SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12025-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

[FIRST RESPONDENT – NAME REDACTED] First Respondent
[SECOND RESPONDENT – NAME REDACTED] Second Respondent
VICTORIA KINSELLA Third Respondent

Before:

Mr B. Forde (in the chair)
Mr W. Ellerton
Mr S. Howe

Date of Hearing: 24–27 February 2020

Appearances

Rory Mulchrone, barrister or Capsticks LLP, 1 St Georges Road, Wimbledon, London, SW19 4DR for the Applicant.

Edward Levey, counsel of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH instructed by Evan Wright, solicitor of JMW Solicitors LLP, 1 Byrom Place, Spinningfields, Manchester, M3 3HG for the First Respondent.

Marianne Butler, counsel of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH instructed by Michelle Garlick, solicitor of Weightmans LLP, No 1 Spinningfields, Hardman Square, Manchester M3 3EB for the Second Respondent.

The Third Respondent did not attend and was not represented.

JUDGMENT

Allegations

1. The allegations against the First Respondent made by the Solicitors Regulation Authority ("SRA") were that, whilst practising as a Director at High Street Solicitors Limited ("the Firm"):

1.1 Between October 2016 and June 2017, he failed to ensure compliance with the Solicitors Accounts Rules 2011 ("the SAR"), in that monies relating to (a) unpaid professional disbursements and/or (b) ATE insurance premiums, including client monies, were improperly held to the Firm's office account, contrary to Rule 14.1 of the SAR; and in so doing breached Rule 6.1 of the SAR, and Principles 6, 7, 8 and 10 of the SRA Principles 2011 ("the Principles"), and Outcomes 7.2, 7.3 and 7.4 of the SRA Code of Conduct 2011 ("the Code").

1.2 Between July 2016 and September 2017, he caused or allowed the Firm to request of its clients in holiday sickness matters that they delete any comments or photos from their holiday on social media; and in doing so breached Principles 2, 4 and 6 of the SRA Principles 2011.

2. The allegations made against the Second Respondent were that, whilst practising as a Director at the Firm, and as the Firm's COLP:

2.1 Between October 2016 and June 2017, he failed to ensure compliance with the SAR, in that monies relating to (a) unpaid professional disbursements and/or (b) ATE insurance premiums, including client monies, were improperly held to the Firm's office account, contrary to Rule 14.1 of the SAR; and in so doing breached Rule 6.1 of the SAR, Principles 6, 7, 8 and 10 of the Principles, and Outcomes 7.2, 7.3 and 7.4 of the Code.

3. The allegations made against the Third Respondent who is not a solicitor, were that while employed as the Firm's COFA, she had been guilty of conduct of such a nature that in the opinion of the SRA it would be undesirable for her to be involved in a legal practice, in that:

3.1 Between October 2016 and 23 February 2017, she failed to take all reasonable steps to ensure compliance with the Firm's regulatory obligations under the SAR, in that monies relating to (a) unpaid professional disbursements and/or (b) ATE insurance premiums, including client monies, were improperly held to the Firm's office account, contrary to Rule 14.1 of the SAR; and in so doing she breached her obligations under Rule 8.5(e) of the SRA Authorisation Rules 2011 ("the Authorisation Rules") and Principles 6, 7, 8 and 10 of the Principles.

3.2 Between October 2016 and February 2017, she failed as soon as reasonably practicable to report to the SRA a material failure to comply with the SAR, inasmuch as she was aware that monies relating to (a) unpaid professional disbursements and/or (b) ATE insurance premiums, including client monies, were improperly held to the Firm's office account, contrary to Rule 14.1 of the SAR; and in so doing she breached her obligations under Rule 8.5(e) of the Authorisation Rules and Principles 7 and 8 of the Principles.

Documents

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

- Notice of Application dated 18 November 2019
- Rule 5 Statement and Exhibit HVL1 dated 18 November 2019
- First Respondent's Answer dated 15 January 2020
- Second Respondent's Answer dated 13 January 2020
- Applicant's Reply and Exhibit HVL2 dated 29 January 2020
- Applicant's Statement of Costs 18 February 2020
- Skeleton Argument on behalf of the Second Respondent dated 19 February 2020

Preliminary Matters

5. The absence of the Third Respondent

5.1 The Third Respondent did not attend and was not represented. Proceedings had been served on her by registered mail to her last known address on 12 December 2019. Mr Mulchrone applied to proceed in her absence. The documents served had been signed for on 13 December 2019. Standard Directions detailed the date and time of the hearing. On 20 December 2019 and 14 January 2020, those directions were varied such that the time for service of the Answer was extended to 15 January 2020. On 21 January 2020, a Case Management Hearing took place. The memorandum from that hearing was sent to all parties. At no point during the proceedings had the Third Respondent engaged.

5.2 On 20 February 2020, solicitors that were believed to have been instructed by the Third Respondent confirmed to the Applicant that they did not represent her and were not on record as doing so.

5.3 Mr Mulchrone directed the Tribunal to Rule 16(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR") which stated:

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

5.4 In considering the application to proceed in the Third Respondent's absence, the Tribunal should exercise its discretion with the utmost care and caution, and with regard to the factors set out in R v Jones [2001] EWCA Crim 168, as clarified by the House of Lords. Whilst fairness to the Third Respondent was of paramount importance, her right to appear could be waived in circumstances where she was voluntarily absent from the hearing. There had been no application for an adjournment of the proceedings, and there was no indication that any adjournment would secure the Third Respondent's attendance at a future fixture. The expeditious disposal of the matter was in the public interest and also in the interest of the First and Second Respondents who had both attended and were represented. In the circumstances, Mr Mulchrone applied to proceed in the Third Respondent's absence.

5.5 The First and Second Respondents both submitted that they were keen for matters to progress.

The Tribunal's Decision

5.6 The Tribunal noted that the proceedings papers had been signed for by someone with the same surname as the Third Respondent. The date and time of the hearing had been detailed in those papers. The Third Respondent was aware of the investigation into the Firm, having been interviewed by the Applicant's Forensic Investigation Officer ("FIO"), and having provided a response dated 18 June 2018 to the Applicant's EWW letter dealing with the issues regarding the SAR breaches. A number of emails regarding the proceedings had been sent to the Third Respondent's email address. None of those emails had been returned as undeliverable. The Tribunal was satisfied that the Third Respondent had been served in accordance with the SDPR.

5.7 The Tribunal had regard to the principles in Jones, GMC v Adeogba [2016] EWCA Civ 162 and the Third Respondent's ability to apply for a rehearing pursuant to Rule 19 of the SDPR. The Third Respondent had not made any contact with the Applicant or the Tribunal concerning this matter and had not instructed lawyers to appear on her behalf. There had been no application to adjourn the proceedings. There was nothing to indicate that the Third Respondent would attend or engage with the proceedings if the case were adjourned. The Tribunal was satisfied that in this instance the Third Respondent had chosen voluntarily to absent herself from the hearing. It was in the public interest, the interests of the First and Second Respondents and in the interests of justice that this case should be heard and determined as promptly as possible. In the light of these circumstances, it was just to proceed with the case, notwithstanding the Third Respondent's absence.

6. Application to withdraw the allegation of a failure to achieve Outcome 7.4 of the Code against the First and Second Respondents.

6.1 Allegations 1.1 and 2.1 as contained in the Rule 5 Statement, included an allegation that the First and Second Respondents had failed to achieve Outcome 7.4. That breach had not been particularised in the Rule 5 Statement. Whilst it was not accepted that in circumstances where a substantial shortfall had been accepted by the First and Second Respondents, the failure to achieve Outcome 7.4 had been inadequately pleaded, Mr Mulchrone submitted that the proof of a failure to achieve that Outcome was unlikely to make any difference to any sanction imposed. In the circumstances he applied to withdraw that matter. The application was supported by the First and Second Respondents.

6.2 The Tribunal determined that it was not in the interests of justice nor proportionate for that matter to remain contested in light of the submissions. Accordingly, the Tribunal granted the application for the allegation of a failure to achieve Outcome 7.4 to be withdrawn. The allegations proceeded with are those detailed in the allegations above.

Factual Background

7. The First Respondent was admitted to the Roll in September 2000. He has been a Director of the Firm since 1 November 2009. At the material time, he was described in the Firm's Terms of Business for holiday sickness claims as the Firm's Managing Director. Since 19 February 2019 he had been the Firm's COFA.

8. The Second Respondent was admitted to the Roll in August 2008. He became a Director of the Firm on 24 May 2011 until his resignation on 22 October 2019. The Second Respondent was the Firm's COFA from 14 November 2012 until 21 November 2014. According to the Applicant's records, he was the Firm's COLP (and remained so).

9. The Third Respondent was not a solicitor. She was employed by the Firm from 21 November 2014 until leaving the Firm on 28 February 2017, as the Firm's Head of Finance. She was the Firm's COFA throughout the relevant period. During her interview, the Third Respondent informed the Forensic Investigation Officer ("FIO") that she had no accountancy qualifications.

10. Ms R commenced working with the Firm on 21 April 2017 on an ad-hoc consultancy basis and became the Firm's COFA with effect from 21 April 2017. Ms R left the Firm on or around 26 October 2018. She liaised with the FIO during the investigation. Ms P was a member of the Firm's Accounts staff during the relevant period.

Witnesses

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

- Sarah Bartlett – Forensic Investigation Officer in the employ of the Applicant.
- The First Respondent.
- The Second Respondent.

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

Findings of Fact and Law

13. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondents' rights to a fair trial and to respect for their private and family lives 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 all the parties.

Integrity

14. 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".

