The Respondent appealed the Tribunal's decision dated 20 September 2019. The appeal was heard by Murray J on 19 January 2021 and Judgment handed down on 10 August 2021. The Respondent's appeal was dismissed.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11954-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ROBERT METCALFE Respondent

Before:

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

Date of Hearing: 16–20 September 2019

Appearances

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

Martin Budworth, counsel of Kings Chambers 36 Young Street, Manchester M3 3FT for the Respondent.

JUDGMENT

Allegations

1. The allegations made against the Respondent by the Solicitors Regulation Authority ("SRA") were that, while in sole practice under the style of RMJ Solicitors (612988) ("the Firm"), between approximately April 2014 and March 2017:

1.1 He acted, or purported to act for clients, in relation to a number of investment schemes, loans or other transactions, which were dubious, risky or bore the hallmarks of early release pension scams. He therefore breached any or all of Principles 2, 4, 6 and 10 of the SRA Principles 2011 ("the Principles").

1.2 He acted for buyers of 'off-plan' student accommodation, in transactions which were dubious, risky or bore the hallmarks of fraudulent financial arrangements. He therefore breached any or all of Principles 2, 4, 6 and 10 of the Principles.

1.3 He acted in relation to, and/or facilitated through client account, the sale and purchase of shares in Company PSL, in circumstances where such transactions were dubious, risky or bore the hallmarks of fraudulent financial arrangements. He therefore breached any or all of Rules 14.5 and 29.2 of the SRA Accounts Rules 2011 ("the Accounts Rules") and any or all of Principles 2, 4, 6 and 10 of the Principles.

1.4 He caused or allowed the Firm's client account to be used improperly, namely as a banking facility in the absence of an underlying legal transaction, for Company NRL, Company FSL and Company CBFS or any of them. He therefore breached Rule 14.5 of the Accounts Rules and any or all of Principles 2 and 6 of the Principles.

1.5 He failed to keep accounting records properly written up to show his dealings with client money in respect of the files identified in Schedule 1 or any of them. He therefore breached any or all of Rules 1.2(f), 29.1, 29.2 of the Accounts Rules and Principle 10 of the Principles.

1.6 He failed adequately or at all to run the Firm effectively and in accordance with proper governance and sound financial and risk management principles, including in that he:

1.6.1 caused or allowed an unqualified person, Mr PD, who was not formally employed by the Firm, to manage the sales of various properties, with no or inadequate supervision by the Respondent;

1.6.2 permitted a third party, Company SCL to arrange signature of the Firm's client care letters;

1.6.3 caused or allowed the transactions referred to in allegation 1.3 above to be effected through client account with no or inadequate scrutiny of the same.

He therefore breached Principle 8 of the Principles.

1.7 On one or more occasions, he acted for clients whose interests were in conflict, in breach of Principles 4 and/or 5 of the Principles. By so doing he failed to achieve Outcome 3.5 under the Code of Conduct.

1.8 He allowed one or more third parties an improper degree of influence or control over the Firm and/or its client account, in breach of any or all of Principles 2, 3, 6 and 8 of the Principles.

1.9 He caused or allowed the Firm to be held out as being accredited with or by the Law Society's Conveyancing Quality Scheme (CQS) in circumstances when it was not so accredited, in breach of Principle 2 and/or Principle 6 of the Principles.

1.10 In his capacity as sole principal, COFA and/or COLP at the Firm the Respondent failed to ensure or take adequate steps to ensure compliance with the Firm's regulatory obligations under the Accounts Rules, in breach of Rule 8.5 of the SRA Authorisation Rules 2011 and any or all of Principles 7, 8 and 10.

2. Allegations 1.1-1.3 above were advanced on the basis that the Respondent's conduct was dishonest. Dishonesty was alleged as an aggravating feature of the Respondent's misconduct but was not an essential ingredient in proving the allegations.

3. Further or alternatively, allegations 1.1-1.3 above were advanced on the basis that the Respondent's conduct was reckless. Recklessness was alleged as an aggravating feature of the Respondent's misconduct but was not an essential ingredient in proving the allegations.

Documents

4. The Tribunal reviewed all the documents submitted by the parties, which included:

- Notice of Application dated 29 April 2019
- Rule 5 Statement dated 29 April 2019
- Respondent's Answer to the Rule 5 Statement
- Respondent's Witness Statement dated 29 August 2019
- Applicant's Schedule of Costs dated 5 September 2019
- Testimonials submitted on the Respondent's behalf

Preliminary Matters

5. <u>Application for a Witness Summons</u>

5.1 Witness CJ provided a statement in the proceedings. An application had been made for him to give his evidence via video-link. That application was unopposed and was granted by the Tribunal. The day before the hearing was due to take place, Witness CJ informed the Applicant that he was no longer able to attend the hearing. Following correspondence between the Applicant and Witness CJ, Witness CJ agreed a time at which he would be available to give evidence. The Tribunal was unable to contact Witness CJ via video-link. Following further correspondence from the Applicant, Witness CJ explained that his health was such that he could not give evidence.

The Applicant's Submissions

5.2 Mr Mulchrone submitted that pursuant to Rule 13(9) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR"), the Tribunal had the power to issue a witness summons to compel his attendance. He was conscious that the Tribunal had historically taken the view that it did not have such a power, however Section 46(11) of the Solicitors Act 1974 ("the Act") provided the statutory power so to do.

5.3 As to the merits of the application, the Applicant had gone to considerable trouble and cost to secure his attendance. Whilst he had not returned a signed copy of his statement to the FIO, he had provided a signed statement to Capsticks. The Applicant could not have known, until the day before the hearing, that Witness CJ was not willing to give evidence in this matter in circumstances where he had provided a statement in which he confirmed his willingness to attend.

5.4 Mr Mulchrone submitted that in the event that the Tribunal was not prepared to grant a witness summons, time should be afforded to the Applicant to obtain a summons from the High Court.

The Respondent's Submissions

5.5 Mr Budworth submitted that Rule 13(9) of the SDPR did not confer a power on the Tribunal to issue a witness summons, as it was silent as to which entity had the power to issue a summons. The position was the same with Section 46(11) of the Act.

5.6 As to the merits, it was submitted that the case had been managed pursuant to a robust and full set of directions. Whilst the Respondent was prepared to be flexible, there were obvious limits to that flexibility in circumstances where there was a real possibility that the case would not conclude during its allotted listing. Witness CJ had explained in his witness statement that he had ignored the Applicant's initial invite. This, it was submitted, was a clear sign to the Applicant that Witness CJ was potentially a reluctant witness. In those circumstances it was surprising that the Applicant had not already obtained a witness summons on a protective basis.

5.7 Mr Budworth suggested that in order to make the most efficient use of the Tribunal's time, the Applicant's witnesses could be interposed into the Respondent's evidence.

The Applicant's Reply

5.8 Mr Mulchrone submitted that as regards the legal framework, it was unclear why the Tribunal took the position that it did. The statutory power was clear. As to interposing the Applicant's witnesses, it would be entirely unsatisfactory for the Respondent to give evidence without having heard the Applicant's case in its entirety.

The Tribunal's Decision

5.9 Rule 13(9) of the SDPR stated:

> "A party to an application may, pursuant to Section 46(11) of the Act, require the attendance at the hearing of any person or the production of any document

> relevant to the proceedings and any summons for that purpose shall be in the form of Form 5 in the Schedule to these Rules."

5.10 Section 46(11) of the Act stated:

> "For the purposes of any application or complaint made to the Tribunal under this Act, the Tribunal may administer oaths, and the applicant or complainant and any person with respect to whom the application or complaint is made (or, in the case of an application under section 47(1)(b), any of the parties to the application) may issue writs of subpoena ad testificandum and duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action".

5.11 There was nothing in the statutory framework that specified the venue at which an application for a witness summons for proceedings before the Tribunal should be made. The Tribunal determined that the current framework did not provide sufficient clarity as to the Tribunal's power to issue a witness summons. In the circumstances, the Applicant's application for the Tribunal to issue a witness summons was refused.

5.12 The Tribunal granted the Applicant time to obtain a witness summons from the High Court on the basis that such an application would not interfere with the hearing.

5.13 Having made further enquiries, the Applicant informed the Tribunal that as CJ was outside of the jurisdiction, any application for a witness summons could not be made or granted administratively. Whilst a witness summons could be applied for, the requisite steps meant that there was insufficient time for that to be done in accordance with the Tribunal's direction. The Applicant considered that in all the circumstances it was not reasonable to apply for the witness summons. The parties agreed that the witness statement of CJ was admissible; it was for the Tribunal to consider what weight it would attach to that evidence.

5.14 The Tribunal determined that in all the circumstances, it would attach little weight to the statement of CJ.

6. <u>Application to interpose the evidence of KG</u>

6.1 KG was due to give evidence at 2pm on 17 September 2019. Due to a number of technical difficulties, KG was unable to give evidence. The Tribunal directed that KG give evidence on the morning of 18 September 2019. On that morning Mr Mulchrone explained that KG's availability had not been ascertained when the Tribunal made its direction. Due to an unavoidable appointment, KG would not be available to give evidence until the afternoon. Mr Mulchrone suggested that in order to make progress, KG's evidence could be taken out of turn, with the Respondent commencing his evidence and KG being interposed.

6.2 Mr Budworth submitted that the Tribunal's direction as to the timing of KG's evidence was clear. The Tribunal staff had done all that it could to accommodate KG providing her evidence by way of video-link. It was surprising that the suggestion made as regarding the interposing of witnesses that had been strongly objected to by

the Applicant was now being promoted by the Applicant. Mr Budworth objected to that application on the basis that it was unsatisfactory for the Respondent to commence his evidence without knowing what evidence KG was going to give.

6.3 The parties agreed that the witness statement of KG was admissible; it was for the Tribunal to consider what weight it would attach to that evidence.

The Tribunal's Decision

6.4 The Tribunal had regard to its requirement to ensure that hearings were both efficient and fair. It had accommodated as much as possible the ability of the witnesses to give oral evidence at the hearing. The Tribunal did not consider that it was appropriate for the evidence of KG to be interposed into the Respondent's evidence. The Respondent would not have had an opportunity to hear all the Applicant's evidence prior to giving his own evidence. Further, once his evidence commenced he would be in purdah and would not be able to provide any instructions or discuss the evidence of KG with his Counsel. The Tribunal considered that this would be unfair.

6.5 The Tribunal determined when balancing the competing interests of the parties, that it was contrary to the interests of justice and unfair to the Respondent to allow the evidence of KG to be interposed into his evidence. The Tribunal also considered that it was contrary to the interests of justice to delay the hearing any further, given that the hearing had not progressed the previous day due to the Applicant's witness difficulties.

6.6 The Tribunal ascribed some weight to the evidence of KG given that she was willing to give oral evidence but had been prevented from doing so in light of the Tribunal's decision.

Factual Background

7. The Respondent was born in 1971 and was admitted to the Roll in September 2000. The Firm was his sole practice. The Respondent did not hold a current practising certificate but remained on the Roll as a non-practising solicitor.

