had knowingly made false statements to the Applicant's FIO in order to attempt to hinder his investigation. The Tribunal had found it was not plausible that she had in fact been told or believed the information she conveyed to Mr Esney. The Tribunal was therefore satisfied that the Respondent had known that the information she provided to Mr Esney was misleading. Applying the second stage of the Ivey test, the Tribunal had no doubt that ordinary decent people would regard the deliberate provision of misleading information to a regulator investigating potential misconduct to be dishonest. Accordingly, the Tribunal found that the allegation of dishonesty had been proved beyond reasonable doubt.

12. **Allegation 1.3: On or before 28 September 2011 the Respondent raised a bill against the estate of Ms M in the sum of around £64.75 which was unjustified and/or improper and therefore breached all or any of:**

1.3.1 Rules 19 and 22 of the 1998 SARs;

1.3.2 Rules 1.02, 1.04 and 1.06 of the 2007 Code.

The Applicant's Case

12.1 The Applicant's case was that on or about 17 June 2011 the Respondent wrote to Ms X advising her that the administration of Ms M's estate was complete. The file was closed and archived on or about 22nd June 2011.

12.2 On or about 13 July 2011, a dividend was received in respect of a shareholding and the financial ledger credited in the sum of £64.75. It was alleged that to accommodate that payment, the matter was re-opened on 14 July 2011 and closed again on 28 September 2011, a bill having been raised by the Respondent in precisely the sum held on client account, so as to 'zero' the client account. The Applicant relied on procedures at the Firm meaning that the file could not be closed and archived without a nil balance on both office and client accounts. There was said to be no evidence that this bill was sent to the client or paying party (i.e. to the beneficiary, Ms X).

12.3 On 28 September 2011, the day on which the file was again closed, the sum of £64.75 was transferred from the client account to the office account. Mr Wheeler described the transfer discharging a liability shown on the ledger to have arisen under a bill issued as far back as 15 April 2011 in respect of "BACS payments". The charge for "BACS payments" was in the sum of £53.69 plus VAT, which matched exactly the amount of the dividend received on 13 July 2011 when converted to sterling. Despite the final bill issued on 17 June 2011 and despite the availability of ample funds, payment had not been taken in respect of the bill shown on the ledger as issued on 15 April 2011. That did not happen until the transfer from client account to office account on 28 September 2011. Mr Wheeler submitted that the implication was that the ledger entry showing the bill of 15 April 2011 had been made retrospectively at some stage after 13 July 2011 when the sterling value of the dividend as credited to the Firm's client account was known.

12.4 There was said to be no evidence that the bill of 15 April 2011 was ever sent to Ms X, or to anyone, and no copy of it existed on the file. The Tribunal was invited to infer from all of the available evidence that the 15 April bill was created only after 13 July 2011 and was backdated to 15 April 2011 for the purpose of being entered on the ledger; the bill did not genuinely reflect charges for "BACS payments" but was raised to zero the account after receipt of the dividend, thereby allowing the file to be closed without making any further payment to Ms X. When the Firm did charge for BACS payments, it charged £10 plus VAT and it was submitted that a genuine bill for BACS payments would not have amounted to £53.96. As the fee earner responsible for the file and responsible for raising bills, it was submitted that the Respondent must have caused or permitted the bill of 15 April 2011 to have been raised.

12.5 The conduct alleged was submitted to be in breach of Rules 19 and 22 of the 1998 SARs. Rule 19 provided that "*A solicitor who properly requires payment of his or her fees from money held for a client or trust in a client account must first give or send a bill of costs, or other written notification of the costs incurred, to the client or the paying party.*" Rule 22 set out the circumstances in which client money could be withdrawn from client account. It was submitted that none of those circumstances applied to the bill for £64.75 on the basis that that bill was allegedly only raised in order to 'zero' the ledger and close the file.

12.6 The conduct alleged was submitted to be in breach of Rules 1.02, 1.04 and 1.06 of the 2007 Code. The Respondent's conduct was submitted to have lacked integrity (as defined above) because it was said to be morally unsound to raise a bill against the shareholding dividend in order to 'zero' the ledger and close the file. The shareholding dividend represented funds due to Ms X because the Respondent had failed to dispose of the relevant shares. This was described as a sham bill which did not represent costs "properly incurred" within the meaning of the 1998 SARs. It was alleged that the Respondent therefore breached Rule 1.02 of the 2007 Code. For the same reasons, she was also alleged to have also breached Rules 1.04 and 1.06 because this conduct was submitted not to be in Ms X's best interests and was also conduct which was likely to diminish public trust and confidence in the Respondent and the provision of legal services.

Dishonesty alleged in relation to allegation 1.3

12.7 The test for dishonesty summarised in paragraph 10.13 above was again relied upon. With regards to allegation 1.3 specifically, it was alleged that as the solicitor with conduct of this matter and an experienced solicitor of at least 5 years standing at the material time, the Respondent must have known that this bill was unjustified and/or improper but she nevertheless caused or allowed it to be raised. This in circumstances where she was aware of but had failed to dispose of shares which were still paying dividends into client account. It was submitted that ordinary, decent people would consider this behaviour to be dishonest.

The Respondent's Case

Submission of no case to answer

12.8 The submission relied on the same background legal position summarised in paragraphs 10.15 to 10.16 above. The submission was based on the Applicant's acceptance that the interim accounts showed two previous receipts of Canadian dollars and that a further dividend was not received and converted until 13 July 2011. Mr Wheeler, for the Applicant, had accepted that the raising of the bill related to the April 2011 bill. It was submitted that it was accordingly impossible for this allegation to proceed on the basis that:

- The Respondent could not have known in April 2011 that a dividend would be received in July 2011 and the exact conversion rate of the same;
- There was no reason for her to have wanted to do so for the sake of issuing a bill.

12.9 With regard to the suggestion that the financial ledger could have been amended retrospectively, that was not part of the Rule 5 Statement and such a serious allegation could not now be added, especially where it relates to dishonesty. In any event the financial ledger could only be operated by the accounts department; there was no direct evidence that the financial ledger could be amended retrospectively; even if it could be so amended, there was no evidence that anyone in accounts knew it could be so amended and no evidence that the Respondent knew it could be amended or that even if she did, that anyone in accounts would have been willing to take such a step. It was submitted that at its highest, there has been an error in the financial ledger that the Respondent, by definition, was not responsible for as she was not able to amend the financial ledger (the evidence of both Mr Hayward and Ms Bright was that only the accounts department could do that).

12.10 In addition, Ms Bright's evidence was that:

- the financial ledger could not be amended without it being clear on the face of the ledger; and
- the accounts department were able to raise bills for transfer costs, such as BACS transfers.

It was submitted that unless the Respondent could predict the future receipt and conversion of a Canadian cheque, then it was impossible for allegation 1.3 to be made out.

The Tribunal's Decision on the submission of No Case to Answer in relation to Allegation 1.3

12.11 The charge in question did not on the face of it appear to be likely to be a BACS fee, which was a suggestion put to the Applicant's witnesses in cross examination. Mr Hayward, who the Tribunal considered gave straightforward and persuasive evidence, had said in his evidence that no bill would be issued by the Firm's Accounts department without instruction by a fee earner. As Ms Newbegin had stated, Ms Bright's evidence on this point was different. The Tribunal did not consider that it

was clear why the sum seemingly due in April 2011 was not taken when the final bill was settled in April 2011 and instead was only charged in September 2011 (by which time the dividend from the Canadian Teck shares had been received in exactly the sum described as due, but not previously paid, for BACS transfer(s)). Whilst there were contradictions in the Applicant's witness evidence, and the Tribunal accepted the force of Ms Newbegin's submissions about the new suggestion (absent from the Rule 5 Statement) that the bill was backdated, the Tribunal nevertheless considered that in light of the points summarised in outline in this paragraph, the Applicant's case passed the low threshold of displaying a case to answer. Whether it succeeded would depend on an assessment of witness reliability and without more, on one view of the facts, the Tribunal could conclude the allegations against the Respondent were proved. Accordingly the Galbraith test was not satisfied and the submission of no case to answer failed.

The Respondent's substantive case

12.12 The allegation was denied and Ms Newbegin submitted it was unsupported by any evidence. The Respondent's case was that there was no bill raised on or around 28 September 2011. Instead, a bill for £64.75 was raised on or around 15 April 2011 in respect of a BACS transfer. Subsequently, on or around 13 July 2011, the estate received a dividend of £64.75 from Teck Canadian shares. The Firm's Accounts department will then have transferred the funds from client account to satisfy the balance on the office account.

12.13 On 15 April 2011 the Respondent requested payment of a "final legacy" to Ms X, the residuary beneficiary. This appeared in the Firm's financial ledger. The Respondent's evidence was that she requested the payment be made, but did not specify how. Both BACS and "TT" transfers involve a cost for the payee. The Respondent's evidence was that she anticipated the Accounts department would have contacted Ms X to agree a method for payment and fee if applicable.

12.14 The Firm's financial ledgers were maintained by the Accounts department. The Respondent was not able to amend the financial ledger (something confirmed in oral evidence by Mr Hayward and Ms Bright). The ledger for 15 April 2011 showed an entry for "BACS payments" amounting to £53.96 plus VAT, which totalled £64.75. By way of possible explanation for this, the Respondent noted that the last time a "BACS fee" had been added to the financial ledger was 3 March 2011 since when there had been three payments made to Ms X. The Respondent was not responsible for arranging or agreeing such fees, but her evidence was that she believed the £64.75 "BACS payments" fee would have related to more than one transfer to Ms X and could only have been entered on the ledger by the Accounts department. The financial ledger showed a debit from the client account to office account in that sum on 28 September 2011, something which would have been made by the Firm's Accounts department without reference to the Respondent. These transactions were open for anyone to see on the Firm's financial ledger.

12.15 Ms Newbegin submitted that Mr Wheeler had put what was effectively a new allegation to the Respondent during cross examination – that the bill in question dated 15 April 2011 had been created later and backdated. She submitted it was improper to seek to amend the case in this way at this stage and that there was no evidence to

support it. Mr Hayward had accepted during cross examination that the entry could simply be an error by the Accounts department. No evidence was produced from the Accounts department about the entry in the ledger, and as noted above it was common ground that the ledger could only be operated by the Accounts department. There was said to be no evidence that the Respondent knew that the ledger could be so amended, this fact was only discovered by Ms Smith when asked by Mr Hayward in preparation for the hearing. Ms Bright's evidence had been that it was not possible for amendments to the ledger to be made without that fact being clear on the face of the ledger. The (new) allegation that the ledger had been backdated was submitted to be untenable.

12.16 It was submitted that there was no breach of the SARs 1998:

- there was submitted to be no breach of Rule 19. The financial ledger showed that there was a bill issued in respect of the transfer fees on 15 April 2011. There was said to be nothing improper about that bill. In addition, the transfer fees would have been agreed between Ms X and the Accounts department and not by the Respondent, enabling the fees to be incurred by the Firm on Ms X's behalf and enabling the Accounts department to record them on the financial ledger and bill for them;

- there was submitted to be no breach of Rule 22. The transfer from client to office account (which was undertaken by the Accounts department and not by the Respondent) was to satisfy the earlier bill previously raised on 15 April 2011.

It was submitted that there was no breach of the 2007 Code:

- there was submitted to be no breach of Rule 1.02. The Respondent did not fail to act with integrity as alleged as she did not the raise the bill. Even if she had (which was denied), the Respondent's case was that the 15 April 2011 bill was properly raised in respect of transfer fees and before the receipt of the Canadian dividends;

- there was submitted to be no breach of Rule 1.04. The Respondent did not fail to act in the best interests of her client. She did not raise the bill. Even if she had (which was denied), the Respondent understood that the bill was properly raised in April in respect of the BACS transfers made to/on the instruction of Ms X. The later transfer between client and office account was described as entirely proper. It was submitted that it would make no sense to chase for a bill of £64.75 whilst simultaneously paying out £64.75 (with associated costs of doing so);

- there was submitted to be no breach of Rule 1.06. The Respondent denied that she acted in a way likely to diminish the trust the public placed in the legal profession. She did not raise the bill in question. Even if she did (which was denied), the April bill was described as properly incurred and the September transfer by the Accounts department was entirely proper and in accordance with what the public would expect.

Response to allegation of dishonesty in relation to allegation 1.3

12.17 It was submitted that there can have been no dishonesty as alleged or at all. The Applicant's basis for alleging dishonesty was said to be that the bill was raised to zero the ledger following receipt of the Canadian dividends. Leaving aside that there would be no motive for doing so, the bill was raised before receipt of the Canadian dividends and so cannot have been raised to zero the ledger in respect of the same. It was noted that the paragraph of the Rule 5 statement that alleged dishonesty in respect of Allegation 1.5 made no mention of any alleged retrospective amendment to the financial ledger.