15. **Allegation 1.1 - Between October 2016 and June 2017, he failed to ensure compliance with the SAR, in that monies relating to (a) unpaid professional disbursements and/or (b) ATE insurance premiums, including client monies, were improperly held to the Firm's office account, contrary to Rule 14.1 of the SAR; and in so doing breached Rule 6.1 of the SAR, and Principles 6, 7, 8 and 10 of the Principles, and Outcomes 7.2 and 7.3 of the Code.**

Allegation 2.1 - Between October 2016 and June 2017, he failed to ensure compliance with the SAR, in that monies relating to (a) unpaid professional disbursements and/or (b) ATE insurance premiums, including client monies, were improperly held to the Firm's office account, contrary to Rule 14.1 of the SAR; and in so doing breached Rule 6.1 of the SAR, Principles 6, 7, 8 and 10 of the Principles, and Outcomes 7.2 and 7.3 of the Code.

The Applicant's Case

15.1 During her inspection, the FIO reviewed the Firm's reconciliations on the office bank account between October 2016 and June 2017. A comparison of the closing cashbook balance and the bank balance for each month showed a large number of unreconciled items consisting of unpresented cheques and unprocessed electronic transfers. The FIO ascertained that a majority of the unpresented items related to unpaid professional disbursements and ATE insurance premiums. Some of these payments were more than six months old and included client money. On further analysis, the FIO noted that the majority of unreconciled items that appeared on the October 2016 cashbook remained unreconciled on the April 2017 cashbook:

October 2016

- Unpaid Professional Disbursements: £33,662.26
- ATE Insurance Premiums: £36,370.62

Total: £70,032.88

April 2017

- Unpaid Professional Disbursements: £101,053.35
- ATE Insurance Premiums: £88,730.81

Total: £189,784.16

15.2 All of the unpaid professional disbursements and ATE insurance premiums included in the figures above were more than 6 months old. They included both unpresented cheques and unprocessed electronic transfers.

15.3 The Firm recorded aged creditors as a contra entry on the cashbook created for the end of the financial year on 29 April 2016 in respect of cheques more than six months old. The value of the aged creditors was in excess of £90,000. That figure, it was submitted, should be added to the figures set out above in order to arrive at a total for unpresented items. In her interview with the FIO the Third Respondent explained how in April 2016 they had attempted to "tidy up the unpresenteds list" by moving them to a purchase ledger. This meant that those items could not be readily seen on the Firm's books of account because it had the effect of cancelling them off, and it would not be apparent that these were in fact still outstanding.

15.4 On 31 July 2017, Ms R provided a figure of £269,040. On 16 August 2017 a spreadsheet was provided to the FIO which showed the following:

Un-cleared Cheques

- ATE Premium: £87,194.24
- Counsel: £27,991.85
- Medical Report: £72,095.00

Aged Creditors

- ATE: £47,280.33
- Counsel: £15,417.00
- Medical Report: £29, 136.40

15.5 The Firm's overdraft limit was £400,000.00. Mr Mulchrone noted that during the months from October 2016 to June 2017, the office account was close to (or in excess of) the overdraft limit. But for the unpresented items, the account would have exceeded its overdraft limit each month by figures in the region of £200,000.00 - £300,000.00. The unreconciled items were, in effect, propping up the Firm's general financial position. The FIO found that, for example, in April 2017 there were insufficient funds in the Firm to ensure that all of the unpresented items could be paid without the injection of further funds.

15.6 On 26 October 2016, a letter was sent to the Second Respondent at the Firm by the Firm's accountants. This letter had the subject "SAR work - year to 30 April 2016" and purportedly enclosed a signed Accountant's Report Form covering the period from 1 May 2015 to 30 April 2016. The letter described the report as a "clean" report (i.e. no reportable breaches). However, the following was brought to the Firm's attention:

> "At the year end the client account bank reconciliation included unpresented cheques totalling £7,406.40 which were more than six months old. Six months is normally regarded as the cut-off point at which a cheque becomes "out of date" i.e. the bank will no longer cash it. You should therefore look to

> incorporate into your systems a regular review whereby unpresented cheques more than six months old are written back to the client ledger and re-issued."

15.7 Mr Mulchrone submitted that the issue of the unpresented items, including those more than 6 months old, had therefore been brought to the Firm's attention by its own accountants no later than October 2016.

15.8 By a letter dated 16 August 2017, the Firm made a self-report to the SRA of a material failure to comply with the SAR. The breach related to the level of unpaid professional disbursements and ATE insurance premiums. The letter stated:

> "It would appear from our internal investigation carried out that upon receipt of costs from third party insurers, cheques have been written to pay the provider/medical agency but for reasons which we have not been able to categorically identify, these cheques have either not been sent to or have not been received/cashed by the intended recipient."

15.9 The Firm was unable to explain why the cheques had not been cashed or where they were. The Firm would, in future, pay all monies received from third parties for disbursements into and out of the client account.

15.10 In her interview with the FIO on 20 September 2017, the Third Respondent explained the process for paying professional disbursements at the Firm. Money for disbursements (e.g. a cheque received in the post) would be paid into office account predominantly, a bill would be raised at the same time, and a request for a cheque out would be generated at the same time.

15.11 The Firm's qualified accountant's report for the year ending 30 April 2017 (signed by the accountant on 31 October 2017) stated that:

> "A review of the office bank reconciliations showed a significant amount of unpresented cheques representing disbursement amounts transferred from client account".

15.12 In his interview with the FIO on 5 December 2017, the Second Respondent stated that the finance team were "putting the payment in to the relevant account, and when the payment of ATE and/or medical reports needed to be paid, they were then being transferred to the office account, to then have the cheques issued and to be paid". However, by the time of the interview this had been changed so that "all payments go in and out of the client account".

15.13 Given the admissions made by the First and Second Respondents, Mr Mulchrone limited his submissions as regards the Principle breaches and failure to achieve Outcomes to those that were in dispute.

Principle 6

15.14 The conduct alleged amounted to a breach by the First and Second Respondents of the requirement to behave in a way which maintains the trust placed by the public in them and in the provision of legal services. As Directors of the Firm, they were responsible

for ensuring compliance with the SAR. Public confidence in the First and Second Respondents, in solicitors, and in the provision of legal services, will be undermined by unpaid professional disbursements and ATE insurance premiums, including client money, being improperly held to the office account, and in particular at a time when that account was close to its overdraft limit. The First and Second Respondents therefore breached Principle 6 of the Principles.

15.15 It was the Respondents case that they could not be liable for a breach of Principle 6 when they were ignorant of the shortage. It was accepted by the Applicant that the Respondents were not aware of the position. Mr Mulchrone acknowledged that a breach of the SAR did not automatically lead to a breach of Principle 6. It did not follow that ignorance of the shortage afforded the Respondents a complete defence to the allegation of a breach of Principle 6. They were the Managing Director and COLP of a small Firm as well as the only equity Directors during the relevant period. When the Firm became an ABS, they were the only qualified lawyer managers. If they did not know of the shortage, they ought to have done. They were able to access all of the Firm's systems and had an obligation to ensure that the Firm complied with the SAR. It was the Applicant's position that the ignorance of the Respondents of the shortage was both serious and culpable.

15.16 The Tribunal was referred to the case of Lawson v SRA [2015] CO/5047/2014. In that case at paragraph 19 there was no suggestion that Mr Lawson was "ever to the smallest degree an active participant in the delinquencies concerning the client money. The case against him was that he was passively complicit. It was not that he knew, but that he ought to have known, what was going on." Further, at paragraph 28, Mostyn J stated:

> "There is not much appellate guidance about passive complicity. Obviously lack of knowledge is no defence. As Mr McClelland rightly says a core provision or obligation is Rule 6 of the Solicitors Accounts Rules 1998 and 2011 which states that "All the principals in a practice must ensure compliance with the rules by the principals themselves and by everyone employed in the practice". It is to state the obvious that it was a major dereliction of duty for the appellant not to have informed himself what was going on in the practice of which he was a partner. The warning signs could not have been clearer."

15.17 The Respondents were the only Principals (or qualified lawyer managers when the Firm became an ABS). Whilst they may have delegated some of the accounting functions of the Firm, they were, ultimately the ones responsible for ensuring compliance with the SAR. The Principle in Lawson established that passive complicity could amount to misconduct. Mr Mulchrone submitted that the smaller the Firm and the larger the shortage, the more irresistible was the inference of passive complicity.

15.18 Mr Mulchrone did not accept that the decision in Wingate required the SRA to plead or establish either recklessness or manifest incompetence in order to establish a breach of Principle 6: "Principle 6 is directed to preserving the reputation of, and public confidence in, the legal profession. It is possible to think of many forms of conduct which would undermine public confidence in the legal profession. Manifest incompetence is one example". In circumstances where substantial amounts of client

money was effectively spent in reducing the Firm's office overdraft, the Applicant considered that the breach of Principle 6 was serious and obvious. This was the case notwithstanding that it was not alleged that the Respondents had actual knowledge of the position.

Principle 10

15.19 The funds in question were credited to the office account, which was overdrawn. The Firm would have had to become yet more overdrawn in order to honour any individual payment, and would not have been able to honour all the outstanding payments without the injection of additional funds. Furthermore, to the extent that the sums were held to the office account, these would not have received the same protection as funds held in a bank account designated as a client account. In the office account, the money was not protected from the contingencies of insolvency or the bank withdrawing its overdraft facility. Client money received from third party insurers was needed in order to pay outstanding professional disbursements and ATE insurance premiums.

15.20 The duty under Principle 10 was an ongoing and prospective duty, and could not be complied with retrospectively. The fact that no client actually lost any money was not relevant as regards liability for breaching the Principle. The replacement of the shortage was mitigation. Principle 10 required that client money be kept in client account, save as exceptionally permitted by the SAR. By keeping client money in office account it was mixed with the Firm's own funds or, even more seriously in this case, the Firm's liabilities to the bank (i.e. it is spent in reducing the overdraft). In all the circumstances, it was submitted that the breach of Principle 10 was serious and obvious.

