SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11899-2018

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

DERWENT WILLIAM MOGER CAMPBELL Respondent

Before:

Mr E. Nally (in the chair)
Mr J. P. Davies
Dr S. Bown

Date of Hearing: 21-22 November 2019 and 20 January 2020

Appearances

Mr Geoffrey Williams QC, counsel, of Farrar's Building, Temple, London, EC4Y 7BD for the Applicant

Mr Graham Reid, counsel of RPC Solicitors, Tower Bridge House, St Katharine's Way, London, E1W 1AA

JUDGMENT

Allegations

1. The allegations against the Respondent, made by the Applicant were that:

1.1 The Respondent determined the fees to be charged in the matter of BD (deceased) on an improper basis which resulted in the estate being unreasonably and excessively overcharged and thereby breached Principles 2, 4, 5 and 6 of the SRA Principles 2011 ("the Principles").

1.2 Having determined the fee (£45,000) to be charged in the matter of BD (deceased) and causing or permitting this amount to be billed over the course of the administration, the Respondent allowed the estate to be unreasonably and excessively overcharged contrary to Principles 2, 4, 5 and 6 of the Principles

Documents

Applicant

- Application and Rule 5 Statement with exhibit "SM1" dated 26 November 2018
- Reply to Respondent's Answer dated 18 February 2019
- Reply to the Respondent's closing submissions dated 13 December 2019
- Extract from MN document
- Schedule of Costs dated 20 November 2019

Respondent

- Answer to the Rule 5 Statement dated 4 February 2019
- Respondent's statement dated 2 May 2019
- Updated Skeleton Argument dated 18 November 2019
- Closing Submissions dated 6 December 2019
- Letter from Rebecca Silcock to SRA dated 3 March 2017
- Part III of the Solicitors Act 1974
- The Solicitors' (Non-Contentious Business) Remuneration Order 2009
- Jemma Trust Company Ltd v Liptrott & Ors [2004] 1 WLR 646

Preliminary Matters

2 Amendment to Rule 5 Statement

2.1 Mr Reid raised his concerns regarding the Applicant's Rule 5 Statement. Mr Reid submitted that the Rule 5 Statement gave the misleading impression the Applicant's case was that the Respondent had deliberately and dishonestly overcharged BD's estate and that the Rule 5 Statement contained criticism and assertions that the Respondent had been aware of the overcharging.

2.2 Mr Reid said that the Rule 5 Statement contained phrases such as *"the Respondent would have known this fee was excessive and would result in overcharging"* (para. 32 of the Rule 5 Statement) and "*...the fee to be charged must be both fair and reasonable to the client and Solicitor. It is evident that a fee of £45,000 has no relation to the actual*

work undertaken to complete the administration of the Estate" and in Mr Richards' view it would have been apparent to the Respondent that this would be the case when he formulated the initial quote (para.42 of the Rule 5 Statement).

2.3 Mr Reid stated that it was not in dispute that the Respondent "determined" the fees, in the sense that he selected the figure of £45,000.00, excluding VAT and disbursements, as a fixed fee for the Probate Matter and that the key issue was whether the Respondent selected the £45,000 figure on an "improper basis" and not a dishonest one. That said, Mr Reid contended that use of the term 'improper basis' was not precise and was loose wording which could cover any number of forms of misconduct and could lead to uncertainty about what this case was about.

2.4 Mr Reid submitted that the Rule 5 Statement required amendment to dispel the misleading impression of deliberate overcharging by the Respondent.

2.5 Mr Williams for the Applicant stated that the Rule 5 Statement did not require amendment and that for some months prior to the substantive hearing the Respondent had been aware that the crux of the Applicant's case was that the Respondent determined the fees on the Probate Matter on an "improper basis" but not on a dishonest basis and that the Applicant was not putting its case as one of deliberate overcharging and dishonesty.

2.6 The improper basis was the Respondent's conclusion as to how much MN, the residuary beneficiary, would be prepared to pay to obtain the legacy in question. It was the Applicant's case that the Respondent relied upon the issue of the importance of the legacy to MN and in all the circumstances this was an improper basis of calculation of what had to be a fair and reasonable fee.

2.7 Mr Williams submitted that the Tribunal was an expert Tribunal and capable of disregarding particular sentences in the Rule 5 Statement and determining the case as it was put by the Applicant in court.

The Tribunal's Decision on the application to amend the Rule 5 Statement

2.8 Having listened very carefully to the submissions the Tribunal decided that it was not necessary for the Rule 5 Statement to be formally amended. The Tribunal was an expert Tribunal and was aware that it was not unusual for details which underpinned the matters set out in the Rule 5 Statement to change during the course of a hearing.

2.9 The Tribunal considered the Applicant was clear upon the basis upon which the Applicant brought its case namely that this was a case of mistaken overcharging rather than a conscious and deliberate overcharging on the Respondent's part.

3. Application for disclosure of documents

3.1 Mr Reid applied for the disclosure of material supplied to the Applicant by MN, the residuary beneficiary, on 4 August 2015 in which he made complaints against the firm regarding the way in which it had handled the affairs of BD, his aunt. The Respondent had applied on earlier occasions directly to the Applicant for disclosure but the Applicant had refused to disclose the material.

3.2 Mr Reid considered this material to be important as it had contributed to the commencement of the Applicant's investigation into the Respondent. Mr Reid submitted that the material had been viewed by the firm's COLP and it was fair that the Respondent also be permitted to consider the material.

3.3 The relevance of the material lay in the way in which the MN had put his complaint to the Applicant and how this may have affected the Applicant's investigation of the Respondent although Mr Reid acknowledged that the Applicant had chosen not pursue allegations of fraud made by MN against the Respondent.

3.4 Mr Reid submitted that the material was disclosable as it was the foundation of the investigation. Further, MN had been present at the meeting when the fixed fee was agreed but was not to be called as a witness by the Applicant.

3.5 Mr Williams for the Applicant submitted that the Applicant's case was not pleaded on the basis of the complaint made by MN but on the investigation by the Applicant of the client file from the firm.

3.6 Mr Williams said that the material which comprised of a letter and 148 pages of documents had not been disclosed hitherto because it had contained matters which were not probative to the allegations brought by the Applicant and were also highly prejudicial to the Respondent. However, Mr Williams said that the Applicant would disclose the material if so directed by the Tribunal.

The Tribunal's Decision on disclosure of documents

3.7 The Tribunal considered that in the interests of justice and a fair hearing the Respondent was entitled to know and have some clarity regarding the background of the case he faced and to reflect upon the relevance of the MN material.

3.8 The Tribunal directed the Applicant to locate and serve the MN material along with all attached exhibits upon the Respondent and then for the Applicant and Respondent to agree which parts of the material should be uploaded to the electronic hearing bundle if reliance was to be placed on such material by either side.