The Tribunal's Decision

12.18 Both Mr Hayward and Ms Bright confirmed in their evidence that the Respondent was not able to amend the financial ledger which was maintained by the Firm's Accounts department. The bill with which the allegation was concerned, for £64.75, did not appear to be a sum likely to relate to BACS payments, which was the case the Respondent advanced. Nevertheless, the burden of proof was on the Applicant and not the Respondent. The financial ledger showed an entry for "BACS payment" on 15 April 2011, before the dividend from the Canadian shares with which the allegation was concerned. Whilst the reference on the relevant entry on the financial ledger was not in the form of those immediately before or after it, and Mr Hayward gave oral evidence that the bill number was incorrect, the Tribunal did not consider that it had been established clearly that the bill was created retrospectively.

12.19 Given the evidence from Ms Bright that Ms Smith of the Firm's Accounts department could, and did, raise invoices herself in respect of BACS payments, the Tribunal did not consider that it had been established clearly that the Respondent herself had raised the bill for £64.75. Accordingly, notwithstanding the evidence that £64.75 was only transferred to the Firm's office account (without any notification to Ms X) on 28 September 2011, after the receipt of the dividend in exactly that sum, and that the £64.75 said to be due in respect of BACS payments from April 2011 was not taken with or reflected in the bill of the Firm's costs sent to Ms X in June 2011, the Tribunal could not be sure to the requisite standard that the allegation had been proved.

The Tribunal's Decision on Dishonesty

12.20 Given that the substantive allegation had not been proved, the Tribunal did not move on to consider the alleged aggravating feature of dishonesty.

13. **Allegation 1.4: The Respondent failed to dispose of a number of shareholdings belonging to the estate of Ms M before leaving the Firm on or around 3 June 2015 and therefore:**

1.4.1 breached all or any of Principles 4, 5 and 6 of the Principles;

1.4.2 failed to achieve Outcomes 1.2 and 1.5 of the 2011 Code.

The Applicant's Case

13.1 The Respondent left the Firm on or about 3 June 2015. Mr Hayward confirmed in his evidence that the Firm made contact with the sole beneficiary, Ms X, to seek a refund of a distribution made to her, to cover a shortfall between the proceeds of sale of an overseas holding of shares and the cost of sale. The Respondent's handover note stated that the holding of shares had come to her attention after the administration was completed, as a result of the new owner of the deceased's home bringing into the office some share dividends received at the house. Ms X, through her solicitors, advised that she had told the Respondent of the holding of shares at the commencement of the administration. Mr Hayward and his colleagues then examined the ledgers and found this to be accurate, with dividends being received and paid into client account throughout the administration.

13.2 As noted in relation to allegation 1.3, the matter had been concluded when the client balance was at zero and the file had been marked for closure. A further dividend was then received and this prevented the file from being closed. It was alleged that the Respondent raised a bill to clear the client balance and closed the file and that no attempt was made to sell the shares. The Firm was therefore obliged to sell the shares at its own cost but they had lost value in the interim. A claim was received and reported to the Firm's insurers.

13.3 Mr Wheeler set out some chronology which he submitted was significant. In April 2010, the Respondent received a report on shareholdings which identified the relevant shares which gave rise to the dividend of £64.75 received after the file was closed in June 2011. The shares were from a Canadian company, Teck. On 2 July 2010, Teck issued a dividend to Ms M in the sum of Can$68 and the cheque was credited to the client account on 19 August 2010 in the sum of £41.37. On 31 May 2011, the Respondent wrote to Ms X apologising for the "*delay in finalising the administration of the estate*". Interim estate accounts enclosed with that letter showed that the estate had by then received payments in Canadian dollars which were dividends from Teck (although only the first was shown on the ledger by 31 May 2011)

13.4 On 3 January 2013, the Respondent sent a letter enquiring how the shares could be transferred into the name of the executors. The response prompted further efforts by the Respondent to arrange that share transfer. Despite the efforts undertaken by the Respondent, it was alleged that Ms X was not told about the Teck shares until the Firm wrote to her on 10 July 2015. The exchange of correspondence which followed prompted Ms X to instruct solicitors who wrote to the Firm indicating that Ms X had a prima facie claim in negligence as a consequence of the delay in dealing with the shares. The Teck shares were not sold until 21 December 2015. Transferring the shares into the names of the executors was described as a complex process which inevitably introduced delay. It was submitted that nonetheless, it was clear that the Respondent knew about both the Teck shares but still closed the file and told Ms X that the administration of the estate was complete despite those shares remaining unsold.

13.5 The failure to sell those assets and the closure of the file when they remained unsold was submitted to represent a failure by the Respondent to act in the client's best interest or to provide a proper standard of service in breach of Principles 4 and 5 of the Principles respectively. The Respondent was also alleged to have breached Principle 6 as it was submitted that the conduct alleged was capable of undermining public trust and confidence in both her and the legal profession.

13.6 For the same reasons, it was alleged that the Respondent failed to achieve mandatory outcomes 1.2 and 1.5 in the 2011 Code which stated:

> O(1.2) "*you provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice*"; and
>
> O(1.5) "*the service you provide to clients is competent, delivered in a timely manner and takes account of your clients' needs and circumstances.*"

The Respondent's Case

13.7 The allegation was denied. It was said to be unclear which shares were referred to by the Applicant but that in any event, any failure to sell the Canadian Teck shares was a temporary oversight that the Respondent took steps to address once reminded of the existence of the shares. The Respondent's evidence was that she passed the matter of dealing with foreign shares to colleagues on leaving the Firm and expected they would complete the job of selling them. To the extent that she made any error, it was submitted on her behalf that this was genuinely made and did not amount to misconduct.

13.8 Ms Newbegin stated that the allegation was based on a comment in the Respondent's handover note from when she left the Firm (stating that the shareholding had come to her attention after the administration was completed). The note had not been disclosed to the Respondent which was described as concerning. Mr Hayward in his evidence made reference to having seen a note but was unable to produce it and there was no other evidence of the contents of the note.

13.9 The Respondent's case was that it seemed the matter was accidentally closed in 2011 and this error was not discovered until 2012 when the dividend cheque was received. Ms Bright confirmed that it was she who had asked for the file to be re-opened by the Accounts department. In his oral evidence Mr Mann stated that this happened from time to time. It was submitted that there was no reason for the Respondent to have sought to hide such an oversight and that she did not do so.

13.10 The Respondent's evidence was that she undertook a significant amount of work to locate and dispose of shares in the relevant estate. Human error caused the file to be closed and then re-opened in or around March 2012 after which time she undertook significant further work on share disposals. There were various matters described as being beyond the Respondent's control (such as the suspension of the medallion stamp scheme between October 2013 and January 2015) which made it impossible to sell the Canadian Teck shares before her departure from the Firm. The matter was passed to a colleague for completion on her departure.

13.11 It was denied that there had been a breach of the Principles or the 2011 Code:

- There was submitted to have been no breach of Principle 4/Outcome 1.2. To the extent that there was a human error in initially failing to dispose of the Teck shares, this was submitted to be insufficiently grave in the circumstances to amount to a breach;

- There was submitted to have been no breach of Principle 5/Outcome 1.5. It was again submitted that human error in such circumstances was not sufficiently grave to amount to a breach;

- There was submitted to have been no breach of Principle 6 on the basis that an understandable human error would not undermine public trust in the Respondent or the legal profession.

It was submitted that none of the errors alleged were sufficient to amount to misconduct. Per Sharp (above), failure to comply with a rule did not necessarily amount to misconduct. The gravity of the failure and the circumstances as a whole must be considered. It was submitted that an understandable human error as part of a busy practice did not amount to misconduct.

The Tribunal's Decision

13.12 The Tribunal had not seen a copy of the Respondent's hand-over note said to have indicated that she had become aware of the overseas shares after the administration of the relevant estate was completed. Mr Hayward gave evidence that he had seen the note and that is what it stated, but the Tribunal could not be sure that given the time which had passed the contents could be said to have been established beyond reasonable doubt. The hand-over note had never been disclosed to the Respondent. Ms Bright gave evidence that she had requested that the Accounts department re-open the file in 2012 when a subsequent dividend came to light. Mr Mann had given evidence that from time to time dividends were received after it had been thought that estates were finalised. It was stated on the Respondent's behalf that despite the work she had done on the estate and in particular on the disposal of shares, the closure of the matter had occurred in error. The Tribunal accepted the submissions made on the Respondent's behalf that the failure to identify and sell the overseas shares was not sufficient to establish the alleged breaches to the requisite standard of proof. An understandable human error in itself did not necessarily amount to a breach of any regulatory Outcome or Principle and the Tribunal was not satisfied that the evidence supported such a conclusion in this case.

14. **Allegation 1.5: In a number of cases the Respondent:**

1.5.1 caused or allowed payments to be made from estates being administered by her to C & Co, a business owned and/or operated by one or more relatives of her children, without disclosing her personal connection to that business, adequately or at all;

1.5.2 failed to record any or adequate justification, explanation or breakdown of such payments, or evidence of any alternative quotations obtained and therefore breached all or any of:

1.5.3 Rules 1.02, 1.04, 1.05 and 1.06 of the 2007 Code;

1.5.4 Principles 2, 4, 5, 6 of the Principles.

The Applicant's Case

14.1 In the Rule 5 Statement the Applicant provided a non-exhaustive list of cases to which this allegation related. Mr Hayward's evidence was that, while employed by the Firm, the Respondent made a payment of £6,200 out of an estate to a firm, C & Co, for "house clearance" but she failed to retain an invoice for this work or a proper breakdown of the work undertaken. Further investigation was said to have identified that C & Co was a firm owned and run by Mr Donald C, the uncle of the Respondent's former partner and the father of her children, Mr Darren C.

14.2 This issue had come to Mr Hayward's attention as a result of a complaint from solicitors acting for the sole beneficiary of the estate. There was another file where complaint was made for excessive house clearance charges. Both complaints related to estates to which partners in the Firm had been appointed executors. Accordingly, Mr Hayward asked his office manager to carry out a full investigation of files in which partners in the Firm were appointed executors and where the Respondent had administered the estate. The office manager also interrogated the Firm's electronic database for relevant emails.

14.3 As a result of these searches, an invoice was discovered from C & Co, operating from an address in Romford, where a charge of £2,600 was made to clear a property in a third estate. This invoice contained a bank account number and sort code for payment to be made by BACS. Mr Hayward and his office manager also discovered an email chain relating to the Respondent having ordered a container for her personal use to ship furniture and effects to Ghana. The container was subsequently cancelled and emails requested a refund of the payment to a bank account in the name of Mr DJC. The account number and sort code matched those on the invoice for house clearing services referred to above. It was alleged that Mr Hayward had therefore identified a "close personal link" between the Respondent and the account to which payments out of estates administered by her had been made.

14.4 Mr Hayward identified various instances where C & Co was used to undertake house clearing services. Eleven examples were provided in the Rule 5 Statement. In his witness statement, Mr Hayward stated:

> "*My understanding was that the probate department had a list of house clearers they used if they couldn't engage the services of a charity to clear the house. I was told that [the Respondent] often used [C & Co] for house clearances and they thought (but were not sure) Mr [C] was Ms Martin's partner's uncle*".

He went on to say that he contacted the Respondent on 2 November 2015 and explained that Ms X's solicitor was querying the payment of £6,200 made to C & Co. He requested a contact address and telephone number for C & Co so that he could request a copy of their invoice for that work and a breakdown of their charges. The Respondent replied that her list of contacts was stored in her garage but that she would go through them and let Mr Hayward have contact details as soon as possible. On 9 November 2015 the Respondent emailed Mr Hayward and advised that she did not have an electric light in her garage but she was able to provide an email address. Knowing that the Respondent had used C & Co's bank account for personal banking Mr Hayward said he was surprised that the Respondent did not have a telephone number or address to hand and that she did not give any indication of the family connection. The evidence of both Mr Hayward and Ms Bright was that they did not know the surname of the Respondent's partner or children. They stated that before the matters giving rise to these allegations emerged, they were entirely unaware that the Respondent had any personal connection to C & Co.

14.5 Mr Hayward confirmed that the use of C & Co was not properly documented. He was only able to find one invoice. C & Co was not local to the Firm and was otherwise unknown to them. The Firm had no inventories of the contents of each house cleared by C & Co. They did not know what was removed or the value of the contents, or what became of the sale proceeds of those contents, if any. Mr Hayward confirmed that this was contrary to his Firm's usual practice which was to have the contents itemised and value/saleability appraised before the house was cleared.