Outcome 7.3

15.21 The First and Second Respondents failed to identify, monitor and manage risks to compliance, and to take steps to address issues identified. The Respondents' case was that they did not identify the issue of unpresented cheques or unprocessed electronic transfers, which on any view presented a material risk to the Firm's compliance with the Principles etc. (in that substantial amounts of client money was improperly held to office account, which was overdrawn at material times). It followed that they were unable to monitor or manage such risks, adequately or at all. Accordingly, they failed to achieve Outcome 7.3.

The Respondents' Case

15.22 In his Answer and his Witness Statement, the First Respondent adopted the detailed explanations as regards the disputed matters that had been provided by the Second Respondent. During the hearing, the submissions as regards those matters were provided by Ms Butler. Those submissions were likewise adopted by the First Respondent. Mr Levey added brief supplemental submissions.

15.23 The Respondents admitted that client monies had been improperly held in the Firm's office account in breach of Rule 14.1 of the SAR. They further admitted that as a result, they had breached Rule 6.1 of the SAR, Principles 7 and 8 of the Principles and

had failed to achieve Outcome 7.2 of the Code. Those admissions were on a strict liability basis. The Respondents' denied that they had breached Principles 6 and 10 of the Principles, or that they had failed to achieve Outcome 7.3 of the Code.

15.24 In his evidence, the Second Respondent explained that accounts matters had been delegated to the Third Respondent, who, as the Firm's COFA, was responsible for ensuring compliance with the SAR. The Second Respondent had been comfortable with her work, as had the other Directors of the Firm. She had received praise for her work from the Firm's external accountants.

15.25 The Third Respondent had relied on the expertise that the Firm had purchased, at substantial cost, to ensure that the Firm complied with its regulatory obligations. The Firm had recruited RSM, a well renowned and respected accountancy and auditing firm, to be its accountants. RSM had full access to all of the Firm's systems. It had not raised any issues as regards the unpresented cheques. The Second Respondent explained that he had a very good, open and transparent relationship with Mr B from RSM. Had there been any serious issues identified, he was certain that Mr B would have contacted him directly to discuss matters.

15.26 The Firm had also retained the services of a regulatory compliance consultancy ("LCS"), who were a team of former SRA experts. LCS undertook quarterly audits of the Firm's compliance. That company had never raised any issues in relation to the Firm's systems. The Second Respondent explained that both RSM and LCS had unrestricted access to the Firm's systems. He had relied on their expertise. In the absence of any negative feedback as regards the Firm's systems, he believed, and was entitled to believe, that the Firm was compliant. He was angry with RSM. Ms R was adamant that they should have picked up the unpresented cheques issue. He had raised the matter with Mr B, and the Firm had changed its accountants.

15.27 As to the cashbook balance, the Second Respondent explained that there was a cashbook balance in existence when he became a Director of the Firm. He had understood that to be normal. The cashbook balance was increasing, which again was not unexpected given the growth in the Firm.

15.28 The Second Respondent explained that the Firm had an excellent relationship with the bank. The Firm had provided the bank with its vision and business plan. The bank was also aware of the Firm's relationship with other funders and its ability to secure further funds if required. The Firm's authorised overdraft was in the sum of £400,000.00. Whilst that figure might sound high, at its peak the Firm had a turnover of £2,000,000 with work-in-progress valued at £20,000,000. The Second Respondent stated that notwithstanding the level of ingress into the Firm's authorised overdraft, if all the unpresented cheques had been presented (which would take the Firm above its authorised limit), the Firm would have been able to honour all of the cheques. The Firm had access, through third parties, to large amounts of money. The bank was fully aware that that was the position.

15.29 During cross-examination by the Applicant, the Second Respondent accepted that even though the Firm had delegated its accounting functions, as a Director, he was still responsible for ensuring compliance with the SAR. He did not consider there to be anything unusual about the Firm having a cashbook balance. He explained that the

Firm had a strong forecast. They met each month to discuss income streams or bringing in more capital to the Firm. The bank was fully aware of the Firm's capital and reserves. He accepted that the bank was not aware that the overdraft was being reduced by client monies in the form of unpresented cheques. In any event, if all the cheques were to be presented at the same time, whilst this would have taken the Firm above its overdraft limit, the overdraft limit was not the limit of the Firm's capital or reserves.

15.30 The Second Respondent did not accept that it was difficult to ensure compliance with the SAR if he did not check the account reconciliations. He explained that the Firm had taken a responsible position, and had invested in trusted and experienced people to whom the accounts functions could be delegated. He confirmed that he had not asked for the reconciliations during the monthly financial meetings.

15.31 The Second Respondent did not accept that the report from the accountants as regards unpaid cheques from the Firm's client account should or did put him on notice of a problem more generally.

15.32 The First Respondent explained that he did not recall the Third Respondent showing him the office account reconciliations. He accepted that had he seen them in any detail, he would have been aware that the unpresented items related to client money. It was the Third Respondent's responsibility to bring such matters to the attention of the First and Second Respondents; she failed to do so.

15.33 Ms Butler submitted that Lawson was distinguishable from the instant case, as the facts were entirely different. Mr Lawson was found to be aware of the "dire position" of the Firm. There was no evidence of the Firm's financial position and it had been the Second Respondent's unchallenged evidence that the Firm had access to large amounts of money. The Applicant accepted that the Respondents had no knowledge of the unpresented cheques issue. There were no warning signs, let alone clear warning signs that had been pleaded by the Applicant of which the Respondents should have been aware.

Principle 6

15.34 Ms Butler submitted that the basis of the Applicant's case of a breach of Principle 6 was unclear. The Rule 5 Statement stated that "the conduct alleged" against the Respondents amounted to a breach of Principle 6 as public confidence was undermined by client monies being improperly held in the office account, "in particular at a time when that account was close to its overdraft limit." In its Reply, the Applicant submitted that "in circumstances where substantial amounts of client money was effectively spent in reducing the Firm's office overdraft, the SRA considers that the breach of Principle 6 is serious and obvious".

15.35 The Applicant properly accepted that a breach of Principle 6 did not automatically follow from a breach of the SAR as a matter, effectively, of strict liability. Principle 6 was only breached if the proven conduct was of some inherent seriousness and culpability such that it could be characterised as professional misconduct. The Applicant's pleaded case did not identify the conduct which made the Respondents culpable for the shortfall caused by the unpresented cheques and ATE premiums.

15.36 It was the Applicant's case that if the Respondents did not know, they ought to have known by virtue of the information being available to them. Ms Butler submitted that access to information was not the same as advancing a case as to why the Respondents should have looked further at the accounts. At no point was it explained why a cashbook balance ought to have alerted the Respondents to the issues. The Tribunal had been shown office account reconciliations which detailed the unpaid cheques. Ms Butler submitted that it was dangerous to focus solely on those documents when there was no evidence of how the reports had been provided to the Respondents or indeed if they had been provided to the Respondents at all.

15.37 It was also part of the Applicant's case that the Respondents were put on notice that there was a potential issue by virtue of the letter from the Firm's accountants dated 26 October 2016 which stated:

> "At the year end the client account bank reconciliation included unpresented cheques totalling £7,406.40 which were more than six months old. Six months is normally regarded as the cut-off point at which a cheque becomes "out of date" i.e. the bank will no longer cash it. You should therefore look to incorporate into your systems a regular review whereby unpresented cheques more than six months old are written back to the client ledger and re-issued."

15.38 Ms Butler submitted that this was a hopeless position. The letter stated that there were no reportable breaches and it did not identify any concerns about the Firm's system of payments or any breaches of the SAR. Indeed, the accountants had provided a "clean" report stating that there were no reportable breaches. Accordingly, there was no reason for the Respondents to make any connection between the unpresented cheques on the client account and the unpresented cheques in the office account.

15.39 The onus was on the Applicant to explain why the Respondents should have looked further than the accounts staff and external accountants upon whose expertise they had reasonably relied. The Applicant had not been able to point to any warning signs:

- The cashbook balance could not, of itself, have alerted the Respondents to the issue
- The report from RSM did not identify the issue, despite RSM having full access to all of the Firm's systems
- Lawson was entirely distinguishable on its facts
- There was no evidence of how the issue arose thus it was impossible to say what risk should have been obvious to the Respondents
- There was no evidence to show that the Respondents' reliance on their employed accounting staff was unreasonable

15.40 The Tribunal was referred to the findings as regards Principle 6 in Wingate:

> "[104]...A solicitor breaches Principle 6 if he behaves in a way that undermines the trust which the public places in himself/ herself and in the provision of legal services.
>
> [105] Principle 6 is aimed at a different target from that of Principle 2. Principle 6 is directed to preserving the reputation of, and public confidence in, the legal profession. It is possible to think of many forms of conduct which would undermine public confidence in the legal profession, Manifest incompetence is one example. A solicitor acting carelessly, but with integrity, will breach Principle 6 if his careless conduct goes beyond mere professional negligence and constitutes "manifest incompetence"; see Iqbal and Libby .
>
> [106] In applying Principle 6 it is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the Principles of professional conduct are of a different order."

15.41 In its Reply, the Applicant stated that it did not need to plead manifest incompetence or recklessness on the part of Respondents in reliance upon the fact that they were merely given as examples by the Court of Appeal in Wingate of the "many forms of conduct which would undermine public confidence". Whilst that was uncontroversial it was submitted that if the Applicant were not going to allege (let alone prove) manifest incompetence or recklessness against the Respondents for failing to prevent the client monies being held in the office account, then it needed to plead and prove the conduct upon which it relied was sufficiently serious, and evidenced sufficient culpability, so as to constitute a breach of Principle 6. Further, in circumstances where it was not the Applicant's case that the Respondents knew of the unpresented cheques issue, or that they had knowingly allowed client monies to be held on office account, it was incorrect to state that the Respondents' reliance on the expertise on the Firm's COFA and external accountants went to mitigation only. On the contrary, it was submitted, that reliance went directly to liability in circumstances in which Principle 6 was concerned with personal culpability through conduct.

