The Tribunal's decision dated 31 March 2021 is subject to appeal to the High Court (Administrative Court) by the First Respondent. The Order remains in force pending the High Court's decision on the appeal.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 12102/2020

BETWEEN:

SOLICITORS REGULATION AUTHORITY — Applicant

and

RICHARD MALLETT — First Respondent
SHARON MALLETT — Second Respondent

Before:

Ms A E Banks (in the chair)
Mr W Ellerton
Mrs S Gordon

Date of Hearing: 16 February, 19 February – 5 March 2021

Appearances

Andrew Tabachnik QC, of 39 Essex Chambers, 81 Chancery Lane, London WC2A 1DD instructed by Nimi Bruce, barrister in the employ of Capsticks LLP, 1 St George's Road, Wimbledon, London SW19 4DR, for the Applicant.

Timothy Nesbitt QC, of Outer Temple Chambers, The Outer Temple, 222 Strand, London WC2R 1BA, instructed by Nick Trevette, solicitor of Murdochs Solicitors, 45 High Street, Wanstead, London, E11 2AA or the First Respondent.

Klentiana Mahmutaj, counsel of Red Lion Chambers, 18 Red Lion Court, London EC4A 3EB, instructed by Steve Roberts, solicitor of Richard Nelson LLP, Castle Court, 6 Cathedral Road, Cardiff CF11 9LJ, for the Second Respondent.

JUDGMENT

Allegations

1. The allegations made against the First Respondent by the Solicitors Regulation Authority ("SRA") were that while in practice as a director and solicitor at Malletts Solicitors Limited ("the Firm"):

1.1 In the period from December 2013, he permitted, allowed and/or caused Loan Note monies (as defined below) to be used for purposes other than those specified and sanctioned by the lenders. In so acting, the First Respondent breached Principles 2 and 6 of the Solicitors Code of Conduct ("the Principles");

1.2 In the period from December 2014, he permitted, allowed and/or caused the Firm to receive and utilise loans from its clients (Cornelius Smith and/or John Dodman) who had not first taken independent legal advice, and thereby failed to achieve Outcomes (3.1), (3.2) and (3.4) of the Code of Conduct 2011 ("the Code"), acted in breach of IB 3.8 of the Code, and breached Principles 2, 4, 6 and 8 of the Principles;

1.3 On or about 10 October 2014, he made a number of false and misleading statements and/or representations to Mr Kashdan, in order to persuade the latter (together with his wife) to purchase Loan Notes, and in so doing breached Principles 2 and 6 of the Principles;

1.4 In or about October 2014, he made a number of false and misleading statements and/or representation to Ms Magee, in order to persuade the latter to purchase Loan Notes, and in so doing breached Principles 2 and 6 of the Principles;

1.5 In the period from late 2014, he allowed or encouraged the Firm's professional indemnity insurance cover to be presented to putative lenders as if it offered security in respect of their loans, thereby creating a misleading impression, and in so doing breached Principles 2 and 6 of the Principles;

1.6 He failed, in the period after the matter had been drawn to his attention on 28 July 2016, to take any or any sufficient steps to remedy the ongoing breach of an undertaking he had given to Hall Smith Whittingham LLP on 25 May 2016, and thereby failed to achieve Outcome (11.2) of the Code, and breached Principles 2 and 6 of the Principles;

1.7 He failed to ensure compliance with Rules 14.1, 16.1(e), 17.1(b) and 29.12-29.14 of the Solicitors Accounts Rules 2011 ("the Accounts Rules") in relation to unpresented cheques sent to counsel.

2 The Allegations against the Second Respondent, were that while in practice as a director and solicitor at the Firm:

2.1 In the period from December 2013, she permitted, allowed and/or caused Loan Note monies (as defined below) to be used for purposes other than those specified and sanctioned by the lenders. In so acting, the Second Respondent breached Principles 2 and 6 of the Principles;

2.2 In the period from December 2014, she failed to take any or any sufficient steps to ensure that the Firm did not receive or use monies loaned by those who were clients of the Firm (such as Cornelius Smith and/or John Dodman) unless the client had first received independent legal advice, and thereby failed to achieve Outcomes (3.1), (3.2) and (3.4) of the Code, acted in breach of IB (3.8) of the Code, and breached Principles 2, 4, 6 and 8 of the Principles;

2.3 In a 21 June 2016 Defence which she completed, she made a number of false and misleading statements, and in so doing breached Principles 1, 2 and 6 of the Principles;

2.4 Without good reason, she failed to perform an undertaking (alternatively, promise) given by her in a 9 December 2014 email, whether within a reasonable amount of time or at all, and in so doing she failed to achieve Outcome (11.2), and breached Principles 2 and 6 of the Principles;

2.5 In the period March – early November 2016, she failed to respond to numerous requests from the SRA for an explanation regarding the failure to perform the undertaking (or promise) given by her in the said 9 December 2014 email, and she thereby breached Principles 2, 6 and 7 of the Principles;

2.6 She failed to ensure compliance with Rules 14.1, 16.1(e), 17.1(b) and 29.12-29.14 of the Accounts Rules in relation to unpresented cheques sent to counsel.

3. Furthermore, dishonesty was alleged with respect to each of the allegations at paragraphs 1.1, 1.2, 1.3, 1.4, 1.5, 2.1, and 2.3, but dishonesty was not an essential ingredient to prove any of the allegations.

4. Recklessness was also alleged in the alternative with respect to each of the Allegations at paragraphs 1.1, 1.2, 1.3, 1.4, 1.5, 2.1, and 2.3, however, recklessness was not an essential ingredient to prove any of the allegations.

Documents

5. The Tribunal reviewed all the documents submitted by the parties, which included (but was not limited to):

- Rule 12 Statement and Exhibit NB1 dated 12 June 2020
- First Respondent's Answer and Exhibits dated 21 December 2020
- Second Respondent's Answer and Exhibits dated 21 December 2020
- Skeleton Argument on behalf of the First Respondent dated 17 February 2021
- Skeleton Argument on behalf of the Second Respondent dated 17 February 2021
- Skeleton Argument on behalf of the Applicant dated 18 February 2021
- Applicant's Schedule of Costs dated 8 February 2021

Preliminary Matter

6. Respondents' Application to Stay the Proceedings for Abuse

6.1 The parties agreed that the relevant test was that detailed in R v Maxwell [2011] 1 WLR 1837. At [13], Lord Dyson summarised the two categories of case which would justify a stay of a prosecution that would otherwise be an abuse of process:

> "It is well established that the Court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the Court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the Court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of balancing of competing interests arises. In the second category of case, the Court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the Court concludes that in all the circumstances a trial will offend the Court's sense of justice and propriety (per Lord Lowry in R v Horseferry Road Magistrates' Court ex p Bennett [1994] 1 AC 42, 74g) or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in R v Latif [1996] 1 WLR 104, 112f)."

6.2 In Ex p Bennett, Lord Lowry stated:

> "…I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely "*pour encourager les autres*"."

The First Respondent's Submissions

6.3 Mr Nesbitt QC submitted that there had been significant delay in the bringing of the proceedings. Delay had long since been recognised as an enemy of justice, particularly when that delay was caused by an emanation of the State. The Tribunal was referred to Lord Bingham's comments at [16] in Attorney General's Reference (No 2 of 2001) [2004] 2 AC:

> "The state should not subject claimants to prolonged delay in pursuing their claims, whatever the outcome, nor defendants to prolonged uncertainty and anxiety in learning whether their opponents' claims will be established or not.

> The ill consequences of delay in civil litigation, immortalised in Bleak House, need no elaboration. In H domestic law, a battery of statutory limitations, procedural rules and equitable doctrines address the problem. Article 6(1) gives a further remedy to those prejudiced, at the hands of the state, by this pernicious evil."

6.4 That principle had been applied to regulatory proceedings both in the higher courts and by the Tribunal.

6.5 Mr Nesbitt QC detailed the chronology of the matter prior to proceedings being issued:

- 19 March 2015 – A forensic investigation by the SRA was commenced by Mr Carruthers
- 24 September 2015 - The Respondents were first interviewed by the SRA
- 14 June 2016 - An "Explanations and Warnings" (EWW) Letter was sent to both Respondents.
- 15 and 17 August 2016 - The Respondents respond to the EWW letter
- 12 September 2016 - Further Forensic Investigation was commenced by Ms Natalie Garrard
- 12 October 2016 - Respondents interviewed for second time
- 2 February 2017 - Interim FIO report of Natalie Garrard (principal report on which prosecution based)
- 22 June 2017 - An EWW letter was sent to the Respondents in respect of the second forensic investigation, a deadline of 4 July 2017 was given to the Respondents. Mr Nesbitt QC submitted that on any objective view, the SRA had been investigating the Firm for over two years and to expect a response of these serious matters was never going to be achieved within that timeframe. The time for a response was later extended to 27 March 2018
- 11 October 2017 - Internal SRA memo regarding referral to SDT.
- 11 December 2017 - Notice from SRA of decision to refer case to SDT (despite extension to reply to EWW granted to 27 March 2018)
- 22 February 2018 – Murdochs seek a review of the decision to refer
- 23 February 2018 – Murdochs informed that the matter is now being dealt with by Capsticks
- 27 March 2018 – EWW response provided on behalf of both Respondents
- 17 April 2018 – Email from Capsticks stating:

"We are in the process of collating outstanding information/evidence pertinent to the referrals. In light of this, we will not be in a position to discuss the response and/or RSA in detail at this time. I will keep you updated in relation to progress made and we will of course be able to discuss the matter with you in due course."

- 27 July 2018 – Email from Capsticks stating:

"By way of update, we have concluded our investigation and drafted the Rule 5 Statement. This is under review by the client and is not finalised. We will be looking to get the Rule 5 filed and served over the next couple of weeks. I hope this assists."

- September 2018 – Murdochs seek a draft copy of the Rule 5 Statement – none was provided.

- 5 December 2018 – Further request for a review of the decision to refer (as regards a matter that was not proceeded with at the Tribunal)

- 28 February 2019 – Email from Capsticks stating:

"… Please accept my apologies for the delay in responding to you on this matter. I can confirm that the SRA has recently commenced without prejudice negotiations with [another], who as you are aware was referred for disciplinary proceedings alongside [the Respondents]. We anticipate being in a position to conclude these negotiations within the next 3-4 weeks. We will in due course confirm the outcome of these negotiations and confirm the SRA's next steps in relation to the Rule 5 Statement"

- 1 April 2019 – Email to Capsticks regarding apparent decision to confirm the referral of the Respondents to the SDT and highlighting that representations made in the EWW response had not been taken into account

- 3 May 2019 – Email to Capsticks referring to the correspondence as regards the matter being reviewed having seemingly been ignored and further "the continued delay and lack of response, or consideration, of any of the issues raised in our correspondence is understandably causing our clients distress and concern …"

- 6 May 2019 – Email from Capsticks stating:

"… I do appreciate that the delay is frustrating to your client and that matters being progressed expeditiously is in the interests of all parties.

As you know, following the exchange of correspondence post EWW, a decision was taken to refer this matter to the Tribunal. That being the case, I anticipate that the next stage will be the issuing of the R5 at which point your clients will have the opportunity to make further representations according to the statutory timeframe laid down and the standard directions. We are currently in the process of finalising the R5, the investigation in this matter now being complete."

- 17 May 2019 – Following confirmation that the SRA maintained the referral, Murdochs emailed Capsticks stating:

  "… You will be aware of the inordinate time it has taken to progress this matter …. you will be aware that there has been a catalogue of correspondence from ourselves to Capsticks, none of which appears to have been addressed or considered. We say again, apart from indicating that there was delay owing to negotiations with [another], we have not received a single response from either the SRA or Capsticks in relation to that correspondence …"

- 13 August 2019 – Email from Capsticks apologising for there being no response to the EWW response and stating that "we will be in touch shortly

- August 2019 - June 2020 - No further substantive communication until receipt of the Rule 12 Statement in June 2020

6.6 Mr Nesbitt QC submitted that the concerning delay commenced from 17 April 2018. By July 2018, the Applicant stated that the investigation was concluded and a Rule 5 Statement had been drafted. In May 2019, the Applicant stated that it was finalising the Rule 5 Statement. This was almost a year later. The Rule 12 Statement (it now being a Rule 12 Statement following the change of the Tribunal's Rules) was not issued until June 2020.

6.7 The Applicant, it was submitted, was aware of the Loan Notes in April 2014, but did not commence its investigation until September 2016. That was a delay of 2½ years. Had that been the only delay, that might have been excusable. The interim investigation report was produced in February 2017. It was then a further 10 months before notification of the decision to refer the matter to the Tribunal.

6.8 There was then the extraordinary delay of a further 2½ years from the referral decision to the issuing of the proceedings. The Applicant had failed to provide any adequate explanation for the substantial delay. Mr Nesbitt QC submitted that there was no direct accusation of bad faith on the part of the Applicant, however, the Tribunal would no doubt expect an explanation particularly in the context where the Respondents were expecting to be tried under the criminal standard of proof, that expectation being a legitimate one.

6.9 Mr Nesbitt QC submitted that the delay had been, at the very least, a delay of three years. The Tribunal, it was submitted, ought to conclude that the delay was unreasonable and had caused the First Respondent real prejudice such that he could no longer have a fair trial. Mr Nesbitt QC detailed four reasons why a fair trial was no longer possible.

6.10 *The death of a witness*

6.10.1 Mr D was a key witness and had provided a statement. Had the case come to trial within a reasonable time, it was likely that he would have been available as a witness. In his statement, Mr D mentions that he was told something about loans being required for cashflow problems. This was a matter that the First Respondent would have wished to explore in cross-examination, and it was

anticipated that his responses could have assisted the First Respondent's case. He was an important witness who was now not available to give evidence. The delay occasioned by the Applicant caused the First Respondent real prejudice.