14.6 Given the personal connection between the Respondent and C & Co, it was alleged that the connection should have been disclosed by the Respondent before any work was referred. The Applicant's case was that the disclosure ought to have been made to Mr Hayward or Ms Bright as the executors in seven cases; in the other two cases, the disclosure ought to have been made to the individuals who were instructing the Respondent. Where Mr Hayward and Ms Bright acted as executors, the Respondent made no suggestion that her connection with C & Co was specifically disclosed to the executors before work was given to C & Co. Mr Wheeler stated that she did however, rely on the following matters:

- An assertion (which was disputed) that Mr Hayward and Ms Bright knew the surname of the Respondent's partner and children.

- The fact that either Mr Hayward or Ms Bright authorised payments to C & Co, which generally contained reference to the surname.

- The ability of Mr Hayward and Ms Bright to ask questions about these payments because they had access to the electronic ledgers where the surname appeared.

14.7 The Respondent therefore contended that she reasonably believed that Mr Hayward and Ms Bright knew of her personal connection with C & Co. It was submitted that even if the Respondent's case on the facts was accepted in full, the disclosure that she stated that she made of her connection with C & Co was inadequate. The purpose of such disclosure was to ensure that others are fully aware of the personal connection and can consciously address it and consider whether actions being taken are appropriate in the light of the connection. Mr Wheeler submitted that the requirement

of disclosure could not be met by virtue of a trail of ostensibly unrelated information from which the party to which disclosure is being made was expected to draw the appropriate inferences. Nor was it enough that questions could be asked in his submission, the burden was not on Mr Hayward or Ms Bright to uncover, or to make enquiries that would reveal a link between the Respondent and C & Co.

14.8 Much of the Respondent's answer to these allegations was described as focusing on the reasonableness of the sums charged by C & Co. In reply, Mr Wheeler submitted that it was impossible to determine the reasonableness of the charges in circumstances where there was no clear documentation of the work that was done. This difficulty was compounded by the absence of any competing quotations. Whether C & Co's charges were reasonable was submitted in any event to be irrelevant. This was on the basis that the Respondent's personal connection ought to have been disclosed regardless of the level of their charges.

14.9 In these circumstances, the referral of work to C & Co without disclosure of the Respondent's personal connection with the owner, and the failure properly to document the transactions, were submitted to amount to breaches of Rules 1.02, 1.04, 1.05 and 1.06 of the 2007 Code (and the equivalent Principles 2, 4, 5 and 6 of the Principles) where the conduct took place after 5 October 2011). Rule 1.02/Principle 2 related to acting with integrity (as previously defined) and it was submitted that the Respondent failed to do so because she failed to disclose her personal connection with C & Co and the consequential own interest conflict submitted to be inherent in paying that company out of estate funds administered by her. She also failed to document these transactions (or the underlying work done), adequately or at all, with the result that it was not possible to justify what, on the face of it, were described by the Applicant as apparently excessive charges.

14.10 Rule 1.04/Principle 4, that solicitors must act in clients' best interests, and Rule 1.05/Principle 5, that they must provide a good/proper standard of service, were submitted to have been breached for the same reasons. It was submitted that acting in her clients' best interests and/or providing an appropriate standard of service would have required the Respondent not to use a clearance company with which she had a personal connection, or at least to disclose the existence of that personal connection to those instructing her, i.e. to the partners appointed as executors of the estates in question. The Applicant's case was that she failed to do so, with the result that those estates were charged apparently excessive fees with no or inadequate breakdowns and explanations of those fees. It was further submitted that in breach of Rule 1.06/Principle 6 such conduct would undermine public confidence in the Respondent and in the provision of legal services. It was submitted that members of the public expect solicitors promptly to disclose matters giving rise to an own interest conflict.

Dishonesty alleged in relation to allegation 1.5

14.11 Dishonesty was alleged in relation to allegations 1.5 and 1.6. Given the overlap between the allegations the Applicant's case is summarised for both together under allegation 1.6 below.

The Respondent's Case

14.12 The Respondent accepted that she allowed payments to be made from estates administered by the Firm to C & Co and that that business was managed by the uncle of her ex-partner (and father of her children). The Respondent stated that she understood Mr Hayward and Ms Bright were aware of the family link to C & Co. Neither she nor her ex-partner had any financial or other interest in C & Co. The Respondent's evidence was that C & Co were one of a number of options that she gave to beneficiaries and that she always disclosed that C & Co were relatives of her partner to lay executors or beneficiaries.

14.13 At the time there was said to be no list of recommended people/companies who undertook such house clearing work which was made available to the Respondent. The Respondent's evidence was that during her time at the Firm she dealt with a huge number of properties and that C & Co had only been used in around nine. Other options recommended to beneficiaries were Mr T (the husband of a fee earner at the Firm whose services were regularly used and recommended by the Firm's Probate department), local charity shops and various other local auction, removal, furniture and clearance companies. It was denied that the work carried out by C & Co was not of an acceptable level or that there was any overcharging (which was not part of the allegation, but which it was suggested had been implied). The Respondent's evidence was that beneficiaries generally negotiated the fees and that in all cases the fees were approved by at least one residuary beneficiary and/or the lay executor.

14.14 The Respondent's case was that Mr Hayward and Ms Bright as executors were aware of the surname of her children and ex-partner (which was the same as the "C" in C & Co). The Respondent said she had brought her ex-partner and children to a party at Mr Hayward's house. Mr Hayward was said (along with others at the Firm) to have joked about the Respondent's curly hair and her surname. The Respondent said that many people in the office joked about her ex-partner's surname and that if she took the name upon marriage this would complement her natural afro hair. Mr Hayward and Ms Bright both gave evidence that they were not aware of any such jokes and would consider them inappropriate. The Respondent's ex-partner and children also attended Ms Bright's wedding, and the Respondent's evidence was that her partner's surname had been included on the invitation. The Respondent further asserted that Ms Bright had her ex-partner's contact details and that her knowledge of his surname was confirmed by an employee of the Applicant, Mr Chambers, who recorded in a note following a meeting with Mr Hayward and Ms Bright that the latter "*knew [C] was [the Respondent's] partner*". Mr Hayward also stated in his oral evidence that when reviewing the Respondent's files after she had left the Firm someone in the Probate department had told him the Respondent's ex-partner's surname which was submitted was consistent with this being common knowledge.

14.15 Ms Bright was the supervising partner on all of the matters before the Tribunal and had oversight of all relevant files. She had personally authorised various transfers to C & Co, as had Mr Hayward. The Respondent also stated that given the practices of the Firm at the time, there was no requirement to make this disclosure to the executors. The practice of Ms Bright and Mr Hayward was said to be to direct the Respondent to ensure that the beneficiaries were happy. The note made by Mr Chambers following a meeting with both recorded: "*[the Respondent] had full*

responsibility as long as she gets approval from residual beneficiaries". During her oral evidence Ms Bright agreed with this statement (whilst stating that she did not recall the meeting).

14.16 The Respondent disputed the allegation regarding the lack of inventories. She stated that in each case to which reference had been made she had engaged the individual used by the firm to value saleable items and to produce an inventory of any such items. All such items were accounted for. Mr Hayward had acknowledged in his evidence that once those identified items of value had been removed, there was no requirement for any further inventory to be completed by those engaged to clear the house of remaining items. The Respondent also stated that in various cases the work done went beyond the mere removal and sale of items and included searching for paperwork, fixing septic tanks, fixing collapsed ceilings, installing toilets, sorting and recycling, clearing gardens, cleaning and disinfecting houses. The Respondent's evidence was that she was unaware that the individual who valued saleable items had also been used by Ms Bright for such tasks. It was submitted to be significant that Ms Bright herself did not herself obtain alternative quotes when arranging for valuations and clearance work.

14.17 The Respondent submitted that the various payments made by the Firm to C & Co would not have been made without invoices having been presented. She stated that she had not had access to the files since she left the Firm in 2015 and she did not know why the invoices had not been retained. The Respondent relied upon a letter from Mr Donald C to Mr Hayward of 15 February 2017 in which he stated that invoices were submitted in every job that C & Co undertook for the Firm/beneficiaries. He had stated that all invoices had been submitted directly to the beneficiaries, none had been queried and all had been paid.

14.18 The Respondent provided details of her actions and the clearance and other work undertaken on each case raised by the Application. In relation to the matter which had led to the original complaint, the £6,200 charge, the Respondent stated that the residual beneficiary, Ms X, had discussed costs which were approved. During cross examination Ms X had stated that she "might have done" when asked if she had known of the Respondent's family connection to C & Co and also if she might have negotiated the fee directly with C & Co. The fee also included delivery, entailing a four hour round trip, of items from the property to be sold to Ms X's home. The payment to C & Co was recorded on the file and the transfer of £5,000 was approved by Ms Bright on 22 July 2010. The Respondent's evidence was that further work, and the fee of £1,200, were agreed between Ms X and C & Co. Again Ms Bright authorised the payment and the details appeared in the client ledger, estate accounts and the legal file. Similar details were provided in respect of the other cases cited by the Applicant.

14.19 It was denied that the Respondent failed to act with integrity. It was submitted that Ms Bright and Mr Hayward were aware of the family link with C & Co or alternatively that the Respondent believed that they were and that it was subjective believe that was relevant with respect to integrity. Neither the Respondent nor her then partner had any interest in C & Co and as such there was submitted to be no conflict. In each case the beneficiary was made aware of the family link to R's partner

and the beneficiary either negotiated or approved the fees. There was said to be no evidence that the fees for the work done was excessive.

14.20 The remaining alleged breaches were denied on the following bases:

- The Respondent contended she did act in each client's best interests. The Respondent was acting in accordance with the wishes of the executors by obtaining approval from the beneficiaries. The Respondent generally advised the beneficiaries to agree and arrange the clearance costs themselves to reduce costs to the estate. She was acting in the best interests of each estate by providing suggestions of clearers to beneficiaries.

- The Respondent contended she did provide a good standard of service. It was disputed that she was required to use a house clearance firm that did not involve relatives of her then partner or disclose the same to Ms Bright or Mr Hayward. In any event, it was submitted that she did disclose the family link to Ms Bright and Mr Hayward and that there was no evidence that the fees for the work done was excessive. Invoices were obtained for all of the work and there was said to be no requirement for any further explanation or breakdown.

- For the reasons summarised above, it was submitted that the Respondent did not act in a way that would undermine public confidence in the profession. There was no own interest conflict: neither she nor her partner had any interest, financial or otherwise, in C & Co. In any event, the Respondent's case was that Ms Bright and Mr Hayward were aware of the family link and the Respondent informed the beneficiaries of it.

Response to dishonesty alleged in relation to allegation 1.5

14.21 As with the Applicant's case, the basis for the Respondent's denial that she acted dishonestly in relation to the events set out in allegation 1.5 and 1.6 is set out together under 1.6 below.

The Tribunal's Decision

14.22 The Tribunal considered that it was surprising that the Respondent had not ensured that she kept a clear record where she had referred work to an entity with which she had a family connection. Nevertheless, the Tribunal was not satisfied to the requisite standard that on the evidence presented the allegation had been proved.

14.23 The evidence indicated that Ms Bright (who supervised all of the Respondent's files and acted as executor on most) had been aware of the family connection. Mr Chambers, an employee of the Applicant, recorded after a meeting with Ms Bright and Mr Hayward that Ms Bright "*knew [C] was [the Respondent's] partner*". The Respondent and her then partner had attended Ms Bright's wedding reception. The Tribunal was not persuaded that Mr Hayward was aware of the family connection. His role was more remote from the Respondent and the evidence of knowledge less persuasive. He did however confirm in his evidence that a member of the Probate department had informed him after the Respondent left the Firm of her partner's surname. The Tribunal accepted the submission that this was consistent with the

Respondent's contention that the family connection was common knowledge at the Firm.

14.24 The Tribunal accepted that there was no list of approved individuals or companies who undertook house clearance work provided to the Respondent. Her oral evidence that out of many hundreds of files that she worked on she had only referred work to C & Co in around nine of them had not been challenged. Whilst there was a family connection, it was not financial. The Respondent's partner confirmed in his evidence that he had no financial or other interest in the company run by his father or uncle. The Respondent's evidence that the husband of an employee of the Firm was also instructed was not challenged. Ms Bright had confirmed in her meeting with Mr Chambers that the Respondent "*had full responsibility as long as she gets approval from residual beneficiaries"*. The requirement to seek specific authority from the executors (Ms Bright and Mr Hayward) in circumstances where there was some evidence that the family connection was known at least to Ms Bright was not clear. Whilst clearer record keeping would undoubtedly have been prudent, given the surrounding circumstances the Tribunal could not be satisfied to the requisite standard that this deficiency translated to any misconduct and the breaches as alleged.