8. Following authorisation of the inspection of the Firm's books of account and other documents, an investigation of the Firm commenced on 20 January 2017. On 17 February 2017, an Interim Forensic Investigation Report ("IFIR") was issued, highlighting breaches of the Principles, the Accounts Rules, the SRA Authorisation Rules 2011 and failures to achieve outcomes under the Code of Conduct.

9. A report dated 22 February 2017 recommending intervention into the Respondent's practice was disclosed to the Respondent, in order for him to make representations. On 10 March 2017, a decision was made to intervene on the grounds of the Respondent's failure to comply with rules made by the SRA. A decision was also made to refer the Respondent's conduct to the Tribunal.

10. A final Forensic Investigation Report ("FFIR") dated 8 March 2018 was prepared highlighting further breaches of the Principles, the Accounts Rules and the SRA Authorisation Rules 2011 and failures to achieve outcomes of the Code of Conduct.

11. In summary, the FFIR identified the following facts and matters:

- Following the SRA's intervention into the Firm on 14 March 2017, 18 client files were identified by the Intervention Agents on which the firm had been instructed to act in respect of clients taking out loans with Company SL and then investing some of the loan funds with Company SCL into student property and other investment schemes.

- According to the evidence on the files, large deductions were made from the loan funds in respect of up front interest, payments for fees for introducing agents and a fee of 5% of the value of the loan payable to the Firm in respect of its costs.

- The files contained no evidence of the loan documentation or any documentation relating to the subsequent investments. Apart from the original client care letters and terms of business, there was no evidence that the Firm had provided any advice to the clients in respect of the loans and investments and the client files did not contain any attendance notes.

- The FIO contacted three of the clients. All the clients stated words to the effect that they had never heard of the Firm, prior to being notified by the Intervention Agents of the existence of a client file in their name, and had never instructed the Firm in any matters. They had no knowledge of taking out a loan with Company SL or making an investment into Company SCL.

- All three clients stated that they had either received an unsolicited telephone call or had made enquiries relating to the transfer of their pension. All three had transferred their pensions around the time shown on the client files found at the Firm and said that they had transferred their pensions to Company O, based in Skelmersdale.

- Two of the clients contacted stated that they received lump sum payments from their pension schemes. Both were under the age of 55. A third client stated that he was due to receive a lump sum from his pension; however this was never paid and all attempts to chase the agent as to the whereabouts of the monies had been unsuccessful.

- The Firm had also acted for two developer clients where there appeared to be no legal transaction. The client care letter on one of the file described the legal work as: "Advising regarding the reservation agreement"; and "Accepting and dispersing funds in the relation this matter to/from our client account". However, neither client files contained any evidence of any advice having been given by the Firm.

- As the Firm had failed to maintain proper accounting records, there were no client account ledgers; however, the client account bank statements showed that, for one client matter, reservation fees to the value of £222,500.00 had been paid into the Firm's client account. Payments had then been made by the Firm to the client. On the second matter, the FIO was unable to identify all receipts and payment specifically associated with the matter due to the lack of accounting records.

- The Firm also acted for Company CBFS, a bridging finance company on a variety of matters including share sale and loan matters.

- For the loan matters, the Firm was instructed to provide advice "regarding the matter and our assistance with the collection of the loan payment" but none of the client files contained evidence that any advice had been given. Instead the bank account statements showed that the loan proceeds had been paid to the client via the Firm's client account.

- One of the files recovered by the Intervention Agents contained over 130 payment instruction forms from Company CBFS to the Firm giving them instructions about payments to be made on their behalf. The FIO was unable to identify the various client matters to which the payments related due in part to the lack of accounting records held by the Firm and as it did not appear that the Intervention Agents held the relevant client files.

- The FIO identified a client account ledger for Company CBFS which contained 207 postings of payments and receipts dating from 30 April 2015 to 31 March 2016. The transactions did not appear to relate to one client matter but various client matters including share sales and loans. The FIO was unable to identify the client matters to which the transactions related amongst the files recovered from the firm. The FIO was unable to determine whether individual client files relating to the various transactions shown on the client account ledger had ever existed.

- The Firm acted for clients purchasing leasehold off-plan, purpose built student accommodation in Bolton. The investment opportunity included clients being guaranteed an annual rental yield of 9% from the property, interest being paid on their deposit monies and an option to sell back the property after 5 years at 110% of the purchase value. The client files contained a number of agreements which the purchasers needed to sign as part of the investment.

- Clients were required to pay a non-refundable reservation fee and then a deposit of 50% of the purchase price (less the reservation fee) upon exchange of contracts. These were paid into the Firm's client account and forwarded onto the seller's solicitors once contracts had been exchanged.

- There was no evidence on the files that clients had been advised about the terms and conditions of the investment or about the content of the agreements and other documentation associated with the purchase. There were no attendance notes or any other correspondence to the clients apart from the client care letter. The Respondent said that all clients had been provided with a Contract Report; however, the FIO was unable to find a copy of this on any of the client files she reviewed.

- Contracts for the purchases had been exchanged by PD. The FIO identified that PD was the sole director of Company CBFS. The Respondent said that PD was a "consultant" at the Firm and worked on an "ad hoc basis" although he had not yet received payment for any work he had carried out behalf of the Firm and he was not legally qualified.

- The Firm acted for clients on the simultaneous purchase and sale of the beneficial interest in shares in Company PSL. The Firm acted for the clients under a general Power of Attorney. None of the client files contained a client care letter, evidence of instructions from the client or any other communications with the client.

- The shares were purchased and sold on the same day, having been purchased for a lower price for which they were then sold. All shares were purchased from Mr GQ and were sold to Company SI. A payment was then made to the clients. This appeared to be for the difference between the purchase and the sale price of the share after a small deduction had been made.

- There were no individual client account ledgers for the matters but instead the payments which were made to the clients were posted to the client account ledger for Company CBFS. The Respondent said that these payments had been posted to the ledger in error.

- The FIO was unable to identify any monies having been received from the clients relating to the purchase of the shares or any monies having been received by Company SI in respect of their purchase of the shares.

Witnesses

12. The following witnesses provided statements and gave oral evidence:

    - Lindsey Barrowclough – Forensic Investigation Officer
    - Robert Metcalfe – Respondent

13. The written and oral evidence of the 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, made notes of the oral evidence, and referred to the transcript of the hearing. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

Findings of Fact and Law

14. 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. The Tribunal considered all the evidence before it, both written and oral together with the submissions of both parties.

Dishonesty

15. The test for dishonesty was that set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 at [74] as follows:

> "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 knowledgeable belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder 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."

16. When considering dishonesty the Tribunal firstly 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. It then considered whether that conduct was honest or dishonest by the standards of ordinary decent people. When considering dishonesty, the Tribunal had regard to the references supplied on the Respondent's behalf.

Integrity

17. The test for integrity was that set out in Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366, as per Jackson LJ:

> "Integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members … [Professionals] are required to live up to their own professional standards … Integrity connotes adherence to the ethical standards of one's own profession".

Recklessness

18. The test applied by the Tribunal was that set out in R v G [2003] UKHL 50 where Lord Bingham adopted the following definition:

> "A person acts recklessly…with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; and (ii) a result when he is aware of a risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk."

19. This was adopted in the context of regulatory proceedings in Brett v SRA [2014] EWHC 2974 (Admin).

20. **Allegation 1.1 – He acted, or purported to act for clients, in relation to a number of investment schemes, loans or other transactions, which were dubious, risky or bore the hallmarks of early release pension scams. He therefore breached any or all of Principles 2, 4, 6 and 10 of the Principles.**

The Applicant's Case

20.1 The FIO identified that the Respondent acted for clients who obtained loans from Company SL and, after various deductions had been made, invested in or lent the loan funds to Company SCL. Some of these loans to Company SCL were taken over by Company BL, who then lent the funds to Company MBA. The transactions appeared to be connected with the early release and transfer of pension funds into Company O's Retirement Benefits Plan, and were effected in circumstances where:

- the Respondent's supposed clients had no knowledge of taking out a loan with Company SL or investing in Company SCL or of instructing the Firm in relation to the same;
- the Respondent provided no advice to his supposed clients in relation to the loan, or the investment schemes, or the need for the same;
- the Respondent's file contained no documentation on the investment schemes into which the loan proceeds were paid and he did not hold copies of the loan agreements or know the terms of the loan;
- the Respondent's client file contained bogus signed correspondence containing instructions falsely purporting to be from the client;
- no accurate accounting records of payments and receipts relating to the matter were maintained;
- large deductions were made from the loan funds, purportedly on behalf of the client, including the Firm's fee of 5% of the gross loan amount, a deduction of 20% in relation to interest payments on the loan and a deduction of between 12 and 22% of the 'loan' amount to the introducer or agent, before funds were paid into the investment scheme and to the client;
- the Respondent's role was simply to process the paperwork and receive and distribute the funds.

20.2 The Respondent stated that the Firm acted in an "execution only manner" and "did not have any instructions or knowledge of what would occur in any further transactions". He admitted that he did not advise on the merits of the transaction and purportedly justified this by stating that no advice was given or requested.

20.3 The Respondent denied that there was bogus correspondence on his files, and discredited the information provided by witnesses referred to in the FFIR. He contended that they did not provide signed witness statements to the FIO because they did not have any issues with the transactions. However, the Applicant had since obtained witness statements from two of the Respondent's supposed clients, each of whom confirmed that they had never heard of the Respondent or the Firm until contacted by the SRA or its agents.

20.4 The Respondent admitted that deductions were made from the loan funds but stated that the Firm's clients were aware of the deductions and did not complain about them. He was unable to explain the lack of documentation on the file, as the files were taken from his control. The Respondent maintained that accounting records were maintained, just not in the appropriate form.

Early release pension scams

20.5 The Financial Conduct Authority published a warning about early release pension scams at https://www.fca.org.uk/scamsmart/early-pension-releasescams, including as follows:

> "**Early pension release scams**
>
> …
>
> You should be very wary of any scheme offering to help you release cash from your pension before you're 55, as it's almost certainly a scam.
>
> This may also be called 'pension liberation' or a 'pension loan', as it's often claimed you will borrow money from your pension fund.
>
> But generally you can only take money from your pension when you're 55 or older except in certain circumstances, like having a terminal illness.
>
> You could face a tax bill of 55%, plus other charges, on what you withdraw - and you could also lose all your money.
>
> You will have to pay tax even if:
>
> - you didn't realise you had broken the tax rules
> - you offer to put the money back in your pension
> - you have paid fees or charges to the company involved
> - you have spent all the money
>
> This means taking cash from your pension before you're 55 is highly unlikely to be in your interests.
>
> **How early pension release works**
> Investors are often called out of the blue, but contact can also come by email, post, word of mouth or at a seminar or exhibition.
>
> You could be offered a free pension review, then told you can take cash from your pension even though you're under 55. This may be called a 'loan', 'saving advance' or 'cashback'.
>
> Your pension funds will be transferred from your legitimate pension scheme into one set up by the scam. This new scheme is often based abroad.