Factual Background

4. The Respondent was born in 1952 and he was admitted as a solicitor in England and Wales on 15 January 1982.

5. At all material times the Respondent was a Partner at Mogers Drewett LLP ("the firm") in Bath, Somerset. Since May 2016 the Respondent had been a Consultant at the firm. The Respondent holds a current Practising Certificate free from conditions.

6. On 4 August 2015, Mr MN sent a report to the SRA that raised a number of allegations against Mogers Drewett LLP relating to the way the firm had handled the affairs of his late aunt, BD, who had died on 18 February 2014. One of the allegations was that the firm's fees (£45,000 + VAT) were excessive.

7. The executors to BD's will were the Respondent and MB, who were both partners at the firm.

8. The Respondent had a good knowledge of BD's assets at the time of her death. The Respondent was also the firm's COLP and head of the private client team at the material time.

9. The Respondent and MB had also held power of attorney for BD during her lifetime. MB had little to no involvement in the matter beyond being named as an executor and attorney.

10. The Respondent knew the Deceased and was aware of her family affairs. He knew that the relationship between some family members (also beneficiaries) was dysfunctional.

11. When the BD died in February 2014, the Respondent commenced acting as executor of her Estate and the firm commenced acting on the probate. The Respondent was therefore the Firm's client on the Probate Matter.

12. The Firm's Mr Hill and Ms Harwood were the Matter Team. Mr Hill had overall responsibility for the work and for supervising it.

13. At the start of the Probate Matter, the Respondent selected £45,000.00 excluding VAT and disbursements, as the fixed fee for the work to be done. It was discussed and agreed with the Matter Team and the residuary beneficiary and it was supposed to be given legal effect in an Engagement Letter dated 30 April 2014.

14. The letter was prepared by the Matter Team and not by the Respondent.

15. The letter was defective in that it created a legal entitlement to charge on a conventional basis (i.e. the value of time), not a fixed fee. The Matter Team and the Respondent did not realise this mistake at the time.

16. In due course the Matter Team prepared bills and they billed in stages up to the fixed fee, believing the Firm was entitled to receive it. However, they were wrong in this: on the conventional basis put in place by the defective Engagement Letter, the value of the Firm's time was in the region of £15,000.00 excluding VAT and disbursements. Their mistake in this regard did not come to light until late 2016.

Witnesses

17. 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. 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.

18. The following gave evidence:

- David Hill – Solicitor at the firm
- Gemma Harwood – Para-legal fee earner at the firm

- Stephen Richards – Costs Lawyer
- The Respondent

Findings of Fact and Law

19. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

20. **Allegation 1.1: The Respondent determined the fees to be charged in the matter of BD (deceased) on an improper basis which resulted in the estate being unreasonably and excessively overcharged and thereby breached Principles 2, 4, 5 and 6 of the SRA Principles 2011**

The Applicant's Case

20.1 Several members of the firm's Private Client Team were involved in the administration of the BD estate. Gemma Harwood, a fee earner, assumed conduct in March 2014 "*...following instructions received by* [the Respondent]" and she was supervised by David Hill, an Associate.

20.2 Ms Harwood and Mr Hill held an initial meeting to consider the fees involved in the administration of the estate. They used a 'matrix' which set out the estate's assets and liabilities to determine the appropriate level of the fees and concluded that in light of the work required, the fees should be approximately £20,000 to £25,000. Ms Harwood stated that:

> "*This fee range* [£20,000 to £25,000] *was based on a similar size estate I had just dealt with, but we were also aware that I would need David's supervision of the file, together with his experience and it was agreed that this would be a fixed fee. I felt that due to the size and nature of the estate administration and the supervision I may need from David to complete the matter, that this was a fair estimate our costs*".

The "improper basis"

20.3 Subsequently Ms Harwood and Mr Hill met with the Respondent to discuss the matter and to decide internally between them upon the level of fees to be charged. Mr Hill confirmed that the Respondent "*...knew the family well and had knowledge of the main beneficiary MN.*"

20.4 Mr Hill recalled, in relation to their meeting with the Respondent, that "*During this meeting we discussed the size and nature of the estate, and the relevance to its value to the fee eventually charged. Derwent compared the proposed fee to the likely net inheritance* [MN] *would receive and felt that was a relevant factor to consider.*"

20.5 Ms Harwood stated, in relation to that same meeting, that [the Respondent] *also compared the proposed fee to the likely net inheritance [MN] would receive and felt that was a relevant factor to consider. I was uncomfortable with this comparison but*

also aware that [the Respondent] *knew the family well, whereas I had not had any previous dealing with them."*

20.6 In cross examination both Ms Harwood and Mr Hill gave further explanation regarding the nature of their discomfort. Gemma Harwood, explained that being "uncomfortable" involved her worrying about her ability to deal with an estate of this size and complexity as well as the prospect of warring family members.

20.7 Mr Hill was uncomfortable proposing a fee of that size without first discussing it with the Residuary Beneficiary, MN. Mr Hill said that he would have asserted himself if he had thought the proposed fixed fee of £45,000 was wrong, and he did not.

20.8 The Respondent and Mr Hill attended a meeting with MN on 10 April 2014 and MN agreed the fee of £45,000 as part of the discussions and Mr Hill confirmed that the Firm would send a letter of engagement to MN in due course.

20.9 When subsequent enquiries concerning this matter were raised by the Applicant with the firm a full file review and audit was undertaken by Rebecca Silcock, the firm's COLP at that date. These enquiries led to a detailed report being provided to the Applicant.

20.10 Rebecca Silcock recorded that Mr Hill informed her regarding fees in the BD matter, that:-

- *RS asked how the figure of £45,000 came about.*
- *Based on their experience of similar matters they came up with an estimate of £20-£25,000.*
- *They met with* [the Respondent], *the £45,000 figure came from* [the Respondent] *who would consider how much a beneficiary would be happy to pay. In this case how much would be comfortable to pay if he were to receive £1.1m.*
- *David said this approach was not shared by him and Gemma and they both felt uncomfortable as they both believed that between £20-£25,000 was a reasonable quote.*

20.11 Rebecca Silcock recorded, in a separate discussion with Ms Harwood covering the same issues, that:-

> "...*she* [Gemma Harwood] *thought £20-£25,000 was fair.*
>
> *that she [*Gemma Harwood] *and Dave* [presumed to refer to David Hill] *had a meeting discussing this* [fees] *with Derwent, just before or a few days before they were due to see the residuary beneficiary* [MN].
>
> *Gemma recalled Derwent's way of reaching the fee was to ask if you were about to inherit at £1.1 million how much would you pay to get it."*