The Tribunal's Decision on Dishonesty

14.25 Given that the substantive allegation had not been proved, the Tribunal did not move on to consider the alleged aggravating feature of dishonesty.

15. **Allegation 1.6: On or about 6 August 2014 the Respondent caused or allowed a payment of around £5,400.00 to be made from the estate of Mr JEBS to a Mr H, under the pretext that Mr H was employed and/or recommended by Company B (Chartered Surveyors), in circumstances where he was not, and therefore:**

1.6.1 failed to achieve Outcome 1.2 of the 2011 Code;

1.6.2 breached Rule 20.1(c) of the 2011 SARs;

1.6.3 breached Principles 2, 4, 6, and 10 of the Principles.

The Applicant's Case

15.1 The partners of the Firm were named as executors in the will of Mr JEBS. The residuary beneficiary of the estate was the RSPCA. The estate included a property which was in a run-down condition. The RSPCA asked the Respondent to instruct Mr Duncan Scott, a chartered surveyor with the firm Berrys, to value the property. He valued the property, which had been cleared when he visited it. Following preparation of the valuation, Mr Mooney of the estate agent Savills was instructed to sell the property.

15.2 The Respondent's case was a Mr H carried out some work to the property. It was said not to be clear what work was done and that there were limited contemporaneous records of how Mr H came to carry out that work or what he did, although Mr Scott did note that the property had been cleared when he visited it to conduct his valuation. On 5 August 2014, the Respondent prepared a covering letter to "Mr Mark [H]",

addressed "c/o Berrys". The letter thanked Mr H for "*assisting us with the clearance and securing our late client's property to effect the clearance. I enclose herewith our client cheque as agreed with the Charity in the sum of £5,400.00 for the work done to date. We will make a final payment to you once you have finished the groundworks*".

15.3 Despite the terms and address of the letter to Mr H, Mr Scott had no knowledge of him, knew no one of that name and stated that he did not recommend him to the Respondent (or to anyone else). The file contained no record of any agreement as to Mr H's fee with the RSPCA (i.e. "the Charity"). The Applicant's case was that the letter (marked "by hand") did not appear to have been sent and no cheque was issued according to the ledger. However, a payment by bank transfer was made on 6 August 2014 to "Mr R H [H]" and was recorded on the ledger as being by way of "payment of invoice". That payment was made in accordance with an email sent by the Respondent to her secretary on 6 August 2014 in which the Respondent provided details of the bank account to which the transfer was to be made. Nothing in the file indicated how the Respondent was able to provide the bank details for the payment made to Mr H. Subsequent research by the Firm indicated that the account to which payment was made was based at a branch of Halifax in Romford. The Firm also identified "Mark [H]" residing at an address in Romford which would have made him a near neighbour of the Respondent.

15.4 In her Supplemental Answer the Respondent had stated that she reasonably believed that Mr H was recommended by Berrys, even if she was mistaken in that belief. She had also stated that the payment was evidenced on the file and would not have been made without presentation of an invoice and also that Mr H was not a personal associate or known to her. Mr Wheeler submitted that the Tribunal would need to form a view in the light of all of the evidence as to whether the Respondent did reasonably believe that Mr H was recommended by Berrys. Mr Wheeler stated in particular and by way of summary of the matters he submitted emerged from the evidence:

- there was no clear record of who Mr H was or when or how he had been authorised/instructed to do work for the estate;
- there was no documented record of what work was done by him or when the work was done;
- there was no documented record justifying the amount paid to Mr H; and
- it was submitted that the Respondent attempted to justify the payment to Mr H by falsely linking him to Berrys.

15.5 By making this substantial payment to Mr H in the circumstances described above, the Applicant alleged that the Respondent failed provide services to her clients in a manner which protected their interests and therefore failed to achieve mandatory Outcome 1.2 of the Code of Conduct. The conduct alleged was also submitted to be in breach of Rule 20.1(c) of the 2011 SARs on the basis that there was no evidence that this money was "*properly required for payment of a disbursement on behalf of the client or trust*".

15.6 The conduct alleged was also submitted be in breach of Principle 2 and the obligation to act with integrity on the basis that, on the face of it, this was a substantial payment to a personal associate in circumstances where there is no or inadequate evidence that it was properly required for work done or that it was appropriately authorised. It was further submitted that by allegedly creating a letter to Berrys purporting to enclose a cheque for work supposedly done by Mr H, only to cancel that cheque and make the payment direct to Mr H by electronic transfer, it appeared that the Respondent had attempted to 'cover her tracks'.

15.7 With regards to Principles 4, 6 and 10, it was averred that in breach of Principle 4 it would not be in a client's best interests for such a substantial payment to be made out of the estate without a clear justification, authorisation and a proper audit trail. By doing so it was averred that in breach of Principle 6 the Respondent failed to maintain public confidence in herself and the provision of legal services, especially in circumstances where it appeared that she had also sought to fabricate a justification for the payment on file. The Respondent was also submitted to have failed to protect client money, in breach of Principle 10, because if there was no justification for this payment, by making it she created a shortage on client account in the same amount.

Dishonesty alleged in relation to allegations 1.5 and 1.6

15.8 The test for dishonesty summarised in paragraph 10.13 above was again relied upon. With regards to allegation 1.5 and 1.6 specifically, it was alleged that as the solicitor with conduct of these matters and an experienced solicitor of at least 5 years standing at the material time, the Respondent must have known that her payments to C & Co and others were, in all the circumstances, seriously improper and/or unjustified but she nevertheless caused or allowed them to be made. In the case of Mr H, it was alleged that she also sought to 'cover her tracks' by creating the letter to Berrys. It was submitted that ordinary, decent people would consider this behaviour to be dishonest.

The Respondent's Case

15.9 The allegation was denied. The Respondent stated that she genuinely (albeit apparently mistakenly) believed that Ms H had been recommended by Berrys. The Respondent's evidence was that significant work was needed on the house which was left to the RSPCA as the residuary beneficiary under Mr JEBS' will. Mr Scott of Berrys had been contacted by the Respondent to value the property at the RSPCA's request. The Respondent stated that the property required significant clearance before it could be sold.

15.10 The Respondent stated that by the date of the hearing she could not recall what had prompted the original cheque for Mr H to be cancelled, or who had prompted this. She stated that the presence of the electronic payment to Mr H on the slips prepared by the Respondent's secretary, the financial ledger and the estate accounts strongly suggested there was an invoice for the work at the time (although it was said not to be amongst the documents disclosed to her). The legacy officer for the RSPCA had been interviewed as part of the Applicant's investigation and he had stated that he "*probably did agree to work to be done [sic]*" and that "*My reaction is that these were authorised. I am a stickler for these things usually*".

15.11 The Respondent's evidence was that she did not know Mr H personally. It was submitted there was no evidence to the contrary beyond a Google search which suggested someone with the same surname had lived on the same road at some point. There was also said to be no evidence to support the allegation that the Respondent had sought to 'cover her tracks'. All relevant details, including the cancelling of the original cheque would have been clear to anyone inspecting the file or the financial ledger.

15.12 There was submitted to be no breach of the 2011 Code, the 2011 SARs or the Principles:

- There was submitted to be no breach of Outcome 1.2 of the Code of Conduct/Principle 4 as the Respondent genuinely believed that Mr H had been recommended by Berrys (who in turn she had been instructed to use by the residuary beneficiary). She therefore believed that she was acting in a way that protected the interests of both the residuary beneficiary and the executor (her client). The work was duly carried out by Mr H;

- There was no breach of Rule 20(1)(c) of the 2011 SARs as the money paid to Mr H was said to be properly required for a disbursement on behalf of the estate, namely for the work he carried out;

- Given the above, it was submitted that the Respondent had behaved with integrity throughout (Principle 2). Mr H was not known to the Respondent and she genuinely believed that he had been recommended by Berrys. The letter intended to enclose payment to Mr H was not prepared to "cover her tracks" by cancelling the cheque and then making an electronic transfer. These actions were on the face of the file for anyone to see. There was nothing to cover up and there was no cover up;

- It was submitted that the Respondent acted in a way that maintained the trust the public placed in the provision of legal services (Principle 6) as she acted in the best interests of her client and in accordance with what she had understood to be the recommendation of Berrys. The work was duly carried out by Mr H, as approved by the residuary beneficiary;

- It was submitted that the Respondent did not fail to protect client money and assets (Principle 10). There was said to be nothing "improper" about the payment as a significant amount of work was required to clear the property. Mr H undertook and was paid for that work.

Response to allegation of dishonesty in relation to allegations 1.5 and 1.6

15.13 It was submitted that there was no dishonesty in respect of either allegation as alleged or at all. There was submitted to be nothing "seriously improper or unjustified" about the payments to C & Co which were the subject of allegation 1.5, for the reasons summarised above, and nothing that could be said to amount to dishonesty. Regarding allegation 1.6, and the payment to Mr H, it was submitted that for the reasons summarised above there had been no dishonesty or hiding of payments, as alleged or

at all. The payment to Mr H was recorded on the file for anyone inspecting the file or financial ledger to see.

The Tribunal's Decision

15.14 The evidence that there was any connection between the Respondent and Mr H was speculative. It amounted to a 'Google search' showing that someone with the relevant surname seemingly lived (or had lived) close to the Respondent. The Respondent accepted that she had been mistaken in her stated belief that Mr H had been employed by or recommended by the surveying firm Berrys. It appeared, however, that clearance work had been carried out at the property and the payment to Mr H was recorded in correspondence on the file and was clear from the client ledger. Mr Greenfield, of the RSPCA had been interviewed as part of the Applicant's investigation and stated, of the work completed by Mr H and associated payment, that he "*probably did agree for the work to be done*" and that "*My reaction is that these were authorised*". In these circumstances the Tribunal did not consider that it had been proved that all of the alleged breaches were made out. The work in respect of which the payment was made was likely to have been approved by the residual beneficiary, the payment was clear on the file and there was no cogent evidence of any link between the Respondent and Ms H.

The Tribunal's Decision on Dishonesty

15.15 Given that the substantive allegation had not been proved, the Tribunal did not move on to consider the alleged aggravating feature of dishonesty.

16. **Allegation 1.7: In or around June 2011, the Respondent purchased a motor car from the estate of Ms OCM:**

1.7.1 without the approval of the partner in the Firm who was appointed as executor;

1.7.2 at an undervalue;

and therefore breached Rules 1.02, 1.04, 1.05, 1.06 and 3.01 of the 2007 Code or any of them.

The Applicant's Case

16.1 In the course of administering the estate of Ms OCM the Respondent personally purchased a VW Fox car from the estate for £1,600. The car was around 3-years old and was due for its first MOT. The residuary beneficiaries of Ms OCM's estate were two charities.

16.2 When first contacted about the car, the residuary beneficiaries both indicated that they would be happy for the car to be sold for "no less than £500". On 15 June 2011, the Respondent sent an email to the representatives of the two residuary beneficiaries and stated that:

> "*Following the withdraw of the initial offer on the car, I have obtained a formal valuation of the Car being a VW Urban Fox bearing registration number [redacted], from the original dealers who sold the car to our late client.*
>
> *Mr [SR] values the car at between £2500-2600 as it has no MOT and has dents to one side. The cost of service including MOT is £900.*"

The Respondent offered to buy the car for £1,600. Both residuary beneficiaries approved the purchase. The Respondent accordingly paid this sum to the Firm's client account on 11 July 2011.

16.3 The "formal valuation" of the car to which the Respondent referred in her email of 15 June 2011 was an email sent on 8 June 2011 from Mr SR of the Volkswagen dealership from which the car had originally been purchased. He provided "guidance on the market value" of the car following a telephone conversation with the Respondent. Mr SR said that "*the approximate value for such a car based on its age, mileage and condition would be around £3,000. However, I understand this vehicle has no valid MOT; therefore, £2,500-2,600 would be a more realistic value*". Mr SR's email itself was not sent to the residuary beneficiaries.

16.4 The estimated cost of service referred to in the Respondent's email to the residuary beneficiaries was based on an email sent to the Respondent by Mr IJ on 14 June 2011. Mr IJ was described as a director of The Financial Practice Limited. Mr IJ wrote in his email that, "*I have spoken to my mechanic, to pick up the car from Varley to his work shop in Latchingdon, carry out a full service and MOT, taking into consideration that he has not seen the vehicle would be in the region of 800-900*".