15.42 Mr Levey, having adopted the submissions made on behalf of the Second Respondent further submitted that following Wingate mere professional negligence was not enough to establish a breach of Principle 6. The Applicant had to demonstrate evidence that the Respondents conduct went beyond that. The Applicant's case came nowhere near to showing that the Respondents' conduct was manifestly incompetent.

Principle 10

15.43 It was the Applicant's case that the Respondents were not aware that client monies were being retained in the office account by virtue of the unpresented cheques issue and the ATE premiums. However, it was alleged that they had failed to protect client money. Ms Butler submitted that the Applicant's case was in effect, one that the strict liability breach of the SAR had led to a breach of Principle 10.

15.44 The Respondents denied that they had failed to protect client monies. It was common ground that no actual client lost any money. No client money was materially at risk. The Second Respondent's evidence as to the availability of funds were the cheques to have all been presented was unchallenged. In addition, when the matter was brought to the Second Respondent's attention in late June 2017, the Firm was able to raise the necessary finances to rectify the shortfall within a few weeks. In those circumstances, it was submitted, the Respondents had not failed to protect client monies in breach of Principle 10.

Outcome 7.3

15.45 Outcome 7.3 related to identifying, monitoring and managing risks to compliance. The Firm had taken numerous steps to identify, monitor and manage any risks to compliance. The Rule 5 Statement did not identify how those steps were allegedly insufficient. Nor did the Applicant refer to any warning signs of which the Respondents should have been aware.

The Tribunal's Findings

15.46 The Tribunal found that the Respondents' conduct was in breach of Rules 6.1 and 14.1 of the SAR, Principles 7 and 8 of the Principles and that they had failed to achieve Outcome 7.2 of the Code. The Tribunal found that the Respondents' admissions were properly made. The Tribunal then considered the matters that were still in issue between the parties.

Principle 6

15.47 The Tribunal did not accept the submission that for a Principle 6 breach to be found proven, the conduct needed to amount to manifest incompetence. That was not what was found in Wingate; manifest incompetence was an example of conduct that could breach Principle 6. It was not definitive of the conduct that could breach Principle 6.

15.48 During his evidence, the Second Respondent had described the monthly finance meetings that took place at the Firm. He explained that during those meetings they discussed income streams and bringing in additional capital to the Firm. The financial forecast for the Firm was good and the bank was fully aware of the Firm's capital and resources. The Tribunal considered that the clear focus of those monthly meetings was on growing the business and assessing its profitability. There was no suggestion that during those meetings the participants considered their compliance with the regulatory obligations. Whilst it was entirely reasonable for the Respondents to rely on the Firm's COFA and its accountants to undertake the financial work, that did not negate their responsibility for ensuring compliance. It was no defence to say that they relied entirely on those they had paid to undertake that work. At a minimum, it was expected that the First and Second Respondents, as the directors (and later the only qualified managers) would have applied some scrutiny to the monthly reconciliations to satisfy themselves that they were complying with their obligations. The unpresented cheques issues was clear from the face of the monthly reconciliation reports that were prepared by the Firm. Had they requested/seen those documents, the position would have been obvious.

15.49 The Tribunal found that notwithstanding their evidence as to the steps they took to ensure compliance, the First and Second Respondents failed to make any enquiries at all. That failure, the Tribunal found, was culpable. They were not expected to check each and every piece of work undertaken by the finance team, however they should have checked the product of that work in circumstances where non-compliance would be found to be a material and thus reportable breach. To that extent, the Tribunal found that the First and Second Respondents' failure to ensure compliance was culpable. The First and Second Respondents were not absolved from responsibility or culpability due to the Third Respondent's duty, as the COFA, to report any issues. The duties of the First and Second Respondents ran alongside those of the Third Respondent.

15.50 The Second Respondent was aware, by virtue of the accountants' letter of 26 October 2016, that there was an issue with unpresented cheques on the client account. This was not deemed a reportable breach by the accountants. The Tribunal did not consider that this was sufficient, of itself, to amount to a warning sign as to the office account.

15.51 It was not the Applicant's case, nor was it the Tribunal's finding that unpresented cheques were, in and of themselves an issue or that the transfer of monies from the client account to the office account to settle payment was improper. However, the Respondents had no proper systems in place to ensure that the payments were actually made. The Second Respondent's evidence was that a cashbook balance had already existed before he became a partner and had grown in line with the growth of the Firm. The First and Second Respondents made no enquiries as to why the cashbook balance existed, nor did they discuss it during their monthly meetings. Had they done so, the issues would have been clear. The fact that the Firm had held a cashbook balance was not to the point – it was not a defence to the Principle breach alleged to say that it was the way that it had always been.

15.52 The Tribunal found that the First and Second Respondents failings were culpable and that such failings amounted to a breach of Principle 6. Members of the public expected them to ensure compliance with the SAR. They had failed to do so. They had relied on the expertise of others but had not satisfied themselves that the Firm was complying with its obligations by looking at the product of the work undertaken. Accordingly, the Tribunal found beyond reasonable doubt that the First and Second Respondents had breached Principle 6.

Principle 10

15.53 As was accepted, there had been a significant shortfall caused by the unpresented cheques issue. By keeping client monies in office account, those monies were not afforded the protection that is afforded to monies held in the client account. The fact that no client actually lost money did not equate to compliance; had clients lost money, that would have aggravated the breach. The ability to remedy the breach quickly, as described by the Second Respondent likewise did not equate to compliance. It was to the First and Second Respondents credit that they remedied the breach, however, that did not negate the breach. The Tribunal considered that whilst client money was being improperly held in the office account, it was at risk. In this case, there were significant amounts of client money that were being held in office

account over a period of time. During that time, those monies were at risk. Accordingly, the Tribunal found beyond reasonable doubt that the First and Second Respondents breached Principle 10.

Outcome 7.3

15.54 The Tribunal considered that it was clear that the First and Second Respondents had failed to achieve Outcome 7.3. This was evidenced by the length of time and the amount of the unpresented cheques issue. A substantial amount of client money had been improperly held in the office account. The Tribunal found beyond reasonable doubt that the First and Second Respondents had failed to identify, monitor or manage the risk that the unpresented cheques posed to compliance. Accordingly, the Tribunal found that the First and Second Respondents had failed to achieve Outcome 7.3 as alleged.

15.55 For the reasons detailed above, the Tribunal found allegations 1.1 and 2.1 proved beyond reasonable doubt and in their entirety.

16. **Allegation 1.2 - Between July 2016 and September 2017, the First Respondent caused or allowed the Firm to request of its clients in holiday sickness matters that they delete any comments or photos from their holiday on social media; and in doing so breached Principles 2, 4 and 6 of the Principles.**

The cross-examination of the Second Respondent as regards allegation 1.2

16.1 At the conclusion of the Second Respondent's evidence, Mr Levey stated that he had no questions for the Second Respondent. It was the First Respondent's case that responsibility for the social media warning lay with the Second Respondent and it was not a matter of which he had any knowledge at the time. The Second Respondent gave no evidence, either in his written or oral evidence regarding allegation 1.2.

16.2 Mr Mulchrone submitted that in the circumstances, the Tribunal had to assess the weight to be accorded to the First Respondent's evidence and also whether the Tribunal should allow him to ask open questions of the Second Respondent. Mr Mulchrone accepted that it would be unfair to co-opt the Second Respondent as a witness for the Applicant.

16.3 Mr Levey submitted that the Applicant had made a conscious decision not to bring this allegation against the Second Respondent. The First Respondent's case was clear from his Answer. It had been open to the Applicant to bring a Rule 7 Statement, making an equivalent allegation against the Second Respondent; it had not done so. Mr Levey submitted that he was not under a duty to cross-examine the Second Respondent.

16.4 The Tribunal was referred to an extract from R v Bircham 1972 WL 37529 (1972) which stated:

> "B and F were convicted of wounding S with intent, it being alleged that B stabbed him. B's defence was that he had not stabbed S and he did not know who had done so. F's defence was that he was attacked by S and was not

> aware of anyone else being involved in the struggle. In his closing speech B's counsel, despite warnings from the judge, argued for the first time an imaginary case against F and came near to alleging that a prosecution witness, W, was the guilty party. B appealed on the ground that the judge's interventions reflected unfavourably on the way his defence was conducted and might have prejudiced the jury against him.
>
> Held, that the judge had acted properly; it was wrong for counsel to suggest at such a late stage that F had done the stabbing and was equally wrong for counsel to make suggestions against witnesses without giving them an opportunity to answer them. The appeal failed."

16.5 The principle from that case was detailed in Phipson on Evidence (19th Edition) which stated at paragraph 12-35:

> "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g. if the witness has deposed to a conversation, the opposing counsel should put to the witnesses any significant differences from his own case. If he asks no questions he will generally be taken to accept the witness's account and will not be permitted to attack it in his final speech; nor will he be allowed in that speech to put forward explanations where he had failed to cross-examine relevant witnesses on the point. Thus in R v Bircham defending counsel was stopped in his closing speech when he suggested that a co-defendant and a prosecution witness were the perpetrators of the crime. The Court of Appeal upheld the judge's decision to intervene. However, a failure to put a matter in cross-examination does not render evidence about that matter inadmissible. It has been held that the general rule does not apply in magistrates' courts."

16.6 Mr Mulchrone relied on the extract from Phipson at paragraph 12-31 which stated: "defendants. The prosecution may cross-examine a defendant to obtain evidence against co-defendants". Whilst he was entitled to do so, Mr Mulchrone confirmed that he did not resile from his position that to cross-examine the Second Respondent would be unfair. However, given his entitlement to cross-examine the Second Respondent, it became more difficult to see why he should be prevented from asking open questions.