> *"Gemma said that Derwent had been managing partner and was always her "Boss" who she held in high esteem and respect had been doing this work for ever. He was, in 2014, team leader, had always been her mentor and was COLP. She did not feel the need to talk to anyone else, she did not question what he proposed."*

20.12 Ms Silcock also sought Mr Hill and Ms Harwood's recollections concerning the significant uplift in billing on the BD matter i.e. the significant billing over and above the actual time that was recorded and work done on the matter. Ms Silcock noted that Mr Hill informed her:

> *"RS* [Rebecca Silcock] *asked if* [the Respondent] *had been aware of the uplift and the actual time recorded. Dave confirmed that he was from their monthly wip reports, billing margins and specifically praised Gemma for this uplift."*

20.13 Ms Harwood likewise informed Ms Silcock that:-

> *"Gemma also explained that the value billing on this file increased her figures and she was praised by* [the Respondent] *who oversaw her wip and profit billing figures."*

The "estate being unreasonably and excessively overcharged"

20.14 Stephen Richards, a costs lawyer, confirmed that he was instructed by the Applicant to assess the work undertaken by the firm in relation to the estate of BD in order to ascertain a fair and reasonable fee. His instructions included providing an opinion on what would have been a reasonable estimate of the costs at the time the fee (in the sum of £45,000.00) was determined by the Respondent and whether anything in the file would justify a significant uplift.

20.15 Mr Richards reported that:

> *"...the Estate comprised the Deceaseds residence and several bank and building society accounts and other substantial investments and was a relatively straightforward Estate to administer. This is evidenced by the file and the Subject Firm's Time recording ledger which clearly shows that the administration of the Deceased's Estate was conducted principally by lesser experienced fee earners, including a Paralegal and a Legal Assistant. The two Partners appointed Executors only became involved in the administration to deal with swearing of the Oath and consideration of completed documents as well as attendances with the Beneficiary. Therefore, I consider this was a straightforward Estate with only minor complications including the issues raised by the Beneficiary in respect of the Deceaseds residence prior to her death and the appointment of two Partners in the Subject Firm instead of himself as Executors".*

20.16 Mr Richards was critical of the failure to provide MN with "...the provision of requisite costs information" as the matter progressed.

20.17 In relation to the type of fee charged in the matter Mr Richards stated that:

> *"...the figure of £45,000 was an estimate of the likely fees to be incurred and not a quote for the Subject Firm dealing with and completing the administration of the Estate. Even if you took the view that the estimate of £45,000 was in fact a quote as opposed to an estimate of the likely costs to be incurred, the fee charged must be both fair and reasonable to the Client and the Solicitor. The Subject Firm's own Billing guide detailing all the work to be undertaken and the time engaged on this administration shows a total fee on a time costing of £18,389 (excluding VAT). In my opinion a fee of £45,000, although estimated at the outset, should not have been charged as this is not a fair representation of the work undertaken when calculated on a time spent basis at appropriate hourly rates."*

20.18 In relation to what would have been a reasonable estimate to provide MN with at the commencement of the matter it was Mr Richard's opinion that *"...it is very rare for solicitors to provide actual quotes for completing an administration of an Estate."*

20.19 Mr Richards stated that unforeseen complications on probate matters were commonplace and that in light of this it was better to provide a *"qualified estimate"*. This is an estimate with a caveat that the costs may increase commensurate to the complexity and work increasing beyond that which was anticipated at the outset.

20.20 In this case Mr Richards concluded:

> *"The Subject Firm would have had a very good understanding of the matter and therefore a good understanding of the likely costs to be incurred for completing this Estate administration when providing their estimate as this was given at the same time as Grant of Probate was applied for. The estimate of £45,000 was substantially in excess of the costs likely to be incurred at that point... in my opinion a more realistic estimate would have been £20,000".*

20.21 Mr Richard's conclusion was that the initial estimate proposed at the outset by Mr Hill and Ms Harwood was appropriate but that the Respondent's approach of hypothesising *"if you were about to inherit at £1.1 million how much would you pay to get it"* had caused a fee to be quoted to MN that was *"...substantially in excess of the costs likely to be incurred..."*.

20.22 In assessing the fees that were ultimately charged in the matter Mr Richards stated that:

> *"Even if the supposed quote was not a qualified estimate the fee to be charged must be both fair and reasonable to the client and Solicitor. It is evident that a fee of £45,000 has no relation to the actual work undertaken to complete the administration of the Estate."*

> *"Based on the Solicitors' file submitted and the costs information provided, I consider that a fair and reasonable fee for the administration of the Deceased's Estate would be £15,175 (excluding VAT and disbursements)."*

20.23 It was put Mr Richards in cross-examination on the Respondent's behalf that he was not an expert witness and that he had no proper understanding of the duties of an expert witness (e.g. the primary duty of an expert is to the court). Under cross-examination, Mr Richards was unable to explain the legal basis for his assertion that solicitors' costs needed to be fair and reasonable and appeared not be aware of, or could not remember The Solicitors' (Non-Contentious Business) Remuneration Order 2009 which was not mentioned in his 'informal assessment' document.

20.24 Mr Richards was also cross-examined on his assertion that a realistic estimate of fees as at April 2014 would have been £20,000. It was suggested by Mr Reid on the Respondent's behalf that this figure was based on a faulty approach.

20.25 Mr Richards said in his informal assessment that £20,000 was based on the first invoice for £10,000, rendered halfway through the administration and his approach was to double the amount, to reflect the future work. However, it emerged during cross-examination that he said this in his assessment document without checking how much time had in fact been expended on the matter as at 29 April 2014, without taking into account that the administration was to continue until April 2015 and without realising that the April 2014 invoice had not been calculated on a time-value basis, as the Matter Team were billing to a fixed fee.

20.26 The Applicant submitted that with respect to Allegation 1.1 the Respondent's conduct amounted to breaches of the following:

Principle 2 of the Principles

20.27 The Applicant submitted that the evidence of Mr Hill and Ms Harwood confirmed the position that the Respondent decided on the fee to be charged in the BD matter based not on the time and resources needed by the Firm to undertake the work in line with his professional and fiduciary duties as a solicitor, but on the size of the potential legacy and how much the residual beneficiary, MN, would be willing to pay in order to inherit it. The Respondent had overruled the views of Mr Hill and Mr Harwood.

20.28 The Applicant submitted that this was inappropriate and represented an improper basis on which a fee calculation could be made and that by doing so and overcharging the estate the Respondent had failed to act with integrity i.e. with moral soundness, rectitude and steady adherence to an ethical code.

20.29 In Wingate v Solicitors Regulation Authority v Malins [2018] EWCA Civ 366, it was said that integrity connotes adherence to the ethical standards of one's own profession and that this involves more than mere honesty. The duty to act with integrity applies not only to what solicitors say but also what they do.