16.5 The Respondent's offer of £1,600 for the car was therefore based on deducting the top-end of the estimated cost for serving/MOT of £900 from the lower-end of the range of estimated values for the car without an MOT (i.e. £2,500). The Applicant's case was that the Respondent's offer therefore effectively required the estate to bear the estimated cost of the MOT, whilst still only achieving the estimated price for the car without an MOT. The Respondent did not tell the residuary beneficiaries that Mr SR had valued the car at around £3,000 with an MOT. The residuary beneficiaries therefore did not have access to all of the information available to the Respondent when giving their consent to her purchase of the car. If they did have access to that information, it was submitted that it would have been apparent that the offer of £1,600 understated the value of the car.

16.6 It was alleged that the Respondent used her position as the estate's solicitor to purchase the car without having the fully informed consent of the executors of the estate to do so; and purchased the car at an undervalue. It was submitted that such conduct breached rules 1.02, 1.04, 1.05, 1.06 (summarised above – relating to acting with integrity, in the client's best interests, providing a good/proper standard of service and public confidence respectively) and also 3.01 ("you must not act if there is a conflict of interests") of the 2007 Code. It was submitted to lack integrity because a solicitor should never take advantage of their privileged position in order to make a financial gain at the expense of a client, trust or estate. Such behaviour was submitted not to be in that client's best interests and to constitute a very poor standard of

service. The Applicant submitted that conduct of this nature would clearly bring the profession into disrepute and fail to maintain public confidence in the Respondent and the provision of legal services. It was also submitted to represent a clear conflict of interest.

Dishonesty alleged in relation to allegation 1.7

16.7 Dishonesty was alleged in relation to allegations 1.7 and 1.8. Given the overlap between the allegations the Applicant's case is summarised for both together under allegation 1.8 below.

The Respondent's Case

16.8 It was submitted that there was no rule of law preventing the purchase of assets from an estate or from a client by a solicitor in a firm whose partners were acting as executors. There was said to have been no requirement for the Respondent to obtain the approval of one or more of the executors (Mr Hayward and Ms Bright). Further, at the time there were no policies in place regarding the purchase or assets of the estate and no guidance had been provided.

16.9 The fact that the Respondent purchased the car was recorded on the client ledger. The proceeds of sale were recorded in the draft estate accounts. The Respondent contended that one of the executors (Mr Hayward or Ms Bright) must have signed the log book, and Ms Bright accepted when questioned that she may have done so. Copied of the emails from beneficiaries agreeing to the sale and the cheque were provided to the Firm's Accounts Department. The Respondent's case was that she reasonably concluded that at least one of the executors did approve the purchase (or it was reasonable for her to assume this).

16.10 The Respondent maintained that in any event the purchase was not made at an undervalue. Ms Bright had accepted during cross examination that the email enquiries by the Respondent were an appropriate method of obtaining a valuation and that there were no specific Firm rules. As noted above, Mr SR had advised that the value of the car would be around £3,000 with an MOT and around £2,500 to £2,600 without. As also noted above, following enquiries the Respondent was advised that obtaining an MOT would cost between £800 and £900. The Respondent stated that she conveyed the relevant information, the current value of the car (£2,500) and the cost of a full service and MOT (£900) to the two residuary beneficiaries and offered to buy the car for £1,600. The offer was accepted. It was submitted that there was no reason for the beneficiaries to accept the offer if they were not happy with the price. It was also submitted that the sale was of clear benefit to the estate given that fees would have been payable had the car been sold at auction. Given that there was no MOT the Respondent's evidence was that the car would have been entered into auction at scrap value (around £500). The Respondent stated that she in fact paid significantly more than £900 to repair the car.

16.11 It was denied that the Respondent acted in breach of the 2007 Code:

- It was submitted that she did not fail to act with integrity (Rule 1.02). She consulted with the beneficiaries and purchased the car with their express approval and not at an undervalue. The Respondent did not make a financial gain;

- It was submitted that the Respondent was acting in the best interests of the client (Rule 1.04). By consulting with the beneficiaries and purchasing the car for significantly more than would have been achieved at auction, she was acting in the best interests of the estate;

- It was submitted that the Respondent provided a good standard of service to the client (Rule 1.05). The purchase of the car was not at an undervalue, was in excess of what would have been obtained at auction and was in the best interests of the estate;

- It was submitted that the Respondent did not behave in a way that was likely to diminish the trust the public placed in the legal profession (Rule 1.06). The purchase was not at an undervalue and was with the express consent of the beneficiaries and, at a minimum, the implied consent of the executor-partners;

- There was submitted to have been no conflict of interest (Rule 3.01). Applying Groom v Crocker [1939] 1 KB 194 at 222, there was no prohibition on the purchase of the car and, in any event, the Respondent was not the executor. The beneficiaries consented to the purchase. There was no requirement on them to do so and they could have refused to approve the purchase.

As with the previous allegations, it was submitted that to the extent there was a breach of any of the above Rules there was no misconduct. It was submitted (based on Connolly v The Law Society) that in particular, a genuine but mistaken belief with regard to a question of professional judgement (such as a question of a conflict of interest) does not generally give rise to a disciplinary offence.

Response to allegation of dishonesty in relation to allegation 1.7

16.12 As with the Applicant's allegation of dishonesty, the basis of the Respondent's denial in respect of both allegation 1.7 and 1.8 are dealt with together below.

The Tribunal's Decision

16.13 The Tribunal considered that the Respondent's email to the beneficiaries had been misleading. It had not included the estimated value of the car with an MOT. However, her email had stated the value without an MOT, and it was clear that the offer she was making had deducted from that value the cost of obtaining an MOT. Whilst the methodology of the offer may have been surprising, it was not concealed. It would have been evident to the recipients of the offer that, as Mr Wheeler stated, the estate was effectively meeting the cost of the MOT under that offer and receiving the value of the car without one. Both beneficiaries confirmed their acceptance of the offer in writing. The Respondent stated that car's log book would have been signed by Ms Bright or Mr Hayward (the executors of the estate). Ms Bright accepted that she could have done so. The Respondent's contention that the car was likely to have been sold for scrap value if sold at auction was not disputed.

16.14 In such circumstances, the Tribunal concluded that the allegations had not been proved to the requisite standard. The beneficiaries had approved an offer which was comprehensible if badly expressed and the executors had signed the relevant sale paperwork. Accordingly, the Tribunal was not satisfied to the requisite standard that the shortcomings in the Respondent's conduct, with respect to the phrasing of the offer and associated record keeping demonstrating that the estate received a market price and she did not obtain a financial advantage, amounted to misconduct.

The Tribunal's Decision on Dishonesty

16.15 Given that the substantive allegation had not been proved, the Tribunal did not move on to consider the alleged aggravating feature of dishonesty.

17. **Allegation 1.8: In or around August 2014, the Respondent caused, allowed or facilitated the sale of a motor car belonging to Client Mr MEP to a third party, NC, in circumstances where:**

1.8.1 Client Mr MEP was elderly, vulnerable and/or lacked capacity;

1.8.2 the Respondent was acting or proposing to act for him under a lasting power of attorney;

1.8.3 the third-party purchaser was a relative of her children;

She subsequently:

1.8.4 recorded information in the estate accounts to the effect that Client Mr MEP's car had sold for £8,500.00, when in fact NC had only paid around £6,400;

She therefore:

1.8.5 failed to achieve Outcomes 1.1 and 3.4 of the 2011 Code;

1.8.6 breached all or any of Principles 2, 4, 5, 6 and 10 of the Principles.

The Applicant's Case

17.1 Mr MEP was a client of the Firm who was around 80 years old. On 17 July 2014, Mr MEP appointed the Respondent as his attorney under a general power of attorney under which the Respondent assisted Mr MEP in the sale of a property. As part of that work, the Respondent arranged for the property to be cleared. The Applicant's case was that C & Co were introduced to Mr MEP by the Respondent. There was no contemporaneous record of the Respondent disclosing her connection to Mr DJC when referring him to Mr MEP.

17.2 The sale of the car occurred in late August 2014 when the Respondent was on holiday. An attendance note dated 28 August 2014 prepared in the Respondent's absence records Mr DJC bringing a cheque for £6,400 for the car to the Firm's offices. The cheque was not accepted but was replaced by an agreement by Mr DJC to

discharge debts owed by Mr MEP, namely £2,750 for house clearance and gardening work (apparently due to C & Co) and £3,800 owed for storage charges.

17.3 Notwithstanding that arrangement, the administration accounts prepared by the Respondent showed:

- £8,500 as being received for the sale of the car. Although the sum was shown as a receipt on the accounts, it was alleged that nothing was ever received by the Firm in respect of the sale of the car (and there was no such receipt shown on the ledger). There was said to be no other contemporaneous record of the sale price of the car being £8,500 rather than the sum of £6,400 recorded in the attendance note of 28 August 2014.

- £3,600 as being paid for "Whitehouse storage". Again, the payment was not made by the Firm and was not shown on the ledger. It was noted that the charge was similar in amount to the £3,800 bill for storage charges noted in the 28 August 2014 attendance note as being settled by Mr DJC.

- £4,300 as being paid for "house clearance inc computer specialist disposal". Although there was no invoice on the file, this sum was said to be due to Mr DJC. No reference was made to the £2,750 already discharged by Mr DJC according to the 28 August 2014 attendance note. No payment was made to Mr DJC through the Firm in respect of this work although the Respondent contended that she gave instructions for £2,200 to be paid.

- Despite not passing through the Firm's client account, all three sums were taken into account in calculating the payment due to the Firm from Mr MEP. Payment was received in the sum of £16,479.16 shown on the accounts to be due.

17.4 Although the net effect of these entries on the estate accounts was stated to reduce Mr MEP's bill by £600 compared to what it would otherwise have been, their inclusion on the estate accounts was alleged to render them inaccurate. On that basis, it was alleged that the Respondent's conduct breached Principles 2, 4, 5 and 6 of the Principles. The Respondent's conduct was submitted to have lacked integrity (Principle 2) because a solicitor should not use their privileged position to facilitate the sale of client property to their relatives. It was submitted that such conduct was inevitably not in that client's best interests (Principle 4), constituted a very poor standard of service (Principle 5) and failed to maintain public confidence in the Respondent and the provision of legal services (Principle 6). It was further submitted to constitute a failure to achieve Outcomes 1.1 and 3.4 of the SRA Code of Conduct 2011 which provide, respectively, that "*you treat your clients fairly*" and "*you do not act if there is an own interest conflict or a significant risk of an own interest conflict*".

Dishonesty alleged in relation to allegation 1.7 and 1.8

17.5 The test for dishonesty summarised in paragraph 10.13 above was again relied upon. With regards to allegations 1.7 and 1.8 specifically, it was alleged that the Respondent knew that she did not have permission to purchase the Ms OCM vehicle, still less at an under-value but she nevertheless did so.

17.6 Further or alternatively, it was alleged that the Respondent must have known that the sale of Mr MEP's vehicle to NC was inappropriate in all the circumstances but she nevertheless caused, allowed or facilitated it. Further or in the further alternative, the Applicant alleged that the Respondent must have known that it was inaccurate to record the sale price in the estate accounts at £8,500, when in fact NC had only paid around £6,400, but she nevertheless did so. It was submitted that ordinary, decent people would consider all or any of this behaviour to be dishonest.

The Respondent's Case

Submission of no case to answer

17.7 In opening the Applicant's case, Mr Wheeler had conceded that the Respondent was away on holiday/annual leave at the material time and that the word "facilitated" in allegation 1.8 was limited to introducing Mr MEP to Mr NJC. It was submitted that this could not, at its highest, amount to an allegation of misconduct. Introducing two people who then go on to enter into an arrangement whilst you are on holiday could not be misconduct. It was submitted that as such this allegation could not sensibly proceed.

The Tribunal's Decision on the submission of No Case to Answer in respect of Allegation 1.8

17.8 Ms Newbegin had submitted that the Respondent was abroad on holiday at the material time, but not at all times with which the allegation was concerned. In particular, the Respondent herself had prepared the estate accounts in which £8,500 was recorded as being received for the sale of the car. This was seemingly not the price actually paid. Mr MEP was an elderly client which raised questions as to potential vulnerability and there was no contemporaneous evidence that the Respondent's family connection to Mr NC was disclosed to him. The Tribunal considered that the case presented displayed a case to answer. The credibility of the Respondent's explanation of, in particular, the accounts she prepared would need to be assessed. In the absence of such evidence, at the conclusion of the Applicant's case, the Tribunal considered that on one view of the facts summarised in this paragraph, the Tribunal could conclude the allegations against the Respondent were proved. Accordingly the Galbraith test was not satisfied and the submission of no case to answer failed.