You may be ‘loaned’ an amount (often around half of your pension) with the company involved taking a fee, often as much as 30%. This fee is often unclear and doesn’t include the tax you will owe for accessing your pension early.

Any money remaining in the scheme after fees and tax are paid will then be invested in high-risk products or projects like overseas property developments – or it’s sometimes simply stolen outright.

How to protect yourself

If you get a cold call about your pension, the safest thing to do is hang up - it’s illegal and probably a scam. Report pension cold calls to the Information Commissioner’s Office (ICO) (link is external).

If you get offers via email, text or online adverts, you should simply ignore them.

Be wary if you’re contacted about any financial product or opportunity and they mention using your pension.

Professional advice on pensions is not free – a free offer out of the blue is probably a scam.

Always check that anyone offering you advice or other financial services is FCA authorised and permitted to give advice on pensions.

The first step is to check if their name appears on our Register.

If the firm is on our Register, the next step is to call our Consumer Helpline on 0800 111 6768 to check the firm is permitted to give pension advice.

If you don’t use an FCA-authorised firm, you also won’t have access to the Financial Ombudsman Service (link is external) or Financial Services Compensation Scheme (FSCS) (link is external) so you’re unlikely to get your money back if things go wrong.

Always be wary if you’re contacted out of the blue, pressured to invest quickly or promised returns that sound too good to be true.

If an FCA-authorised adviser recommends an early pension-release scheme, ask them to explain the full consequences and risks, and your other options. These schemes can be illegal if you’re not told – or are misled – about the tax consequences and risks of entering into one.

If you intend to use the money in your pension to repay debts, you should contact a free debt adviser first to see what else you could do. Taking money from your pension early might help your immediate debts, but it’s a very expensive way to free up money.”

20.6 Mr Mulchrone submitted that whilst this warning may not have been available to the Respondent at the material time, it set out in clear terms some of the hallmarks of early release pension scams.

20.7 The Respondent, it was submitted, had failed to provide any explanation as to why the Firm held files on matters where his supposed clients had no knowledge of the Firm or the transactions being processed. His explanations as to his Firm's role in the transactions being "execution only" strongly supported the inference that his Firm was used to lend credibility to the scheme.

20.8 It was denied that the Firm's files contained bogus correspondence, however the Respondent had not provided any or any adequate explanation as to why the Firm's files contained letters to the Firm purporting to be signed by clients, in circumstances where those individuals confirmed that they had never heard of, still less instructed the Firm, and knew nothing of a loan from Company SL or an investment into Company SCL. Nor had the Respondent explained how his 'clients' knew of the deductions made.

20.9 It is very well established that a solicitor should have no role to play in the collection and disbursement of monies in a situation where he is not receiving fees for the benefit of his advice. It was not for a client to explain the nature of a transaction to a solicitor but rather the solicitor's role was to explain the nature of a transaction to the client: SRA v Wilson-Smith (SDT 8772/2003)

20.10 Further, the SRA had repeatedly and publicly warned the profession against involvement in dubious financial arrangements or investment schemes since at least April 2009. A solicitor could not avoid culpability in conduct by purporting to limit his retainer if he should not have become involved in the first place.

20.11 Mr Mulchrone submitted that by acting, or purporting to act for clients in the circumstances described above, the Respondent failed to act with integrity. A solicitor acting with integrity would never have allowed his firm to become involved with investment schemes, loans or transactions which were dubious or bore the hallmarks of early release pension scams. The Respondent did so and therefore breached Principle 2. Further, his conduct was plainly not in the best interests of the Respondent's supposed clients, who appeared to have been unaware of his existence, let alone instruction/handling of their funds. The Respondent therefore breached Principle 4. The Respondent failed to behave in a way that maintained the trust the public placed in him and in the provision of legal services. He therefore breached Principle 6

20.12 He also failed to protect client money and assets. On the contrary, he caused client money to be dissipated without any or adequate instructions to do so. He therefore breached Principle 10.

20.13 Dishonesty and Recklessness

20.13.1 Mr Mulchrone submitted that as a solicitor with conduct of these matters and an experienced solicitor of some 15 years' standing, the Respondent must have known or at least suspected that the transactions in question or

any of them were dubious, risky or bore the hallmarks of early release pension scams but he nevertheless acted in relation to the transactions and/or facilitated them. Ordinary, decent people would consider this behaviour to be dishonest.

20.13.2 Further or alternatively to the Applicant's case on dishonesty, the Respondent was reckless as to whether the transactions were dubious, risky, or bore the hallmarks of early release pension scams, and as to whether the Firm and its client account were being used to lend credibility to the investment schemes, loans or transactions in question.

The Respondent's Case

20.14 The Respondent denied allegation 1.1. He explained that the Firm was instructed for execution only. He did not advise as to the merits of the transaction. At the time the clients instructed the Firm, they had already made the decision to take out the loans. The Respondent did not accept that the clients had no knowledge of the Firm. There was documentation that had been signed by them, and bank account details had been provided. Indeed, Client G had received a payment from the Firm directly into her account. The client care letters signed by the Clients was completely clear as to the work the Respondent would and would not undertake. It stated that the work would consist of:

- liaising with the respective parties including the lender;
- completing on the loan;
- completing paperwork;
- proceeding to complete on the investment;
- transferring funds by telegraphic transfer to the relevant parties including payment of any disbursements.

20.15 Further, the identification documents received by the Respondent has been verified by an FCA authorised and regulated Independent Financial Advisor.

20.16 The Respondent explained that there was no evidence that the transaction might have been an early pension release scam. As far as he was aware, the transactions were loan transactions with a subsequent investment. There was no information available or provided to the Respondent that would suggest that any of the clients were redeeming their pensions early. As to the FCA Warning referred to by the Applicant, the Respondent explained that whilst he tried to keep abreast of with regulation in other industries, neither he nor the Firm were regulated by the FCA and he was not aware of their warning notice.

20.17 Mr Budworth referred the Tribunal to Wilson-Smith and invited it to consider the very different nature of that case in which there had been an admission by the solicitor that he was acting as an Escrow agent in transactions where the fraud was plain and obvious. That was not the position in this case. The Applicant had not established, and had not sought to establish, that there was a fraud. Given that position, the question as to whether the Respondent knew, or ought to have known, that the transaction was fraudulent, did not arise.

20.18 The Applicant's case, it was submitted, rested on the unsubstantiated allegation that the Respondent's files contained bogus items of correspondence, presumably documents that had not been signed by the clients. It was clear from the statement of Client G that she had provided her bank details. There was no evidence, it was submitted, that any of the documents on the Respondent's files were not signed by the clients. Once the allegation of bogus correspondence was stripped away, the Applicant's case was reliant on the clients saying they had not heard of the Firm. However, there was signed correspondence on the Firm's files from those clients, and addressed to the Firm. It seemed that the case was based on the FIO's view that as the clients said they had not heard of the Firm, the documents contained within the Respondent's file could not be genuine.

20.19 As to the transaction bearing the hallmarks of an early pension release scam, there was nothing that could have alerted the Respondent to this. The Applicant had decided that this was an early release pension scam – it was therefore dubious and the Respondent therefore should not have become involved.

20.20 This left the issue of the cost of the loan, namely the 20% upfront deposit, the payments to third parties and the Respondent's fee of 5%. It was not the role of a solicitor to refuse work on the basis that their client had struck a bad bargain – solicitors were not there to protect people from themselves and therefore not become involved in transactions that were risky for clients. It was established law that legal considerations apart, there was no duty on a solicitor to look at the prudence of a transaction. Further, the Applicant had interpreted Patel as requiring legal advice, when in fact it required there to be a professional service.

20.21 Mr Budworth submitted that whilst the Tribunal may have considered the transactions to be "grubby work", that was not the basis for a finding of professional misconduct. It was apparently the Applicant's case that execution-only work was prohibited and automatically represented professional misconduct. That was surely incorrect. It was legitimate for a solicitor to be asked to assess documentation and satisfy himself and tell the parties that it was effective to achieve the purpose of the documentation and then taking steps to process it.

20.22 Given the lack of evidence, allegation 1.1 and its alleged aggravating features of dishonesty and/or recklessness should be dismissed.

The Tribunal's Findings

20.23 The Tribunal accepted that each of Clients G and J had been contacted about releasing funds from their pensions. Whilst the Tribunal had, for the reasons detailed above, limited the weight it attached to the witness statements of Clients G and J, it was noted that the Respondent did not dispute that the clients had been contacted for this purpose. The Respondent contended that there was nothing in anything that he had seen that would have made him aware that this was potentially an early pension release scam. The Tribunal considered that had the Respondent spoken to any of his clients, he might have ascertained this. On his own case, the Respondent had had no direct contact with any of his lay clients for the transactions.

20.24 During his cross-examination the Respondent was asked whether Company SCL had in fact been dissolved at the time of these transactions. The Respondent explained that his understanding was that Company SCL still existed "otherwise I would not have acted for them". He confirmed that all of his instructions from his clients were in fact relayed to him by Company SCL. He had drafted letters of instruction from his clients to himself based on the information received. He had also used Company SCL to obtain his clients signatures on his client care letters. The Tribunal determined that the Respondent ought to have been extremely concerned that all of his clients' instructions were coming from Company SCL, particularly in circumstances where Company SCL was the ultimate beneficiary. Further, there was no signed authority on the files from any of the clients authorising Company SCL as their agents. The Respondent stated that he considered a document signed by the clients, and the signature on the client care letters to be their authority. The Tribunal examined each of the documents referred to. The Tribunal determined that there was nothing in those documents that suggested that the clients authorised Company SCL to act as their agents.

20.25 In his evidence the Respondent accepted that on reflection, it would have been better had he used a different third party to obtain his clients signatures. The Tribunal considered that this would have been obvious to any solicitor at the time. It was highly inappropriate to use the ultimate beneficiary to obtain the clients' signatures. The distance between the Firm and the clients was not a valid reason for using Company SCL. The Respondent could and should have contacted his clients directly. The Tribunal found that the Respondent's conduct clearly demonstrated that he considered Company SCL as his actual client and he had no regard for the interests of his actual clients.

20.26 The Tribunal considered that it was plain that the Respondent's only function was to process the paperwork and receive and distribute the funds. There was no necessity for a solicitor to be involved in the transaction. His involvement was to lend credibility to the transactions. The Respondent, during cross-examination, accepted that the involvement of his Firm would have provided "reassurance" as regards the transactions. The Tribunal found the Respondent's explanations as to the actual legal work he undertook on the transactions to be vague and unsatisfactory.

20.27 The Respondent explained during his evidence that he did not have copies of the loan agreements (these were held by Company SL) nor did he have copies of the investment agreements. He contended that despite not having any of the underlying documents, he was aware of the terms from the documents that he had produced. The Tribunal found that evidence to be incredible. All of the information the Respondent had, had been provided to him by Company SCL, the ultimate beneficiary. It was extremely troubling that this had caused the Respondent no concern.