20.30 In the Respondent's case acting with integrity would have required the Respondent to reach a fee calculation on a fair and reasonable basis and by not doing so the Respondent had breached Principle 2 of the Principles.

Principle 4 of the Principles

20.31 A solicitor must act in the best interests of his client and by arriving at a fee in an inappropriate way and improper basis resulting in overcharging was not acting in the best interests of the client and that by doing so he had breached Principle 4 of the Principles.

Principle 5 of the Principles

20.32 A solicitor must provide a proper service to their clients and in the circumstances set out in this case the Applicant submitted that it was evident that the Respondent had not provided a proper service to his client and that he had breached Principle 5 of the Principles.

Principle 6 of the Principles

20.33 A solicitor must maintain the trust placed in them by the public and in the provision of legal services. The improper basis upon which the Respondent determined the fees to be charged in the matter of BD's estate and the result that BD's estate was unreasonably and excessively charged showed that the Respondent had breached Principle 6 of the Principles and had behaved in a manner which would not maintain the trust of the public in him and in the provision of legal services.

The Respondent's Case

20.34 The Respondent accepted that he acted as the executor of the BD's estate at the material time. He was a partner in the Firm. He considered that a fixed fee of £45,000.00 (plus VAT and disbursements) was an appropriate sum for the Firm to charge for the work involved. This was a "fair and reasonable" amount to have proposed, within the meaning of Rule 3 of The Solicitors' (Non-Contentious Business) Remuneration Order 2009 and, even if it was not, he had good reason to consider it to be so, and acted properly in proposing it.

20.35 The £45,000.00 was agreed by the relevant individuals, including the Matter Team and the Residuary Beneficiary, but by mistake this agreement was not reflected in the drafting of the Firm's Engagement Letter.

20.36 All relevant individuals involved on the BD matter thereafter proceeded on the mistaken assumption that the Firm was legally entitled to charge a fixed fee of £45,000.00 and eleven invoices were prepared, and paid from estate funds, reflecting that fixed fee. The first bill was raised on 29 April 2014 (the day before the client care letter was sent) for £10,000 and the next ten bills were raised on roughly a monthly basis, with the final bill being raised on 10 April 2015. The eleven invoices were prepared by Mr Hill and Ms Harwood and the Respondent stated that he played no role in their preparation.

20.37 The Respondent accepted that the Firm had in fact not been entitled to charge a fixed fee: the Engagement Letter instead created a legal entitlement to charge for the value of the Firm's fee earners' time in the usual way. In consequence, the Firm ought to have

submitted invoices consistent with that entitlement. On the time-value basis the Firm should have charged a lesser amount.

20.38 Whilst the Respondent proposed the fixed fee, and acted properly in doing so, he did not have overall day to day responsibility for the conduct of the Probate Matter. In fact he was one of the Firm's two clients on the BD matter. He did not prepare the Engagement Letter, he did not appreciate it had been mistakenly drafted, he did not prepare the eleven invoices, and he did not realise that the Firm was only entitled to charge for the value of its time. Throughout the Probate Matter he believed (and reasonably believed) that a fixed fee had been agreed, and that the invoices reflected that entitlement to charge a fixed fee.

20.39 At the time of the Probate Matter the Respondent said the Firm fairly routinely proposed and agreed fixed fees for probate work and he estimated that at least a dozen such fixed fees were agreed by the Firm for probate matters each year and his view the key features of a fixed fee were that it was transparent and that the price was fixed and that they provided a fairer approach to risk-sharing between beneficiaries.

20.40 In probate cases it was usually the case that beneficiaries other than the residuary beneficiary were paid first from estate funds and the costs of administering the estate were paid next with the remainder going to the residuary beneficiary. This meant that the residuary beneficiary would usually experience the impact of unusually high administration costs disproportionately compared to other beneficiaries.

20.41 It followed that if a firm agreed to charge on a time-value basis, and one of the beneficiaries required the firm to undertake a great deal of enquiry and effort, that cost may fall to be borne by the residuary beneficiary. On the other hand, if the firm agreed in advance a fixed fee then it provided a better sharing of financial risk between beneficiaries.

20.42 The Respondent anticipated that the Estate would have to bear significant costs in dealing with MN generally, and in respect of MN's relationship and concerns about his cousin PN and on this basis the Respondent thought a fixed fee would be desirable and that it would give all concerned parties certainty as to the amount which was to be charged.

20.43 In around early April 2014 the Respondent attended an informal internal meeting with Mr Hill and Ms Harwood, at which they discussed the subject of fees for the BD Matter.

20.44 The Respondent recalled that one of the Matter Team suggested that the fee should be between £20,000.00 and £25,000.00.

20.45 The Respondent's experience of Mr Hill's approach to pricing probate work was that he generally did so by reference to the broad nature of the assets in the estate, he made assumptions about the nature of the work needed to with reference to those assets (e.g. the number of attendances on others, and the numbers of letters to be written), and these assumptions and rules of thumb would provide the ballpark for the fee proposal.

20.46 The Respondent did not agree with the proposed £20,000.00 to £25,000.00 and said as much to the Matter Team. Based on his knowledge of the wider family background to BD's estate the Respondent raised the issue of the personality of MN and the fact that the Respondent expected him and the administration to be very difficult. The Respondent also mentioned to the Matter Team the value of the Estate and asked them to think about value to the client.

20.47 The Respondent accepted that he may have said that the Matter Team should ask themselves how much they would be willing to pay to receive a substantial legacy under an estate worth a certain amount and the Respondent's reason for saying this was because he routinely saw discussions with fee-earners about pricing work as training opportunities.

20.48 The Respondent was keen to get fee-earners to challenge their own assumptions and he tried to get them to ask *"What if...?"*, and *"Why is this relevant?"* with reference to their approach to charging for work. Whilst the Firm undoubtedly did work on a time-value basis, the Respondent tended to see this as the *"salvation of the inefficient"*, a phrase which he used on many occasions with the Matter Team and others. The Respondent's experience was that clients increasingly preferred the predictability of fixed fee arrangements over hourly rates, especially for work such as conveyancing, will-drafting and probate.

20.49 One aspect of this approach was for the Respondent to ask fee-earners to look at the *'value'* of the proposed work from the perspective of the client.

20.50 The Respondent considered that the value of an estate and, by extension, the keenness of beneficiaries to receive their legacies under that estate, were also proper factors to take into account when a solicitor proposed a fixed fee for a probate matter and it was the Respondent's understanding that solicitors were entitled to charge for probate work on the basis of a percentage of the value of the estate (and they could also charge for the value of their time and separately charge a percentage of estate value). This indicated to the Respondent that the issue of 'client value', here measured by reference to the value of the estate, was a relevant factor to take into account when proposing a fee for probate work.