6.11 *Witness memory*

6.11.1 Most of the witnesses being called were giving evidence about their recollection of events that had taken place seven years previously. It was known that human organic memory deteriorated over time. The Tribunal was now required to rule on critical disputed matters in circumstances where the overall quality of the evidence was diminished due to the delay in bringing the matter to trial. This, it was submitted, involved a real erosion of the quality of justice and was plainly prejudicial and unfair to the First Respondent.

6.12 *Inability to access documents*

6.12.1 In the period of time since the First Respondent was interviewed, the Firm had closed and its computer databases were no longer available to the First Respondent. Despite a copy of the hard drive being provided to the First Respondent by the Applicant, much of the material was inaccessible with the result that a number of documents that might assist were not available to the Tribunal. In addition, the First Respondent had not been able to fully interrogate the hard drive.

6.13 *Change in the standard of proof*

6.13.1 This was an important and worrying feature. The standard of proof at the time of the investigation and the first drafting of the allegations was the criminal standard; the Applicant was required to prove the matters beyond reasonable doubt. Irrespective of the reason for the delay, the First Respondent now faced prosecution under the civil standard; the Applicant was now required to prove the case on the balance of probabilities following the change in the Tribunal's Rules on 25 November 2020. Had the application been made when it should have been, the matter would have been considered before the change in the law. The change was dramatically to the First Respondent's prejudice; there was nothing more prejudicial than a change in the standard of proof in favour of the opposing party. It was unfair and prejudicial that the delay occasioned by the Applicant had resulted in a situation where the First Respondent was now to be tried on allegations facing a different standard of proof than that which he legitimately expected to face.

6.14 Mr Nesbitt QC submitted that for the reasons detailed, it was no longer possible for the First Respondent to receive a fair trial. As to the Tribunal's conscience being offended, Mr Nesbitt QC repeated the submissions made above. In addition, the First Respondent had had the allegations hanging over him for nearly 6 years without resolution. This was at least 3 years longer than would have been the case had the Applicant acted with the necessary expedition. The delay had had a dramatic effect on the First Respondent's personal and professional life, leaving him with the constant daily worry about what was happening. Additionally, a further consequence of the delay was that the First Respondent had faced proceedings brought by the insolvency service prior to the trial

of the issues at the Tribunal. The First Respondent did not have the means to contest those proceedings as well as the proceedings before the Tribunal, and so was forced, on pragmatic grounds, not to. The witnesses in the insolvency proceedings included witnesses upon whom the Applicant relied. Had the matter come before the Tribunal when it ought to have, the evidence of those witnesses would have been tested, and the First Respondent would have had the benefit of that when dealing with the insolvency proceedings. This, it was submitted, was an additional real and substantial prejudice which was no longer capable of correction.

Article 6

6.15 It had been acknowledged by the Applicant that there had been unreasonable delay and that the First Respondent's Article 6 rights were breached. Accordingly, the Tribunal ought to find that there had been a breach of the First Respondent's Article 6 rights. Mr Nesbitt QC submitted that the authorities made clear that a breach of Article 6 did not automatically lead to a stay of the proceedings; where there was another appropriate remedy, that should be imposed instead. Mr Nesbitt QC submitted that for the reasons detailed above in support of the application to stay the proceedings, the damage to the First Respondent and the fairness of the trial process as a result of the unreasonable delay was not something that could be corrected by any other remedy.

6.16 For the reasons detailed above, it was submitted that the First Respondent could not have a fair trial, and that the Tribunal's sense of justice, fairness and propriety would be offended were the First Respondent to be tried in the circumstances. Accordingly, the Tribunal was invited to stay the contested allegations.

The Second Respondent's Submissions

6.17 Ms Mahmutaj adopted and supported the submissions made by Mr Nesbitt QC. In addition to the submissions made by Mr Nesbitt QC as regards the standard of proof, Ms Mahmutaj submitted that the Applicant was aware of the potential change to the standard of proof from mid-2018. It was not submitted that the change in the standard was of itself unfair. The delay in issuing the proceedings taking into account the chronology rendered it unfair for the Second Respondent to be tried as:

- The Applicant informed the Second Respondent in July 2018 that the Rule 5 Statement had already been drafted. The subsequent delay had not been explained;

- The Applicant knew of the potential change to the standard of proof, a process in which it was participating as its chief proponent; and

- The longer the delay, the higher the chance that the proceedings would be made subject to the civil standard, thus improving the Applicant's chances of the matters being found proved.

6.18 Ms Mahmutaj submitted that it was unfair that the Applicant, who had caused the delay, should then benefit from that delay by having a better chance of success. Given its knowledge of the likely changes, it was all the more imperative that the Applicant acted expeditiously and diligently in bringing the proceedings. This was not a situation of mere "bad luck"; but for the culpable and unreasonable delay on the part of the

Applicant, the Second Respondent would have been tried under the criminal standard of proof.

6.19 Additionally, the decision to refer the Second Respondent was made three months prior to receipt of the EWW response, in circumstances where the Applicant had expressly extended the time for that response. The Second Respondent detailed issues regarding her health and that of her child in the EWW response. Having made the decision to refer prior to receiving that response, the Applicant had, from the outset, frustrated the ability to take those circumstances into account. The Applicant did not raise any questions on receipt of the EWW response, nor did it review its referral decision in light of the information contained in the EWW response.

6.20 The duty to deal with matters expeditiously and to avoid unnecessary delay was increased due to the Second Respondent's personal circumstances. The failure to do so had caused the Second Respondent additional pressure and strain that could not now be remedied. The Applicant's apology and recognition of a breach of Article 6 were not sufficient to remedy the breach.

6.21 Ms Mahmutaj submitted that for the reasons detailed by Mr Nesbitt QC and the additional matters raised, it was no longer possible for the Second Respondent to have a fair trial, and that in the circumstances, the Tribunal's sense of justice and propriety was offended such that the proceedings must be stayed.

The Applicant's Submissions

6.22 Mr Tabachnik QC resisted the application in full. It was submitted that there was no real prejudice let alone serious prejudice such as to render the proceedings unfair; the case came nowhere near the exceptional category where the propriety of the Tribunal was so offended that the case should be halted. On the contrary, it was in the public interest that the Respondents faced a trial on the serious matters alleged.

6.23 The Applicant accepted that matters had not proceeded as it would have wished. The apology given was not as a remedy, but as recognition of that. Whilst it was accepted there had been some delay, it was the Applicant's position that the delay was for approximately six months, and not for the period of time advocated for by the Respondents.

6.24 Mr Tabachnik QC commented on the timing of the application. No application had been made when the case was issued, nor had the matter been raised at the previous interlocutory hearings before the Tribunal. Further, there had been no mention of the applications in the certificates of readiness completed by the Respondents. It was considered that this was a "last ditch attempt" to stop the proceedings and to allow the Respondents to evade the allegations of dishonesty and recklessness.

6.25 As regards the delay, it was accepted by the Applicant that there had been a breach of the Article 6 reasonable time requirement, however it was not accepted that as a result the continuation of the proceedings would be unfair or that the Tribunal's conscience would be offended. Mr Tabachnik QC noted that it was not suggested that there had been bad faith on the part of the Applicant. There had been no decision made to delay

the proceedings; the delay had not been a conscious choice. Mr Tabachnik QC separated the alleged delay into three separate periods:

April 2014 – March 2018

6.26 The Respondents' attempt to say that the Applicant was on notice of the misconduct in April 2014 when it was aware of the Loan Notes, was misconceived. At that time the Applicant was looking at the solvency of the Firm and had been told that the Loan Notes were for the launch of the schemes. Had the monies been used for those purposes, it would have been consistent with the reason that the loans were made.

6.27 Whilst it was correct that Mr Carruthers commenced his investigation into the Firm in March 2015, the only allegations that arise from that investigation were the Accounts Rules breaches which were admitted in full by both Respondents. The Respondents, it was noted, did not seek to have those matters stayed. Mr Carruthers did not investigate the matters upon which the majority of the allegations faced by the Respondents were based. It was Ms Garrard who investigated the matters which the Respondents now sought to have stayed. By the time of Ms Garrard's investigation, the Firm was close to closure. Her investigation commenced in September 2016. In November 2016, the Firm went into creditors' voluntary liquidation. Her interim forensic investigation report was produced in February 2017. There was no criticism from either Respondent about the time taken to produce the report. EWW letters were sent to the Respondents in June 2017. The Respondents provided their response to the EWW letters in March 2018. Mr Tabachnik QC submitted that there was no basis for saying that the Applicant had caused any undue or unreasonable delay prior to March 2018.

March 2018 – June 2020

6.28 The Applicant acknowledged and apologised for an element of undue delay during that period. The application ought to have been issued at the end of 2019, rather than when it was actually issued in 2020. Without excusing the accepted small delay:

- The First Respondent accepted that the time taken by the Applicant in reviewing matters that had been investigated but were not before the Tribunal was "adequately explained".

- The time taken in negotiating with another potential Respondent was properly incurred. That was the appropriate way to proceed, but contributed to holding up progression of the prosecution.

- There was a change in the fee earner with conduct of the matter in May 2019. Proceedings were issued just over a year later.

- This was a complex matter with extensive documents. The investigation reports ran to over 2,000 pages. The EWW response was 77 pages long with a further 430 pages of exhibits. The documents in the case required careful and detailed consideration. Inevitably, given the nature of the case, it took longer to prepare than less complicated and less document heavy matters.

- The internal reviews of the Rules 12 Statement were necessary. The drafts were reviewed by external counsel. Mr Tabachnik QC was instructed in October 2019. A further review was undertaken resulting in substantial revisions. Evidential issues were also identified including securing the Firm's server, which took a number of months, the server not being received until March 2020

6.29 Mr Tabachnik QC submitted that notwithstanding that the above properly accounted for the time taken, the Applicant accepted that it took too long, following receipt of the EWW response, to issue the proceedings. This was not because the case was being ignored, nor was it a conscious decision. The delay was occasioned by the Applicant's desire to make sure the case was right.

June 2020 - Present

6.30 From the time of issue, the Tribunal held case management responsibility. The listing of a matter with a 15 day time estimate within nine months of issue and during the pandemic was not a matter that could be criticised, nor did the Respondents seek to do so. Accordingly, there could be no suggestion of unreasonable delay during that period.

6.31 As to the submission that a fair trial was impossible due to the serious prejudice suffered by the Respondents:

6.32 *The death of a witness*

6.32.1 Mr D was a witness for the Applicant, but was not a central witness. Further, his partner was available to give evidence. The First Respondent referred to parts of the statement which he considered assisted the First Respondent's case. The First Respondent was already in possession of that. Further, the inability to cross-examine Mr D should be considered in the context of the other available witnesses. Mr D was a Loan Note investor; there were three other Loan Note investors scheduled to provide oral evidence. Further, the Applicant relied on the evidence of Mr D as regards allegations 1.2 and 2.2, the facts of which were not in dispute by either Respondent. In the circumstances, it was not credible to suggest that the absence of Mr D made a fair trial impossible.

6.33 *Witness memory*

6.33.1 The contested matters turned, in the main, on the documentary evidence. The statements of the witnesses were mainly made in by March 2017, relatively proximate to the matters complained of. Further, the Respondents had responded to the allegations in their EWW response, having reviewed the interim forensic investigation report that was produced in February 2017. They had also been interviewed as regards the matters in October 2016.

6.33.2 The Respondents had not suggested either in their EWW response or in their Answers to the Rule 12 Statement that they did not understand the allegations they faced, or that their memories had been affected by any medical condition.

6.33.3 The Tribunal was referred to the comments of Sir Brian Leveson in R v R [2016] 1 WLR 1872 where at [69] he stated:

> "As the judge accepted, the case turned in large part on documentary evidence and to the extent that recollections were necessary, documents would allow memories to be refreshed. While he was concerned, ten years on from the date that the alleged conduct occurred, memories would have faded, this is arguably true of many prosecutions. Furthermore, in this case, the defendants have had the prosecution case summary and statements of the prosecution witnesses for many years and thus have had and will have ample opportunity (even if they needed it) to re-acquaint themselves with the detail of what is an almost exclusively paperbased prosecution case . . ." (Mr Tabachnik QC's emphasis).

6.33.4 Mr Tabachnik QC submitted that those comments were directly applicable in the instant case. This was not 10 years later (as was the position in R v R). The Respondents had been in possession of the witness statements and forensic investigation reports for many years, and had had ample opportunity to acquaint themselves of the evidence upon which the Applicant relied.

6.33.5 In addition, closer scrutiny was required of when the misconduct occurred. The First Respondent sought to place the conduct in December 2013, however that was not the case. Whilst there were Loan Notes in December 2013/January 2014, 30 of the Loan Notes were obtained between May 2014 and June 2015. The use of the monies continued until June 2015. The Loan Notes and the use of the monies formed the substance of allegations 1.1 and 2.1. Allegations 1.2 and 2.2 related to loans from clients which occurred in December 2014 and March 2015. Allegations 1.3 and 1.4 related to conversations that took place in October 2014. Those allegations were based on complaints made to the Applicant and the witness statements made by the complainants in 2017. Allegation 1.5 related to events in late 2014. Allegation 1.6 related to conduct in the period July – September 2016.

6.33.6 Allegation 2.3 related to a Defence completed in June 2016, the facts of which were not in dispute. Allegations 2.4 and 2.5 related to admitted failures in 2014 and 2016.