20.28 It was also extremely concerning that the Respondent provided no advice to his lay clients in relation to the loan or the investment schemes. Not only had he failed to provide any advice, but on instruction from Company SCL, his client care letter specifically excluded his providing any advice to his clients. The Tribunal found such a stance to be extraordinary in all the circumstances. The direction not to provide any advice to his own clients whatsoever should have been of huge concern to the

Respondent and was, in and of itself, a very clear indictor as to the possible fraudulent nature of the transactions.

20.29 The Respondent drafted correspondence in the name of his clients, addressed to the Firm, on the instruction of Company SCL which detailed large deductions to be made from the loans, including a fee for the Firm. The Respondent stated that this was drafted on the instructions of his clients via Company SCL and that the signatures on the letters was confirmation of the clients' instructions. However, as detailed above, those signatures were obtained by Company SCL. The Respondent had no knowledge of what his clients had been told, or that they had viewed and read the documents in their entirety before they were signed.

20.30 The 5% fee charged by the Firm for the transactions had been agreed with Company SCL. He was asked by the FIO "Can you explain why your fees were so high? How was that related to the work undertaken on those matters?" His written reply stated: "This was a new area of business and I didn't know how much work would be involved and so I deemed it necessary to be remunerated accordingly. [Company SCL] informed me that they wished for me to place a flat percentage on the fee as this would ensure it was easier for them to simplify their calculations, as opposed to billing on an hourly basis which would be unquantifiable for them." During his evidence the Respondent explained that as this was a new area of work for the Firm, he did not know whether the percentage charged was too high or too low. In any event, the clients had signed the document on which the fee was plainly stated. His entitlement to the fee was thus in accordance with his clients' instructions.

20.31 The Tribunal found that the significant upfront costs to the clients, including a 20% upfront interest payment, the payment to the introducers and the Respondent's fees should have been a cause for concern. It was highly unusual for a loan to require that all interest on the loan be paid upfront. The Respondent had referred to the cost of payday loans. However, the interest rates charged on those loans whilst high, was supposed to be over a short period, and not over 5 years, which was the length of the loan according to the Respondent.

20.32 The Tribunal determined that each of the matters detailed above, were clear and obvious 'red flags' that would have put the Respondent on notice of the dubious nature of the transactions.

20.33 The Tribunal found beyond reasonable doubt that in taking his instructions solely from the ultimate beneficiary with no authority from his clients, in failing to scrutinise the underlying documents, in failing to have any direct contact with his clients and in failing to make any enquiries into the appropriateness of the transactions, the Respondent had failed to act in his clients best interests and to protect client monies and assets in breach of Principles 4 and 10. That such conduct failed to maintain the trust the public placed in him and in the provision of legal services was plain. Members of the public would not expect a solicitor to pay away client monies on the instruction of those to whom the monies would be paid without the express consent of the clients. Nor would they expect a solicitor to act on their behalf with the express condition that whilst acting, they would provide no advice whatsoever. Thus the Tribunal found beyond reasonable doubt that the Respondent's conduct was in breach of Principle 6.

20.34 The Tribunal considered that no solicitor acting with integrity would have allowed himself or his firm to become involved in transactions that were clearly dubious. Nor would a solicitor acting with integrity have taken instructions or conducted the matter in the way in which the Respondent had. Accordingly, the Tribunal found beyond reasonable doubt that the Respondent's conduct was in breach of Principle 2.

20.35 Dishonesty

20.35.1 The Tribunal determined that the Respondent had been indifferent to his clients as it had suited him to be so. He had deliberately turned a blind eye and had asked no questions and undertaken no enquiries so as not to establish as a fact the dubious nature of the scheme. Whilst it was accepted that there was nothing on the face of what was presented to the Respondent to alert him to the use of pension monies, the Respondent made no contact at all with any of his clients. All his clients were in the position to tell him that the monies were in fact released from their pensions. Whilst it was not for the Respondent to advise the clients as to the prudence of the transaction, or not to act because it was a "bad bargain", it was his role to advise his clients as to the nature of the transaction generally. He could not do so as (i) he had no real knowledge of the transaction having no access to any of the underlying documents and (ii) on the basis of what he was told by Company SCL, the ultimate beneficiary, he had excluded all advice from his retainer. The Respondent was, in effect, being paid large amounts of money for doing very little work.

20.35.2 The Tribunal determined that the Respondent had turned a blind eye and failed to undertake any adequate enquiries, as the arrangement was to his financial benefit. As he explained, he was approached by Company SCL who offered this work to him. The Respondent saw this as "an opportunity to create a new revenue stream in order to grow the Firm". This came at a time when the Respondent had lost a significant amount of his potential revenue with the departure of some key members of staff. The Tribunal noted that when asked about Company SCL and these transactions in his interview, the Respondent was unable to provide any detail as regards the transactions and was unable to recall who Company SCL was or anything about the transactions. The Tribunal considered those answers to be evasive and incredible in circumstances where it was his evidence that this was a new income stream for the Firm. The Respondent, it was found, had subordinated his clients' interests in favour of his and his Firm's financial interests. The Tribunal determined that the Respondent had deliberately closed his eyes and ears, and had deliberately not asked questions, lest he learned something he would rather not know. The Tribunal found that ordinary and decent people would consider such conduct to be dishonest. The Tribunal thus found beyond reasonable doubt that the Respondent's conduct had been dishonest.

20.36 Accordingly, the Tribunal found allegation 1.1 proved beyond reasonable doubt, including that the Respondent's conduct had been dishonest. Given those findings, it was not necessary for the Tribunal to consider whether the Respondent's conduct had been reckless.

21. **Allegation 1.2 – He acted for buyers of 'off-plan' student accommodation, in transactions which were dubious, risky or bore the hallmarks of fraudulent financial arrangements. He therefore breached any or all of Principles 2, 4, 6 and 10 of the Principles.**

The Applicant's Case

21.1 The FIO identified that the Respondent acted for buyers of 'off plan' student accommodation at 4 Great Moor Street, Liverpool. The following features were present, indicating that the transactions were dubious, risky or bore the hallmarks of fraudulent financial arrangements:

- the marketing brochure promised buyers a 9% assured net return over 5 years, an assumed capital growth of 2.5% over 5 years and a return on investment of 58% after 5 years;
- buyers were dissuaded from instructing their own solicitor, with the promise of legal fees paid by the seller, if they used his firm;
- some buyers were vulnerable by reason of their overseas residency;
- the reservation fee of around £3,000 was non-refundable;
- the deposit due on exchange was equal to 50% of the purchase price;
- the deposit was to be held by the seller and released to the developer to finance the development;
- completion of the development (expected in April-June 2017) was still outstanding.

21.2 The Respondent's client files contained no evidence of instructions from or advice given to his clients about the transactions or their unusual and risky features, and no evidence of the work typically undertaken on a property purchase.

21.3 The Respondent denied that these transactions bore the hallmarks of a risky/dubious investment. He stated that there were a large number of new build student accommodation/off plan buildings of this sort around the country and that this was "a common investment". He also stated that the promises in the marketing brochure were "typical of this type of investment". He contended that the non-refundable reservation fee and 50% deposit were "standard business terms", and that clients had freedom of choice as to who they instructed to act for them.

21.4 The Respondent's response indicated that he relied on a belief as to the existence of other genuine and profitable schemes as reassurance, rather than critically analysing the actual scheme he was presented with. The Respondent had simply processed transactions for buyers which, on the evidence, carried with them substantial risks. The Respondent did not provide his clients with appropriate advice as to the unusual and risky nature of the terms.

21.5 Mr Mulchrone submitted that the Respondent had either failed to identify the clear warning signs or he had turned a blind eye to them, failing to question whether the transactions were in the best interests of his clients and whether he should be involved in them at all.

21.6 In acting as he did, the Respondent failed to behave in a way that maintained the trust the public placed in him and in the provision of legal services in breach of Principle 6. He also failed to protect client assets in breach of Principle 10. The conduct alleged was plainly not in the best interests of his clients, which lay in receiving proper advice as to the dubious or risky nature of the transactions and their unusual features. By failing to provide this advice, the Respondent breached Principle 4.

21.7 By acting for buyers in the circumstances described above, and in particular by failing to advise them properly despite the clear warning signs, the Respondent failed to act with integrity. Acting with integrity would require the Respondent not to have involved himself in transactions which were objectively dubious, risky or bore the hallmarks of fraudulent financial arrangements. A solicitor acting with integrity would have critically examined the transactions with anxious scrutiny and given proper advice to clients in respect of their apparent risks and dubious nature. The Respondent failed to do so but instead facilitated the schemes. He therefore breached Principle 2.

21.8 Dishonesty and Recklessness

21.8.1 Mr Mulchrone submitted that as solicitor with conduct of these matters and an experienced solicitor of some 15 years' standing, the Respondent must have known or at least suspected that the transactions in question or any of them were dubious, risky or bore the hallmarks of fraudulent financial arrangements but he nevertheless acted in relation to the transactions and/or facilitated them. Ordinary, decent people would consider this behaviour dishonest.

21.8.2 Further or alternatively to the Applicant's case on dishonesty, the Respondent was reckless as to whether the transactions were dubious, risky, or bore the hallmarks of fraudulent financial arrangements and as to whether the Firm and its client account were being used to lend credibility to the investment schemes, loans or transactions in question.

The Respondent's Case

21.9 The Respondent denied allegation 1.2. As to the claims made in the brochure about the yield, this was not something in which the Respondent had any input. It was not accepted that the offer from the seller to pay the buyers' legal fees was "too good to be true". Whilst there would be no fee if buyers instructed the Respondent, they were free to use any solicitor of their choosing. The Respondent explained that it was standard in these types of transactions for the sellers to pay the buyers' legal fees. By the time the clients instructed the Respondent, they had already paid the non-refundable reservation fee. The transaction was bona fides and common in the North West.

21.10 The role of the Firm in relation to the transactions was:

- carrying our full anti money laundering checks
- reporting on title
- reviewing and sending out contracts for the clients to sign and return
- collecting deposits and paying those to the seller's solicitors
- ensuring exchange took place
- carrying out the relevant checks on the security
- completing on the same

21.11 The clients were all provided with a report on title which explained what the schedules meant. The Respondent referred the Tribunal to other brochures advertising similar schemes with similar terms and conditions.

21.12 Mr Budworth submitted that the transactions were a long way from being dubious or bearing the hallmarks of fraud. The FIO, during cross-examination, made clear that the concerns related to the prudence of the investment. That risk, it was submitted, was the height of the Applicant's case. There were no 'red flags'. The Applicant and the FIO commented on the lack of documentation on the Respondent's files, however this was not the allegation that the Respondent faced. Mr Budworth that the Respondent's written answers to the FIO's questions were unable to be dismantled. There was no evidence that the schemes were dubious, risky or bore the hallmarks of fraudulent financial arrangements. Accordingly, the allegation should be dismissed.