20.51 The Respondent was also aware that there were rules governing costs on solicitors' non-contentious business, that those rules required solicitors' charges to be fair and reasonable in all the circumstances of the matter, and that pursuant to those rules a solicitor could properly have regard to a range of factors identified in the rules including the value of the property involved and the importance of the matter to the client.

20.52 The Respondent said he had an approximate idea of the size of the BD estate and this was in the region of £1.2m and in proposing the fixed fee of £45,000.00 he took into account the Matter Team's suggestion that the fee should be between £20,000.00 and £25,000.00. The Respondent said that he did not ignore this suggestion or give it no weight and he denied that he had put the Matter Team under any pressure during his meeting with them. He did not recall either Mr Hill or Ms Harwood showing signs of particular discomfort about his proposed fixed fee at the time or during the course of the Probate Matter.

20.53 The Respondent said he had experience of probate matters and had practised in the area of probate work for over 12 years. At the time of the BD matter the Respondent was the head of the Firm's probate practice and he had extensive experience of how probate matters could become difficult and time-consuming and had *"experience of families at war"* and when considering the position and proposing the £45,000.00 figure he had regard to this experience.

20.54 Whilst the Respondent had not anticipated that the work on the BD matter would necessarily be legally complex, e.g. giving rise to tricky points of law the Respondent did anticipate that it would be complex in a different sense, namely that MN would be a very demanding and difficult individual to deal with. Although MN was not going to be the client on the Matter (the executors were the clients of the Firm) his capacity as residuary beneficiary and his opinions and requests were likely to be significant and difficult, if not impossible, for the Matter Team to ignore. In some respects therefore MN was like a client in that his requirements could significantly affect the scope of the work to be undertaken.

20.55 On 10 April 2014 there was a meeting with the Matter Team and MN, at which the Respondent was also present. Mr Hill led the meeting on 10 April 2014 and the proposed fixed fee of £45,000.00 was clearly put to MN.

20.56 At the meeting MN did not discuss, argue or propose an alternative to the fixed fee.

20.57 Also at the meeting on 10 April 2014 Mr Hill confirmed that he would send a Letter of Engagement to MN and in due course the letter dated 30 April 2014, was prepared by him and sent to MN.

20.58 The Engagement Letter was based on the Firm's standard form engagement letter template. The template for the Engagement Letter was designed by the Respondent to simplify the process for probate matters and to provide clear, unambiguous detail about the extent of the work/services to be provided, by whom and at what cost.

20.59 The template contemplated alternative methods of charging (fixed fee or time based) and needed to be tailored to the relevant agreement. The fee-earner preparing the engagement letter was expected to modify it to reflect whether or not a fixed fee or a time-value basis for charges had been agreed with the client and to reflect the scope of work covered by the agreed fee agreement.

20.60 At Schedule 2 of the Engagement Letter Mr Hill set out the basis for the Firm's Charges. The first paragraph under the heading *"Basis of Charge"* stated:

> *"Our Fees in connection with the administration of estate of the late* [BD] *will be £45,000 plus VAT and disbursements making a total of £54,000 plus disbursements."*

20.61 The next paragraph expressed Mr Hill's hope *"...that this will include all work necessary to complete the transaction and all fee earners working in this matter will charge their time spent on the matter at the rates given below..."* Mr Hill then went on to refer to *"My estimate of the likely costs"*, under the heading "*Likely Costs"*.

20.62 The Respondent had no recollection of reviewing the Engagement Letter in any detail at the time but accepted that he had signed it and that the Engagement Letter had not clearly referred to a fixed fee of £45,000.00.

20.63 The Respondent said that as a matter of practice, signing post involved anything from a dozen letters to many more, sometimes from other teams in the Firm, as well as cheque requests and endorsing copied documents and that the practical way to get through such bulk was to make the assumption that the letter produced reflected the agreement.

20.64 The Respondent said that he would have considered the Engagement Letter, its content and signing to be a routine matter and he would have expected Mr Hill to have prepared an engagement letter that accurately reflected the arrangements that had been discussed and agreed on 10 April 2014. Mr Hill, an experienced probate practitioner, was present at that meeting and would have been well aware of the issues and the Respondent had no reason to expect him to make an error in the preparation of the Engagement Letter.

20.65 The Respondent was unaware of the defects in the Engagement Letter until November 2016, when the issue was first was brought to his attention (and thus after the end of the BD Matter).

20.66 At all times during the BD Matter the Respondent had believed that a fixed fee had been agreed and put into contractual effect by the Engagement Letter and therefore the Firm was entitled to charge a fixed fee of £45,000.00 plus VAT and disbursements and if the defects in the Engagement Letter had been brought to the Respondent's attention at around the time it was circulated, then he would have asked Mr Hill to correct its content so as properly to reflect the arrangements discussed and agreed on 10 April 2014 and so as to achieve the fixed fee arrangement.

20.67 Whilst the Respondent did not accept that the £45,000.00 represented *"excessive and unreasonable overcharging"* he accepted that by the time of billing, the Firm ought to have charged in a manner consistent with its legal entitlements arising under the Engagement Letter, namely on the time-value basis and to that extent, the Respondent accepted that the Firm wrongly and mistakenly submitted bills in the mistaken belief a fixed fee of £45,000.00 had been agreed. The Respondent also accepted that the effect of this was to result in the Estate being overcharged.

20.68 In his closing observations *(which the Tribunal permitted to be in writing)* Mr Reid made the following points with respect to Allegation 1.1:

- This case concerned an incident of accidental overcharging.

- Solicitors should not overcharge, accidentally or otherwise. The Respondent had never suggested to the contrary and consistently been open and remorseful about the fact that he did not notice the defects in the Engagement Letter, leading to the Firm charging more than it was entitled to on the Probate Matter.

- There is a well-known strand of case-law that strongly indicates that a negligence is not automatically professional misconduct. Finally, there is a well-known strand of case law indicating that not all breaches of the SRA Code of Conduct 2011 will automatically amount to professional misconduct for the purposes of the Tribunal.

- The Respondent's selection of the £45,000.00 fee was properly undertaken. He engaged with the issues. He exercised his professional judgment and there were good reasons for the Respondent to have thought that MN, the residuary beneficiary would cause a great deal of difficulty and to anticipate that a fee higher than the one suggested by the 'matrix' would be needed and he discussed the fee with the Matter Team.

- The Respondent took proper matters into account and did not take improper matters into account. He did not ignore the Matter Team's views.

- The Respondent could properly take into account the value of the Estate and the importance of the matter to the Residuary Beneficiary.

- With respect to the above the Applicant had failed to prove matters to the contrary.