6.33.7 Mr Tabachnik QC noted that the alleged misconduct occurred, or continued to occur within 4 – 5 years prior to the issue of the proceedings. There was no statute of limitations as regards disciplinary proceedings. It was submitted that were these civil recovery proceedings, all but the earliest Loan Notes would be in time; there would be no credible basis to seek a stay of such proceedings.

6.33.8 Accordingly, it was submitted, the generalised points made by the Respondents carried little weight and came nowhere near establishing serious prejudice such as to render a fair trial impossible.

6.34 *Inability to access documents*

6.34.1 Mr Tabachnik QC submitted that this ground was a make weight. Each of the Respondents were given access to the server in October 2020. The First Respondent had some technical issues as regards accessing the data. The

Applicant provided both Respondents with the contact details of the Applicant's IT experts in order to resolve any issues. Nothing further was heard from either Respondent as regards the ability to access the data. Neither Respondent reported any issue with accessibility either at the Case Management Hearing in January 2021, nor in their certificates of readiness.

6.35 *Change in the standard of proof*

6.35.1 The change in the standard of proof was not a matter that could be relied upon to demonstrate serious prejudice such that a fair trial was impossible. The Second Respondent accepted that the change, or itself, did not render a fair trial impossible. The change in the standard of proof affected all proceedings issued after 25 November 2019. It reflected the legislature's clear view of the appropriate standard of proof to be applied when determining allegations intended to protect the public and the reputation of the profession. There were no transitional arrangements to the effect that conduct that pre-dated the change in the standard should be tried under the criminal standard. That a trial under the civil standard was fair, was plain. Were that not the case, all cases where the conduct complained of took place prior to the change, but were issued after the change, would have to be stayed on the basis that a fair trial was not possible.

6.36 For the reasons detailed, it was submitted that the Respondents' application to stay on the basis that a fair trial was not possible should be dismissed.

6.37 As regards the Tribunal's conscience, Mr Tabachnik QC repeated the submissions made above.

6.38 In relation to the submission that the Respondents had been caused undue stress occasioned by the delay, whilst sympathetic, it was not accepted that such a factor meant that the Tribunal's sense of justice and propriety was so offended that the proceedings should be halted.

6.39 Mr Tabachnik QC submitted that the Respondents' arguments about the potential "benefit" had the Tribunal's proceedings been heard prior to the insolvency proceedings, were incoherent. The "benefit" would depend on the Tribunal's findings. It was entirely possible that the Tribunal's findings would be of no benefit whatsoever in those proceedings.

6.40 As to the additional medical matters raised by the Second Respondent, there was no application on medical grounds to halt or adjourn the proceedings. Mr Tabachnik QC submitted that there were no medical grounds upon which a stay of the proceedings could be predicated or justified.

6.41 The submissions of the Respondents came nowhere near the very exceptional circumstances necessary to persuade the Tribunal that its conscience would be offended if the matter proceeded to trial. Accordingly, the application to stay the proceedings should be refused.

6.42 The Article 6 rights of the Respondents did not add to the stay application. The parties agreed that a breach of Article 6 alone did not automatically mean that the proceedings should be stayed. Even where a breach of Article 6 was established, the Respondents needed to persuade the Tribunal that a fair trial was impossible or offensive. For the reasons stated above, the Respondents had failed so to do.

The Tribunal's Findings

6.43 The Tribunal considered the issue of delay. The Tribunal did not accept that knowledge that the Firm had obtained Loan Notes in 2013 fixed the Applicant with knowledge of serious professional misconduct. At that time, the Applicant was not investigating how the monies had been used. The issuance of the Loan Notes did not, in and of itself, amount to professional misconduct. It was the alleged misuse of those monies that could, if proved, amount to professional misconduct. Accordingly, the Tribunal did not accept that there had been a delay of 2½ years between the Applicant's knowledge of the Loan Notes and the investigation into the use of the monies.

6.44 As to the time thereafter, the Tribunal considered that the time taken for the production of the interim report was reasonable, given the documents and the matters that were investigated. The Tribunal did not understand the Respondents to be arguing the contrary.

6.45 The Tribunal noted the steps that had been taken by the Applicant between April 2018 and June 2020 when proceedings were issued. The Tribunal considered that the time taken in negotiating with another potential Respondent, and reviewing the not-proceeded with matters, was reasonable and entirely proper. The Tribunal also considered that the nature and complexity of the case was such that the Applicant should take proper care in determining the allegations and evidence upon which it relied. The Tribunal noted that the Applicant accepted that there had been some undue and unreasonable delay. Given the nature of the case and the matters to be considered, the Tribunal did not accept that the delay was for a further 2½ year period as was submitted by Mr Nesbitt QC. The Tribunal considered that the further delay was for a period of approximately six months for the reasons submitted by Mr Tabachnik QC.

Impossibility of a fair trial

6.46 The Tribunal considered each of the matters in which it was submitted that a fair trial was impossible:

6.47 *The death of a witness*

6.47.1 The Tribunal noted that the Applicant relied upon the evidence of Mr D in support of allegations 1.2 and 2.2. Neither Respondent disputed the underlying facts in relation to those allegations. Indeed, both had made some admissions as regards those allegations. Mr D's evidence in that regard, would not assist the Respondents; it was for the Tribunal to determine on the basis of the agreed facts, whether the Respondents' conduct was in breach of the Rules and Principles as alleged. As to the First Respondent relying on Mr D's evidence in support of allegation 1.1, the First Respondent was in possession of the witness statement, and the comments therein which it was considered supported his case. Whilst those matters might have been explored in cross-

examination, the suggestion that Mr D could give evidence that might assist the Respondents was, at best, speculative. Mr D, it was determined, was not a key witness such that the inability to cross-examine him was fatal to the Respondents' case. His absence did not mean that it was impossible for the Respondents to receive a fair trial.

6.48 *Witness memory*

6.48.1 The Applicant's witnesses had all provided statements by March 2017 at the latest. As regards the witnesses for allegations 1.1 and 1.2, Mr Kashdan and Ms Magee had invested in October 2014. Their witness statements were provided by March 2017, within 2½ years of their investment. The witnesses would have access to those statements from which they could refresh their memories. The Tribunal did not find that such a timescale would diminish their memories to the extent that to proceed with matters would cause serious prejudice to the Respondents such that it was impossible for them to have a fair trial. The Respondents had not, in their Answers or in the EWW response, sought to suggest that they were unable to defend the allegations due to the passage of time. The Tribunal considered the comments of Sir Brian Leveson. The Tribunal found that the Respondents and witnesses were in possession of the necessary documentary evidence so as to re-acquaint themselves with the detail of the case. The Tribunal further determined that the six month delay occasioned by the Applicant did not materially affect the memory of the witnesses or the Respondents. Accordingly, the Tribunal did not find that fading witness memories caused such serious prejudice that a fair trial was impossible.

6.49 *Inability to access documents*

6.49.1 The Tribunal noted that the Respondents had been provided with the hard drive and had the opportunity to interrogate it for any documents upon which they sought to rely. The Applicant had provided the necessary technical support when difficulties had been encountered. Neither Respondent had sought, either at the Case Management Hearing in January 2021, nor in their certificates of readiness, to assert that they were unable to access the documents on the server. Further, the Respondents had not sought to raise any further issues with the Applicant as regards access to the material. The Tribunal determined that this ground had no merit; there was nothing in the submissions made to demonstrate the impossibility of a fair trial.

6.50 *Change in the standard of proof*

6.50.1 As detailed above, the Tribunal determined that the delay caused by the Applicant was no more than six months. That being the case, even if the proceedings had been issued in 2019, that would have been following the change in the standard of proof in any event. The Tribunal did not consider that there had been a legitimate expectation of the Respondents being prosecuted under the criminal standard. At no time had the Applicant promised that this would be the case. Further, the Respondents, it was found, had failed to demonstrate that they had relied upon this, and had been caused prejudice by that reliance.

6.50.2 It had not been submitted, and the Tribunal did not find, that the Applicant had deliberately delayed in issuing the proceedings so as to gain an advantage in the change of the standard of proof.

6.50.3 The Tribunal did not accept that the change in the standard of proof was such that the Respondents could no longer have a fair trial.

6.51 Accordingly, the Tribunal found that the trial of the issues could be conducted fairly and properly; the application to stay the proceedings on the basis of the impossibility of a fair trial was refused.

6.52 The Tribunal then considered whether its conscience would be offended in the circumstances. For the reasons detailed above, the Tribunal found that this was not the case. The Tribunal considered the additional matters whereby it was submitted that to proceed with the matter would be improper and unjust.

6.53 As regards the insolvency proceedings, the Tribunal considered that the submission that the Tribunal proceedings could have assisted the Respondents was conjecture and speculation without any supporting evidence. For the avoidance of doubt, the Tribunal placed no weight or reliance on the case details regarding the First Respondent detailed on the insolvency service website. The Tribunal determined that the failure to hear this matter prior to the insolvency proceedings was not something that offended its sense of justice and propriety such that the proceedings should be stayed.

6.54 The stress and anxiety caused by the proceedings was not, it was found, such that the Tribunal's conscience was offended. For the reasons detailed above, the Tribunal found that the unreasonable delay caused by the Applicant was no longer than six months. Whilst this had caused the Respondents more stress and anxiety than was necessary, the Tribunal did not find that the additional stress and anxiety meant that its conscience had been offended such that the proceedings should be stayed.

6.55 The Tribunal noted the extremely difficult personal circumstances suffered by the Second Respondent. It was noted that the Second Respondent had not sought any expert report as to her ability or health at the time of the alleged conduct. As to the failure of the Applicant to take the submissions in the EWW into account, that was not a reason to stay the proceedings. Had it been considered that the bringing of the prosecution was unfair, the appropriate course was to challenge the decision to refer, or to judicially review the Tribunal's decision to certify the case against the Second Respondent. The Tribunal found that notwithstanding the additional stress caused to the Second Respondent by the six month unreasonable delay, her personal circumstances were not such that to proceed with the trial offended the Tribunal's sense of justice and propriety.

6.56 Accordingly, and for the reasons detailed above, the Respondents' application to stay the proceedings was refused.

Factual Background

7. The First Respondent was admitted to the Roll in October 2000. At all material times, he was a director of, and 50% shareholder in, the Firm. He practiced primarily in the

field of criminal law. He acted as chief executive officer of the Firm, and was responsible at all material times for the Firm's business development. The First Respondent's 2019/2020 practising certificate was subject to conditions.

8. The Second Respondent was admitted to the Roll in October 1993. She was at all material times a director of, and 50% shareholder in, the Firm. She was also at all material times the Firm's Compliance Officer for Legal Practice (COLP), Compliance Officer for Finance and Administration (COFA), Money Laundering Reporting Officer (MLRO) and acted as its chief operating officer, with responsibility for financial, accounting and administrative matters. The Second Respondent practiced primarily in the field of family law. The Second Respondent's 2019/2020 practising certificate was subject to conditions.

9. The Firm was incorporated by the Respondents on 11 January 2010, as a successor to a partnership of which the Respondents were the two equal equity partners. At the material times, the directors of the Firm were both Respondents and (until 29 April 2016, when he resigned) JM. The Firm was placed into creditors' voluntary liquidation on 11 November 2016, with over £3,100,000 owing to creditors.

10. As well as directors loans said to be owing to the Respondents (in the sum of around £226,000 to the First Respondent; and around £463,000 to the Second Respondent), and trade and banking creditors, the Firm's indebtedness at the time of its collapse included over £1,000,000 owing to 27 parties that subscribed for "Loan Notes" with the Firm, as described below, and a client (Mr Smith) who extended an unsecured loan to the Firm of £300,000 (without the Respondents having insisted or ensured that he take independent legal advice).

11. The Companies House disqualified director register and Insolvency Service websites indicated that the Respondents each submitted to 13 year bans from acting as directors, commencing on 7 February 2020 as regards the First Respondent and 8 November 2019 as regards the Second Respondent arising out of their directorships of the Firm. The Insolvency Service's website provides case details for the First Respondent as follows:

> "**Conduct**: Mr Mallett allowed Malletts Solicitors Ltd ("the Company") to use misleading marketing and financial material to attract investment between December 2013 and August 2015 by members of the public and some of the Company's clients in the total sum of £1,380,915 by way of loan notes which were marketed – or which investors were led to believe were marketed – for the sole purpose of a specific part of the Company, but which were used by the Company generally and not as intended or promoted by the marketing materials. As a result of this investment being placed in the Company generally, the Company was able to continue trading to the risk of these investors, causing losses totalling £1,844,091 (including interest/return on investments)."

Witnesses

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

- Natalie Garrard – Forensic Investigation Officer in the employ of the Applicant
- Mr Kashdan – Loan Note Investor

- Ms Magee – Loan Note Investor
- Richard Mallett – First Respondent
- Sharon Mallett – Second Respondent

13. The written and oral evidence of the witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case 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

14. The Applicant was required to prove the allegations on the balance of probabilities. 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, written and oral together with the submissions of both parties.

Dishonesty

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

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

16. When considering dishonesty the Tribunal firstly established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held. It then considered whether that conduct was honest or dishonest by the standards of ordinary decent people. When considering dishonesty, the Tribunal had regard to any references supplied on the Respondents' behalf.

Integrity

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

> "Integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members … [Professionals] are required to live up to their own

> professional standards … Integrity connotes adherence to the ethical standards of one's own profession".

Recklessness

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

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

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

20. **Allegation 1.1 - In the period from December 2013, the First Respondent permitted, allowed and/or caused Loan Note monies (as defined below) to be used for purposes other than those specified and sanctioned by the lenders. In so acting, the First Respondent breached Principles 2 and 6 of the Principles.**

In the period from December 2013, the Second Respondent permitted, allowed and/or caused Loan Note monies (as defined below) to be used for purposes other than those specified and sanctioned by the lenders. In so acting, the Second Respondent breached Principles 2 and 6 of the Principles.