The Respondent's substantive case

17.9 The Respondent stated that Mr MEP was aware at the time of the sale of his car to Mr Norman C (the father of her ex-partner) of the family connection. His friends and subsequent attorneys were also aware. It was submitted that Mr MEP did not lack capacity to decide to sell his car. The Respondent's attendance note from 2 April 2014 recorded his nephews agreeing that he was "mentally very capable". Similar comments were made by others from the Firm who met Mr MEP and also by his social worker and G.P. The Respondent also stated that contrary to what was alleged the sale of the car was not conducted under a power of attorney at all.

17.10 More fundamentally, the sale of the car largely took place when the Respondent was out of the country on holiday. The Respondent provided evidence of the flights she had taken to confirm this. A letter from JR, the daughter of Mr MEP, dated 27 May 2016 stated:

> "*This was something I helped with as [the Respondent] was on holiday. I was present with [Mr MEP] when he agreed the price and signed the paperwork we sold the car for £8,500 due the condition and agreed Mr Norman [C] ([the Respondent's] father in law who was doing the clearance due the [Mr MEP's] various request [sic], paid a deposit and the balance we agreed it was to be deducted from his clearance costs. This was reflected in the accounts presented to [Mr MEP]. This was all being done whilst [the Respondent] was on holiday so [Mr MEP] decided to leave the logbook at [the Firm] for [the Respondent] to deal with.*"

Consequently, the Respondent stated that she understood that:

- the sale price of the car was agreed at £8,500 which took the condition of the car into account;
- Norman C made out a cheque to Mr MEP for £6,400. This was a deposit for the car, with the balance of £2,100 remaining payable;
- on presentation of various bills for house clearance and gardening which Mr MEP struggled to pay, Norman C agreed to reissue the cheque and instead settle debts on Mr MEP's behalf;
- the result was that the balance of £2,100 remained payable in respect of the car;
- this was to be deducted from C & Co's clearance invoice.

17.11 The estate accounts showed the sale of the car for £8,500 and the cost of "House clearance inc computer specialist disposal" for £4,300. The Respondent stated that the £4,300 was meant to have £2,100 deducted from it, being the balance Norman C owed Mr MEP for his car. That meant £2,200 remained due to Norman C for the clearance work he had undertaken.

17.12 There was submitted to have been no breach of any Outcomes or Principles:

- It was submitted that the Respondent did not fail to act with integrity (Principle 2). Mr MEP had capacity and agreed the sale of his case with Mr C and knew about the family connection with the Respondent. The transaction largely took place whilst the Respondent was on holiday;
- It was submitted that the Respondent did not fail to act in the best interests of Mr MEP (Principle 4) or fail to provide a proper standard of service to her client (Principle 5). Mr MEP had had his driving licence revoked by the DVLA and had therefore agreed to sell his car to Mr NJC;

- It was submitted that the Respondent did not fail to behave in a way that maintained the trust that the public placed in the provision of legal services (Principle 6). Mr MEP, who had capacity, decided to sell his car to Mr NJC at an agreed price. The failure of the Firm to carry out the Respondent's instructions regarding the payments and in accordance with the accounts the Respondent prepared meant that it was Mr NJC and not Mr MEP who was left being owed money;

- It was submitted that the Respondent did not fail to protect client money and assets (Principle 10). Principle 10 relates to the protection of money, documents or other property belonging to a client which has been entrusted to a solicitor or his or her firm. In this case, it was submitted that the car was not property entrusted to either the Respondent or to the Firm. The sale of the car was by a person with capacity to a third party. The administration accounts reflected the sums owed to each and there was no failure by the Respondent to protect client money or assets;

- For the reasons summarised above, it was submitted that the Respondent did not fail to achieve outcome 1.1 on the basis that Mr MEP was not treated unfairly by the Respondent;

- It was further submitted that the Respondent did not fail to achieve outcome 3.4 as there was no own interest conflict. The sale of the car took place mainly whilst she was abroad and was to a third party and not to the Respondent. She did not benefit from the sale of the car.

17.13 Given that it was accepted by the Applicant during the hearing that the Respondent was on holiday at the material time, and that during cross examination both Mr Hayward and Ms Bright accepted that that the Respondent was not responsible for what happened whilst she was on holiday it was submitted that she could not be held liable for acts which occurred whilst she was on annual leave and certainly not so as to amount to misconduct. This allegation was also described as being wholly contrary to the Respondent's character. As with previous allegations, it was submitted that even if there was a breach of any of the Principles or Outcomes, there was no misconduct.

Response to allegations of dishonesty in relation to allegations 1.7 and 1.8

17.14 For largely the same reasons for which the regulatory breaches were denied, the aggravating allegation of dishonesty was also denied. In relation to allegation 1.7, and the Respondent's purchase of the car, she was open about her purchase and obtained the express consent of the beneficiaries. Ms Newbegin stated that it had not been put to the Respondent in cross examination that she had been dishonest, something that Mr Hayward in his evidence made clear that why clarifying he was not saying that the misdirection as to the value was "deliberate". The Respondent's case was that she started with the current value of the car and deducted the cost of a service and MOT. She was open about doing so. That she should or should not have calculated her offer based on the £3,000 instead of the £2,500 was submitted not to amount to dishonesty. Moreover, she believed that the executors were aware of the purchase and also that she was not purchasing it at an undervalue. Ms Newbegin referred the Tribunal to the test for dishonesty in Ivey and submitted that it was based upon the Respondent's

subjective belief of the facts, whether the Tribunal considers that belief to be reasonable or not.

17.15 In relation to allegation 1.8, and Mr MEP's sale of his car to Mr C, it was submitted that the administration accounts reflected the sums owed to each of Mr MEP (in respect of the car) and Mr NJC (in respect of the clearance work). The fact Mr NJC was not paid at all was not due to the Respondent's conduct. Accordingly, there was no basis for a finding of dishonesty.

The Tribunal's Decision

17.16 The Tribunal accepted the evidence presented on the Respondent's behalf that Mr MEP had capacity. Her evidence was that she had notified Mr MEP of her family connection to C & Co when the introduction was initially made, but as in other allegations there was no documentation to confirm this. Crucially, the Applicant had accepted that the Respondent had been abroad on holiday when the arrangements between Mr MEP and Mr NJC of C & Co for the sale of the car were made. The daughter of Mr MEP confirmed by letter of 27 May 2016 that she was present with Mr MEP when he agreed to sell his car to Mr NJC for £8,500. Her letter made clear that she and Mr MEP had known that Mr NJC was the Respondent's father in law. She also stated that as the transaction was agreed whilst the Respondent was on holiday Mr MEP had left the log book at the Firm for her to conclude the formalities on her return. The Tribunal accepted that the Respondent was not involved in the agreement for the sale of the car. The Respondent's case was that she understood that the sale price was £8,500 and that sums due from Mr MEP were set-off against that, and that the picture recorded in the estate accounts reflected her understanding.

17.17 Given the evidence suggested that Mr MEP had been aware of the Respondent's family connection to Mr NJC, and that he had mental capacity to sell his car, and agreed to do so whilst the Respondent was abroad on holiday, the Tribunal did not consider that the Respondent could be said to have misconducted herself in relation to a sale with which she was not involved. Whilst the Respondent had made the introduction, the Tribunal did not consider that the alleged breaches in relation to the sale of the car had been proved to the requisite standard.

17.18 With regards to the estate accounts, the Respondent's evidence was that all of the elements which were set-off were recorded and that the estate did not suffer any loss. The Tribunal did not consider that the allegation that she had mis-recorded the sale price as £8,500 had been proved beyond reasonable doubt. Mr MEP's daughter had stated this was the agreed price. Mr Wheeler had acknowledged that the estate had not suffered any loss, but submitted the accounts were inaccurate. Focusing on the scope of the allegation as set out in the Rule 5 Statement, which was based on Mr NJC paying £6,400 and not £8,500, the Tribunal was not satisfied to the requisite standard that, given the surrounding context, this inaccuracy was sufficient to amount to misconduct. The Tribunal could not be sure on the evidence presented that the Respondent had not simply sought to reflect her genuine understanding of the transaction in the accounts. Accordingly the allegations were not proved.

The Tribunal's Decision on Dishonesty

17.19 Given that the substantive allegation had not been proved, the Tribunal did not move on to consider the alleged aggravating feature of dishonesty.

18. **Allegation 1.9: On one or more occasions the Respondent billed costs to the estate of Mr JEA which were:**

1.9.1 unjustified or excessive on the basis of the work undertaken by her;

1.9.2 raised in order to conceal a payment made to C & Co and/or to balance the estate accounts;

and therefore:

1.9.3 failed to achieve Outcome 1.2 of the 2011 Code;

1.9.4 breached Rule 17.2 of the 2011 SARs;

1.9.5 breached all or any of Principles 2, 4, 6, and 10 of the Principles.

The Applicant's Case

18.1 The estate of Mr JEA was one of the estates on which C & Co carried out work. There were two residuary beneficiaries of the estate. The Respondent dealt primarily with one of those, GL (the other beneficiary residing abroad). Final distributions were made to the beneficiaries on 31 October 2012, when the Respondent wrote to GL informing her of the conclusion of the administration.

18.2 The expenses incurred on the administration of the estate include the sum of £705 which was paid to C & Co from the Firm's client account, as recorded on the ledger. Despite that payment, the estate accounts prepared by the Respondent did not include any reference to the sum paid to C & Co. However, the estate accounts still showed the net estate and the sums distributed to beneficiaries as balancing. It was alleged that the accounts balanced despite the omission of the payment to C & Co because:

- The accounts overstated the Firm's final bill. The final bill was shown on the accounts as £4,200 plus vat of £840, whereas the sum actually shown on the Firm's bill as being due was £3,060 plus vat of £612. The Firm's charges were therefore overstated by £1,368 in total (including VAT).

- The overstatement of the charges was mitigated by the omission of £59 in BACS charges that ought to have been included but were not. That reduced the alleged overstatement of fees in the estate accounts to £1,309.

- The omission of the payment of £705 to C & Co from the estate accounts meant on the Applicant's case that the payments as a whole were overstated by £604 (i.e. the overstated fees less the omitted payment).

- The payments out of the estate ought therefore to have been shown on the estate accounts as being £27,754.41. By showing the payments at the higher figure of £28,358.41, the net estate for distribution was left at £164,575.31 (£604 less than it otherwise would have been) which matched the sum shown on the accounts as distributed.

18.3 The Applicant alleged that applying the necessary corrections to the estate accounts suggested that £604 ought to have remained in the Firm's client account after the "final" distribution to the beneficiaries. In fact, the higher sum of £697.03 remained on the ledger because: the estate accounts omitted £21.03 of interest that had accrued on the client ledger and was available for distribution; the actual distribution to the beneficiaries was £72 in total less than shown on the estate accounts. Combined with the £604, the additional £21.03 and £72 left £697.03 held in the client account. These sums held in the client account were subsequently further increased by a utility reimbursement of £2.94 which meant there was therefore £699.97 held on the client account.

18.4 It was alleged that nothing on the file suggested that the beneficiaries were ever told that further sums were held by the Firm which ought to have been available for distribution to them. Instead, a final bill was raised on 30 January 2013 in the sum of £583.31 plus vat, which resulted in a total charge of £699.97. Payment of the bill reduced the balance of the client account ledger to zero. There was stated to be no evidence that the bill was ever sent to the beneficiaries as the paying parties. It was alleged that the amount of the bill appeared to have been manipulated to match the sum outstanding on the client account.

18.5 Mr Wheeler stated that the Respondent contended that: the estate accounts relied upon were only draft accounts; sums were deliberately held back from distribution to the beneficiaries in anticipation of further work being required; and the bill raised on 30 January 2013 reflected work done subsequent to the distribution to the beneficiaries and matched the sum held on the ledger because the Respondent chose to write off the additional charges. Mr Wheeler invited the Tribunal to conclude that those assertions by the Respondent were not factually accurate in the light of the totality of evidence before the Tribunal.

18.6 The Respondent had reconstructed the estate accounts as they ought to have read. Mr Wheeler submitted that those reconstructed estate accounts reflected the sums shown on the ledger but they did not reflect an accurate reconstruction of the estate accounts in the form that they should have been sent to the beneficiaries on 31 October 2012 because they include receipts and charges that post-dated 31 October 2012 (namely, the bill of 30 January 2013 and the utility receipt on 21 January 2013).