- The £45,000.00 fee was a fair and reasonable one for the Respondent to have proposed, by reference to the applicable legal principles under Part III of the Solicitors Act 1974. The Solicitors' (Non-Contentious Business) Remuneration Order 2009 (the "2009 Order"). The explanatory memorandum to the 2009 Order sets out the principles that may be considered when assessing fair and reasonable costs for non-contentious business.

- The position in summary is that a solicitor can charge a fixed fee for the work envisaged on the Probate Matter, the client can challenge that fee on grounds it is unfair and unreasonable, and the 2009 Order provides principles to guide the court when deciding on assessment if a charge is unfair or unreasonable.

- The Applicant had not argued a case concerning how the 2009 Order should apply.

- Mr Richards was an unreliable witness whose opinion evidence should be ignored.

- There was no issue with Mr Richards' costing of the matter file in which he added up the fee-earner hours, comparing the hours with the file, and multiplying by the rates given in the defective Engagement Letter resulting in a total of £15,176.00, before VAT and disbursements. However, Mr Reid submitted that this was not a valid basis for comparison with the £45,000.00 for the following reasons:

    - First, the £45,000.00 was a fixed fee whereas the £15,176.00 was calculated on the conventional basis as the product of hours and rates. It was not a like-for-like comparison.

    - Second, the proper comparison was with the range of fixed fees that could have been properly put forward by the Respondent at the time in April 2014 and it was fanciful to suggest there could be only one 'proper' fixed fee.

    - Third, a fixed fee should be judged primarily by the factors and circumstances existing at the time it is fixed. If it could be adjusted up or down by reference to later events, this would undermine the certainty that a fixed fee creates.

- Fourth, if the comparison is to be between £45,000.00 and what the Firm could have charged on a conventional basis, then one must take into account that the Firm could have put in place an Engagement Letter charging on a conventional (time value) basis with the same rates as appeared in the defective one and the Firm could have charged an additional value element.

- The decision in Jemma Trust Company Ltd v Liptrott & Ors [2004] 1 WLR 646 (paragraph 31) suggested that 1.5% of estate value can be charged as a value element, in addition to time costs, for estate value up to £1m, and 0.5% for the £4m band thereafter. The reasoning also demonstrated that inflation could be taken into account so as to adjust such figures. Inflation from 2003, when Jemma Trust was decided, to 2014, had been 41% and this suggested a value element, inflation-adjusted, of £22,560.15. This could be added to £15,176.00, giving a total of £37,736.00 excluding VAT and disbursements which was considerably closer to £45,000.00, albeit the comparison basis was still incorrect as it compared a fixed fee with a time-value one.

20.69 In his Reply *(which the Tribunal also permitted to be writing)* Mr Williams made the following points on behalf of the Applicant:

- Dishonesty was never alleged by the Applicant in these proceedings. Dishonesty was not a relevant issue for the Tribunal.

- Negligence can amount to professional misconduct. Errors of judgment do not necessarily amount to professional misconduct so long as the solicitor has properly addressed his mind to the issues before the error was made.

- There was a good deal of evidence with respect to the basis upon which the Respondent determined the fee that was charged.

- Fixed fees, as with other fees must be fair and reasonable.

- The Respondent and his then partner, MB, were clients of the Firm in this case. MN was not a client.

- The fundamental requirement of the 2009 Order is that costs must be fair and reasonable having regard to all the circumstances of the case including the complexity of the matter and the time spent on the business.

- The case against the Respondent on Allegation 1.1 was that an approach of how much a beneficiary would be prepared to pay to receive his legacy is improper.

- The Applicant put its case on the basis that costs of £45,000.00 were excessive and unreasonable. Allegation 1.1 was put on the basis of the Respondent's approach when arriving at this figure.

- No fixed fee was ever put in place in this case and the conventional basis of charging was the only possible basis upon which the Firm could properly charge fees.

The Tribunal's Findings

20.70 The Tribunal carefully considered the evidence presented by the parties in the hearing and the matters raised in the written closing submissions.

20.71 The Tribunal considered that the Respondent had determined the fee to be set at £45,000.00 and that this fee had been intended to be an agreed fixed fee by the Matter Team and the Residuary Beneficiary, but by mistake this agreement was not reflected in the drafting of the Firm's Engagement Letter. It could not be said at the relevant time that proposing and setting a fixed fee would necessarily be improper of itself. The issue needed to be judged on the basis of the context at the time and the process of moderation that occurred when the fixed fee was settled upon during the meeting with the Matter Team, and subsequently discussed at the meeting with MN

20.72 The Tribunal accepted that all relevant individuals involved on the BD matter thereafter proceeded on the mistaken assumption that the Firm was legally entitled to charge a fixed fee of £45,000.00 but that due to muddled drafting of the Engagement Letter the Firm had in fact not been entitled to charge a fixed fee but on a time-value basis instead.

20.73 The Tribunal noted that the Respondent did not have overall day to day responsibility for the conduct of the matter (he was one of the Firm's two clients on the BD matter) and he had not prepared the Engagement Letter and he did not appreciate it had been mistakenly drafted.

20.74 Within this factual context the Tribunal did not consider that the Applicant had proved to the requisite standard, namely beyond reasonable doubt, that the Respondent had determined the fees to be charged in the matter of BD on an improper basis and that as a result the estate had been unreasonably and excessively overcharged.

20.75 The Tribunal considered that whilst the Respondent's question to Mr Hill and Ms Harwood which had been along the lines of: '*if you were about to inherit at £1.1 million how much would you pay to get it'* had been phrased inelegantly it had not been the sole basis upon which the level of the fee was determined. Viewed in the context of the evidence which the Tribunal heard it was a phrase used during a more nuanced discussion at which the proposed fee was moderated and settled upon by the Respondent with the Matter Team as analysed below.

20.76 The Respondent's question to Mr Hill and Ms Harwood had been an attempt by the Respondent to get more junior fee earners to challenge their own assumptions and to consider wider issues including the at the 'value' of the proposed work from the perspective of the client.

20.77 Mr Hill and Ms Harwood had reached their proposed fee of £20,000.00 to £25,000.00 by recourse to their matrix however it was clear they had been open to a moderated discussion with the Respondent who had questioned this figure.

20.78 The Respondent brought to their discussion his greater experience and his knowledge of the wider family background to BD's estate. It was appropriate and reasonable for the Respondent to have raised the issue of the personality of MN and the fact that the Respondent expected him and the administration to be very difficult. The Respondent

anticipated that the BD estate would have to bear significant costs in dealing with MN generally, and in respect of MN's relationship and concerns about his cousin PN and on this basis the Respondent thought a fixed fee would be desirable because it would give all concerned parties certainty as to the amount which was to be charged.