The Applicant's Case

20.1 In the period December 2013 to June 2015, the Firm issued 34 Loan Notes to 27 persons, in the total principal sum of £1,038,000. The Loan Notes were offered at a specified annual interest rate (varying between 8%, 10% and latterly 20%), and with return of capital over a fixed period of time. The interest payments were due six monthly, from the date of the investment and the capital was to be returned at 25% pa from year 2 to year 5.

20.2 The Loan Notes were issued by the Firm's Resolutions and Loan Note Instruments.

20.3 There were Resolutions of the directors (including the First and Second Respondents) dated 20 August 2013, 2 October 2014, and 11 October 2014.

20.4 The 20 August 2013 resolution was signed by the Second Respondent, and provided:

> "By exercising the powers conferred on them by the Articles, the directors of the Company have, by a Resolution passed today Tuesday 20th August 2013, approved the issue of up to £1,000,000 in aggregate value of 8% unsecured loan notes denominated in pounds sterling, and have agreed to constitute these loan notes as per the attached Sterling Denominated 8% Loan Note instrument".

20.5 Clause 4 of the August 2013 8% Loan Note instrument was entitled "Use of Proceeds" and provided as follows:

> "The proceeds of all subscriptions for the Notes shall be used for business development generally and for investment into the Legal Expenses Insurance ("LEI") product. …"

20.6 In addition, on Saturday 11 October 2014, the directors (including the First and Second Respondents) resolved to issue up to £500,000 in aggregate value of 20% unsecured Loan Notes denominated in Pounds Sterling, pursuant to the terms of an 11 October 2014 Sterling Denominated 20% Loan Note instrument. Clause 4 of that Loan Note instrument was also entitled "Use of Proceeds" and provided:

> "The proceeds of all subscriptions for the Notes shall be used for business development generally and for investment into the 247businesshub/Legal Expenses Insurance ("LEI") product. …"

20.7 The Application Form for the Loan Note scheme (in respect of both the August 2013 and October 2014 instruments):

- Stated that the application was an irrevocable offer to subscribe for the relevant number of Loan Notes on the terms and conditions of the Application Form and the relevant Loan Note instrument. The Application Form also required those signing to declare that they had considered the relevant Loan Note instrument and had read the terms and conditions of the Application "and agree to be bound by them"; and

- Requested payment into an account which was in fact the Firm's office account.

20.8 The Loan Note Certificates provided that they were issued "with the benefit of and subject to the provisions and Conditions contained in [the relevant Loan Note instrument] and the conditions on this certificate". Some Loan Note Certificates were signed by the First Respondent and others were signed by the Second Respondent.

20.9 Mr Tabachnik QC submitted that it was a condition of the Loan Notes that the monies were only to be used for "business development generally" or the 247businesshub/LEI product. The 247businesshub/LEI product was intended to be a 24 hour telephone advice service to members of national organisations (and with associated benefits). "Business development" meant the seeking out, progression and/or securing of new business opportunities. It did not cover, and could not reasonably be thought to cover, the maintenance of the Firm by paying off existing liabilities and/or ordinary day-to-day expenses.

20.10 Contrary to Clause 4 of the Loan Notes, the Respondents permitted, allowed and/or caused the substantial bulk of the Loan Note monies (at the very least) to be used for purposes other than "business development generally" or the 247businesshub/LEI product. Instead, the Loan Note monies were utilised to provide temporary relief in respect of the Firm's office account overdraft (which invariably and in short order returned to the level of indebtedness which had immediately preceded receipt of the relevant tranche of Loan Note monies) and/or to fund payment of ordinary trading debts of the Firm out-with the terms of the Loan Notes. The Second Respondent agreed at interview that (as is indisputable) the Loan Note monies were spent on "the ongoing costs of the office".

20.11 Mr Tabachnik QC exemplified the use of some of the loan monies.

20.12 A loan of £145,000 received by the Firm funded, (amongst other things):

- a £20,000 payment to HMRC in respect of the Firm's tax liabilities
- £17,268 for rent owing on the Firm's Gray's Inn premises
- Payments to the First and Second Respondents personally

20.13 When the First Respondent was asked specifically about the use of this £145,000 at interview, the relevant exchanges included the following:

"Ms Garrard:	But do you think these people would have invested had they have known that their £145,000.00 that was coming in, was majority gonna pay your tax bill?
First Respondent:	If that was the case? Yeah, I'm not sure.
Ms Garrard:	Yeah
First Respondent:	I mean its
Ms Garrard:	And again I can only see it from looking at the figures
First Respondent:	Yeah, no I agree, I agree it's, it's difficult."

20.14 The £166,000 received from a number of lenders on or about 21 May 2014 funded (amongst other things)

- a £100,000 payment to HMRC in respect of the Firm's tax liabilities,
- £17,268 for rent on the Firm's Gray's Inn premises,
- Payments to the Respondents personally.

20.15 Mr Tabachnik QC submitted that despite the payments to HMRC detailed above, the Firm's debt to HMRC remained around £399,000 as at 11 September 2014, as both Respondents must have known (and did so know).

20.16 The £503,000 Loan Note monies received by the Firm in the period October-December 2014 funded (amongst other things):

- payments to HMRC in respect of the Firm's tax liabilities totalling £152,836.46
- staff wages for the Firm for October, November and December 2014, totalling £133,376.03
- various payments to the Respondents personally

20.17 An individual loaned the Firm £125,000 on about 25 March 2015. That individual received an email from the liquidators of the Firm on 23 February 2017 which stated:

> "The £125,000 you loaned the Company was deposited in their Office Account …. on 25 March 2015. At this time, the Office Account was overdrawn in the amount of £204,897.18; therefore the funds you loaned the Company

significantly reduced their overdraft. On 26 March 2015, the Company made a payment of £203,124.96 to HMRC, therefore your loan was utilised by the Company to assist them in paying their tax."

20.18 The Firm had defaulted on paying back the principal, and most interest payments, due under the Loan Notes. In view of the Firm's insolvent liquidation, there was no prospect that the relevant lenders would recover their monies from the Firm.

The First Respondent

20.19 Mr Tabachnik QC submitted that the First Respondent was aware of the relevant "use condition" in Clause 4 of the Loan Note instruments. He was also aware, at any rate in general terms, as to the manner in which the funds raised via the Loan Notes were expended by the Firm, which he permitted, allowed and/or caused to continue. As a director and the chief executive officer of the Firm at the material times, the First Respondent must have been (and was) aware of the Firm's general trading circumstances and cash-flow difficulties, and the extent of the Firm's debts to HMRC.

20.20 Equally, he was aware that no attempt was made to hold the Loan Note monies in a segregated manner, for example in a separate bank account, and he gave out the Firm's office account details for payment, in the Application Forms.

20.21 Therefore, it was submitted, the First Respondent was aware that the Loan Note monies were used by the Firm otherwise than in accordance with the stated restrictions, but he permitted, allowed or caused the same. He was further aware that he stood to benefit from the said mis-use of the Loan Note monies propping up the Firm while he fruitlessly sought to market the 247businesshub/LEI product, and in respect of some payments he benefitted directly.

20.22 Mr Tabachnik QC submitted that in permitting, allowing and/or causing Loan Note monies to be used for purposes other than those specified and sanctioned, the First Respondent acted without integrity, in breach of Principle 2, because he failed to take any, let alone sufficient, steps to prevent the Loan Note monies being used for purposes other than those specified and sanctioned by the lenders. Such conduct was also in breach of Principle 6 and was also manifestly incompetent. The First Respondent permitted and/or allowed the Loan Note monies to be paid into the Firm's overdrawn office account and/or to be used for purposes beyond those specified and sanctioned by the lenders, and he took no (or no sufficient) step to prevent the same from occurring. In effect, the First Respondent abrogated his responsibilities as director.

20.23 Mr Tabachnik QC submitted that the First Respondent's conduct, as detailed above, was dishonest. Further or alternatively, the First Respondent failed to make appropriate inquiries as regards the use of the Loan Note monies, thereby abrogating his responsibilities as director and unreasonably running the risk they were being or would be mis-used for purposes beyond those specified and sanctioned by the lenders. Such conduct, it was submitted, amounted to recklessness and accordingly the First Respondent acted recklessly.

The Second Respondent

20.24 The Second Respondent was aware of the relevant "use condition" in the Loan Note instruments. She had resolved at a number of directors' meeting to agree the issue of the Loan Note instruments. Further, she signed numerous Loan Note certificates.

20.25 The Second Respondent was generally aware as to when Loan Note monies were to be received. She was also aware of the manner in which the funds raised via the Loan Notes were expended by the Firm, which (as the director with primary responsibility for financial and accounting matters, and for approving payments from the Firm's office account), she permitted, allowed and/or caused to continue.

20.26 Equally, the Second Respondent was aware that no attempt was made to hold the Loan Note monies in a segregated manner, for example in a separate bank account.

20.27 In permitting, allowing and/or causing Loan Note monies to be used for purposes other than those specified and sanctioned by the lenders, the Second Respondent's conduct lacked integrity in breach of Principle 2. The Second Respondent failed to take any, let alone sufficient, steps to satisfy herself as to the permissible use of the Loan Note monies or to prevent the Loan Note monies being used for purposes beyond those specified and sanctioned by the lenders.

20.28 Additionally, the Second Respondent's conduct was in breach of Principle 6 and was also manifestly incompetent. She permitted and/or allowed the Loan Note monies to be paid into the Firm's overdrawn office account and/or to be used for purposes other than those specified and sanctioned, and she took no (or no sufficient) step to satisfy herself as to the permissible use of the Loan Note monies or to prevent misuse of the same from occurring. In effect, the Second Respondent abrogated her responsibilities as director.

20.29 Mr Tabachnik QC submitted that the Second Respondent was aware that the Loan Note monies were used by the Firm otherwise than in accordance with the stated restrictions, but she permitted, allowed or caused the same. Further, she was aware that she stood to benefit from the said mis-use of the Loan Note monies propping up the Firm while the First Respondent fruitlessly sought to market the 247businesshub/LEI product, and in respect of some payments she benefitted directly. The above conduct on the part of the Second Respondent, it was submitted, was dishonest.

20.30 Further or alternatively, the Second Respondent failed to make appropriate inquiries as regards the permissible and actual use of the Loan Note monies, thereby abrogating her responsibilities as director and unreasonably running the risk they were being or would be mis-used for purposes beyond those specified and sanctioned by the lenders. Accordingly, the Second Respondent acted recklessly.

The First Respondent's Case

20.31 The First Respondent denied allegation 1.1. The First Respondent did not deny that Loan Notes were obtained in the amounts detailed, or that they were expended to satisfy the Firm's obligations. Further, it was not denied that the First Respondent was, generally, aware of the use the Firm made of the Loan Note monies.

20.32 The First Respondent explained that from around 2012 the Firm was in negotiations about the provision of advice line services for national associations and/or companies with large client/customer bases offering other services/membership benefits. Very shortly after the discussions, an agreement was entered into in 2012 for the provision of such a service to around 36,000 members of that the NCMA, for a small fee per month per member. Once it was operating, the advice line was an immediate additional source of revenue for the Firm. In addition to the monthly fee per member the service provided the Firm with additional revenue generating opportunities through instructions from membership under the LEI policy and for representation in contentious matters (not covered by policy), as well as a debt recovery service.

20.33 In around or close to the same time as the NCMA helpline service was being developed, negotiations were also entered into with other organisations for the provision of similar services, including Metro Bank, a body called NSF International, and the National Database Registration Authority of Pakistan.

20.34 By 2013/14 the Firm had set up the NCMA advice line and LEI project, and it was progressing successfully.

20.35 Against the background of the development of the projects and in the expectation of substantial new sources of income being generated by them, the Firm wished to obtain borrowing that would allow it to support its operations and develop these and other new business opportunities. The First Respondent had meetings with representatives of an investment management company in which it was suggested that borrowing could be obtained by way of loans from individual lenders via the issue of what were known as Loan Notes, pursuant to which lenders would provide short term loans for relatively high returns. The First Respondent had not come across the use of such Loan Notes before and was guided in relation to this by the investment management company who had experience of their use. They provided the documentation and introduced the Firm's brokers to investors/lenders who were interested in providing short term borrowing.

20.36 The First Respondent had no prior knowledge of and very limited direct dealings with the investors/lenders who were referred to the Firm by the brokers and expressed an interest and/or then lent money to the Firm. His understanding was that the Firm was taking on borrowing which it could use to meet its business costs, as it would be able to with any business borrowing.

20.37 Throughout the period in which money was lent to the Firm by the lenders the First Respondent had received written and verbal assurances at a very high level from Metro Bank and NSF that the advice hub projects with the Firm would be proceeding, and also in relation to the proposed LEI product for non-resident Pakistanis in the UK. On the basis of the assurances that he received the First Respondent understood these would be definitely proceeding, and he believed that they would be very profitable streams of revenue for the Firm, and on the profit forecasts undertaken by the Firm the repayment of the borrowing to the lenders would present no difficulty for the Firm at all.

20.38 As regards what the Loan Note monies could be used for, the First Respondent explained that when the Loan Notes were drafted, a copy of a cashflow forecast was sent to Mr T (who drafted the Loan Notes). That forecast made it clear that any Loan

Note monies were to form part of the general pot of monies available for the Firm to use. That had always been the Firm's intention, and there was nothing in Clause 4 of the Loan Note agreements that limited that use.