The Tribunal's Findings

21.13 The Tribunal examined each of the particulars upon which the Applicant relied to show that the transactions were dubious, risky or bore the hallmarks of fraudulent financial arrangements:

- As regards the promises made in the marketing brochure, the Tribunal noted other brochures that made very similar promises including as to net return and capital growth. The Tribunal did not consider that this was a red flag or was a matter which should have caused the Respondent any concern. It accepted that the Respondent had no input into the promotional materials.

- The Tribunal did not accept that the offer by the seller to pay the buyers' legal fees was an indicator that the scheme was dubious or fraudulent. The Tribunal accepted that such an offer was often made in transactions of this nature.

- The Tribunal did not find that the fact that some buyers were overseas equated to their being vulnerable.

- The non-refundable reservation fee was not found to be unusual.

- The Tribunal accepted that developments of this nature often required the use of deposit monies in order to build the development. Whilst this was risky for clients, especially if there was no deposit insurance in place, that risk alone was not sufficient to demonstrate that the scheme was dubious or bore the hallmarks of fraud. Equally, late completion of a project was not an indicator that a project was not bona fides.

21.14 The Tribunal agreed with Mr Budworth that the mere fact that a venture, scheme or transaction that a client wished to undertake was risky, was not sufficient, of itself, to put a solicitor on notice as to the nature of a venture, scheme or transaction.

21.15 Having determined that there was no evidence that the particulars relied upon by the Applicant, either individually or cumulatively, were dubious or bore the hallmarks of fraudulent financial transactions the Tribunal found beyond reasonable doubt that the allegation was unsustainable. Accordingly allegation 1.2 was dismissed.

22. **Allegation 1.3 – He acted in relation to, or facilitated through client account, the sale and purchase of shares in Company PSL, in circumstances where such transactions were dubious or bore the hallmarks of fraudulent financial arrangements. He therefore breached any or all of Rules 14.5 and 29.2 of the Accounts Rules and any or all of Principles 2, 4, 6 and 10 of the Principles.**

The Applicant's Case

22.1 The FIO identified that the Respondent acted for his "best friend", GQ in relation to the sale and purchase of shares in Company PSL. He also acted for the buyers of the shares, which were immediately sold on to Company SI at a higher price. The transactions bore the following indicators/hallmarks of a dubious or risky scheme:

- the transactions were conducted by the Firm under a general power of attorney, supposedly made by the buying client;
- there was no evidence of advice given to or instructions from the client regarding the power of attorney or share sale documentation;
- there was no evidence of monies having been received from clients or Company SI in relation to the purchase of shares;
- payments made to clients (as evidenced by bank statements) were posted to a ledger for a separate entity, Company CBFS whose involvement in the share sales was unclear and unexplained;
- the Respondent was not providing proper advice on an underlying legal transaction but simply facilitating transfer of the money through client account.

22.2 The Respondent described the share sale transactions as "a standard business transaction carried out every day in this country". He explained that DH loaned his clients' money to buy the shares, that clients received profit from the shares and that there was nothing dishonest or fraudulent about the transactions. He was satisfied that the instructions received represented the clients' wishes.

22.3 Mr Mulchrone submitted that the Respondent had not adequately explained how the clients came to instruct the Firm, the lack of attendance notes on the file evidencing client instructions, bills of costs and client ledgers, how and why the Firm came to be acting for these clients under a power of attorney, what DH's role was in relation to Company PSL and why he was making loans to the Firm's clients.

22.4 The Respondent provided no plausible reason as to why shares in a private Gibraltar company were being bought and sold in this way, and why it was necessary for the Firm to be involved. He has also failed to explain why there was no receipt from Client H for the purchase of the shares, no evidence as to how the shares, which were sold for £467 each, were valued, and no explanation as to why, on the same day, the shares were sold for £900 each.

22.5 Rule 14.5 of the Accounts Rules related to the use of a firms client account as a banking facility. It was submitted that the SRA had continuously warned against the improper use of a client account as a banking facility, including since its warning notice dated 18 December 2014

22.6 In Patel v SRA [2012] EWHC 3373 (Admin), Cranston J held that:

> "…rule 14.5 is a crystallisation of the principle established in Wood and Burdett… The first sentence of the rule contains the prohibition on the use of a client account to provide banking facilities. Use of the term "instructions" in the next sentence of the rule implies professional instructions, in other words instructions relating to the accepted professional services of solicitors. The term is being used in rules concerned with the work of solicitors and takes its meaning from that context. Thus the import of the first limb of the second sentence of rule 14.5 is that movements on a client account must be in respect of instructions relating to an underlying transaction which is part of the accepted professional services of solicitors. In shorthand the instructions must relate to an underlying legal transaction. The other limb of that second sentence requires that movements on a client account must be in respect of instructions related to a service forming part of the normal regulated activities of solicitors

22.7 None of the movements on the Firm's client account in relation to these share transactions were in respect of instructions related to an underlying transaction which was part of the accepted professional services of solicitors (i.e. the instructions did not relate to an underlying legal transaction). Nor were any of the movements on client account in respect of instructions related to a service forming part of the normal regulated activities of solicitors. The Respondent therefore breached Rule 14.5 of the Accounts Rules. Further, by failing to record all dealings with client money appropriately and as prescribed by Rule 29.2, the Respondent breached that rule.

22.8 By acting in relation to or facilitating share transactions which were dubious or bore the hallmarks of fraudulent financial arrangements, the Respondent failed to act with integrity. Acting with integrity required the Respondent not to involve himself in dubious transactions of this nature and to alert his buyer clients to their unusual and risky features. The Respondent therefore breached Principle 2. Such conduct was not in the best interests of the Respondent's buyer clients, at least one of whom he purported to act for under a power of attorney. He therefore breached Principle 4. Further, the conduct alleged constituted a failure by the Respondent to behave in a way that maintained the trust the public placed in him and in the provision of legal services in breach of Principle 6. In addition, he failed to protect client money and assets in breach of Principle 10.

22.9 Dishonesty and Recklessness

22.9.1 Mr Mulchrone submitted that as solicitor with conduct of these matters and an experienced solicitor of some 15 years' standing, the Respondent must have known or at least suspected that the transactions in question or any of them were dubious, risky or bore the hallmarks of fraudulent financial arrangements but he nevertheless acted in relation to the transactions and/or facilitated them through client account. Ordinary, decent people would consider this behaviour to be dishonest.

22.9.2 Further or alternatively to the Applicant's case on dishonesty, the Respondent was reckless as to whether the transactions were dubious, risky, or bore the hallmarks of fraudulent financial arrangements and as to whether the Firm and its client account were being used to lend credibility to the investment schemes, loans or transactions in question.

The Respondent's Case

22.10 The Respondent explained that he was approached by GQ with the potential share deal which constituted of GQ selling shares at a discount to Clients E and H. Clients E and H would then sell them on to Company SI at a higher price. The Respondent explained that GQ showed the Respondent legislation from the Finance Act 2004 which demonstrated that the payment from Company SI was an authorised payment under the Act.

22.11 The deal was to proceed as a back-to-back transaction where Company SL paid the monies to Client H, who in turn would pay GQ.

22.12 The Respondent denied that he had breached the Principles as alleged. He had, at all times, acted in his clients' best interests, protected their assets, and maintained the trust placed in him. Further, he had acted with integrity. The Respondent denied that his conduct had been dishonest or reckless.

22.13 Mr Budworth submitted that the cross-examination of the Respondent culminated in questions around why GQ did not sell directly to Company SL. The transaction was entirely straight forward. GQ and the clients were entitled to instruct the Respondent and the Respondent was entitled to undertake the work. The Respondent was performing a legitimate advisory function in assessing that the documentation drawn up was effective to achieve the purpose of the documentation and in taking steps to process the transaction. There was no overarching requirement to take responsibility for and advise on the commercial merit of the scheme. As the Respondent had provided professional services, the monies that were paid into client account were not in breach of Rule 14.5. The Applicant, it was submitted, had failed to establish that the transaction was dubious, risky or bore the hallmarks of fraudulent financial arrangements. Accordingly, the allegation should be dismissed.

The Tribunal's Findings

22.14 During cross-examination the Respondent stated that:

- The company owned by GQ was a private company
- The private company was based in Gibraltar
- Client H was a member of the public
- He did not have an independent valuation of the shares
- The use of a power of attorney was at the request of the parties
- The power of attorney was not registered

22.15 The Tribunal determined that there was no legitimate reason for the use of a power of attorney. The Respondent explained that it was considered by the parties that it would facilitate the transaction, and that if Client H was unable to sign the documents, he could do so on her behalf and that it was, in effect, an "insurance policy". The Tribunal found that this could not be the case as the power of attorney and the other documents were all signed on the same day, including the transfer and sale documents.

22.16 The Tribunal noted that in his witness statement, the Respondent explained that there was no need for Client H to pay any monies in as the back-to-back transaction meant that monies came in from Company SI. Client H then used the appropriate percentages of the monies to pay GQ. In his oral evidence he explained that the monies were loaned to her.

22.17 The Tribunal did not accept Mr Budworth's interpretation of Patel. Whilst it was correct that there was no requirement in that case for advice, the professional services provided should relate to an underlying legal transaction. The Tribunal considered that there was no underlying legal transaction in this case. Accordingly, the monies paid into client account were in breach of Rule 14.5.

22.18 The Tribunal agreed that it was not for a solicitor to enquire as to the prudence of a transaction when instructed to act, however a solicitor should satisfy himself that it was proper to act in all the circumstances. The Respondent failed to do this. This failure was culpable in circumstances where the transaction appeared on its face to be dubious or bearing the hallmarks of fraudulent financial arrangements. GQ and Client H were known to each other. He was presented with the sale of shares by GQ to Client H at an undervalue/discount for the immediate onward sale to Company SI. A power of attorney was drafted to facilitate those transactions in circumstances where it was entirely unnecessary. The Respondent did not know why a power of attorney was required other than that it had been requested by the parties. There was no independent valuation of the shares; the actual value of the shares was unknown. All of these matters taken together, it was found, evidenced that the transaction was dubious and bore the hallmarks of fraud.

22.19 In allowing his clients to become involved in a dubious transaction, the Respondent had failed to act in their best interests in breach of Principle 4 and had failed to protect their monies and assets in breach of Principle 10. That such conduct failed to maintain the trust the public placed in the Respondent and the provision of legal services in breach of Principle 6 was plain.

22.20 In facilitating transactions which were dubious and bore the hallmarks of fraudulent financial arrangements, the Respondent had fallen below the standards expected of him by the public and members of the profession. A solicitor acting with integrity

would not facilitate such a transaction. The Tribunal found beyond reasonable doubt that the Respondent had breached the Accounts Rules and Principles as alleged.