20.79 The different factors were weighed up the Respondent, Mr Hill and Ms Harwood, collectively, and the Tribunal was not persuaded, having heard their oral evidence that either Mr Hill or Ms Harwood had been overruled by the Respondent's will in this matter.

20.80 The Tribunal considered that the Respondent's selection of the £45,000.00 fee had been properly undertaken, and, given the size of the BD estate and the circumstances as the Respondent genuinely perceived and apprehended them to be, it had been fair and reasonable one.

20.81 There had been no attempt to hide the fee from MN who had been present at meeting on 10 April 2014 and the fee had been confirmed to MN in the Engagement Letter albeit the letter had been defective.

20.82 The Tribunal considered that this had been a case of accidental overcharging and observed that once the Firm became aware of the mistake the BD estate was refunded with the appropriate amount.

20.83 The Tribunal found that the factual basis of Allegation 1.1 had not been proved to the requisite standard, namely beyond reasonable doubt, and so it did not as a consequence consider there had been any breaches of the Principles as pleaded.

21. **Allegation 1.2: Having determined the fee (£45,000.00) to be charged in the matter of BD (deceased) and causing or permitting this amount to be billed over the course of the administration, the Respondent allowed the estate to be unreasonably and excessively overcharged contrary to Principles 2, 4, 5 and 6 of the SRA Principles 2011.**

The Applicant's Case

21.1 Contrary to the narrative set out in the Rule 5 Statement the Applicant did not pursue this allegation on the basis that the Respondent would have known that the fee of £45,000.00 was excessive and thereby result in overcharging but pursued the allegation on the basis that his culpability lay in signing the defective Engagement Letter which did not set out that this was a fixed fee matter but was in fact being charged on a time –value basis.

21.2 Having signed the letter it followed from the evidence set out in Allegation 1.1 that the costs taken were neither fair nor reasonable and that there was never any attempt to charge fees on the basis of the value of time and this was apparent on the face of the bills. The time recording log showed that the bills had no relation to the work being carried.

21.3 The Applicant submitted that once the fixed fee had been approved, the Respondent, in his view, considered that it conferred discretion to bill freely regardless of the actual work being done and that it would be "*bad business*" to vary a fee once agreed and lower it should the case not prove as complex as he originally envisaged.

21.4 The Applicant submitted that the Respondent's comments signified a lack of insight, with little or no regard for his professional and fiduciary duties to act in the best interest of his client and keep fees under review to ensure they were commensurate with the actual work undertaken.

21.5 Furthermore, when it became clear that these issues of complexity would not arise and would not require any further work during the estate administration, the Respondent caused and permitted the billing up to the full extent quoted (£45,000.00), when this did not comply with the requirement to ensure that costs were fair and reasonable having regard to all the circumstances of the case.

21.6 The Applicant submitted that with respect to Allegation 1.2 the Respondent's conduct amounted to breaches of the following:

Principle 2 of the Principles

21.7 By determining the fee in the BD matter at the level of £45,000.00 and causing or permitting this to be billed during the administration, the Respondent allowed the BD estate to be unreasonably and excessively overcharged and he thereby failed to act with integrity contrary to Principle 2 of the Principles.

Principle 4 of the Principles

21.8 Having arrived at a fee in an inappropriate way and improper basis and permitting the overcharging the Respondent had not acted in the best interests of the client and he had breached Principle 4 of the Principles.

Principle 5 of the Principles

21.9 The Applicant submitted that in the circumstances set out in this case it was evident that the Respondent had not provided a proper service to his client and that he had breached Principle 5 of the Principles.

Principle 6 of the Principles

21.10 A solicitor must maintain the trust placed in them by the public and in the provision of legal services. In permitting BD's estate to be unreasonably and excessively charged this showed that the Respondent had behaved in a manner which would not maintain the trust of the public in him and in the provision of legal services contrary to Principle 6 of the Principles.

The Respondent's Case

21.11 The Respondent accepted that the BD estate was overcharged on the basis that whilst a fixed fee of £45,000.00 had been contemplated and agreed at the meeting with MN on

10 April 2014 the defective Engagement Letter gave only an entitlement to charge on a conventional, time-value basis. Neither the Respondent nor Mr Hill realised the error at the time.

21.12 In his closing observations Mr Reid submitted:

- The Applicant had not pursued the allegation that the Respondent had been aware of the overcharging.
- The Respondent did not accept that the £45,000.00 was unfair and unreasonable.
- With respect to the Engagement Letter and its consequences. The Respondent accepted that the Engagement Letter was defective for which he apologised.
- That the Respondent's failure to spot defects in the Engagement Letter was not sufficient for a finding of professional misconduct. Neither the Firm nor Mr Hill had received any sanction for the same omission to prepare an effective Engagement Letter.
- The allegation that because the Respondent determined the fixed fee of £45,000.00 and so allowed the BD estate to be overcharged was a misconceived allegation. The only effective cause of the estate being overcharged was Mr Hill preparing a faulty Engagement Letter, leading to the Firm charging more than it was legally entitled to do. Mr Hill had had responsibility for drafting the letter, and for the overall conduct of the Matter. The Respondent failed to notice the defects and both were at fault.
- This was a minor fault and one that the Applicant did not consider sufficient to visit as an adverse consequence or sanction on the Firm or the Matter Team.

21.13 In his written reply Mr Williams Q.C. made the following point on behalf of the Applicant:

- The Tribunal would need to consider the evidence with respect to the Engagement Letter. The letter was created from a template created by the Respondent. The letter was addressed to the Respondent and MB and they both signed it. A decision on culpability would need to be made.

The Tribunal's Findings

21.14 The Tribunal carefully considered the evidence presented by the parties in the hearing and the matters raised in the written closing submissions.

21.15 The Tribunal found that on the basis of the Respondent's continuing role as solicitor/executor he did cause or permit the fee of £45,000.00 to be billed over the course of his administration, however, the Tribunal was not satisfied to the requisite standard that the BD estate had been unreasonably and excessively overcharged.

21.16 The Tribunal accepted that the Respondent had set the fee of £45,000.00 on the basis of his professional judgment and experience and by using his knowledge of the circumstances in this case as the Respondent genuinely perceived and apprehended them to be. The Respondent had discussed his reasoning with his colleagues and the course of action was agreed.

21.17 In the event, the administration of the BD estate proved to be less problematic than the Respondent had envisaged. The Tribunal considered that it was not fair and reasonable to criticise the Respondent's approach retrospectively and with the benefit of hindsight.

21.18 The Tribunal noted that the Respondent accepted that the Engagement Letter had been defective and that he had apologised for not spotting the mistake sooner. The Tribunal considered that this mistake was not sufficient for a finding of misconduct on the part of the Respondent.