20.39 It was the First Respondent's understanding that the borrowing which the Firm was undertaking was borrowing that the Firm could use to meet its business costs, as it would be able to with any business borrowing. He was not aware of any restriction on the use to which the borrowing could be put being "specified or sanctioned" by the lenders; and he believed that the Firm would be able to repay the borrowing, and accordingly did not think that there was anything wrong with the Firm taking on the borrowing, or spending the money provided on business expenses whilst the advice line (and other) projects were being prepared/waiting to start.

20.40 The First Respondent explained that he had made it clear to all brokers that the borrowing was for the Firm generally, and for the LEI projects. He did not suggest, and did not believe, that the monies would be ring-fenced. He referred the Tribunal to the statements of Mr Dodman, where Mr Dodman explained that he was aware that "the investment was to be used to set up some kind of 24 hour helpline and I also recall it making mention of the fact that due to the nature of the Firm's work they were often waiting for payment for work completed so it was also to assist with this". Mr Dodman had also explained that he had been informed that cases ran on for some time and that the investment was to assist with this. The First Respondent considered that this was evidence that he had been transparent about the use to which the monies would be put. The information as regards delayed payment for the Firm's work was information that Mr Dodman could only have got from what the First Respondent had told Mr Dodman's financial advisor.

20.41 The First Respondent confirmed that he had read Clause 4 of the Loan Notes. He could not now recall thinking specifically about the meaning of the clause, or discussing it with anyone. It was his clear understanding that the Loan Note monies could be used for the general purposes of the Firm, and that was what he told the brokers. Accordingly, the First Respondent did not accept that he had breached the Principles as alleged. Further, in all the circumstances, his conduct was neither dishonest nor reckless.

20.42 Mr Nesbitt QC submitted that it was natural for there to be an emotional response when one understood the nature of the collapse of the Firm and the loss of monies by investors who were individuals. The investments might have been considered unorthodox, but the investors did not deserve to lose their money. In the circumstances, it would not be surprising if there was a natural reflexive negative emotional response to those who ran the business.

20.43 It was also recognised that when looking at the decision taken by the Firm and the First Respondent, it might be considered that there were misjudgements, errors, over-confidence and over optimism. However, good or bad business judgements were not a matter for the Tribunal to consider as regards misconduct. The allegations against the First Respondent related precisely to the First Respondent's alleged conduct, and as regards allegation 1.1, whether the First Respondent understood the Applicant's contended for meaning of Clause 4 and then knowingly breached it. When considering the allegation (as with the other allegations) the Tribunal should focus on the evidence,

and should not be swayed by any negative feelings as regards the circumstances or any perceived mismanagement of the Firm.

20.44 The Tribunal should also keep in mind that the First Respondent was of good character with no previous criminal convictions or matters of professional misconduct. The First Respondent's good character made it inherently less likely that he would conduct himself dishonestly. His state of mind was in question as regards allegation 1.1 (and other allegations where dishonesty was alleged). Mr Nesbitt QC submitted that the First Respondent's evidence as to his state of mind was the best and most direct evidence. The Tribunal should give credence to the First Respondent's account and accept it as true unless there was cogent evidence to contradict it, or his evidence was otherwise ludicrous.

20.45 Further, the Tribunal should accept that the First Respondent's confidence as regards the projects was well founded; there was independent evidence within the bundle as to the stage the negotiations had reached. The Loan Notes were embarked upon in the genuine belief that contracts would be signed and the monies would be repaid.

20.46 Mr Nesbitt QC submitted that in order to prove allegation 1.1, the Applicant needed to establish (i) that its construction of Clause 4 was correct and (ii) that the First Respondent, knowing that this was the construction, used the monies otherwise than in accordance with Clause 4. It was accepted that if the Tribunal found that the First Respondent knowingly used the monies in breach of Clause 4, allegation 1.1 was made out and the regulatory breaches alleged would flow from such conduct.

20.47 Mr Nesbitt QC submitted that the Tribunal was not a commercial court set up to determine the construction of contractual clauses. The Applicant's case was that its construction of Clause 4 was the only possible construction. It was not accepted that Clause 4 was as clear as contended for. General business development could be interpreted to mean any expenditure necessary.

20.48 Even if the Tribunal considered that the Applicant's construction was correct, it then needed to consider the First Respondent's state of mind. Mr Nesbitt QC submitted that in an ordinary case, the Tribunal would expect to see evidence as to a Respondent's state of mind. Often, that evidence would be something specific, such as a document or an account from a witness. There was no such evidence in this case. Mr Nesbitt QC submitted that without any evidence that contradicted the First Respondent's direct evidence, it was difficult for the Tribunal to find that this state of mind was not as stated by the First Respondent.

20.49 The First Respondent had explained why he considered that the Firm was able to use the monies in the way it did. The Applicant had not directed the Tribunal to any evidence or any document or statement that demonstrated that the First Respondent's state of mind was anything other than what he had stated it to be in his evidence. On the contrary, the documentary evidence relied upon by the Applicant supported the First Respondent's position.

20.50 Mr Dodman referred to the monies being used to meet cashflow difficulties, and the difficulties as regards payments for work done by the Firm. That supported the First Respondent's case that he informed the brokers of the use to which the monies would be put.

20.51 The cashflow forecast prepared by the Firm for the purposes of instructing Mr T to draft the Loan Notes also supported the First Respondent's case as to his state of mind. It clearly showed Loan Note income being utilised for the purposes of the Firm, and not separated into a different account. The opening balance was overdrawn, reflecting the Firm's office account. This was clear evidence that it was the First Respondent's intention to use the monies generally, and that was clear to Mr T, who drafted the Loan Note documentation. If it was correct that the use of the monies was in breach of Clause 4, it was clear that the First Respondent did not understand that to be the case, nor was that his intention.

20.52 Mr Nesbitt QC submitted that it was also clear from the Firm's dealings with the SRA during 2013 – 2015, that the First Respondent did not consider that he had committed professional misconduct of the type alleged. The Firm was openly discussing its financial difficulties with the SRA. The Respondents had been completely transparent about the use of the funds. Mr Nesbitt QC submitted that such transparency was compellingly indicative as to the First Respondent's state of mind.

20.53 Mr Nesbitt QC submitted that even in circumstances where the Applicant's contended for construction of Clause 4 was correct, it was clear that it was the First Respondent's genuine state of mind that the monies could be used generally for the Firm. Even if the Tribunal found that the First Respondent's interpretation of Clause 4 was incorrect, that would equate to professional negligence, which, as was known, without more, did not equate to professional misconduct. Accordingly, the Tribunal ought to dismiss allegation 1.1

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

20.54 The Second Respondent denied allegation 2.1. The Second Respondent did not deny that Loan Notes were obtained in the amounts detailed, or that they were expended to satisfy the Firm's obligations. Further, it was not denied that the Second Respondent was aware of the use the Firm made of the Loan Note monies.

20.55 The Second Respondent played no part in negotiating or arranging the loans, or (save in that she signed some of the loan notes) dealing with lenders or their representatives. The borrowing was undertaken by the Firm at a point at which the Firm was seeking to launch a series of advice line and legal expenses insurance-related services and seeking to develop the business generally. As well as not arranging the borrowing (although the Second Respondent had been involved in setting up an existing advice line service the Firm ran), she played almost no direct part in developing those new advice line projects.

20.56 Although the Second Respondent accepted entirely that she knew about the borrowing (and indeed was responsible for managing the Firm's finances), at the time of the borrowing by the Firm the Second Respondent understood that the advice line projects that the First Respondent was working on developing were agreed and/or were

definitely going to happen, and she understood that the borrowing was borrowing to the Firm which it could use to meet its business costs, as it would be able to with any business borrowing. She believed that the Firm would be able to repay the borrowing, and was not aware that there was anything wrong with the Firm taking on the borrowing, or spending the money provided on business expenses whilst the advice line projects were being prepared/waiting to start.

20.57 The Second Respondent was not aware of any specific representations that were made to any of the lenders, or of their particular personal situations, although her understanding was that they were all wealthy, sophisticated "professional investors", looking for unusual investment opportunities for high rates of return. She also understood that all of them were in receipt of professional financial advice in relation to the making of the loans.

20.58 Although she had limited involvement in the putting together of the Loan Notes or development of the advice line projects the Second Respondent was involved in managing the Firm's finances. She was very confident that if the advice line projects were to proceed (as she understood they would be) the Firm would have no difficulty repaying the borrowing it was undertaking.

20.59 As regards the uses to which the money the Firm borrowed could be put, she did not know or understand that there was a limitation on the use to which the Firm could spend the money and/or understood (including from what she recalls being told by the First Respondent) that the Firm could spend the money on the business as it would be able to with other commercial borrowing. Had she thought that the borrowing was not allowed to be spent in that way she would not for one moment have allowed it to be.

20.60 The Second Respondent explained that the First Respondent asked her to prepare the cashflow forecast that was provided to Mr T in order to draft the Loan Note documents. It was clear from that cashflow forecast that the monies received from the Loan Notes would be used for general business expenses. The Second Respondent explained that she considered that the First Respondent had provided Mr T with all the relevant information and that the resulting Loan Notes would enable the Firm to spend the monies received in whatever way that the Firm needed.

20.61 The Second Respondent recalled asking the First Respondent whether the Firm was entitled to raise funds using the Loan Notes, and was assured by the First Respondent that they could. Further, advice was obtained that confirmed the validity of the Loan Notes.

20.62 It had always been the Second Respondent's understanding that the investors/lenders had been introduced to the First Respondent and the Loan Note scheme via brokers/financial advisers and thus the investors/lenders were in receipt of independent financial advice. That belief provided the Second Respondent with some comfort at the time that all was in order. The Second Respondent stated that she had always been assured by the First Respondent that the investors were professional investors and knew exactly what they were signing up to. It was her belief that the Firm allowed to use the money for general expenses.

20.63 The Second Respondent explained that at no stage was it ever raised with her that the monies should have been ring-fenced even when the investors/lenders and LF were chasing for repayments. Had it ever been raised that the monies were to be ring-fenced, she would have questioned it as it just would not have been possible to ring-fence the monies.

20.64 The wording of the Loan Notes was that the monies could be used for business development generally and the LEI purposes. Some of the Loan Note monies were used to install a new phone line, upgraded phone system and a website for the LEI schemes, but it was accurate to say that the rest of the moneys were used by the Firm generally.

20.65 The Second Respondent explained that she was aware at the time of the wording of the Loan Notes. It was her belief at the time that the Firm was entitled to use the money for the Firm generally as they were developing the business to move into new areas of work and that meant they were entitled to use the money for general purposes. The Second Respondent acknowledged that Loan Note monies were not spent on direct marketing for the LEI services, but the reality was there was a significant cost to the business in the First Respondent working to agree those contracts.

20.66 Given the Second Respondent's particular personal and professional circumstances at the time, she did not think about the clauses in the Loan Notes in enormous detail. With hindsight, it was acknowledged that the Second Respondent should perhaps have insisted on the Firm taking advice. However, the fact the Loan Notes were drafted by someone who appeared to know what was needed, meant that the Second Respondent was satisfied that the Firm could use the money for general purposes. Further, the fact the individual lenders were being advised by brokers and receiving independent financial advice would also have given the Second Respondent some reassurance that everything was in order.

20.67 Ms Mahmutaj submitted that insofar as the legal principles and core facts were concerned, the analysis of Mr Nesbitt QC was adopted and repeated. It was accepted that the Second Respondent did not engage with the negotiations about the Loan Notes with either the brokers or investors. It was also accepted that it was the First Respondent who was at the forefront of dealing with the brokers and investors.

20.68 It was clear, and not disputed, that the Second Respondent asked the First Respondent whether the Loan Notes were permissible. She was assured by both the First Respondent and the communication from Scott Moncrief that they were. It was never doubted by the Second Respondent that the monies could be used for general business purposes.

20.69 The Second Respondent discussed matters with the SRA including the Loan Notes openly. During a conversation with the Applicant on 28 May 2014, the Second Respondent informed the Applicant that the Loan Note monies (together with money from a commercial lender) had been utilised to settle the Firm's liabilities. Further, in a conversation with the Applicant on 11 September 2014, the Second Respondent made it clear that the Loan Note monies had not been spent on the LEI project.

20.69 Ms Mahmutaj submitted that the Second Respondent's clear and frank discussions with the Applicant about the use of the monies demonstrated the Second Respondent's honest belief that the Loan Note monies could be used generally for business purposes and there was not restriction of the use. The Applicant, it was submitted, was aware of the use and took no issue with the way in which the Firm had used the Loan Note monies at the time.

20.70 The Second Respondent's belief, it was submitted, had remained clear and consistent throughout. She had given clear, transparent honest and consistent evidence as to her state of mind. Ms Mahmutaj submitted that having heard the evidence, there was no doubt that the Second Respondent had acted honestly. Further, there was no evidence on which the Tribunal could find that the Second Respondent had acted dishonestly, recklessly or in breach of the Principles as alleged. Accordingly, allegation 2.1 ought to be dismissed.

The Tribunal's Findings

20.71 The Tribunal noted that the underlying facts of allegations 1.1 and 2.1 were not in dispute. Both Respondents accepted that Loan Notes had been obtained in the amounts detailed by the Applicant, and that the monies had been spent, in the main, on the Firm's liabilities. The wording of Clause 4 was also not in dispute.

20.72 During the cross-examination of Ms Garrard, Mr Nesbitt QC questioned aspects of the investigation, and perceived unfairness to the First Respondent in Ms Garrard not asking further questions of the Respondents, or seeking clarification as regards documents received. It had been Mr Nesbitt QC's submission that the issues to be determined by the Tribunal were the meaning of Clause 4 and the First Respondent's (and indeed the Second Respondent's) state of mind at the time. No insight into those issues could be gained from the evidence of Ms Garrard.