22.21 The Tribunal considered that the Respondent had turned a blind eye to the dubious nature of the transaction and had deliberately not asked questions, lest he learned something he would rather not know. He made none of the obvious enquiries that any solicitor would have made. The Tribunal found that ordinary and decent people would consider that in turning a blind eye and facilitating transactions that bore the clear hallmarks of fraudulent financial arrangements, the Respondent's conduct had been dishonest. The Tribunal thus found beyond reasonable doubt that the Respondent's conduct had been dishonest.

22.22 Accordingly, the Tribunal found allegation 1.3 proved beyond reasonable doubt, including that the Respondent's conduct had been dishonest. Given those findings, it was not necessary for the Tribunal to consider whether the Respondent's conduct had been reckless.

23. **Allegation 1.4 – He caused or allowed the Firm's client account to be used improperly, namely as a banking facility in the absence of an underlying legal transaction, for Company NRL, Company FSL, Company CBFS or any of them. He therefore breached Rule 14.5 of the Accounts Rules and any or all of Principles 2 and 6 of the Principles.**

The Applicant's Case

23.1 The FIO identified that the Respondent caused or allowed the Firm's client account to be used improperly, namely as a banking facility in the absence of an underlying legal transaction, for Company NRL, Company FSL and/or Company CBFS. Mr Mulchrone repeated the submissions at allegation 1.3 above as regards the use of a firm's client account as a banking facility.

23.2 The Respondent stated that there were clients for whom he conducted a number of deals and carried out legal work and that at times he held monies for these clients in the expectation of a business deal.

23.3 The conduct alleged demonstrated the Respondent's lack of integrity. A solicitor acting with integrity would never allow his client account to be used improperly, namely as a banking facility in the absence of an underlying legal transaction. The Respondent therefore breached Principle 2. Such conduct also undermined public trust and confidence in the Respondent and the provision of legal services. Members of the public expect solicitors to adhere to the Accounts Rules scrupulously and not to allow their client accounts to be misused to provide unregulated services. The Respondent therefore breached Principle 6.

The Respondent's Case

23.4 The Respondent admitted allowing his client account to be used as a banking facility in breach of Rule 14.5. He denied that he had breached the Principles as alleged. The Respondent explained that he did not knowingly breach the Accounts Rules and that

he had practised with integrity throughout. The use of his client account was inadvertent, caused by his lack of knowledge and commercial experience.

The Tribunal's Findings

23.5 The Tribunal found beyond reasonable doubt that the Respondent had breached Rule 14.5 as alleged and admitted. The Tribunal determined that in failing to comply with the Accounts Rules and allowing his client account to be used as a banking facility, the Respondent had failed to maintain the trust the public placed in him and in the provision of legal services.

23.6 The public and the profession expected the Respondent to be vigilant as regards the operation of his client account and to ensure meticulous attention to compliance with the Accounts Rules. The Respondent had failed in this regard and had allowed and facilitated the use of his client account as a bank account on a number of occasions for a number of different entities. The Tribunal found beyond reasonable doubt that the Respondent's conduct, on an objective analysis, had fallen below the standards the public and the profession expected of him and thus his conduct was in breach of Principle 2. Accordingly, the Tribunal found allegation 1.4 proved beyond reasonable doubt.

24. **Allegation 1.5 – He failed to keep accounting records properly written up to show his dealings with client money in respect of the files identified in Schedule 1 or any of them. He therefore breached any or all of Rules 1.2(f), 29.1, 29.2 of the Accounts Rules and Principle 10 of the Principles.**

The Applicant's Case

24.1 The FIO identified that the Firm did not keep individual client ledgers for the matters in question in any identifiable form. The Respondent explained that whilst he did keep accounting records, they may not have been drawn up in the proper form. In failing to keep accounting records properly written up to show his dealing with client monies, the Respondent breached any or all of Rules 1.2(f), 29.1 and 29.2 of the Accounts Rules. It followed that he also failed to protect client money and assets in breach of Principle 10.

The Respondent's Case

24.2 The Respondent accepted that he had not kept individual client ledgers as required. He maintained a central index for client monies, but not individual client ledgers for each file. He accepted that he had breached the Accounts Rules as alleged. The Respondent denied that such conduct resulted in a breach of Principle 10.

The Tribunal's Findings

24.3 It was clear, and admitted, that the Respondent had failed:

- to keep proper accounting records to show accurately the position with regard to the money held for each client in breach of Rule 1.2(f) of the Accounts Rules;

- to at all times keep accounting records properly written up to show his dealings with client money received, held or paid by him or any office money relating to any client matter in breach of Rule 29.1 of the Accounts Rules; and

- to appropriately record all dealings with client money in a client cash account and on the client side of a separate client ledger account for each client in breach of Rule 29.2 of the Accounts Rules.

24.4 Accordingly, the Tribunal found beyond reasonable doubt that the Respondent had breached the Accounts Rules as alleged. The Tribunal determined beyond reasonable doubt that in breaching the Accounts Rules as alleged and admitted, the Respondent also failed to protect client money and assets in breach of Principle 10. Thus the Tribunal found allegation 1.5 proved beyond reasonable doubt in its entirety.

25. **Allegation 1.6 – He failed adequately or at all to run the Firm effectively and in accordance with proper governance and sound financial and risk management principles**

The Applicant's Case

25.1 The FFIR indicated that the Respondent failed:

- to ensure that the Firm had effective systems to manage risks to compliance with rules made by the SRA;

- to exercise an appropriate degree of supervision and control over the Firm and its employees.

25.2 In particular, the Respondent:

- caused or allowed an unqualified individual, PD, who worked at the Firm on an 'ad hoc' basis, without the formality of a contract of employment or a contract for services, to manage the sales of various properties, with little or no involvement by the Respondent;

- permitted a third party, Company SCL, to arrange signature of the Firm's client care letters;

- caused or allowed the transactions relating to the sale of shares in Company PSL to be effected through the Firm.

25.3 The Respondent explained during the investigation into his conduct that although he allowed PD to carry out work at the Firm, PD was supervised by the Respondent. All the property sales in question were conducted using an email address at the Firm over which he had control.

25.4 As regards permitting a third party to arrange for signature of the Firm's client care letters, the Respondent suggested that that it was common practice for small firms to have an agent contact clients to sign documents.

25.5 The Respondent confirmed that he had knowledge of the share sale transactions.

25.6 Mr Mulchrone submitted that it was unclear how the Respondent's supervision of PD manifested itself or to what extent he monitored incoming and outgoing emails and oversaw the work undertaken by PD. Whilst it was the Respondent's case that PD undertook administrative duties at the Firm, exchange of contracts was not simply an administrative task, it was an important part of the conveyancing process. Mr Mulchrone submitted that this indicated that the Respondent either did not know the extent of PD's involvement in the conveyancing sales, because he was not supervising his work or that Mr PD's role was in fact much more involved than the Respondent has admitted.

25.7 The Respondent's decision to outsource the signature of client care letters meant that he could not with confidence know what information Company SCL were providing his clients, or that his clients fully understood the nature of the work the Firm would undertake or that they fully understood the transactions they were entering into. Further, it was unclear why Company SCL was considered a suitable entity to be arranging the signature of the Firm's client care letters.

25.8 Of particular concern was that Client G, who supposedly signed the client care letter under the Firm's arrangements with Company SCL, had never heard of Company SCL. Clients J and S also confirmed to the FIO that they didn't know anything about the supposed investment into Company SCL. This indicated that the Respondent failed to monitor the arrangements he had in place with Company SCL and did not have suitable controls and checks in place to ensure that the arrangements protected his clients' interests.

25.9 If the Respondent knew about the share sales, as he claimed, it was concerning that he allowed them to proceed without there being a client care letter or evidence of any other correspondence on the client file, or any instructions, no bill of costs and no client ledger. It was unclear why the Firm was required to be involved at all, in circumstances where no advice was given. The Respondent had not clarified the purpose of the Firm's role, or how and why the Firm was acting for Client H under a power of attorney.

25.10 The Respondent's conduct, it was submitted, represented an abdication of his responsibility to run the business effectively and in accordance with proper governance and sound financial and risk management principles. He therefore breached Principle 8.

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

25.11 The Respondent denied allegation 1.6. He explained that he at all times supervised the work of PD. He reviewed the files on which PD worked including all incoming and outgoing emails, which were received and sent from an email address over which the Respondent had complete control.

25.12 As regards the outsourcing of the signing of client care documentation, the Respondent stated that this was standard practice at the Firm, however on reflection, he should not have outsourced that activity. The client care letters that were signed

using Company SCL did not contain any advice and there was no risk that clients could have been misled or misinformed as to the matter.

25.13 The Respondent denied that there was inadequate scrutiny of the back to back share transaction which was the subject of allegation 1.3. It was not unusual for a firm to be instructed to sell shares as in this instance and the Firm's role was to act under the power of attorney.

25.14 Mr Budworth submitted that the complaints made by the FIO as regards PD related to the fact that he had no employment or consultancy contract. Further, he was not legally qualified, was not based in the office, and was a client of the Firm. He was listed on a number of documents as the person who had effected the exchange of contract at the Firm, but was not being remunerated by the Firm. When asked why it was suggested that PD had an undue influence, the FIO replied that this was not an allegation she had levelled. As to finding any evidence that PD had exerted any undue influence, the FIO stated that "he was a client and was working on client files. That's all I can say about his relationship with the Firm." It was submitted that the FIO made clear during cross-examination, that there was no positive case as regards the supervision of PD.

25.15 The Respondent accepted, with hindsight, that he should not have outsourced the signing of the client care documentation to Company SCL.

25.16 The submissions made as to the share transaction was repeated.

The Tribunal's Findings

25.17 The Tribunal agreed that no positive case had been advanced by the Applicant in relation to PD. It was not unusual for a firm to provide experience to non-qualified persons. The evidence advanced did not demonstrate that the Respondent had failed to exercise an appropriate degree of supervision and control over the Firm and its employees. The Tribunal did not find that allowing PD to work at the Firm resulted in a breach of Principle 8.

25.18 The Tribunal found that using Company SCL to obtain the signatures of clients to client care documentation when Company SCL was going to be the beneficiary of those clients' funds, was inappropriate. The Respondent had no knowledge, and no control over the information provided by Company SCL to his clients. In allowing Company SCL to obtain the signatures the Respondent had failed to run the Firm effectively and in accordance with proper governance and sound financial and risk management principles. The Tribunal found beyond reasonable doubt that such conduct was in breach of Principle 8.

25.19 The Tribunal referred to its findings at allegation 1.3 above. The Respondent had allowed the share transaction which was dubious and bore the hallmarks of fraudulent financial arrangement to be effected through the Firm. Such conduct, it was found beyond reasonable doubt, was in breach of Principle 8.