21.19 The Tribunal found that the factual basis of Allegation 1.2 had not been proved to the requisite standard, namely beyond reasonable doubt, and so as a consequence it did not consider there had been any breaches of the Principles as pleaded.

Costs

22. The Applicant had been unsuccessful with respect to Allegations 1.1 and 1.2 and Mr Williams made no application for the Applicant's costs.

23. Mr Reid applied for the Respondent's costs to be met by the Applicant. Mr Reid said that it was right for the Tribunal to order the payment of the Respondent's costs on the basis of the principle set out in Baxendale-Walker v Law Society [2007] EWCA Civ 233 at para 39:

> *"Unless the complaint is improperly brought, or, for example, proceeds as it did in Gorlov, as a "shambles from start to finish", when the Law Society is 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 follow the event."*

24. Mr Reid submitted that the Applicant's case had been a 'shambles' for the following reasons:

- There was considerable delay in this case and the Applicant had taken a year to commence its investigation following the MN's complaint in April 2015.

- During the course of the investigation the Applicant failed to meet with the Respondent and interview him. If the Respondent had been interviewed he would have given an account which may have negated the need for any proceedings.

- When the investigation ended the Applicant sent the Respondent an Explanation With Warning Letter ("EWW Letter") on 2 June 2017 which alleged knowing overcharging and dishonesty on the Respondent's part.

- Such serious allegations required the Respondent to take the necessary steps to defend himself vigorously and he gave a detailed and prompt response in which he set out the account he maintained throughout the proceedings and from which he did not diverge namely that a fixed fee was agreed but that the Engagement Letter did not reflect that fact. Nonetheless, he believed that a fixed price contract had been agreed.

- The later Rule 5 Statement removed dishonesty from the allegations and pursued, amongst other things, lack of integrity, on the basis that the Respondent must have known he was overcharging the BD estate.

- The Applicant consistently refused to amend the Rule 5 Statement even when it appeared to accept that this was not a case where the Respondent knowingly overcharged the BD estate and where there was an obvious divergence between the case set out in the Rule 5 Statement and the way the Applicant would eventually put its case at the hearing.

- The Rule 5 Statement was unclear and it referred to the £45,000.00 as an "agreed" fee, but also that it was "purportedly" agreed; and that this figure was a quote, and that it was a "qualified estimate". It was a misuse of language to talk of the £45,000.00 as being a "qualified estimate". The phrase came from Mr Richards and he was wrong to have used it. No-one intended the £45,000.00 to be an estimate. They intended it to be a fixed fee.

- Mr Richards was not an expert but he was described as an expert in the Rule 5 Statement. Mr Richards's evidence had been of no utility and he had failed to appreciate what the parties had set out to achieve.

- Throughout the course of the long proceedings the Applicant had failed to engage with the real issues in the case.

25. In response Mr Williams made the following submissions countering the suggestion that the Applicant's case had been a 'shambles':-

- With respect to delay the case had taken time to prepare because there had been a vast amount of material to go through and pare down. In any event, the delay was not of a sufficient order to justify the granting of the Respondent's application.

- There were differences in the Applicant's case as set out in the EWW letter and then in the later Rule 5 Statement because the EWW letter had addressed all the allegations which might properly have arisen from the material gathered in the investigation. The Respondent's answer to the EWW letter and the material in the case was subject to review by another lawyer in the SRA who then drafted the Rule 5 Statement. This lawyer had given proper consideration to the Respondent's explanation and had then taken the decision not to pursue the dishonesty allegations.

- The fact that the case against the Respondent had reduced in seriousness was an indication that it had been carefully and properly reviewed at the relevant stages.

- The Applicant had not been obliged to interview the Respondent. This had been a paper based investigation as opposed to a forensic investigation in which an interview would have been required.

- Mr Richards was not an expert witness and he was not called to give evidence on that basis.

- Whilst the Applicant's witnesses may not have come up to proof this was not an indication that the Applicant's case had been a 'shambles.'

- The case had been properly brought and was certified as showing a case to answer by the Tribunal. The Applicant's case was not challenged by way of a half time submission.

- Paragraph 39 of Baxendale-Walker set out the very high hurdle which had to be cleared by the Respondent if he was to show that the case had been a 'shambles from start to finish'. The Respondent had not cleared that hurdle and there should be no order for costs.

The Tribunal's Decision on Costs

26. The Tribunal listened with care to the submissions made by Mr Reid and by Mr Williams.

27. The Tribunal noted that whilst the Applicant had not been successful on any of its allegations the case had been properly brought.

28. The Tribunal considered that there had been some delay on the part of the Applicant but that the delay had not been egregious. The delay had been unavoidable given the multi-faceted complaints initially made by MN and the need for the Applicant to pare this material down.

29. The EWW letter had been rightfully and properly used by the Applicant as an instrument of further review following the Respondent's response and resulted in a reduction of the seriousness of the allegation.

30. There had been nuanced differences between the witness statements of the Applicant's witnesses and the oral evidence they gave at the hearing, however, they had not been dishonest witnesses and had not collapsed under cross-examination.

31. The Tribunal considered that the case had not been a 'shambles from start to finish' and did not cross threshold for determining it as such as set out in Baxendale-Walker.

32. The Tribunal also had regard to the judgment in Broomhead v SRA [2014] EWHC 2772 where Nicol J. had held, at paragraph 42, that:

> *"While the propriety of bringing charges is a good reason why the SRA should not have to pay the solicitor's costs, it does not follow that the solicitor who has successfully defended himself against those charges should have to pay the SRA's costs. Of course there may be something about the way the solicitor has*

conducted the proceedings or behaved in other ways which would justify a different conclusion. Even if the charges were properly brought it seems to me that in the normal case the SRA should have to shoulder its own costs where it has not been able to persuade the Tribunal that its case is made out. I do not see that this would constitute an unreasonable disincentive to take appropriate regulatory action".

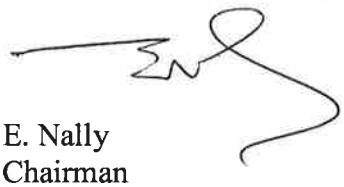
33. Having carefully considered the application the Tribunal refused the Respondent's application for costs in this case and it saw no reason to depart from the practice that in a case where the Applicant had been completely unsuccessful that each side should shoulder their own costs. The Tribunal accordingly made no order for costs.

Statement of Full Order

34. The Respondent, DERWENT WILLIAM MOGER CAMPBELL solicitor, denied the allegations made against him by the Applicant and the Tribunal found the allegations NOT PROVED.

The Tribunal therefore ORDERS that the allegations be dismissed and it further Orders that there be NO ORDER for costs.

Dated this 4th day of February 2020
On behalf of the Tribunal



E. Nally
Chairman