16.7 Mr Levey submitted that the Second Respondent was not his opponent on this matter. Allegation 1.2 was entirely separate to allegation 1.1, and could, had the Applicant so chosen, formed a case in and of itself.

The Tribunal's Findings

16.8 The Tribunal considered the submissions from the parties with care. The Tribunal concluded that as regards allegation 1.2, the First and Second Respondents were not co-respondents. The matters alleged in allegation 1.2 had no nexus to allegations 1.1 and 2.1. Those allegations were identical in nature. The First and Second Respondents were properly considered to be co-respondents in respect of those matters. For them to be co-respondents as regards allegation 1.2, the First and Second

Respondents would need to be facing the same allegation. Allegation 1.2 related to the First Respondent alone. The Tribunal thus found that as regards allegation 1.2, the First and Second Respondents were not opponents. Thus, notwithstanding that the Second Respondent did not agree with the First Respondent's evidence (as Ms Butler had explained at the commencement of the hearing), there was no requirement for Mr Levey to put the First Respondent's case to the Second Respondent. In addition, the Second Respondent had given no evidence (whether written or oral) in relation to allegation 1.2. That position, the Tribunal found, was perfectly proper in circumstances where he was required to answer the case that he faced. He was not required to detail or respond to the case faced by anyone else.

16.9 Accordingly, the application to ask the Second Respondent open questions was refused. Further, there could be no curtailment of Mr Levey's ability to put the First Respondent's case in his closing speech.

The Applicant's Case

16.10 The Firm's areas of practice included holiday sickness claims brought against tour operators. There had been an increase in this type of work at the Firm. During the course of the inspection, the FIO reviewed 26 holiday sickness claims at the Firm. In relation to most of the files reviewed by the FIO, a social media warning had been sent from the Firm to the client, with some clients being sent the warning on more than once occasion. In a letter to a client dated 18 January 2017, the only matter addressed was the warning. The letter stated:

> "**FACEBOOK - TWITTER - INSTAGRAM WARNING**
>
> Defendant Solicitors are now going on facebook, twitter and Instagram to look for comments and photos relating to your holiday to try to prevent travel sickness claims.
>
> Please ensure that you:
>
> 1. Please change your settings to private on facebook.
>
> 2. Please unfriend holiday businesses you may be connected to.
>
> 3. Please delete any comments or photos from your holiday ASAP.
>
> Yours sincerely"

16.11 A similarly-worded warning was included in a "Travel Sickness Claims Script & Qu [sic] Form" used by the Firm in respect of its clients. The FIO's review of the files showed that the script was used on most holiday sickness client matters.

16.12 It may be inferred that the social media warning was a reference to the possibility that non-genuine claims could be exposed by defendant tour companies or solicitors finding material showing claimants enjoying food, drink and other activities at times when they claimed to be sick.

16.13 The Firm's encouragement of their clients to delete holiday comments or photos on social media was improper. Deleting such comments and photos amounted to destroying evidence inasmuch as the inclusion of those comments and photos on a social media platform was itself a publication and likely to be a relevant fact in assessing the merits or otherwise of a claim. Even if comments or photos were somehow retained in an original form, the context of their use was likely to be lost if the publication was deleted. In any event, the Firm's warning did not advise clients to back up or keep any underlying data either for the purposes of disclosure or at all. The command word was "delete".

16.14 On 6 September 2017, the SRA issued a Warning Notice in respect of holiday sickness claims. Page 2 of the guidance stated:

> "Solicitors must engage with [the comment in Wood v TUI Travel [2017] EWCA Civ 11] and assess all of the evidence before submitting claims. We have also seen failures to ensure that all documentary evidence is collated and analysed. We have seen highly improper advice to clients to delete evidence. In all litigation, firms must immediately inform clients of their duty to preserve evidence and require it all to be provided for the firm to review. This is a critical duty to the administration of justice, including to prevent or reduce the public costs of unmeritorious claims. [..]"

16.15 Although the Warning Notice was issued after the time period of the matters alleged, it was in effect stating basic principles of litigation and professional conduct which ought to have been known to the First Respondent, in order that claims could be settled or determined justly on the best evidence and on their merits. Following publication of the SRA Warning Notice, the Firm removed the social media wording from its standard letters.

16.16 The response to the EWW letter on behalf of the First and Second Respondent and the Firm referred to training notes and advice given in relation to holiday sickness claims. Reference was made to the training slides created by external trainers. Although the training did make reference to advising clients to be careful in terms of what they put on social media and to reviewing privacy settings, it did not extend to advising clients to delete existing content. This point was implicitly accepted by the Firm in its letter to the SRA on 2 October 2017.

16.17 The First Respondent had a fee earning role and dealt with holiday sickness claims (among other things). Mr Mulchrone directed the Tribunal to a number of items of correspondence as regards the sickness claims that were in the First Respondent's name. The Firm's Terms of Business for this type of work were sent out in his name and described him as the Firm's Managing Director. As such, he was responsible for the Firm's conduct in this area.

16.18 Mr Mulchrone submitted that it should be inferred that it was clearly a deliberate decision and proactive step on the part of the Firm, and on the part of the First Respondent, to send out warning letters and to include the warning in its questionnaire script. It was part of the Firm's systems and procedures. The desired outcome on the part of the Firm was that comments and photos should be deleted from social media, with the inevitable consequence that potentially relevant evidence would be lost.

16.19 In interview with the FIO, the First Respondent admitted that the letter was "a poorly drafted letter". However, he said that the letter was not asking the Firm's clients to delete "the original evidence, which would still be available for disclosure, as and when we decided to produce it". This answer, it was submitted, failed to engage with the reality that publication on social media could be the "original evidence". Further, the warning letter or questionnaire script could have been used to urge clients to retain evidence and pass it to the Firm (as implied by the First Respondent) but nothing to this effect was mentioned.

16.20 The inevitable risk in the use of this warning was that opponents and a Court might not have the means properly to test the evidence or justly to decide the claim. Potentially relevant material was being destroyed. Furthermore, by asking its clients to delete this material, the Firm was not taking the opportunity (and in fact was depriving itself of the opportunity) to review this material for the wider purpose of interrogating the merits of the case and guarding against the possibility of acting in fraudulent claims. This point was highlighted in the SRA's Warning Notice, but reflected principles of responsible litigation which obviously pre-dated the Notice but which ought to have been obvious to the First Respondent.

16.21 The First Respondent had made inconsistent statements. During the investigation stage, the First Respondent had sought to defend the wording used, and the intent behind that wording. At no stage, until the Answer, did the First Respondent deny any responsibility for the wording.

16.22 Such conduct, it was submitted, breached the Principles as alleged.

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

16.23 The First Respondent explained that he had been approached by the Second Respondent with a view to setting up the holiday sickness claims department. At that time he was running a very busy personal injury department that accounted for 60% of the Firm's income. Staff were provided with training that he did not attend. He had not been involved in any in-house training. He had not been involved in setting up the department and was only involved with the cases when there was an application for pre-action disclosure. At that stage he became the solicitor in the case for the purposes of the application. Thereafter, the matter was handed back to the fee earner with conduct. When he made the applications for pre-action disclosure, he did not read the standard letters that had been sent out to clients. They were generic template letters. He had had no involvement with the creation of those template letters and had not reviewed them before they were sent out to clients. The pre-action phase of the cases lasted for about 6 – 8 months. The first that he became aware of the social media warning was during the FIO's visit in June 2017. The Second Respondent explained that he had made a mistake. They decided to present a united front for the interview. Throughout they referred to "we". At no point during the interview was either the First or Second Respondent asked who had created the letter.

16.24 During cross-examination the First Respondent explained that he took over the department in late August 2017, by which time the social media warnings has been sent to clients. He accepted that the text seemed to suggest deletion of evidence but denied having any knowledge of that prior to the FIO's visit. The First Respondent

explained that he did not want to "throw the Second Respondent under a bus", which was why they had presented a united front throughout the investigation. He did not accept that by referring to "we", his answers had been misleading. He had been answering questions on behalf of the Firm during the investigation stage. It was not until the Rule 5 Statement was issued that he was required to answer questions as regards his own conduct.

16.25 He denied that he had had sight of the template letters; they had been produced by a reputable company and he had no reason to check to see if the Second Respondent had added something to those letters that ought not to be there.

16.26 Mr Levey submitted that the fundamental problem was that during the interview, the FIO had been told that the First Respondent was the lead in the holiday sickness department. Whilst that was the position at the time of the interview, that was not the position when the department had been set up. The Applicant had pleaded the case on the basis that as it considered that the First Respondent was responsible for the department from its inception, he must have been liable for the social media warning. During cross-examination, the FIO confirmed that she had not enquired as to whether the First Respondent had always been the supervising partner, who had set the department up, whether the First Respondent had attended any of the training or been responsible for training staff, or whether he had been involved in any of the evidence gathering for those cases. The FIO expressed that she "wished" she had asked the Respondents who was responsible for creating the social media warning. Mr Levey submitted that it was understandable that the Applicant had assumed that the First Respondent was responsible during the investigation of the matter, but that following his Answer, his position was clear.

16.27 There were three ways in which the case could have been put:

- <u>(A) - The social media warning was a deliberate decision by the First Respondent.</u>

This was what had been alleged by the Applicant. Mr Levy submitted that there was no evidence that the First Respondent had made a deliberate decision or taken any proactive steps as regards the social media warning. The highest that the case had been put to him during cross-examination was that he had been involved in the preparation of the template. Mr Levey submitted that he was not surprised that this case had not been put, as there was no evidence that could lead to the Tribunal finding that the First Respondent had made a deliberate decision or taken any proactive steps.