18.7 It was therefore alleged by the Applicant that the Respondent had:

- manipulated the estate accounts, thereby concealing a payment to C & Co, an entity connected to her;

- inflated the Firm's charges to conceal the payment to C & Co; and

- taken payment of fees from client funds without sending a written notification to the paying party (i.e. the residuary beneficiaries).

18.8 The conduct alleged was submitted to constitute a failure to achieve Outcome 1.2 of the 2011 Code: "*you provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice*". It was also submitted to be in breach of Rule 17.2 of the 2011 SARs, which provides: "*If you properly require payment of your fees from money held for a client or trust in a client account, you must first give or send a bill of costs, or other written notification of the costs incurred, to the client or the paying party.*"

18.9 The Respondent was submitted to have acted without integrity in breach of Principle 2 by manipulating the estate accounts in order to conceal a payment to a personal associate. Such conduct was also submitted to have breached Principles 4, 6 and 10 on the basis that it would not be in a client's best interests for legal fees to be artificially inflated; such conduct was liable to undermine public trust and confidence in the Respondent and in the provision of legal services and constituted a failure to protect client money (respectively).

Dishonesty alleged in relation to allegation 1.9

18.10 The test for dishonesty summarised in paragraph 10.13 above was again relied upon. With regards to allegation 1.9 specifically, it was alleged that as the solicitor with conduct of this matter and an experienced solicitor of at least 5 years standing at the material time, the Respondent must have known that the costs in question were:

- unjustified or excessive on the basis of the work undertaken by her;

- raised in order to conceal a payment made to C & Co and/or to balance the estate accounts;

but she nevertheless raised those costs and then failed to draw them to her client's attention. It was submitted that ordinary, decent people would consider this behaviour to be dishonest.

The Respondent's Case

18.11 The Respondent described the process for finalising estate accounts. This involved sending draft accounts to the beneficiaries for review and approval after which the final accounts would be signed by the executors. She stated that in every case to which the Tribunal had been referred, final accounts would have been produced. Ms Newbegin submitted that in view of the obligations on them under the Administration of Estates Act it was not tenable that final accounts were not signed off by the partner-executors. She also stated that there had been conflicting evidence between Mr Hayward and Ms Bright as to whether this was the practice at the Firm. In the case on which the allegation was based, the Respondent stated that the Applicant relied on what were clearly not final accounts. Her evidence was that these accounts relied upon did not match the amounts ultimately received by the beneficiaries. Ms Newbegin stated that the Respondent had sought disclosure of the final accounts but they had not been forthcoming.

18.12 The Respondent stated there was no attempt to hide the payment to C & Co. The payment slip dated 13 August 2010, which included the payee name was signed by Mr Hayward. The financial ledger recorded the transfer openly and could have been inspected by Mr Hayward or Ms Bright at any time.

18.13 In the absence of the final accounts the Respondent reproduced the accounts by reference to the financial ledger. Her case was that the details on the ledger confirmed that the payment made to C & Co had been included in the calculations of how much was due to the beneficiaries. The relevant bills had also all been included in those calculations. It was submitted that had the final estate accounts been used, it would have been clear that there was no misconduct by the Respondent. It was further submitted that there was no reason for the Respondent to conceal the payment to C & Co in this case as she had not done so on any of the other cases in which such a payment had been made; the final (allegedly inflated) bill was for less than the payment to C & Co and it could not therefore be said to have been raised to cover this payment and as demonstrated by the Applicant's own file note of a conversation with one of the beneficiaries, she had approved the payment.

18.14 It was submitted that the anomalies highlighted by the Applicant only featured in the interim accounts and that these had been rectified by the time the final accounts were produced (as demonstrated by the payments made reflecting the financial ledger rather than the interim accounts on which the allegation was based). Ms Bright had also confirmed in her oral evidence that an amount could be held back from distributions to reflect outstanding work provided this was done rationally.

18.15 There was submitted to have been no breach of Outcome 1.2 on the basis that the Respondent provided her services in a manner that protected the interests of the estate. The payments to C & Co were described as properly incurred and would have been reflected in the final estate accounts. The alleged breach of Rule 17.2 of the 2011 SARs was denied. That rule states that if payment of fees is properly required from money held for a client or on trust in a client account, a bill of costs or written notification of the costs incurred must be sent to the client or the paying party. The Respondent stated that she understood that all bills would have been sent to the residuary beneficiary and in any event, the paying party was the estate and the client was the executors (here Mr Hayward and Ms Bright) and not the residuary beneficiary.

18.16 It was denied that the Respondent had failed to act with integrity (Principle 2). There was no manipulation of the accounts. There was no concealment of a payment to C & Co. The payment was recorded on the matter files and approved by Mr Hayward. The final estate accounts would have shown the payment to C & Co. The Respondent maintained there was no artificial inflation of fees and no cover up. For the same reasons, it was denied that the Respondent had failed to act in the client's best interests (Principle 4), failed to act in a way that maintains the public's trust in the legal profession (Principle 6) or failed to act in a way that protected client money and assets (Principle 10). As with previous allegations, it was submitted by Ms Newbegin that even if there was a breach of any of the Rules/Outcomes/Principles this would not amount to misconduct in the circumstances.

Response to allegation of dishonesty in relation to allegation 1.9

18.17 The allegation of dishonesty was denied on the basis set out above. The Respondent's case was that there was no raising of a bill in order to conceal a payment to C & Co and/or to balance the estate accounts and in those circumstances the allegation must inevitably fail.

The Tribunal's Decision

18.18 The Tribunal noted that Ms Bright's evidence was that final estate accounts were brought to partner-executors to sign, but that the Respondent had not always brought them to her to sign. In contrast, Mr Hayward has denied that this was the general practice. The Respondent's case was that the accounts relied upon by the Applicant were not final accounts and that final accounts would have been prepared and would have reflected the figures from the client ledger (where the payment to C & Co had been recorded). Given the references to draft accounts in the documentation and the conflicting witness evidence about whether final accounts were presented to partner-executors to sign, the Tribunal could not be sure that the Respondent's account, that there were further finalised accounts which had existed, was not correct.

18.19 The Tribunal accepted that the name C & Co was openly documented on the relevant file, and the contention made on the Respondent's behalf that there was no suggestion she had deliberately excluded any payment to C & Co from any other accounts. The Tribunal also accepted that the final bill was less than the C & Co payment which cast doubt on the suggestion that it was raised to cover it. The beneficiary with whom the Respondent had dealt in the main was contacted in February 2017 by the Applicant as part of its investigation and she had confirmed that the clearance payment "probably around £1,000" had been approved by her. In these circumstances the Tribunal was not satisfied that it had been proved beyond reasonable doubt that the Respondent had sought to conceal a payment made to C & Co. Ms Bright had accepted in her oral evidence that distributions to beneficiaries could be made and an amount held back on file to be billed for outstanding work done which created further doubt that the final bill was created in order to conceal the payment to C & Co as alleged. The Tribunal found the allegation, including the aggravating allegation of dishonesty, not to be proved.

The Tribunal's Decision on Dishonesty

18.20 Given that the substantive allegation had not been proved, the Tribunal did not move on to consider the alleged aggravating feature of dishonesty.

Previous Disciplinary Matters

19. There were no previous disciplinary findings.

Mitigation

20. Ms Newbegin submitted that the sanction must be proportionate, and should be set at the lowest level necessary to protect the public. She submitted that a finding of dishonesty did not always mean strike off was appropriate where exceptional

circumstances existed. She submitted that the findings against the Respondent related to a one off action by an incredibly busy practitioner. There were various mitigating factors present, relating to workload which was particularly acute in January 2011 as well as the pressures of a young family. There was no suggestion that the events were anything other than a one off or that there was any risk of repetition. Given that the Respondent was not practising in a role which involved any handling of client money, Ms Newbegin submitted that the public would be adequately protected by a sanction other than strike off.

21. On the subject of harm, Ms Newbegin stated that Ms X had been reimbursed in full. No harm of any kind had been caused to any other clients. The Respondent had no previous disciplinary record or incidents. She had provided various glowing personal testimonials. She had lived with the pressure and stresses of the investigation since 2015 and had been very significantly punished already.

22. In terms of personal mitigation, the Respondent was a single parent with two wholly or partly dependent children. That the events were truly exceptional, and that the impact on the Respondent was likely to be devastating was something Ms Newbegin submitted the Tribunal could properly take into account when considering what was necessary bearing mind the need to protect the public and protect the reputation of the profession. The Respondent undertook unpaid charity legal work and was due to undertake more; a sanction of strike off would remove this valuable contribution she made and was submitted to be a relevant consideration supporting the contention that the findings were a one-off entirely at odds with the Respondent's character.

Sanction

23. 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.

24. In assessing culpability, the Tribunal found that the Respondent's motivation in requesting the Cheque initially was personal enrichment. Her motivation for the subsequent misleading statements was to influence the Applicant's investigation into her conduct. The Tribunal considered that her conduct could not be described as spontaneous. Whilst the initial request may have been, her subsequent changes of position and statements which had been found to be misleading were more planned than spontaneous. The conduct had originated in a one-off event, the requesting of the Cheque, but her conduct had continued over time and involved further conduct which included the misleading statements which the Tribunal had found to have continued to have been deliberate. The Respondent had been in a position of considerable trust, the Tribunal having found that Ms X was to some extent vulnerable. The Respondent had direct control over the circumstances of her misconduct, and she did not personally pay back the money she had received. Whilst Ms Newbegin stated that Ms X had been reimbursed in full, this had been by the Firm's insurer and not by the Respondent. At the time of the misconduct the Respondent was reasonably experienced having over five years' experience. The Tribunal had found that the Respondent knowingly misled her regulator which increased culpability. Overall the Tribunal assessed her culpability as high.

25. The Tribunal considered the harm caused by the misconduct was plainly foreseeable. Whilst Ms X was ultimately reimbursed, she had unnecessarily been deprived of the funds which were paid into the Respondent's account for a significant period of time. The harm to the reputation of, and public trust in, the profession was also obvious and foreseeable. Procuring a cheque in these circumstances and dealing with the money as her own involved a complete departure from the integrity and probity that the public rightly expects from solicitors. The harm caused by the misconduct was very significant.

26. The Tribunal then considered aggravating factors. A finding that the Respondent had dishonestly procured a cheque for £4,700, dealt with the funds as her own and misled her regulator had been made. Her actions had been found to be deliberate and calculated and she had subsequently sought to conceal them. The Tribunal had found that the Respondent took advantage of Ms X who was someone with vulnerabilities in respect of whom the Respondent was in a position of considerable trust. The Tribunal also considered that the Respondent had displayed a lack of insight into the shortcomings of her conduct. The Tribunal had found her evidence in relation to this allegation to be, on the whole, unreliable.

27. The Tribunal also considered mitigating factors. Whilst the misconduct continued over time, the allegations which had been found proved all arose out of a single incident. The Respondent had an otherwise unblemished record and had produced extremely positive testimonials which spoke about her professionalism and integrity.

28. The overall seriousness of the misconduct was high: this was inevitable given the dishonesty findings. In addition, the Tribunal had found that the Respondent's conduct represented a complete departure from the integrity and probity required from solicitors. 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.

29. Ms Newbegin had invited the Tribunal to conclude that such exceptional circumstances existed. Specifically, she made reference to a single incident from an incredibly busy practitioner who had significant pressures in her personal life at the time and who had already suffered a very significant impact of the investigation. She had submitted that the Respondent had produced compelling evidence that this was completely at odds with her professional and personal character and that there was no risk of repetition. Having regard to the Guidance Note on Sanctions, the Tribunal found that the matters raised were not such as could be regarded as exceptional according to the guidance set out in case law. Paragraph [53] of the Guidance Note on Sanctions summarised what amounts to exceptional circumstances drawing on the case of Sharma and SRA v James et al [2018] EWHC 3058 (Admin):

> "*In considering what amounts to exceptional circumstances: relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, or over a lengthy period of time; whether it was a benefit to the solicitor, and whether it had an adverse effect on others." (**Sharma** above). The exceptional circumstances must relate in some way to the dishonesty (**James** above)*"

30. The nature of the dishonesty was the initial procuring of a cheque from someone with vulnerabilities and dealing with the funds as her own followed by subsequent attempts to cover that up. The sum involved was relatively modest, but there were multiple elements involved in the findings made by the Tribunal such that scope of the conduct extended over time and involved several separate actions by the Respondent. It was not momentary. Moreover, the initial dishonest misconduct was of direct financial benefit to the Respondent and the subsequent dishonest misconduct was intended to be of personal benefit by influencing the Applicant's investigation. The dishonest conduct had a direct impact on Ms X, and an indirect one on the Firm. The factors listed by Ms Newbegin whilst significant and understandable pressures could not be said to relate to the dishonesty. They were stresses and pressures to which very many people are subject rather than factors which related to the Respondent's misconduct and which could be regarded as exceptional.