20.73 The Tribunal noted that it was no part of the First Respondent's defence that the investigation was deficient such that the evidence gathered by Ms Garrard was unreliable. Nor were the factual findings contained in the forensic investigation reports in dispute. Further, it had not been argued by the First Respondent that he could not have a fair trial as a result of the deficient investigation. As the factual findings were not disputed, the Tribunal gained no assistance as regards the issues from Ms Garrard's evidence. Accordingly, her evidence is not detailed in the findings.

20.74 The Tribunal considered that it was well placed to assess and construe the meaning of Clause 4, notwithstanding that it was not a commercial Tribunal. The Tribunal found that the wording of Clause 4 was clear – the monies could only be used for "business development generally" and investment in the 247businesshub/LEI product. The Respondents' case was that the monies were spent in accordance with Clause 4, or that they had misunderstood what Clause 4 meant.

20.75 The Tribunal found that "business development generally" even when construed widely, could not and did not mean for the business generally, or to pay the ordinary trading liabilities for the Firm. The Tribunal determined that no interpretation of "business development generally" could be construed as meaning the expenses of the Firm generally, including staff wages, HMRC liabilities, the repayment of other

borrowing, etc. Had that been the case, there would have been no need for a use of monies clause. Ordinarily, loans for any purpose did not contain use of funds clauses. The inclusion of a use of funds clause made it clear that the funds were to be used for the stated purposes and those purposes alone. That "business development generally" did not mean the already existing liabilities of the Firm that were unrelated to the LEI/247business hub was plain. Accordingly, the purposes for which the monies could be used was plain on an ordinary reading of Clause 4.

20.76 The Tribunal thus found that the monies had been spent outwith the purposes specified and sanctioned by the lenders.

20.77 The Tribunal noted that both Respondents confirmed that they were aware of the terms of the Loan Note agreements and were aware of Clause 4. The Respondents both relied on the cashflow forecast given to Mr T in order to draft the Loan Note agreements as evidence that they had understood that the Firm could use the monies in whichever way it saw fit, and that the monies would form part of the Firm's general pot of available funds. The Tribunal found that whilst that might have been the intention, the Loan Note documentation did not allow for monies to be spent in any way the Respondents chose.

20.78 As the Tribunal found above, Clause 4 was a limitation on the use of the funds. It was written in clear and plain terms. The Tribunal did not find it credible that solicitors with the experience of the Respondents would not have understood that to be the case, notwithstanding that they did not practice in commercial law, or that it had been their intention to use the monies for any purpose.

20.79 The First Respondent sought to rely on the statements of Mr Dodman as evidence that the investors were told that the monies were to be used for any purpose. The Tribunal did not find that Mr Dodman's statements supported the First Respondent's case as submitted. At no point did Mr Dodman state that he knew that the monies were to be used in the way that they were. At best, the statements highlighted that Mr Dodman was aware that there were cashflow issues, such that the Firm was seeking additional funding.

20.80 When it was suggested to Ms Magee in evidence that the monies were for the business generally, she explained that she understood it to mean for business development generally "within the LEI focus", and that if the Loan Note allowed for the monies to be used for the business generally "it would be a trick". Ms Magee confirmed that she had read the Loan Note documentation. It was clear from her evidence, that Ms Magee did not consider that she had signed an agreement and invested money that allowed the Firm to use those monies for any purpose it saw fit.

20.81 The Respondents submitted that the transparency with which they communicated with the Applicant was also evidence of their honesty. The Tribunal noted that the Applicant had first communicated with the Firm due to its financial difficulties. As the regulator, the Applicant had the ability to look at the Firm's books of account. Those accounts would show the ways in which the money was spent. The fact that the Respondents confirmed what they knew the books of account would show did not, the Tribunal determined, evidence that the Respondents did not understand Clause 4 to be a limiting clause.

20.82 It was also suggested that the SRA took no issue with the Firm's use of the monies when it was investigated by Mr Carruthers. The Tribunal noted that Mr Carruthers was not investigating the use of the monies. The fact that the Applicant was aware that the Firm had raised money by use of the Loan Notes did not mean that it was also aware that the Firm had spent those monies otherwise than in accordance with the permitted uses.

20.83 The Tribunal did not accept that the Respondents did not know, when they were using the monies in the way that they did, that they were not so entitled to use the monies. It was evident, and accepted, that at the time the monies were used, the Firm was in severe financial difficulty with numerous creditors, including a large amount outstanding for the Firm's tax liabilities. The First Respondent recognised in interview the inherent unlikelihood of the investors investing had they known that their monies were to be used simply to meet the Firm's liabilities, or that the Firm was in financial peril. The First Respondent had asked that the Tribunal listen to sections of the interview so that it could ensure that the transcript was correct and also to hear the tone of his answers. The Tribunal, having listened to the recording, did not consider that there were any material errors in the transcript, and did not find that it was of any additional assistance.

20.84 It was also clear, the Tribunal found, that the First Respondent believed, and the Second Respondent was convinced, that the negotiations were going to lead to a substantial income stream such that the loans would be repaid. The monies were spent with that belief. Had that been the case, there would be no issue as to whether the monies had been spent in accordance with the terms of the Loan Note agreements. However, that was not the case. The expected income did not materialise. Thereafter the Firm's finances were ruinous. As a result of the collapse of the Firm, the misuse of the Loan Note monies became apparent. The Tribunal found that whilst the Respondents might initially have intended to obtain funding without any restrictions on its use, the Loan Notes made clear, and the Respondents knew, that the use of the funding was restricted.

20.85 The Tribunal considered that each Respondent knew and understood at the time that the use of the Loan Note monies was restricted as per Clause 4. In knowingly using those monies contrary to Clause 4, they had acted without integrity in breach of Principle 2 as alleged. A solicitor acting with integrity would not knowingly use monies to support the firm whilst being aware that the use of those monies was not permitted for that purpose. The Respondents, it was determined had consciously breached the terms of the Loan Note agreements in the belief that the projects would be extremely lucrative for the Firm, such that the repayment of the loans would not pose any difficulty. That such conduct failed to maintain the trust the public placed in the Respondents and the provision of legal services in breach of Principle 6 was plain. Members of the public would not expect a solicitor to knowingly breach contractual terms in the expectation that the breach would not be discovered. Accordingly, the Tribunal found that the First and Second Respondents' conduct was in breach of Principles 2 and 6 as alleged.

20.86 As detailed, the Tribunal found that the Respondents knew that the Loan Note monies were being spent otherwise than in accordance with Clause 4. The Tribunal considered that ordinary and decent members of the public would consider that such conduct was dishonest. Given that finding, the Tribunal did not consider whether the Respondents' conduct was reckless.

20.87 Accordingly, the Tribunal found allegations 1.1 and 2.1 proved, including that the conduct of both Respondents was dishonest.

21. **Allegation 1.2 - In the period from December 2014, he permitted, allowed and/or caused the Firm to receive and utilise loans from its clients (Cornelius Smith and/or John Dodman) who had not first taken independent legal advice, and thereby failed to achieve Outcomes (3.1), (3.2) and (3.4) of the Code, acted in breach of IB 3.8 of the Code, and breached Principles 2, 4, 6 and 8 of the Principles**

Allegation 2.2 - In the period from December 2014, the Second Respondent failed to take any or any sufficient steps to ensure that the Firm did not receive or use monies loaned by those who were clients of the Firm (such as Cornelius Smith and/or John Dodman) unless the client had first received independent legal advice, and thereby failed to achieve Outcomes (3.1), (3.2) and (3.4) of the Code, acted in breach of IB (3.8) of the Code, and breached Principles 2, 4, 6 and 8 of the Principles

The Applicant's Case

21.1 Both Mr Smith and Mr Dodman advanced loans to the Firm when they were existing clients of the Firm. Neither the First not the Second Respondent (nor anyone else at the Firm) advised either that they take independent legal advice before advancing loans to the Firm. Neither Mr Smith nor Mr Dodman took independent legal advice.

21.2 In their joint EWW response, the Respondents stated that "they did not specifically advise" Mr Smith or Mr Dodman "to take independent advice". It was contended that both Mr Smith and Mr Dodman had access to advice from their respective financial advisers. Mr Tabachnik QC submitted that whether or not that was case, it was manifestly insufficient to discharge the Respondents' professional obligations.

Mr Smith

21.3 In 2013, he had invested £500,000 in Gravity Child Care Ltd ("Gravity"). By late 2014, Gravity had defaulted on repayment of the funds invested. In December 2014, Mr Smith agreed with the First Respondent that he (Mr Smith) would instruct the Firm to act (free of charge) in relation to Gravity's default, on the condition that £250,000 would be invested in the Firm's Loan Notes once recovered. This arrangement was confirmed in an email from the First Respondent forwarded to Mr Smith on or about 18 December 2014. In consequence, on 22 December 2014, Mr Smith completed an application for £250,000 of Loan Notes on the conditions set out in the First Respondent's email (as to which see allegation 1.5 below).

21.4 Also, on or about 11 December 2014, Mr Smith instructed the Firm to advise in respect of a claim he (and others) had against Silver Square Capital Ltd. Mr Smith has paid two invoices of the Firm in respect of this matter, one on 7 January 2015 for £600 and a further £600 in September 2015.

21.5 On or about 18 March 2015, Gravity repaid to Mr Smith the sum of £313,324, reflecting part of its indebtedness. That sum (along with a small amount of recovered costs) had been received by the Firm into its client account on 18 March 2015. The Firm continued

to act for Mr Smith in respect of the balance of his Gravity investment, well into 2016. Accordingly, Mr Smith was and remained a client of the Firm at all material times from 11 December 2014.

21.6 On 23 March 2015, Mr Smith (together with his wife) and the Firm agreed the terms of an "Enhanced Loan Agreement".

21.7 The "Enhanced Loan Agreement" related to a loan of £300,000 and:

- Arose out of Mr Smith's desire for repayments to be structured as capital repayments;
- Was drafted by the Second Respondent;
- Contained no restriction whatsoever on the use of the £300,000 by the Firm; and
- Was an unsecured loan.

21.8 On 26 March 2015, the Firm transferred the £300,000 (together with the small amount of recovered costs) from its client account to its office account. The monies were expended, in short order, in satisfaction of the Firm's usual business expenditure.

21.9 Mr Smith was not advised by either Respondent or anyone else at the Firm to take independent legal advice in relation to the agreement struck with the Firm in December 2014 about his conditional loan, nor about the "Enhanced Loan Agreement", nor was there any evidence that he did. In a witness statement, Mr Smith specifically confirmed that he did not take independent legal advice at the relevant time.

21.10 Mr Tabachnik QC contended that the Respondents' failures:

- Resulted in Mr Smith not being aware that the conditional loan arrangement agreed in December 2014 was illegal as contrary to public policy, and thus void and/or unenforceable (or, at the very least, potentially so). The conditional loan arrangement was tainted by clear breaches of outcomes (3.1), (3.2) and (3.4) of the Code, and was in breach of IB (3.8). In consequence, there was a breach of subordinate legislation (made pursuant to section 31 of the Solicitors Act 1974), which had been made in the public interest.
- Contributed to Mr Smith not making any or any meaningful inquiries about the Firm's financial standing or liabilities. In particular, the Firm had, by March 2015, received, and spent, around £1 million of loans under the Loan Note schemes; and the various 247businesshub/LEI negotiations had (apart from the PACEY scheme, which generated limited income) been beset by a frustrating sequence of delays regarding firm commitments and definitive start dates.
- Resulted in Mr Smith agreeing an "Enhanced Loan Agreement" which was both unsecured, and contained no use restriction or related requirement to segregate the monies.

21.11 Mr and Mrs Smith did not receive any of their £300,000, nor any interest in respect of the same.

Mr Dodman

21.12 Prior to becoming a client, Mr Dodman had (together with his partner, Ms U) loaned the Firm £30,000 on 6 November 2014, and £100,000 on 27 November 2014 by purchasing Loan Notes.

21.13 In December 2014, Mr Dodman agreed with the First Respondent that the Firm would (free of charge) take over conduct of a claim regarding the sale of some option shares, on condition that Mr Dodman made a further loan of £70,000 to the Firm. Mr Dodman received a client care letter from the Firm (signed by the First Respondent, who indicated that he would "maintain overall supervision and day to day conduct of the file") dated 11 December 2014, on which date he became a client of the Firm.

21.14 Subsequently, on 15 December 2014, Mr Dodman (and Ms U) loaned a further £70,000 to the Firm, pursuant to Loan Note Certificate no 33.

21.15 Mr Dodman was not advised by either Respondent, or anyone else at the Firm, to take independent legal advice in relation to the agreement struck with the Firm in December 2014 about his conditional loan, nor did he do so.

21.16 Mr Tabachnik QC contended that the Respondents' failures:

- Resulted in Mr Dodman not being aware that the conditional loan arrangement agreed in December 2014 was illegal as contrary to public policy, and thus void and/or unenforceable (or, at the very least, potentially so).

- Contributed to Mr Dodman not making any or any meaningful inquiries about the Firm's financial standing or liabilities. In particular, the Firm had, by December 2014, received, and spent, just under £1 million of loans under the Loan Note schemes; and the various 247businesshub/LEI negotiations had (apart from the PACEY scheme, which generated limited income) been beset by a frustrating sequence of delays regarding firm commitments and definitive start dates.

- Contributed to Mr Dodman making a further £70,000 unsecured loan, without any independent legal advice as to the terms on which he did so.

- Contributed to Mr Dodman making, before he extended the further £70,000, no inquiries as to what the £130,000 already advanced had been expended on, and whether this was consistent (which it was not) with the terms on which those advances had been made.