- <u>(B) It was not the First Respondent's decision but he knew of the warning and took no steps to prevent it.</u>

Mr Levey did not accept that this was the case that had been put to the First Respondent in the Rule 5 Statement. It was submitted that the First Respondent's cross-examination had been conducted on the basis that the First Respondent must have known. The evidence on which the Applicant relied was thin and was based solely on inferences. No evidence had been produced that could contradict the First Respondent's position, namely that it was the Second Respondent's idea to open a travel sickness department; the First Respondent had no involvement in the training of the staff; the First Respondent had no involvement in the preparation of the templates

and nor did he review them; the First Respondent had no involvement with the claims until there was an application for pre-action disclosure.

It was accepted that the First Respondent became more involved and took the lead in the department in April/May 2017. By that time all the letters containing the social media warning had been sent to clients. There was no reason for the First Respondent to go back and review those standard letters sent to clients when he took over conduct of the cases. When he became aware of the social media warning, he instructed that it be removed from all letters. In the event the Tribunal accepted that the First Respondent did not have knowledge of the social media warning at the time, this option could not be found proved.

- (C) The First Respondent did not know, but he ought to have known.

Mr Levey submitted that such a case had not been put to the First Respondent.

The First Respondent had been criticised for not saying sooner that he had no knowledge of the social media warning. During the investigation, the Firm put forward the Firm's defence. Mr Mulchrone highlighted that the EWW letter required an explanation of individual conduct. Mr Levey noted that the letter was sent to the Second Respondent, and was copied to the First Respondent. In the EWW the Applicant stated:

> "Please provide your response to the matters raised in this letter on behalf of your firm. We are writing to you about this because you are the firm's COLP. A copy has also been sent to [the First Respondent]. Your response should be on behalf of all of the firm's managers. Please confirm that this is the case in your response."

The response provided to the EWW letter was, in accordance with the instruction, the response of the Firm.

Attached to its Reply, the Applicant had attached a number of documents upon which it relied to establish the First Respondent's involvement in the holiday sickness claims. Mr Levey submitted that on the contrary, those documents supported the First Respondent's evidence that he had minimal involvement in the cases during the pre-action stage. Even if it had been the case that the First Respondent saw the social media warning when he took over the department in May 2017, this was of no assistance to the Applicant as it did not establish that the Respondent knew that the social media warning was being sent to clients in 2016.

He had referred to "we" throughout the interview. His evidence on that point had been clear. The First and Second Respondents presented a united front. At that stage the investigation relation to the Firm, and the answers given in interview were on behalf of the Firm.

16.28 Mr Levey submitted that there was no evidence and no documents provided by the Applicant that contradicted the First Respondent's position. Accordingly, allegation 1.2 should be dismissed.

The Applicant's Reply

16.29 Mr Mulchrone submitted that the manner in which the case had been pleaded meant that the Applicant had to establish, what Mr Levey defined as Option A. It has been alleged in the Rule 5 Statement that "It should be inferred that it was clearly a deliberate decision and proactive step on the part of the Firm, and on the part of the First Respondent, to send out warning letters and to include the warning in its questionnaire script." Mr Mulchrone did not seek to shy away from the inferences the Tribunal had been asked to find.

16.30 As to any suggestion that he had not put the pleaded case to the First Respondent during cross-examination, such a suggestion was not accepted. Mr Mulchrone had spent time cross-examining the First Respondent on his previous inconsistent statements. The Applicant's case was pleaded, and remained, on the basis that the First Respondent took deliberate and proactive steps.

The Tribunal's Findings

16.31 The Tribunal noted that it remained the Applicant's case that the First Respondent had taken deliberate and pro-active steps as regards the social media warning. In those circumstances, it was not necessary for the Tribunal to consider Mr Levey's options B and C detailed above. Mr Levey had invited the Tribunal to consider option B, even in circumstances where it considered that the case against the First Respondent was that detailed in option A. The Tribunal determined that its role was to consider the case that had been put, and not a case that could have been put. In those circumstances, the Tribunal found that it was not necessary for it to consider either option B or C.

16.32 The Tribunal found that there was no evidence that the First Respondent had been involved in the creation of the social media warning. The FIO, during her evidence, confirmed that she had found no evidence of who had created the warning, and that she had not asked the First and/or Second Respondents who was responsible for writing the warning.

16.33 The Tribunal considered that the responses provided by both the First and Second Respondents during their interview and in response to the EWW letter were responses on behalf of the Firm. It did not take issue with the First and Second Respondents referring to "we". The Tribunal found that there was no reason for the First Respondent to have stated, prior to the service of the Rule 5 Statement, that he had played no role in terms of setting up the department or preparing the template letters. It only became necessary for him to do so once he was required to answer allegation 1.2.

16.34 Having determined that there was insufficient evidence to substantiate allegation 1.2, the Tribunal accordingly found that matter not proved, and dismissed that allegation.

17. **Allegation 3.1 - Between October 2016 and 23 February 2017, the Third Respondent failed to take all reasonable steps to ensure compliance with the Firm's regulatory obligations under the SAR, in that monies relating to (a) unpaid professional disbursements and/or (b) ATE insurance premiums,**

including client monies, were improperly held to the Firm's office account, contrary to Rule 14.1 of the SAR; and in so doing she breached her obligations under Rule 8.5(e) of the Authorisation Rules and Principles 6, 7, 8 and 10 of the Principles.

The Applicant's Case

17.1 As the Firm's COFA from 21 November 2014 until 20 April 2017, the Third Respondent was required, pursuant to Authorisation Rule 8.5(e)(i) to take all reasonable steps to ensure compliance by an authorised body of its obligations under the SAR.

17.2 On 23 February 2017 the Firm ceased being a recognised body and became a licensed body. Mr Mulchrone explained that from 23 February 2017 onwards, the Tribunal did not have jurisdiction as the powers under s43 of the Solicitors Act 1974 and the fining powers under the Administration of Justice Act 1985 related to recognised bodies.

17.3 In interview with the FIO, the Third Respondent confirmed that she had been aware of the problem with unpresented cheques stating: "I mean we did have issues, obviously, and we were aware of those issues with the [unpresented cheques] getting higher ... Um, than they should have been". The Third Respondent also confirmed that the Firm's staff could see the cheques which had or had not been presented during the monthly reconciliation or from the cashbook. During the interview having compared a balance on the bank statement with a closing cashbook balance, the Third Respondent confirmed that she was aware that given the level of the Firm's overdraft, it was not possible for everything to be banked.

17.4 The Third Respondent claimed that she raised the matter of the unpresented items with the Directors of the Firm (which would have further demonstrated her awareness of the problem) but in any event she failed to take all reasonable steps as the Firm's COFA to ensure compliance with the SAR. This is reflected in her answers in interview with the FIO. For example, "As for the housekeeping side, and not having gone back through and obviously written them back, um, we just kept, we did keep saying we will do it when we're in a better position next month".

17.5 In her EWW response, dated 18 June 2018, the Third Respondent accepted that client money being incorrectly held in the office account was a breach of the rules and that this should have been reported at the time. She accepted that the cheques should have been written back and re-issued or the money returned to the client account. Her conduct fell short of where it should have been as the Firm's COFA.

17.6 By not taking any or any adequate action in remediation between October 2016 and 23 February 2017 (when the Firm became a licensed body and the Tribunal's jurisdiction over her ceased) the Third Respondent caused or allowed client money to be held improperly to the Firm's office account. As set out above, this arrangement was in breach of SAR 14.1. The breach was aggravated by the fact that unpaid professional disbursements and ATE insurance premiums, including client money, were in effect propping up the Firm's financial position.

17.7 As the Firm's COFA, the Third Respondent failed to take all reasonable steps to ensure that the Firm, its managers and employees complied with the obligations imposed on them under the SAR. The Third Respondent was aware of the problem with unpresented cheques and yet it continued for many months. Accordingly, she breached Rule 8.5(e) of the Authorisation Rules. By failing to comply with her regulatory obligations under the Authorisation Rules, she further breached Principle 7. The Third Respondent also breached Principle 8 by failing to carry out her role as COFA in the business effectively and in accordance with proper governance and sound financial and risk management principles.

17.8 The conduct alleged also amounted to a breach by the Third Respondent of the requirement to behave in a way which maintains the trust placed by the public in her and in the provision of legal services. As the COFA of the Firm, she was responsible for ensuring compliance with the SAR. Public confidence in the Third Respondent, in solicitors, and in the provision of legal services, will be undermined by unpaid professional disbursements and ATE insurance premiums, including client money, being improperly held to the office account, and in particular at a time when that account was close to its overdraft limit. The Third Respondent therefore breached Principle 6 of the Principles.

17.9 The funds in question were credited to the office account, which was overdrawn. The Firm would have had to become yet more overdrawn in order to honour any individual payment, and would not have been able to honour all the outstanding payments without the injection of additional funds. Furthermore, to the extent that the sums were held to the office account, these would not have received the same protection as funds held in a bank account designated as a client account, as set out by the FIO in her statement. In the office account, the money was not protected from the contingencies of insolvency or the bank withdrawing its overdraft facility. Client money received from third party insurers was needed in order to pay outstanding professional disbursements and ATE insurance premiums. Accordingly, the Third Respondent failed to protect client money, in breach of Principle 10.

<u>The Tribunal's Findings</u>

17.10 The Tribunal noted that the Third Respondent was aware of the issues, and had told the FIO during her interview that she was knew of the problem with the unpresented cheques, and that the amount was increasing. Rule 8.5(e) of the Authorisation Rules required the Third Respondent as the COFA to take all reasonable steps to ensure that the Firm, and the First and Second Respondents complied with any obligations imposed upon them under the SRA Accounts Rules.

17.11 In her EWW response of 18 June 2018, the Third Respondent stated:

> "1. Conduct in relation to client money being incorrectly held in office account.
>
> I accept that this was a breach of the rules and that this should have been reported at the time. I did not make the connection to the money needing to go back to client account and should have. My conduct fell short of where it should have as COFA. It was my job as COFA to

ensure that housekeeping jobs were being done and cheques should have been written back and re-issued or the money returned to client account. I did not do this with any intent."