25.20 Accordingly, the Tribunal found allegation 1.6 proved as regards Company SCL and the share transactions.

26. **Allegation 1.7 – On one or more occasions, he acted for clients whose interests were in conflict, in breach of Principles 4 and/or 5 of the Principles. By so doing he also failed to achieve Outcome 3.5 under the Code of Conduct.**

The Applicant's Case

Client H

26.1 The FIO identified that the Respondent acted, or purported to act, under a Power of Attorney, for Client H in relation to her purchase of shares from GQ in Company PSL, and her simultaneous onward sale of the beneficial interest in those shares to a pension scheme, apparently run by Company SI, which was also one of the Respondent's clients. The Respondent had described GQ as his "best friend", yet he also acted for GQ in the transaction (as seller of the shares) and he received instructions from yet another client, Company CBFS, to make a payment to Client H.

Client E

26.2 The FIO further identified that the Respondent purported to act for Client E in relation to his purchase of shares from GQ in Company PSL and his simultaneous onward sale of the beneficial interest in those shares to Company SI. He also acted for GQ (as seller of the shares) and he received instructions from Company CBFS, to make a payment to Client E.

26.3 During the investigation, the Respondent confirmed that he did act for all these clients. He did not consider that there would be any risk for the clients. The transactions demonstrated that there was no risk as the clients made a profit, and no one lost money. He contended that his conduct did not call into question the integrity of the legal profession.

26.4 Mr Mulchrone submitted that the Respondent's response indicated that he had failed to appreciate, or had turned a blind eye, to the potential for conflicts of interest in these matters, arising from his personal associations with GQ, who he described as his "best friend", and also arising from his acting for both the buyers and the sellers of shares, an area which plainly carried a high risk of conflict of interests.

26.5 By acting, or purporting to act, for both sides in commercial transactions, in circumstances where their interests were in conflict, the Respondent failed to act in such clients' best interests in breach of Principle 4 and/or failed to provide a proper standard of service, in breach of Principle 5. The Respondent could not possibly act with single minded loyalty for Client H or Client E in circumstances where he was simultaneously acting for his "best friend", GQ and/or another client, Company SI on the other side of the transaction.

26.6 Further or alternatively, the conduct alleged constituted a clear failure to achieve Outcome 3.5 under the Code of Conduct ("you do not act if there is a client conflict, or a significant risk of a client conflict, unless the circumstances set out in Outcomes 3.6 or 3.7 apply").

The Respondent's Case

26.7 The Respondent denied allegation 1.7. He accepted that he acted for GQ as well as Clients E and H. The Respondent considered whether there was a conflict but concluded that there was not as the clients all had a substantially common interest. He accepted that he should have obtained the clients' written consent to his acting in all the circumstances.

26.8 Mr Budworth submitted that there was no actual conflict as the Respondent was not in the position where he was unable to fulfil obligations to one client without failing the other, nor was he furthering the interests of one client to the prejudice of the other.

The Tribunal's Findings

26.9 The Rule 5 Statement alleged that the Respondent had acted where the interests of clients were in conflict. Given that wording, the Tribunal determined that an actual conflict of interests would need to be established prior to any consideration of whether the Respondent's conduct was in breach of the Principles as alleged. Whilst there might have been a significant risk of a conflict that was inherent in acting on both sides of a transaction, that did not equate to an actual conflict. The Tribunal was not satisfied to the requisite standard that an actual conflict of interests had been proved by the Applicant.

26.10 In the body of the Rule 5 Statement, the Applicant submitted that the alleged failure to achieve Outcome 3.5 was in the alternative. That was not the way in which the allegation had been pleaded. In essence, it was alleged that by acting when there was an actual conflict, as well as breaching the Principles, the Respondent had failed to achieve Outcome 3.5. Thus, the Tribunal determined a finding of an actual conflict was required before there could be any consideration of whether the Respondent's conduct resulted in a failure to achieve Outcome 3.5. Given that the Tribunal did not find any actual conflict, it did not consider whether the Respondent's conduct failed to achieve Outcome 3.5.

26.11 Accordingly, the Tribunal did not find allegation 1.7 proved; that allegation was thus dismissed.

27. **Allegation 1.8 – He allowed one or more third parties an improper degree of influence or control over the Firm or its client account, in breach of all or any of Principles 2, 3, 6 and 8 of the Principles.**

The Applicant's Case

27.1 Mr Mulchrone submitted that the evidence indicated that the Respondent permitted non-solicitors, PD (a consultant at the firm) and GQ (a client and friend), to exercise improper control and influence over the Firm and/or its client account. In particular, he allowed the Firm's office to be used as the correspondence address for various companies owned and controlled by GQ. The Respondent failed to undertake proper due diligence into and scrutinise the involvement of third-party individuals and companies (some of which were incorporated overseas) from whom or on whose

behalf he received and paid out funds, in relation to the financial schemes which he facilitated through his firm.

27.2 He had provided limited explanations of the transactions which were being carried out from the Firm, all of which, he confirmed, would have been authorised by him. It was apparent that client monies were being paid into and out of client account but without proper records being maintained. The Respondent had not explained what due diligence (if any) was carried out on the various third parties and incorporated entities involved in the transactions on which he worked, and who referred work to him.

27.3 In an email to the FIO the Respondent confirmed that in relation to the loan and investment files, he carried out due diligence and AML checks on all the companies involved but he had not described what this was. The Respondent had not confirmed whether due diligence was undertaken in relation to the companies with whom he had dealings, namely Companies PSL, CBFS, SI, NRL and FSL.

27.4 Mr Mulchrone submitted that by allowing one or more third parties an improper degree of influence of control over the Firm, the Respondent failed to act with integrity in breach of Principle 2. A solicitor acting with integrity would never allow his firm or its client account to be used as a 'front' or vehicle for the business/financial activities of non-solicitors, particularly if dubious.

27.5 The conduct alleged also compromised the Respondent's independence, in breach of Principle 3, and failed to maintain public trust in him and the provision of legal services, contrary to Principle 6.

27.6 Further or alternatively, the conduct alleged demonstrated the Respondent's failure to run the Firm effectively and in accordance with proper governance and sound financial and risk management principles in breach of Principle 8.

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

27.7 The Respondent denied allegation 1.8. Neither PD nor GQ had any control over the Firm or its client account. As regards the companies that were his clients, it was standard practice when a file was opened to carry out a company search and obtain ID documents for the relevant individuals or directors/officers of those incorporated entities. The Respondent did this as to satisfy himself as to the identity of those entitles or third parties.

27.8 Allowing the Firm's office to be used as a correspondence address for various companies owned and/or controlled by GQ did not mean that the Respondent was being unduly influenced by GQ. The use of the Respondent's office as a correspondence address was not evidence of the exercise of an improper degree of control over the Firm. There was no evidence to support the assertion that PD, GQ or any of the corporate entities had been involved in the running of the Firm.

27.9 Mr Budworth submitted that the Applicant had presented no evidence as to how it was that PD had any degree of control. The height of the Applicant's case as regards GQ was the use by him of the Firm's office address as a correspondence address.

The Tribunal's Findings

27.10 The Tribunal determined that there was no evidence that either PD or GQ had any degree of control over the Firm and/or its client account. Further, the failure (if there was one) to carry out due diligence on the various third parties and incorporated entities involved in the transactions could not, without more, equate to the exertion of an improper degree of influence or control over the Firm and/or its client account. The use of the Firm's client account as a banking facility was not, in and of itself, evidence to support the allegation. Accordingly, the Tribunal did not find allegation 1.8 proved; that allegation was thus dismissed.

28. **Allegation 1.9 – He caused or allowed the Firm to be held out as being accredited with or by the Law Society's Conveyancing Quality Scheme (CQS) in circumstances when it was not so accredited, in breach of Principles 2 and/or 6 of the Principles.**

The Applicant's Case

28.1 The Law Society Conveyancing Quality Scheme is a quality standard for residential conveyancers. Accreditation under the scheme provides assurance to lenders, insurers, consumers and clients.

28.2 The FIO identified that one of the Firm's client care letters stated that the Firm was "accredited as part of the Law Society's Conveyancing Quality Scheme". When this representation was put to him in interview, the Respondent stated: "That's a typo. Um we were trying, it should have said – we, we're attempting to be part of the scheme". The Respondent went on to describe this as "a mistake", saying "I hold my hands up to that yeah".

28.3 Mr Mulchrone observed that the suggestion that the Firm was a member of the CQS was also made in its standard terms and conditions of business which stated:

> "As part of our continuing commitment to providing a high quality of service to all our clients, RMJ Solicitors maintains accreditation with the Law Society's Conveyancing Quality Scheme. The audit procedure laid down by this scheme may require examination of clients' confidential files from time to time under strictly controlled circumstances and only to duly appointed and qualified individuals. Acceptance of these terms and conditions by any client is deemed to include consent to such disclosure, which may be withdrawn by you in writing at any time."

28.4 Mr Mulchrone submitted that this was not a one-off 'typo' or mistake but an objectively false and misleading representation repeated on multiple of the Firm's official documents. Either the Respondent had deliberately sought to mislead or he had culpably failed to identify and correct the obvious.

28.5 By causing or allowing the Firm to be held out as being accredited with the Law Society Conveyancing Quality Scheme when it was not and he knew it was not so accredited, the Respondent failed to act with integrity, as defined above, in breach of Principle 2. A solicitor acting with integrity would scrupulously avoid making false

and misleading suggestions as to the Firm's credentials in its client care letters and terms of business. Further or alternatively, the conduct alleged constituted a clear failure by the Respondent to behave in a way that maintained the trust the public placed in him and in the provision of legal services, in breach of Principle 6.

The Respondent's Case

28.6 The Respondent explained that the inclusion of the offending material was as a result of copying and pasting from the CQS template. It was an honest mistake and there had been no intention to mislead anyone as to the Firm's status. Mr Budworth submitted that the Respondent had, from the outset, accepted that his documentation contained a false representation. The Respondent had explained that this was the result of an error. There had been no challenge to that explanation. His error did not result in a breach of the Principles as alleged.

The Tribunal's Findings

28.7 The Tribunal noted that the Respondent accepted that his documentation contained misrepresentations. The misrepresentations were not confined to a single document but were contained on a number of key documents. The inclusion of the CQS statement on key documents was more than just a "typo". Members of the public expected a Firm's documents to accurately reflect its status. That the Respondent had failed to maintain the trust placed in him and in the provision of legal services was plain.

28.8 The Tribunal considered that the profession would expect a solicitor to ensure that documents sent to clients were accurate as to their description of the Firm's status so as to prevent any clients from being misled. In failing to do so, the Respondent had fallen below the standards expected of him by both the public and the profession.

28.9 Accordingly, the Tribunal found allegation 1.9 proved beyond reasonable doubt.

29. **Allegation 1.10 – In his capacity as sole principal, COFA and/or COLP at the Firm, the Respondent failed to ensure or take adequate steps to ensure compliance with the Firm's regulatory obligations under the Accounts Rules and/or the Code of Conduct 2011, in breach of Rule 8.5 of the SRA Authorisation Rules 2011 and any or all of Principles 7, 8 and 10.**

The Applicant's Case

29.1 The IFIR identified a number of concerns including:

- non-compliance with the Accounts Rules;
- failure by the Respondent to maintain client ledgers, a client cash account and to undertake client reconciliations;
- uncertainty as to whether the Firm had sufficient cash to meet its liabilities to clients;
- lack of appropriate accounting records;
- failure by the Respondent to report breaches to the SRA;
- unauthorised payments made from client account to Company PC;

- six round sum transfers made from client account to office account;
- two round sum payments totalling £30,000 made from office to client account.