21.17 Mr Dodman and Ms U did not receive any part of their £200,000. They only received some of the interest payments promised.

21.18 Chapter 3 of the Code provided that:

"You can never act where there is a conflict, or a significant risk of conflict, between you and your client". Conflict or potential conflict with a client is an "own interest conflict".

21.19 Outcome 3.1 required that "you have effective systems and controls in place to enable you to identify and assess potential conflicts of interests".

21.20 Outcome 3.2 required that "your systems and controls for identifying own interest conflicts are appropriate to the size and complexity of the firm and the nature of the work undertaken, and enable you to assess all the relevant circumstances …".

21.21 Outcome 3.4 provided that "you do not act if there is an own interest conflict or a significant risk of an own interest conflict".

21.22 Indicative Behaviour 3.8 provided that acting in the following manner may tend to show that "you have not achieved these outcomes and therefore not complied with the Principles", namely: "in a personal capacity, selling to or buying from, lending to or borrowing from a client, unless the client has obtained independent legal advice".

21.23 Mr Tabachnik QC submitted that the Respondents had failed to achieve the outcomes detailed and had acted in breach of Indicative Behaviour (3.8).

21.24 Further, they had failed to act in the best interests of their clients in breach of Principle 4; had behaved in a way that failed to maintain the trust the public places in him and in the provision of legal services, in breach of Principle 6; and had failed to run their business or carry out their roles in the business effectively and in accordance with proper governance and sound financial and risk management principles, in breach of Principle 8.

21.25 Further, in permitting the Firm to receive loans from the said clients, without rigorously and exhaustively confirming the propriety of the same, the Respondents had acted without integrity in breach of Principle 2

21.26 Additionally, as regards the First Respondent, he was aware that Mr Smith and Mr Dodman were clients of the Firm at all material times.

21.27 The First Respondent was, at the material times, aware of the prohibition in the Code on taking loans from a client unless the client has received independent legal advice. Notes of a supervision meeting between the SRA and both the First and Second Respondents on 28 May 2014 referenced a £50,000 from a client (Mr B) to the Firm, and recorded: "He took independent legal advice before making the loan …". The SRA did not accept the First Respondent's assertions at interview on 13 October 2016, that he first learned about the relevant provisions of the Code during the interview itself.

21.28 Mr Tabachnik QC submitted that the First Respondent had acted dishonestly in permitting the Firm to receive loans from clients, in conscious and flagrant disregard of the professional obligation on him to insist they take independent legal advice, which he well knew they had not.

21.29 Further or alternatively, the First Respondent had acted recklessly in unreasonably running the risk that the said clients had not taken the relevant independent legal advice and/or that the said loans were improper for purposes of the Code.

21.30 As regards the Second Respondent, in her financial/accounting role within the Firm and having regard to the Loan Note instruments which she had resolved to approve, the Second Respondent was aware that the Firm was soliciting and at times receiving loans. Further, the Second Respondent drafted and signed the "Enhanced Loan Agreement" with Mr Smith on behalf of the Firm, and had signed the relevant Loan Note Certificate for Mr Dodman (and Ms U).

21.31 Moreover, it was submitted, the Second Respondent was, at the material times, aware of the prohibition in the Code on taking loans from a client unless the client had received independent legal advice. Mr Tabachnik QC repeated the submission as regards the loan made to the Firm by Mr B.

21.32 Mr Tabachnik QC submitted that it was an obvious risk that loans may be advanced by clients of the Firm. The Second Respondent confirmed at interview that, notwithstanding her involvement in Mr Smith's "Enhanced Loan Agreement", she gave no consideration at the time to the existence of an "own interest conflict". Further, the Second Respondent failed to set up any system to run a conflict check as to whether putative lenders were also clients, and if so whether the requisite steps had been taken such that the loan could properly be received; or if she did, she operated the same with manifest incompetence.

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

21.33 The First Respondent admitted that he permitted, allowed or caused the Firm to receive and utilise loans from clients who had not first taken independent legal advice. As a consequence, the First Respondent further admitted that his conduct was in breach of Principles 4 and 6, and that he breached IB (3.8). Those admissions were made on the basis that the First Respondent failed to see that the situations were such that it was necessary for the clients to have independent legal advice. The First Respondent considered that this error of judgment meant that he had breached the rules and regulations as admitted.

21.34 The First Respondent denied that his conduct amounted to a failure to achieve the Outcomes, or that his conduct was in breach of Principles 2 and 8. Further, it was denied that the First Respondent's conduct was dishonest or reckless.

21.35 As regards Principle 8 and Outcomes (3.1) and (3.2), these related to the systems the Firm was required to have in place. The First Respondent considered that the Firm did have appropriate systems in place. The admitted misconduct arose as a result of an error of judgement and was not due to inadequate systems.

21.36 The First Respondent considered that the implications of IB 3.8 were that if a client received independent legal advice, it may be permissible for a solicitor to borrow from a client. Outcome 3.4 placed an absolute prohibition on acting where there was an own client conflict. Reading those rules together, borrowing from a client did not, of itself create an own client conflict. In the circumstances, it was denied that on a proper

analysis of the rules, there was an own client conflict such that the First Respondent's conduct failed to achieve Outcome (3.4).

21.37 The First Respondent explained that as regards the loan from Mr Smith, LF approached the Firm on Mr Smith's behalf saying that Mr Smith was prepared to invest £250,000 if the Firm acted for free to recover monies from Gravity. Mr Smith detailed the terms on which he wanted the Firm to act, including that the loan was to be expressed as an "Enhanced Value Loan". The Firm agreed to the terms provided and the loan agreement was drafted. The First Respondent explained that he was not aware of the other matter on which Mr Smith had instructed a colleague at the Firm, or that Mr Smith had signed a client care letter in relation to that matter on 11 December 2014.

21.38 The First Respondent explained that the suggestion for the loan had come from Mr Smith and LF; Mr Smith appeared to be highly sophisticated and had dictated the terms of the loan; and he was being advised by another professional. The First Respondent accepted that he had not advised Mr Smith to obtain independent legal advice but considered that in light of the factors detailed, he did not think the matter through properly.

21.39 The First Respondent explained that as regards the loan from Mr Dodman, he was approached by Mr Dodman's broker. The broker explained that if the Firm represented Mr Dodman for free on another matter, Mr Dodman would invest a further £70,000 (Mr Dodman having already invested a total of £130,000). The First Respondent accepted that by entering into such an arrangement, Mr Dodman became a client and should have been advised to obtain independent legal advice as regards the £70,000 loan. Against the background of what the First Respondent considered to be an apparently sophisticated investor who was receiving advice from another professional who had approached the First Respondent, the First Respondent did not consider that this was a situation in which the need for independent legal advice arose.

21.40 The First Respondent stated that his conduct as regards both Mr Smith and Mr Dodman amounted to an error of judgement but was not dishonest, reckless or lacking in integrity.

21.41 Mr Nesbitt QC submitted that the First Respondent had made a clear admission that he had got it wrong. He did not see the conflict which was an error of judgement. It had been put to the First Respondent in cross-examination that the consequences of his failure to deal with the conflicts were serious. However, that should not affect the quality of the First Respondent's evidence as to his state of mind at the time.

21.42 Mr Nesbitt QC submitted that whilst it was accepted that both Mr Dodman and Mr Smith were clients of the Firm when they loaned the Firm monies, their initial relationships with the Firm were commercial. It was not until after there had been business negotiations and discussions that they became clients of the Firm. They became clients following their introduction to the Firm by their respective financial advisors, and as a bolt-on to their already existing business relationships with the Firm. Ordinarily, there would have been a client solicitor relationship established. Mr Nesbitt QC submitted that it was easy to see how a busy solicitor could have missed the conflict issue given the sequence of events. In his evidence, the First Respondent explained that there were others at the Firm that were aware of the fact that Mr Smith and Mr Dodman

were clients and were lending money to the Firm. The fact that it was not only the First Respondent that missed the conflict issue lent credence to the fact that this was an oversight and not a deliberate act on the part of the First Respondent. Accordingly, the First Respondent's conduct had neither been dishonest nor reckless. As regards the allegation that the First Respondent's conduct lacked integrity, the breach of the rules had arisen by way of error. Mr Nesbitt QC submitted that where the breach had arisen by way of a mistake, no matter how serious, it would be inconsistent to then find that the conduct also gave rise to a breach of Principle 2. Mr Nesbitt QC submitted that in the circumstances, the Tribunal ought to find the contested matters not proved.

The Tribunal's Findings

21.43 The Tribunal noted that the underlying facts were not in dispute. The Tribunal found on the facts and the evidence that in utilising loans from clients who had not first taken independent legal advice, the First Respondent had failed to act in his clients' best interests in breach of Principle 4; had failed to behave in a way that maintained the trust the public placed in him and in the provision of legal services in breach of Principle 6, and had breached IB (3.8). The Tribunal found that the First Respondent's admissions were properly made.

21.44 The Tribunal considered the contested matters.

21.45 Outcomes (3.1) and (3.2). During the course of the Second Respondent's evidence, the Tribunal was taken to the Firm's conflict policy contained in the Firm's office manual. It had been the evidence of the Second Respondent that the manual was available to all staff in both hard and soft copy. Further, the manual formed part of the induction procedure for members of staff. Any updates to the manual were circulated to all members of staff, including the partners. The Tribunal found the policy contained in the manual to have been comprehensive. It detailed examples of where a conflict might arise including prior to the client retaining the Firm and during the retainer.

21.46 The Tribunal considered that the systems in place were appropriate and adequate. The First Respondent's misconduct had not occurred due to failings of the system, but as a result of his conduct. Given the adequacy of the systems in place, the Tribunal did not find that the First Respondent had failed to achieve Outcomes (3.1) and (3.2). Accordingly, those matters were dismissed.

21.47 Outcome (3.4). The First Respondent submitted that as IB (3.8) when read in conjunction with Outcome (3.4) seemingly allowed for clients to make loans to the Firm, the breach of Outcome (3.4) was denied. The prohibition in Outcome (3.4) was clear and related to actual conflicts as well as the significant risk of an own client conflict.

21.48 It was clear from the evidence that at the time the Firm was loaned monies by Mr Smith, the Firm had spent £1million arising from the Loan Notes. The First Respondent confirmed that this information was not given to Mr Smith. Further, on 9 March 2015, the Firm defaulted on an interest payment due to an investor. The First Respondent confirmed that that information was also not provided to Mr Smith. It was also clear that at the time Mr Dodman entered into the third Loan Note agreement, the monies he had previously loaned the Firm had been expended on the Firm's liabilities.

21.49 It was in the interests of the Firm for Mr Smith and Mr Dodman to loan the Firm monies in the absence of legal advice. It was in the interests of Mr Dodman and Mr Smith to obtain legal advice as to the risks involved in making unsecured loans to the Firm. Those interests were clearly conflicted. The Tribunal found that in all the circumstances, it was plain that there was an own client conflict, or a significant risk of an own client conflict, in breach of Outcome (3.4). Accordingly, the Tribunal found that the First Respondent's conduct failed to achieve Outcome (3.4) as alleged.

21.50 It was the First Respondent's duty to advise his clients of the requirement to take independent legal advice. As was admitted by him, he failed to do so. The Tribunal considered that in either failing to undertake a conflict check, or doing so in such a manner that he evaded the relevant matters, the First Respondent had failed to carry out his role effectively and in accordance with proper governance in breach of Principle 8.

21.51 When it was put to the First Respondent in cross-examination that there was an obvious conflict when monies were borrowed from a client, the First Respondent stated that he did not dispute that. The First Respondent also confirmed that he was fully aware of the provisions as regards client conflicts, but that in all the circumstances, he did not consider that there was a conflict at the time the loans were provided.

21.52 The Tribunal found the First Respondent's explanation in that regard incredible. The First Respondent was fully aware at the times the loans were made that Mr Smith and Mr Dodman were clients of the Firm. The Tribunal did not accept that the First Respondent did not consider his duty to advise his clients to seek independent legal advice as they were introduced by their respective financial advisors. There was no suggestion, and the First Respondent did not consider at the time, that the financial advisors were legally qualified. Nor could he have considered that financial advice equated to, or negated the need for, legal advice. The Tribunal did not accept that in the circumstances, the issue of whether there was a conflict, or the significant risk of a conflict, had not occurred to the First Respondent. That he was aware of his regulatory duty was plain; Mr B had been advised to, and had taken, independent legal advice before making a loan to the Firm. This had occurred before either Mr Dodman or Mr Smith became clients of the Firm. The Tribunal found that a solicitor acting with integrity would have ensured that he complied with his regulatory duty, and would have advised that his clients obtain independent legal advice before loaning the Firm substantial amounts of money. In failing so to do, the Tribunal found that the First Respondent's conduct lacked integrity in breach of Principle 2.

21.53 The Tribunal considered that the First Respondent knew that he ought to have advised his clients to take independent legal advice. His failure to do so was a deliberate and conscious decision so as to avoid any due diligence being undertaken by his clients prior to them lending substantial amounts of money to the Firm. The First Respondent was fully aware of the dire financial situation of the Firm at the time, and was also aware that the Loan Note monies had been fully expended on the debts of the Firm. The Tribunal considered that the First Respondent either deliberately ignored the conflict/substantial risk of a conflict, or undertook the conflict check in such a manner as to avoid the conflict being recognised. The Tribunal found that ordinary and decent people would consider that such conduct was dishonest. Members of the public would find that it was dishonest for a solicitor to fail to comply with his regulatory duties so

as to benefit financially. Accordingly, the Tribunal found that the First Respondent's conduct was dishonest.