17.12 The Third Respondent had referred, in both her interview and her EWW response to her loyalty to the Firm. The Tribunal considered that the Third Respondent had allowed that loyalty to override her obligations as the COFA of the Firm. The Tribunal found that the Third Respondent took no steps to ensure compliance. Accordingly, the Tribunal found beyond reasonable doubt that the Third Respondent had breached her obligations under Rule 8.5(e) of the Authorisation Rules. It followed, and the Tribunal found beyond reasonable doubt that the Third Respondent had failed to comply with her legal regulatory obligations in breach of Principle 7. In failing to take reasonable steps as the COFA to ensure compliance, the Third Respondent had failed to carry out her role effectively and in accordance with proper governance and sound financial and risk management principles. Accordingly, the Tribunal found beyond reasonable doubt that the Third Respondent's conduct was in breach of Principle 8.

17.13 The funds had been credited to the office account. It had been accepted that the funds were, in fact, client monies. In those circumstances, by allowing client monies to remain credited to the office account, and in particular when additional funds would have been required to honour the unpresented items, the Third Respondent had failed to protect client monies. The Tribunal found beyond reasonable doubt that the Third Respondent's conduct was in breach of Principle 10.

17.14 Such conduct, the Tribunal found beyond reasonable doubt, was in breach of Principle 6. Members of the public would expect the COFA of a firm to comply with their duties and obligations. It would not expect the COFA to, in effect, turn a blind eye to material breaches on the basis of loyalty to the firm. The Third Respondent had put client money at risk and was fully aware of the unpresented cheques issues. She had failed to behave in a way that would maintain the trust the public placed in her and in the provision of legal services.

17.15 Accordingly, the Tribunal found allegation 3.1 proved beyond reasonable doubt.

18. **Allegation 3.2 - Between October 2016 and February 2017, the Third Respondent failed as soon as reasonably practicable to report to the SRA a material failure to comply with the SAR, inasmuch as she was aware that monies relating to (a) unpaid professional disbursements and/or (b) ATE insurance premiums, including client monies, were improperly held to the Firm's office account, contrary to Rule 14.1 of the SAR; and in so doing she breached her obligations under Rule 8.5(e) of the Authorisation Rules and Principles 7 and 8 of the Principles**.

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

18.1 As the COFA, the Third Respondent had a duty under SRA Authorisation Rule 8.5(e)(iii) as soon as reasonably practical to report to the SRA any material failure to comply with obligations imposed by the SAR. The arrangement in respect of client money being held in the office account was a breach of Rule 14.1 of the SAR. The

breach was material on account of the importance of protecting client money generally, the seriousness of payments not being made as a matter of routine, and the scale and duration of the problem over many months.

18.2 The Third Respondent accepted in interview with the FIO that she did not report this matter, out of "loyalty" and explained in her response to the EWW letter that she had been "blinded" by her loyalty to the Firm. She also stated that she believed that the Firm was going to get the money in to "bring it all back round". Mr Mulchrone submitted that her actions demonstrated poor judgement. It was reasonably practicable for the Third Respondent to report the matter to the SRA, but she chose not to do so.

18.3 By not meeting her duty to report, the Third Respondent breached Rule 8.5(e)(ii) of the Authorisation Rules. That duty was ended on 23 February 2017, when the Firm's recognised body status ended and the Firm became a licensed body. The Third Respondent left the Firm on 28 February 2017. Her failure to comply with her obligations was, it was submitted, a deliberate decision. Optimism as to funds being received did not remove the Third Respondent's duty to report.

18.4 By failing to co-operate with the SRA in respect of its oversight of the Firm's finances, the Third Respondent failed to comply with her obligations and/or to deal with the SRA in a timely, open and co-operative manner. Such conduct was in breach of Principle 7. Her failure to comply with her obligations as the COFA of the Firm also amounted to a failure to carry out her role in the business effectively and in accordance with proper governance and sound financial and risk management principles in breach of Principle 8.

<u>The Tribunal's Findings</u>

18.5 Rule 8.5(e) of the Authorisation Rules required the Third Respondent as the COFA to take all reasonable steps to, as soon as reasonably practicable, report to the SRA any material failure to comply with the SAR. In her EWW response of 18 June 2018, the Third Respondent stated:

> "3. Non Reporting
>
> I should have reported the issues. I had belief and faith that the firm was getting an injection of working capital that would have meant these issues could have been resolved and my loyalty to the firm blinded me. I believed strongly in the firm and worked hard every day to help them. I understand that this is not an excuse and I accept that I should have reported these issues."

18.6 The Tribunal considered that it was clear from the comments made by the Third Respondent both in her interview and in her EWW response that she was aware of the requirement to report what was a material and ongoing breach of the SAR. She failed to do so. The Tribunal found that as with allegation 3.1, the Third Respondent had allowed her loyalty to the Firm to take precedence over her obligations as the COFA of the Firm. Accordingly, and for the reasons already detailed in the Tribunal's findings as regards allegation 3.1, the Tribunal found beyond reasonable doubt that

the Third Respondent's conduct was in breach of her obligations under Rule 8.5(e) of the Authorisation Rules, and in breach of Principles 7 and 8.

Previous Disciplinary Matters

19. There were no previous disciplinary matters for any of the Respondents at the Tribunal.

The status of ATE premiums as regards quantum of the shortfall

20. Ms Butler submitted that it was common ground that, following the judgment of the Court of Appeal in Herbert v HH Law Limited [2019] EWCA Civ 527, ATE insurance premiums comprised client money (along with unpaid counsel fees and medical reports as unpaid professional disbursements) as a matter of law. That was their correct legal classification as declared by the Court of Appeal and no issue was taken as to the retrospective nature of the judgment for the purposes of quantifying a strict liability breach of the SAR. As such, the ATE premiums should be included with the other unpaid professional disbursements (counsels' fees and medical reports) when quantifying the breach of SAR 6.1 and 14.

21. Ms Butler submitted that it was a separate and distinct question, as to whether ATE premiums should be treated as client money for the purposes of quantifying any proven breaches of Principles in relation to the shortfall given (at best) the unclear legal status of ATE premiums during the Relevant Period (as evidenced by the judgment of DJ Bellamy on 1 June 2007 that ATE premiums were disbursements (and so office money not client money), as upheld by Soole J on 21 March 2018.

22. The position was that it would be quite wrong for a solicitor to be found to have acted in breach of any of the Principles (and so committed serious professional misconduct) in respect of his or her treatment of ATE premiums as office money unless it could be proven by the SRA that their legal status as client money had been clearly established at the time. Unless the SRA was in a position to do this, it could not establish that any reasonably competent solicitor would have treated them as client money (the test for professional negligence), let alone that it would be serious professional misconduct not to have done so (a higher test, as per the judgment of LJ Jackson in Wingate). The Applicant had provided no evidence that the law was suitably clear at the time. In those circumstances, the shortfall created by the ATE premiums should not be included in quantifying the shortfall for purposes of sanction.

23. Mr Mulchrone submitted that as an expert Tribunal, the Tribunal did not require expert evidence as to what constituted client monies. The Judgment of DJ Bellamy was given on the first day of the last month of the relevant period. Soole J's Judgment post-dated the end of the relevant period by approximately 9 months. It was the evidence of both the First and Second Respondents that they considered ATE premiums to be client money, and that they were not aware of the Judgment of DJ Bellamy.

24. It was clear, following the Court of Appeal's decision that the Judgments of DJ Bellamy and Soole J were wrong in law. Mr Mulchrone submitted that the Applicant was entitled to rely on a binding judgment of the Court of Appeal given in

2019 which, it was averred, did little more than confirm the existing state of the law prevailing on dates within the relevant period and overturned two judgments which had misapplied it. Further, it was not the case of either the First or the Second Respondent that they were aware of the Judgements of DJ Bellamy or Soole, J and that they had placed reliance on them.

The Tribunal's Decision

25. The Tribunal determined that it was not necessary for the Applicant to call expert evidence as to the status of the ATE premiums. The position was clear (and accepted). ATE premiums were client monies. The Tribunal also considered that the position was clear throughout the relevant period. The decision of DJ Bellamy and Soole J, did not alter that position and were not, in any event, relied upon by the First and Second Respondents who, in their interview, conceded that ATE premiums were client monies. Both Respondents confirmed during their oral evidence that that was their understanding at the time, and that they had not been aware of the Judgment of DJ Bellamy.

26. The Tribunal determined that the incorrect Judgments did not put the law in a state of flux. The position, during the relevant period was clear. In the circumstances, the shortfall created by the retention of ATE premiums in the office account should count towards the shortfall to be considered for the purposes of sanction.

Mitigation

27. Ms Butler submitted that the Second Respondent had always accepted that the shortfall was serious. The breaches were all premised on his strict liability under the SAR. There was no suggestion that he knew of the shortfall, and there was no additional culpable conduct. There was ample, uncontroverted evidence of the efforts he had made to ensure compliance with the SAR, including the retention of what he believed to be leaders in the field. It was common ground that no clients had suffered any loss and there was no material risk to client money. Whilst the conduct might have been aggravated as it had happened over a period of time, the Second Respondent had no knowledge that that was the case.

28. In mitigation, the shortfall had been made good, it being rectified by 4 September 2017. The Firm had voluntarily notified the regulator. The fact that this had occurred during the investigation was not evidence that they would not otherwise have notified. The First and Second Respondents had given evidence to the effect that Ms R was carrying out a full review. That review had been expedited during the investigation. The self-report was made as a result of the Firm's own discoveries, and not matters discovered by the FIO. The Second Respondent had been fully co-operative throughout the investigation. He had shown genuine insight and was devastated by his appearance before the Tribunal.