29.2 Mr Mulchrone submitted that the following breaches arose:

29.2.1 The Firm's inadequate systems and processes were in breach of Principle 8:

- In failing to have effective systems and controls in place to achieve and comply with all the Principles, rules and outcomes and other requirements of the Handbook the Respondent failed to achieve Outcome 7.2

- The Respondent and the Firm did not have appropriate accounting procedures or proper controls for the handling of client money.

- Regulatory deadlines were missed: the Firm's accountants were unable to complete the Firm's accountants' report for the period ending 31 March 2016 within the required deadline, despite having been granted two extensions of time as they were unable to work with the inadequate information provided by the Firm

- Mr R was permitted to undertake accounting and billing responsibilities when he himself had no experience of the same. This meant that the Respondent transferred round, not precise, sums in payment of costs in breach of rule 17.7 of the Accounts Rules. This was a material breach of those rules which the Respondent did not report to the SRA.

- The Respondent was the COLP and COFA and as such he failed to discharge his compliance obligations, including under rule 8.5 of the SRA Authorisation Rules 2011. He failed to provide information to the SRA and to and address his non-compliance over a significant period of time.

29.2.2 The Respondent failed to protect client money and assets in breach of Principle 10:

- The Firm did not maintain proper accounting records, including accurate and reliable client ledgers or a client cash account. It was unable to determine what its liabilities to clients were in breach of Rules 1.2(e) and (f) of the Accounts Rules. This was a material breach of those Rules but not reported to the SRA.

- Although the Firm had an electronic accounting system, this was not used. Instead, the Respondent created or allowed to be created manual accounting records using Excel spreadsheets. Whilst this was not in breach of the Accounts Rules, if spreadsheets were to be used they were required to meet all the requirements of the Accounts Rules and they did not. This was because they did not provide individual client ledgers or a client account 'cash book' which provides a list of client receipts and payments with accumulative balance in chronological order. That was a breach of the Rules.

- The FIO reported that the manual accounting records maintained by the Firm in relation to its dealings with client money were incomplete. The Firm had not completed client account reconciliations and it appeared that no client account reconciliation had been undertaken since March 2015. This was another material breach of the Rules.

- The FIO calculated a minimum cash shortage in the Firm's client accounts of £5,204.44 at 13 December 2016. The lack of complete records meant that she could not confirm whether this was the full extent of the shortage or whether the Firm held sufficient funds to cover its liabilities to clients. The Respondent replaced the perceived shortage upon being told by the FIO; however, because his accounts were not reliable, he was unaware of it until that time.

- Over a period of 6 months, the Respondent failed to stop a series of monthly payments under a direct debit arrangement from being made from client account. He did not do so because he was unaware that it was happening. This was further evidence of his failure to properly manage his accounts and the impact of having no regular client account reconciliations. He therefore breached the rules for transferring money from the client account even though the direct debit payment was not set up by the Firm and was an error ultimately replaced by the bank.

- The first improper payment was made on 23 August 2016 and was replaced on the same day. The subsequent payments made on 12 September, 11 October, 11 November and 12 December 2016 were not replaced until 23 January 2017. The delay in replacing the shortage resulted in a breach of Rule 7.

- Between 17 March 2016 and 6 May 2016, the Respondent allowed six round sum transfers to be made from the client account on account of the Firm's costs. Round sum transfers on account of costs are expressly prohibited by the Accounts Rules. Regardless of the reasons for the transfers, this is further evidence of the Respondent's failure to handle client money properly. Round sum transfers of £30,000 were also made into the client account, ostensibly to correct errors.

29.3 Mr Mulchrone submitted that in light of the above, it was clear that the Respondent had failed to comply with his legal and regulatory obligations in breach of Principle 7.

The Respondent's Case

29.4 The Respondent accepted the Accounts Rules breaches detailed.

The Tribunal's Findings

29.5 The Tribunal considered that the breaches of the Principles followed, as a matter of course, from the accepted Accounts Rules failings. Further, the Respondent had failed to comply with his obligations as the COLP and COFA of the Firm. Accordingly, the Tribunal found allegation 1.10 proved beyond reasonable doubt.

Previous Disciplinary Matters

30. None.

Mitigation

31. Mr Budworth referred the Tribunal to paragraph 52 of its Guidance Note on Sanction which re-iterated that a finding of dishonesty did not always lead to a solicitor being struck off the Roll. It was important to look at the extent of any adverse effect on others. This was significant as there had been no client complaint in the matters found proved. It was rare that a finding of dishonesty involved no adverse effect on a client. The Respondent had not misled the regulator nor had he attempted to conceal his conduct. He had cooperated fully and had taken a measured approach to both the investigation and the proceedings.

32. The Tribunal, in focussing on the critical questions of the nature and the extent of the dishonesty could properly conclude that this was a case which did not the sanction of striking the Respondent from the Roll. The proven matters had been brief and related to a handful of transactions in an otherwise lengthy and unblemished career.

33. The Respondent had not deliberately and/or intentionally withheld any information from the SRA notwithstanding that he was under immense pressure and emotional stress as a result of the proceedings. He had followed the code of conduct to the best of his ability with a genuine belief at all times that he was acting in his clients' best interests and doing the right thing for his clients. The intervention into his Firm had already had a catastrophic effect on the Respondent both mentally and financially. Mr Budworth directed the Tribunal to testimonials submitted on the Respondent's behalf that spoke to his honesty and integrity. The Tribunal was asked to take these matters into consideration when determining the outcome.

34. It was clear that the Respondent had hit a significant crisis in the running of his practice with the sudden departure of four key fee earners and the failings in his accounts department. The proven matters had all occurred during that period. The effect on his health was, in the circumstances, unsurprising.

35. The purpose of any sanction was to protect the public and maintain the reputation of the profession. In the circumstances of this case it was not necessary to strike the Respondent from the Roll to achieve those aims. An appropriate sanction in this case would be the imposition of restrictions on his ability to practice together with a financial penalty. The intervention into the Firm had been wholly chastening. There was no risk of any repetition of his conduct.

Sanction

36. The Tribunal had regard to the Guidance Note on Sanctions (December 2018). The Tribunal's overriding objective, when considering sanction, was the need to maintain public confidence in the integrity of the profession. In determining sanction, it was the Tribunal's role to assess the seriousness of the proven misconduct and to impose a sanction that was fair and proportionate in all the circumstances.

37. The Tribunal found that the Respondent had been motivated by financial gain. He sought to replace the income he had lost with the departure of the personal injury fee earners with another income stream. His actions were planned and considered. He was directly, wholly and solely responsible for his conduct. Whilst this was a new area of practice, the Respondent was experienced enough to know what information he ought to have sought from his clients and that in all the circumstances, he should have verified his clients' instructions.

38. The Respondent had caused harm to the reputation of the profession. As was stated by Coulson J in SRA v Sharma [2010] EWHC 2022 (Admin):

> "34. There is harm to the public every time that a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."

39. The Tribunal found the Respondent's conduct to have been aggravated by his proven dishonesty, which he knew was in material breach of his obligation to protect the public and maintain public confidence in the reputation of the profession. His misconduct was deliberate, calculated and repeated and had occurred over a period of time. His dishonest conduct had occurred in separate types of transaction in circumstances where he had turned a blind eye to the clear and obvious hallmarks of fraud. He had been evasive in both the interview and in his written answers during the investigation. The Tribunal found the Respondent's position in the interview of having little recollection of Company SCL or the transactions to be incredible.

40. In mitigation, the Respondent had had a previously unblemished career and had made some, albeit limited, admissions from the outset.

41. The Tribunal considered that sanctions such as No Order, a Reprimand, a Fine and Restrictions on practice did not reflect the seriousness of the Respondent's misconduct. Nor would such a sanction protect the public or maintain the reputation of the profession. The Respondent's conduct had been a complete departure from the standards of integrity, probity and trustworthiness expected of him as a solicitor. The Tribunal considered that the seriousness of the Respondent's misconduct was such that a suspension was not an adequate sanction. His conduct was such that the protection of the public and the reputation of the profession required that he be struck off the Roll.

42. The Tribunal considered whether the mitigation and medical evidence advanced on the Respondent's behalf were such that this was a case that fell into the residual category of cases referred to in Sharma. The Tribunal had regard to the relevant caselaw. In SRA v James et al [2018] EWHC 3058 (Admin) LJ Flaux stated:

> "… in my judgement, pressure of work or extreme working conditions whilst obviously relevant, by way of mitigation, to the assessment which the SDT has to make in determining the appropriate sanction, cannot either alone or in conjunction with stress or depression, amount to exceptional circumstances. Pressure of work or of working conditions cannot ever justify dishonesty by a solicitor …"

43. The Tribunal considered that the mitigation advanced by the Respondent did not demonstrate any exceptional circumstances. Having made that determination, the Tribunal found that the appropriate and proportionate sanction was to strike the Respondent from the Roll.

Costs

44. Mr Mulchrone applied for costs in the sum of £32,373.50 which comprised of £10,173.50 for the SRA's internal costs and £18,500 + VAT for Capsticks costs. Whilst the Capsticks costs were the subject of a fixed fee, the number of hours worked on the case gave a notional hourly rate of £104.88 per hour.

45. The time spent by the FIO on preparing the reports was reasonable and should not be reduced. Whilst some of the allegations had not been proved, all the allegations were reasonably brought and certified by the Tribunal as showing a case to Answer. Whilst some aspects of the Applicant's case regarding its witnesses had been frustrating, costs should not be reduced for those issues over which the Applicant had no control. Mr Mulchrone accepted that the Tribunal may decide to make some reduction for the non-proven matters; any such reduction should not be substantial.

46. Mr Budworth submitted that the Tribunal should take a broad-brush approach in its assessment of the appropriate amount of costs. The costs should be reduced as:

- An entire hearing day had been lost due to the non-availability or technical issues with the Applicant's witnesses;
- The time claimed by the FIO for the preparation of the reports was difficult to sustain; and
- The time claimed by Capsticks for the preparation of the Rule 5 Statement and the witness statements was excessive.

47. The Tribunal considered that the SRA's internal costs were both reasonable and proportionate and should not be subject to reduction. The Tribunal determined that there should be a small reduction in the costs claimed by Capsticks as a number of allegations had not been found not proved. The Tribunal determined that the time taken on the unproven matters was minimal and a reduction in costs of £1,500 + VAT was an appropriate reduction. Accordingly, the Tribunal ordered that the Respondent pay costs in the sum of £30,573.50.

Statement of Full Order

48. The Tribunal Ordered that the Respondent, ROBERT JOHN METCALFE, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £30,573.50.

Dated this 14th day of October 2019
On behalf of the Tribunal

B. Forde
Chairman