31. Having found that the Respondent had acted dishonestly, and that exceptional circumstances did not exist, 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

32. Mr Wheeler applied for the Applicant's costs as set out in the revised schedule dated 28 October 2019 of £105,909.95 including VAT. This was on the basis that what he described as the two principle allegations had been found proved. He stated that the Capsticks fixed fee of £77,750 plus VAT which includes all counsel's fees and equated to a notional hourly rate for Capsticks once counsel's fees were removed of around £62 which he submitted was very low. Overall he submitted the costs claimed were reasonable in light of the 472 hours work recorded on the schedule of costs. He invited the Tribunal to award some or all of the Applicant's costs.

33. On behalf of the Respondent, Ms Newbegin opposed the Applicant's application for costs and applied for the Respondent's costs relating to the allegations which had failed and also relating to the Applicant's unsuccessful application for Ms X to give evidence remotely.

Grounds of opposition to the Applicant's costs application

34. Ms Newbegin submitted that Mr Esney had completed the vast majority of the investigatory and drafting work relating to allegations 1.1 and 1.2. Capsticks' involvement in those allegations was minimal. They had instead very largely focused on allegations 1.3 to 1.9, all of which had been unsuccessful. She submitted that these unsuccessful allegations should never have been brought, and that there was no principle that the Applicant should automatically recover its costs. She submitted that

allegations 1.3 to 1.5 were always hard to understand and there were striking ambiguities and omissions. The specific shares to which allegation 1.3 related was said to be unclear; the evidence that Ms Bright was aware of the Respondent's partner's surname, relevant to allegation 1.5, was known the Applicant; allegation 1.6 was embarked upon on the strength of nothing more than a 'Google search' and the Applicant accepted that the Respondent was on holiday at the relevant time of the conduct on which allegation 1.8 was focused. Ms Newbegin stated that the Rule 5 appeared to be lifted from the referral received by the Applicant, and submitted that had it conducted its own meaningful investigation some or all of these failed allegations would have been discontinued.

35. Ms Newbegin submitted that the manner in which the Applicant had conducted disclosure was a further reason why costs should not be awarded. She stated that the Respondent's representatives had been obliged to apply to the Tribunal for a disclosure order, which had subsequently not been complied with. She stated that disclosure had been 'drip-fed' to the Respondent over many months, and that this was particularly so in relation to those allegations which had not been upheld. She described the approach to disclosure as shambolic.

36. Ms Newbegin also submitted that Mr Esney's investigation costs should not be awarded on the basis that they met the "shambles from start to finish" description from Laws LJ in Baxendale-Walker v The Law Society [2007] EWCA Civ 233. She submitted that there were unexplained delays in the progressing of the investigation from December 2015 onwards. She submitted that he had failed to adequately explain why he had made misleading comments to the Respondent about Ms X's recollection or why he had excluded from his meeting summary note the key feature which was that Ms X was not certain in her recollections. Ms Newbegin submitted that in these circumstances it would be inappropriate for his costs to be recovered.

37. With regards to counsel's fees, Ms Newbegin submitted that there must be a reduction to reflect the fact that seven out of nine allegations had been found not proved. Had only the two allegations that succeeded been brought then the hearing would have been significantly shorter and the witness evidence would have been much reduced. Ms Newbegin submitted that the Applicant should recover no costs, or alternatively a proportion to reflect allegations 1.1 and 1.2 only.

38. In reply Mr Wheeler submitted that the difficulty with the Rule 5 Statement had been greatly exaggerated. The case the Respondent had to answer was clear, and she had answered it. He also submitted that the criticism of Mr Esney's conduct was unfair and stated that the matters investigated by Mr Esney had been found proved. He also stated that Capsticks' costs related only to the proceedings and that the firm had not been involved with the prior investigatory work.

Application for the Respondent's own legal costs

39. Ms Newbegin submitted that the Tribunal should have regard to Baxendale-Walker when considering whether the Respondent should be awarded costs relating to her successful defence of seven of the nine allegations. That case made clear that such costs were appropriate where the application was "a shambles from start to finish". She submitted that the approach to disclosure, the changing nature of the case and the

what she regarded as ambiguities in the Rule 5 Statement meant this was an apt description. It was submitted that the Respondent's solicitors at the hearing, Leigh Day, had had to do investigatory work that the Applicant should have done, including obtaining and reviewing 43 files which related in particular to allegations 1.3 to 1.9. Leigh Day had been obliged to make urgent applications for disclosure and had effectively investigated and pieced together the background to allegations 1.3 to 1.9 in the light of the very substantial late disclosure. Ms Newbegin stated that the documents resulting from this work had been utilised throughout the hearing. She noted that the Respondent was funding her case privately. She submitted again that the hearing would have been significantly shorter if only the proved allegations had been brought and that the Respondent should be awarded some if not all of the costs associated with allegations 1.3 to 1.9. The total claimed was £273,887 including VAT.

40. In reply Mr Wheeler submitted that in Tribunal proceedings costs did not ordinarily follow the event and that where allegations were not proved there was usually no order as to costs. The exception was where the application was not properly brought or had been a shambles. The Respondent had argued after the Applicant's case that four of the allegations displayed no case to answer and this had been rejected by the Tribunal. Mr Wheeler submitted that the Applicant was obliged to act in the light of the report it had received from the Firm. Whilst allegations 1.3 to 1.9 had been found not proved, they were properly brought. For allegation 1.3, whilst there had been inconsistent oral evidence from witnesses about the role of the Firm's Accounts department, prior to the hearing the position had been clear. With respect to allegation 1.4, the Respondent had accepted she could have dealt with the shares sooner. With respect to allegation 1.5, the Respondent had not suggested that she expressly told the Firm's partners about the family connection to C & Co and in that context the allegation was properly brought. Regarding allegation 1.6, the Applicant had been notified of payments that the Firm could not explain and Mr Wheeler contended that the Respondent had given a series of different (including some incorrect) explanations in the light of which it was entirely legitimate to pursue the allegation. In relation to allegation 1.7 he submitted that it was clearly arguable that there was a conflict of interest as the Respondent had not passed on the valuation of the car with an MOT. He submitted that the Respondent's explanations about the final accounts in relation to allegation 1.9 were inconsistent with the documents and that, again, the application was properly brought. Mr Wheeler submitted that whilst the Tribunal would inevitably take its own view on reducing the costs awarded to the Applicant to reflect the allegations found not proved, there was no basis for the Respondent to recover her costs.

41. Mr Wheeler submitted that the points made on disclosure did not begin to approach the Baxendale-Walker threshold referred to above. He stated that the Applicant was dependent on the Firm for documentation, and had disclosed what had been provided. The Respondent had sought complete files, and the Applicant had passed on what it had received. He acknowledged that the Respondent's representatives had raised queries and that further disclosure had been provided. He submitted that ultimately the additional disclosure was provided following a limited further review in October. He submitted that the 43 files to which Ms Newbegin referred were what had been requested and that the time taken to review them was a consequences of the scope of the Respondent's request.

Application for the Respondent's costs in relation to the Applicant's video-evidence application

42. Ms Newbegin submitted that the Applicant's unsuccessful application for Ms X to give evidence was unreasonable. The witness was not vulnerable such that special measures were necessary, and the application had been rejected by the Tribunal on this basis. Ms Newbegin submitted that it should never have been brought and that the Respondent should be awarded the £5,439 incurred in contesting the application. The hearing at which the application was determined had lasted for a significant part of a day.

43. In reply Mr Wheeler submitted that such case management decisions, especially made at the behest of a witness, should not have costs consequences. He stated that the relevant hearing also dealt with other constructive case management matters, including extending the hearing from 5 days, without which it would have been part-heard. He stated that the Respondent's own unsuccessful application of no case to answer took a full day and she should bear the costs of it.

The Tribunal's Decisions on Costs

44. The Tribunal assessed the costs for the hearing. The Tribunal had heard the case and considered all of the evidence.

The Applicant's costs application

45. The application had been heavily contested by the Respondent. The vast majority of queries raised on her behalf with the Applicant had been reasonable and proportionate and the Tribunal accepted that material disclosed in response had been utilised. The volume of the disclosure was nevertheless not the Applicant's responsibility. The Tribunal had particular regard to the factors set out in paragraphs [69] and [70] of the Sanctions Guidance when considering the Applicant's application for costs:

> *"69. Where the respondent is partially successful in defending the allegations pursued by the applicant, in considering the respondent's liability for costs the Tribunal will have regard to the following factors:*
>
> - *the reasonableness of the applicant in pursuing an allegation on which it was unsuccessful.*
> - *the manner in which the applicant pursued the allegation on which it was unsuccessful and its case generally.*
> - *the reasonableness of the allegation, that is, was it reasonable for the applicant to pursue the allegation in all the circumstances.*
> - *the extra costs in terms of preparation for trial, witness statements and documents and so on, taken up by pursuing the allegation upon which the applicant was unsuccessful.*

- *the extra Tribunal time taken in considering the unsuccessful allegation.*

- *the extent to which the allegation was inter-related in terms of evidence and argument with those allegations in respect of which the applicant was successful.*

- *the extra costs borne by the respondent in defending an allegation which was not found to be proved. (Please also refer to paragraph 65.)*

70. The Tribunal may award costs against a respondent even if it makes no finding of misconduct, "if having regard to his conduct or to all the circumstances, or both, the Tribunal shall think fit" (Rule 18 of the Solicitors (Disciplinary Proceedings) Rules 2007)."

46. Seven of the nine allegations had failed, but the Respondent's unsuccessful application of no case to answer had taken an entire day and extended the hearing. Allegations 1.1 and 1.2 had required a significant amount of work and proportion of the hearing, and had been found proved. The failed allegations had been properly brought, raised serious issues and disclosed a case to answer. The delays to which Ms Newbegin referred and the fact that additional relevant disclosure had been requested and provided was relevant but did not wholly undermine the Applicant's application for costs or mean that the conduct in pursuing the unsuccessful allegations was unreasonable. In all the circumstances the Tribunal considered that a significant reduction of 50% of the costs claimed to reflect the fact that seven allegations had been found not proved was proportionate and fair in all of the circumstances. This equated to £52,954.98.

The Respondent's general costs application

47. The Tribunal reminded itself of the starting point for considering such applications summarised in paragraph [71] of the Sanctions Guidance:

"*71. The starting point adopted by the Tribunal in considering whether costs should be awarded against the regulator (where that is the applicant in a particular case) is:*

> *"In respect of costs, the exercise of its regulatory function placed the Law Society in a wholly different position from that of a party to ordinary civil litigation. Unless a complaint was improperly brought or, for example, had proceeded as a "shambles from start to finish", when the Law Society was discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs followed the event" (per Laws LJ, Baxendale-Walker v The Law Society [2007] EWCA Civ 233)."*

48. The fact that seven allegations had been found not proved, and the fact that reasonable disclosure requests had been made on behalf of the Respondent did not mean that the Applicant's conduct of the proceedings approached the threshold envisaged in Baxendale-Walker. The allegations were properly brought and a case to answer had been demonstrated when this had been challenged. The Tribunal had found the Respondent's version of events on allegations 1.1 and 1.2 lacked credibility and that she had dishonestly misled the Applicant. Persisting with her account, which the Tribunal had rejected, up to and during the hearing was conduct which had inevitably added to the costs incurred by both parties. Whilst a significant reduction in the Applicant's costs payable was appropriate in all the circumstances, the Tribunal did not consider that any award for costs for the Respondent was appropriate.

The Respondent's application costs relating to the video-evidence application

49. The Tribunal did not consider that the application for Ms X to give evidence by video-link was a standard case management matter. The application was made on very weak grounds with obviously inadequate supporting evidence, albeit at the witness' request. The Tribunal determined that the £5,439 incurred by the Respondent should be deducted from the 50% costs awarded to the Applicant.

50. The net effect of the two orders summarised above was that Tribunal ordered the Respondent to pay the Applicant's costs of and incidental to this application fixed in the sum of £47,515.98.

Statement of Full Order

51. The Tribunal ORDERED that the Respondent, VIDAL EULALIE MARTIN, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £47,515.98.

Dated this 13th day of February 2020
On behalf of the Tribunal

B. Forde
Chairman