29. Ms Butler submitted that the appropriate sanction was a financial penalty at the lower end of the Tribunal's fining powers. The Tribunal was referred to other matters in which a solicitor received an internal sanction from the SRA of a rebuke and a fine of £2,000 for holding £50,000 of client monies in the office account. In an agreed outcome matter that was similar but also included admitted breaches of Principle 2,

the Tribunal fined the Respondents £10,000. Ms Butler submitted that the circumstances of this case, where there was no deliberate conduct alleged, meant that any financial penalty should be closer to £2,000. Whilst the amounts were higher, the Tribunal was imposing a sanction as regards the conduct. The increased amount should not elevate the sanction to be imposed for the conduct.

30. Mr Levey adopted Ms Butler's submissions. In addition the First Respondent had demonstrated genuine insight and remorse. He had been fully co-operative and there had been no deliberate conduct on his part leading to the breaches. The shortage had been promptly rectified and no client had suffered any loss.

Sanction

31. The Tribunal had regard to the Guidance Note on Sanctions (7th Edition). 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.

32. The Tribunal found that the First and Second Respondents were not motivated to commit misconduct; their misconduct had arisen as a result of their failings. Their actions were not planned. As the Principals of the Firm, they had direct responsibility for the failings as regards the accounts. They were both experienced lawyers. In failing to properly monitor client monies, the Respondents had caused harm to the reputation of the profession. The fact that no client had lost money did not militate against that harm. Had clients lost money, that would have made the harm caused more serious than it was. The Tribunal did not find that there were any aggravating features to their misconduct. In mitigation, the Respondents had made good the shortfall. They had self-reported to the Applicant. The Tribunal did not consider that as the self-report was made during the investigation, the First and Second Respondents should be given less credit. It was their unchallenged evidence that Ms R expedited her list of intended matters as a result of the investigation. There was no evidence that save for the investigation, the matter would not have been reported. The Tribunal found that whilst the misconduct had continued over a period of time, it was a single failing that continued during that time. The Tribunal thus considered that the misconduct was a single episode in the otherwise unblemished careers of the First and Second Respondents. The First and Second Respondents had demonstrated genuine insight and had cooperated in full with the investigation.

33. The Tribunal considered that given the seriousness of the First and Second Respondents' misconduct, No Order and a Reprimand were not proportionate sanctions. The Tribunal agreed with Ms Butler's submission that a financial penalty was an appropriate and proportionate sanction. The Tribunal considered the matters to which it had been directed by the parties as regards a proportionate level of fine. The Tribunal noted that those matters were over two years old. There were other similar more recent matters where the level of the fine imposed was higher than detailed in those matters. Further, and in any event, it was for the Tribunal to consider what the appropriate level of any fine should be, taking into account all of the circumstances. The Tribunal considered that the misconduct fell within its Indicative Fine Band Level 3, as it had assessed the misconduct as more serious. A

Level 3 fine was from £7,501 - £15,000. The Tribunal determined that the misconduct fell near to the middle of that band. The Tribunal found that a fine in the sum of £10,000 was appropriate and proportionate to the misconduct.

34. The Third Respondent had not provided any mitigation. In her response to the Applicant and during her interview, she explained that she had been motivated by her loyalty to the Firm. She had direct control, and knowledge, and was fully culpable for her misconduct. She was experienced and had been recruited by the First and Second Respondents on the basis of that experience. In her EWW response, the Third Respondent stated that she did not consider that her failure to ensure compliance with the SAR and to report a material breach of the SAR were issues that should stop her being involved in a legal practice. The Tribunal did not agree with that assessment. The Third Respondent was aware of the issues and did nothing to rectify or prevent them. Her failure as the Firm's COFA was serious, and made more serious by her state of knowledge. The Tribunal found that in all the circumstances, and in order to protect the public and the reputation of the profession, a Section 43 Order was necessary and proportionate.

Costs

35. Mr Mulchrone applied for costs in the sum of £82,860.10. This comprised of the Capsticks fixed fee of £34,500 +VAT and the Applicant's internal investigation fees of £40,860.10. As regards the Capsticks fees, there had been approximately 361 hours of work conducted. This amounted to a notional hourly rate of approximately £95 per hour. Even if it were said that the time claimed was excessive, this did not alter the fixed fee charged; it would only alter the notional hourly rate. The FIO's costs were large (at £40,222.60), however it was common ground that she had conducted a thorough investigation. Mr Mulchrone invited the Tribunal to find that the hours that she had spent investigating the matter and preparing her report were properly incurred. Mr Mulchrone acknowledged that not all of the matters investigated by the FIO formed part of the proceedings before the Tribunal.

36. The Applicant, it was submitted, was entitled to its costs in full, notwithstanding its failure to substantiate allegation 1.2. The Tribunal was referred to its Guidance Note on Sanction which detailed the approach the Tribunal should take including when the Applicant had not succeeded on a particular allegation. There was no suggestion that allegation 1.2 had been improperly brought nor could it be suggested that allegation 1.2 had proceeded as a shambles from start to finish. Further, Mr Levey had made no half-time submission.

37. Whilst it could be said that the Applicant should have brought allegation 1.2 against the Second Respondent, it was not accepted that allegation 1.2 should have been withdrawn against the First Respondent. The cumulative evidence plainly raised a case to answer. A finding that an allegation had not been proved did not equate to a finding that an allegation had not been properly brought.

38. Mr Levey submitted that the costs claimed were excessive. The Applicant had made no attempt to distinguish between the costs of the investigation and prosecution of the travel sickness claims and the SAR breaches. Allegation 1.2 had failed in its entirety. It was not submitted that the Applicant should pay the First Respondent's costs in

regards to that allegation, however, the First Respondent should not be responsible for the Applicant's costs. The FIO admitted, during cross-examination that she had failed to properly investigate who was responsible for the social media warning. It was not until the Rule 5 Statement was issued that there was any distinction between the First and Second Respondents. As a result of allegation 1.2, the First and Second Respondents required separate representation, which had increased their costs of defending the allegations.

39. Mr Levey submitted that allegation 1.2 was misconceived. It was accepted that the allegation could have been put on the basis that the First Respondent ought to have known, however the case had been put on the basis of the First Respondent's alleged deliberate misconduct with no evidence to support such a contention. The appropriate order as regards the costs for the travel sickness claims was no order.

40. The Applicant had referred to allegation 1.2 not being a shambles from start to finish. That was only a relevant consideration in circumstances where a Respondent was seeking an order for costs against the Applicant. That was not the case here. The costs claimed, given the nature of the case, were excessive. This was a case about SAR breaches that could have been dealt with by the Applicant using its internal powers.

41. As to the FIO's costs, the Applicant was claiming in excess of £40,000 for her investigation. That investigation included numerous matters that were not before the Tribunal. The travel sickness claims were a significant part of the investigation; the FIO went through a number of files. In comparison, the SAR breaches were reported by the Firm and were evidenced by the Firm's documents provided to the Applicant. In addition, the FIO had spent 18 days reviewing papers in addition to the 14 days she spent at the Firm. Further, it had taken the equivalent of 2½ weeks to write what was a 30 page report.

42. It was also submitted that Capsticks had spent a significant amount of time reviewing papers, preparing advice to the SRA and drafting the Rule 5 Statement.

43. Ms Butler adopted Mr Levey's submissions. In addition, the travel sickness allegation had not been brought against the Second Respondent. The bringing of that allegation had increased costs for the Second Respondent as a result of his need to have separate representation.

44. The Tribunal found that allegation 1.2 had been properly brought. The Tribunal did not accept that following the First Respondent's Answer, the continued pursuit of allegation 1.2 was misconceived. It could not be that because the First Respondent denied the allegation and blamed the Second Respondent, the Applicant was duty bound to abandon the allegation against the First Respondent. Nor was it the case that the Applicant was duty bound to make the same allegation against the Second Respondent. The parties had provided their evidence in relation to the matter. It was for the Tribunal to determine whether it accepted that, in failing to identify prior to his Answer that he had no involvement in the creation and sending out of the impugned text, the First Respondent had admitted knowledge. The Tribunal had found that this was not the case. The Applicant had been entitled to test that evidence and to leave it to the Tribunal to decide whether it accepted the First Respondent's version as to his

culpability for the impugned text. In those circumstances, the Tribunal did not consider that it was appropriate to reduce the costs claimed so as to remove any element of costs incurred in the investigation and pursuit of allegation 1.2. The Tribunal found that it was appropriate to reduce the First Respondent's liability for those costs given its acquittal of the First Respondent of that matter.

45. The Tribunal found that the costs claimed by the FIO, whilst properly incurred in the course of her investigation, were not proportionate to the matters pursued. Under the "other" section of her costs schedule, a significant amount had been claimed by the FIO. The Tribunal was not satisfied that the FIO had justified the work undertaken for that claim. The Tribunal considered that the FIO's costs should be reduced to take account of the other matters investigated and not pursued, together with the travel sickness investigation. The Tribunal considered that costs of £27,000 was proportionate as regards the FIO's investigation. The Tribunal also considered that there should be a reduction in the costs claimed by Capsticks to reflect the Applicant's failure to succeed on allegation 1.2.

46. The Tribunal determined that the appropriate and proportionate costs in this matter was £60,000. Those costs were to be shared in equal amount by the three Respondents.

Statement of Full Order

47. The Tribunal Ordered that the First Respondent, solicitor, do pay a fine of £10,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £20,000.00.

48. The Tribunal Ordered that the Second Respondent, solicitor, do pay a fine of £10,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £20,000.00.

49. The Tribunal Ordered that as from 27 February 2020 except in accordance with Law Society permission:-

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

And the Tribunal further Ordered that the said Victoria Kinsella do pay the costs of and incidental to this application and enquiry fixed in the sum of £20,000.00.

Dated this 7th day of April 2020
On behalf of the Tribunal

B. Forde
Chair

JUDGMENT FILED WITH THE LAW SOCIETY
07 APRIL 2020