21.54 Given its finding of dishonesty, the Tribunal did not consider recklessness.

21.55 The Tribunal found allegation 1.2 proved on the balance of probabilities including that the First Respondent's conduct was in breach of Outcome (3.4) and Principle 2. Further, the Tribunal found that the First Respondent's conduct was dishonest. The Tribunal dismissed the allegation that the First Respondent's conduct failed to achieve Outcomes (3.1) and (3.2).

The Second Respondent's Case

21.56 The Second Respondent admitted that her conduct was in breach of IB (3.8). It was denied that her conduct was in breach of the Outcomes or Principles as alleged.

21.57 The Second Respondent explained that although she knew of the borrowing from Mr Smith and Mr Dodman, (and in relation to Mr Smith was asked to draft the Enhanced Loan Agreement) she had no direct involvement in their becoming clients or (apart from some minor administrative acts when the file was transferred from the London office to Kings Lynn) in the provision of legal services to them.

21.58 The Second Respondent thought that she was aware that at around the same time they made loans to the Firm they asked the Firm to act for them, but she did not consider them to be pre-existing clients. The Second Respondent understood that Mr Dodman and Mr Smith were in receipt of appropriate professional financial advice. Since the Second Respondent was not dealing with the client matters, she did not apply her mind to whether they would have needed independent legal advice, or whether it was inappropriate for the Firm to act.

21.59 The Second Respondent denied that the failure to see the conflicts issue meant that her conduct was in breach of the Principles as alleged.

21.60 Whilst it was accepted that the conflict issue was not spotted, the Second Respondent did not accept that the Firm did not have an appropriate conflict of interest policy in place. The Second Respondent explained that the Firm had a policy which she had drafted. It was expected that all fee earners would have read and followed this policy when new client matters were opened. For those reasons, the Second Respondent denied that her conduct was in breach of Principle 8, or that she had failed to achieve Outcomes (3.1) and (3.2).

21.61 As regards the allegation that the Second Respondent's conduct failed to achieve Outcome (3.4), it was submitted that the implication of IB (3.8) was that if a client received independent legal advice it might be permissible for a solicitor to borrow from that client. Given that, and that Outcome (3.4) placed an absolute prohibition on acting in an "own conflict" situation, the implication of the rules (read together) was that borrowing from a client did not create an "own interest conflict": rather, the requirement was that such a client should have independent legal advice. Against that background it was denied that on a proper analysis of the rules this was an "own interest conflict" that placed the Second Respondent in breach of Outcome (3.4).

21.62 Ms Mahmutaj noted that it was accepted that the Second Respondent did not act for either Mr Smith or Mr Dodman. It was clear, and admitted by the First Respondent, that he had failed to advise either client to seek independent legal advice. Further, Ms Garrard, during cross-examination confirmed that she had not asked the Second Respondent about the systems the Firm had in place as regards conflicts. Ms Garrard stated that this was an oversight on her part. Despite the factual position, the Applicant had chosen to proceed with this matter against the Second Respondent.

21.63 During the evidence of the Second Respondent, the Tribunal had been taken through the Firm's conflict policy as detailed in the office manual. Ms Mahmutaj noted that the Applicant had chosen not to ask any questions of the Second Respondent as regards the content of the policy. In the circumstances, it was submitted, the Tribunal should accept that the policy was good and represented a sufficient system.

21.64 The Second Respondent confirmed in her evidence that she had not advised either Mr Dodman or Mr Smith. Ms Mahmutaj submitted that there was no legal basis for suggesting that as the COLP she should advise other solicitors' clients as regards seeking independent legal advice.

21.65 As regards Mr B, that had occurred six months prior to the instant matters. The Second Respondent had not advised Mr B. Further, the fact that Mr B obtained legal advice prior to loaning monies to the Firm, was evidence that the policy in place was sufficient.

21.66 Ms Mahmutaj submitted that save for the (admitted) breach of IB (3.8), there was no evidence adduced to demonstrate any misconduct on the Second Respondent's part. Accordingly, the contested matters as regards allegation 1.2 should be dismissed.

The Tribunal's Findings

21.67 The Tribunal found on the facts and the evidence that her conduct breached IB (3.8). The Tribunal considered that her admission was properly made.

21.68 The Tribunal considered the contested matters.

21.69 For the reasons detailed above, the Tribunal did not find that the Second Respondent's conduct failed to achieve Outcomes (3.1) and 3.2). Accordingly, those matters were dismissed.

21.70 It had been the Second Respondent's case in her Answer that she considered she was aware at the time that Mr Dodman and Mr Smith had asked the Firm to act for them as well as providing loans to the Firm. However, in her witness statement, the Second Respondent stated that she was not aware that Mr Dodman was a client until well after the liquidation, and that she was not aware that Mr Smith became a client until after he became an investor.

21.71 It had been the evidence of both the First and Second Respondents that it was the Second Respondent who was responsible for the financial transactions of the Firm, including the authorising of payments. It was also plain on the contemporaneous documentary evidence that the monies loaned to the Firm by Mr Smith were transferred from the client account to the office account. It was also plain that the Second

Respondent had drafted the Enhanced Loan Agreement between the Firm and Mr Smith. The Tribunal found that the transfer of the monies from client account to office account would have been authorised by the Second Respondent. The Second Respondent, it was found, knew when she authorised the transfer that Mr Smith was a client of the Firm. Had that not been the case, his monies would not have been in the Firm's client account.

21.72 The Second Respondent was both the COLP and COFA of the Firm. The Tribunal considered that whilst it was not the Second Respondent's role to double check all the work of her colleagues, in circumstances where she was authorising the transfer of substantial funds from the client account for a loan to the Firm, her compliance roles meant that she was duty bound to ensure that the rules and regulations had been complied with. In the knowledge of the rules and conscious of her compliance responsibilities, the Second Respondent made no enquiries.

21.73 Whilst the Second Respondent had not acted in Mr Smith's matter, she had acted in drafting the Enhanced Loan Agreement, in circumstances in which she was aware that he was a client of the Firm. The fact that she was not the solicitor with conduct of the matter did not absolve her from her duty under Outcome (3.4). For the reasons stated above, the Tribunal found that taking the loan in the circumstances that it did, there was an own client conflict. The Second Respondent had failed to take any steps to ensure that there was no conflict prior to transferring the monies. The Tribunal found that in acting in the way that she did, the Second Respondent failed to achieve Outcome (3.4) as alleged.

21.74 The Tribunal found that it was not in the best interests of Mr Smith for the Second Respondent to transfer his monies from client account for the benefit of the Firm without first ensuring that he had taken independent legal advice. The Tribunal found that the Second Respondent's conduct was thus in breach of Principle 4 of the Principles. That such conduct failed to maintain the trust the public placed in the Second Respondent and the provision of legal services was plain. Members of the public expected solicitors to comply with their regulatory obligations, particularly when those obligations were designed to protect client interests. Accordingly, the Tribunal found that the Second Respondent's conduct was in breach of Principle 6.

21.75 Whilst it was accepted that the Firm had suitable systems in place, the Tribunal considered that the Second Respondent had failed to carry out her role effectively. As the compliance officer for the Firm, it was the Second Respondent's responsibility to ensure compliance with the rules. As detailed above, whilst the Tribunal did not consider that it was the Second Respondent's responsibility to check all of the work of her colleagues, in the instant circumstances, the risks were plain. Accordingly, the Tribunal found that the Second Respondent's conduct was in breach of Principle 8.

21.76 The Tribunal found that a solicitor acting with integrity, in the knowledge (i) of the Firm's financial position, (ii) that the loan was from a client; (iii) that the loan was for a substantial amount; (iv) that the loan was unsecured; and (v) of the regulatory requirements, would have made satisfactory enquiries so as to ensure that all regulatory obligations had been complied with. The Second Respondent had failed to make any enquiries. Her failures, it was determined, amounted to a breach of Principle 2.

21.77 Accordingly, the Tribunal found allegation 1.2 proved on the balance of probabilities, including that the Second Respondent's conduct failed to achieve Outcome (3.4), and was in breach of Principles 2, 4, 6 and 8. The Tribunal dismissed the allegation that the Second Respondent's conduct also failed to achieve Outcomes (3.1) and (3.2).

22. **Allegation 1.3 - On or about 10 October 2014, the First Respondent made a number of false and misleading statements and/or representations to Mr Kashdan, in order to persuade the latter (together with his wife) to purchase Loan Notes, and in so doing breached Principles 2 and 6 of the Principles.**

The Applicant's Case

22.1 Mr Kashdan (together with his wife) loaned the Firm £20,000 on about 17 October 2014, and they agreed to treat the first interest payment due (£2,000) as a further loan to the Firm on about 17 April 2015. In both cases, these loans were advanced pursuant to the Loan Note scheme described above, and on the terms thereof.

22.2 Prior to advancing the initial £20,000, on 10 October 2014, Mr Kashdan had a conference call with the First Respondent and with LF. During this phone conversation, the First Respondent stated and/or represented:

- That any loan advanced by Mr Kashdan would be ring-fenced, to be used for the LEI project.

- That the LEI project was approved by the SRA.

22.3 Mr Tabachnik QC submitted that those representations and/or statements were made by the First Respondent with a view to persuading Mr Kashdan (and his wife) to purchase Loan Notes in the Firm.

22.4 The First Respondent knew that those representations and/or statements were false and misleading:

- Ring-fencing of the loan exclusively for the LEI project potentially conflicted with and would likely be overridden by the terms of the Loan Note (per Clause 4 of the Loan Note instrument), unless a contrary agreement were specifically made. Further and in any event, the First Respondent knew that any loan from Mr Kashdan would not be ring-fenced for the LEI project, but would be used to contribute to the Firm's normal outgoings and expenditure.

- The LEI project was not approved or endorsed by the SRA in any meaningful sense, as The First Respondent well knew. The SRA did not hold any evidence indicating that it approved or endorsed the LEI project, nor that it was invited to consider doing so.

22.5 The First Respondent, it was submitted, in knowingly making false and misleading statements and/or representations had acted without integrity in breach of Principle 2, and had failed to behave in a way that maintained the trust the public placed in him and in the provision of legal services in breach of Principle 6.

22.6 Further, the First Respondent's conduct was dishonest, as he knew the statements and/or representations made were false and misleading. In the alternative, the First Respondent's conduct was reckless as he unreasonably ran the risk that the statements and/or representations made were false and misleading.

The First Respondent's Case

22.7 The First Respondent denied allegation 1.3, on that basis that he did not make the representations alleged. The First Respondent explained that whilst he recalled having a telephone conversation with Mr Kashdan, he did not tell him that the funds were ring-fenced, nor did he assert that the LEI project was approved or endorsed by the SRA.

22.8 Mr Nesbitt QC submitted that should the Tribunal find this matter proved, the allegations of professional misconduct alleged would follow. The question for the Tribunal was whether the First Respondent had made the representations alleged.

22.9 In his evidence, Mr Kashdan explained that he considered that LF was credible and plausible. In considering the investment, Mr Kashdan had been provided with documentation by LF. That documentation made extraordinary claims about the Loan Notes. There was no evidence that the First Respondent ever saw that documentation. Mr Kashdan was unable to recall whether he had a conversation with LF following receipt of the documentation. Mr Nesbitt QC made no criticism of that; it was unsurprising given that the events were 6½ years ago.

22.10 It was plain from Mr Kashdan's evidence that he considered that the PII certificate had been sent to him in the context of how the investment was guaranteed, however there was no evidence that the First Respondent had sent the PII certificate.

22.11 In his evidence, Mr Kashdan explained that he considered that the information he was receiving from LF was coming from the First Respondent. Mr Nesbitt QC submitted that it was very easy, when trying to piece events together, to confuse who had said what, particularly in circumstances where the words of one person were being attributed to another.

22.12 From the documentary evidence, one gained the impression that there were multiple communications between Mr Kashdan and LF over a number of days in the context where LF was making multiple representations about the loans and those representations were being attributed by Mr Kashdan to the First Respondent.

22.13 Mr Kashdan had made notes of the conversation with the First Respondent. Those notes did not refer to the monies being ring-fenced, nor did they refer to approval by the SRA. Mr Nesbitt QC submitted that where notes were taken, it was expected that the important parts of the conversation would be recorded. Had the First Respondent stated that the loans were ring-fenced, or that the project had SRA approval, Mr Kashdan would have noted it.

22.14 When being asked about some of the sequencing as regards SRA approval, Mr Kashdan explained that he could not recall the conversation. Mr Nesbitt QC submitted that this was tantamount to Mr Kashdan saying that he could not now remember the First Respondent saying that the project was SRA approved. This, it was submitted, was as

close as one could come to there being no evidence that the First Respondent made the representation as alleged. Given the risk of Mr Kashdan blurring what was said to him by whom, there was an obvious inference that the statements were made by LF and not the First Respondent.

22.15 Mr Nesbitt QC submitted that the evidence upon which the Applicant relied did not hold up to scrutiny and was insufficient to prove the allegation.

22.16 Further, the First Respondent denied making the statements attributed to him. It was the First Respondent's evidence that it would have been "ludicrous" to have made such statements in the conversation with Mr Kashdan on 10 October 2014, and to then send an email on 31 October 2014 to LF (who was party to the conversation) stating that the funds were not ring-fenced. The First Respondent clearly denied making the representations. He could have said that he recalled the conversation in full. Instead he honestly attested that he could not recall the conversation, but knew that he would not have made the representations attributed to him. This was a mark of his honesty.

22.17 That Mr Kashdan was mistaken as to who told him that the funds were ring-fenced was supported by the notes taken of the conversation with Ms Garrard. In evidence, Mr Kashdan stated that LF did not tell him that the loan would be ring-fenced, however Ms Garrard's handwritten note clearly referred to LF saying that the loan would be ring-fenced. This was evidence, it was submitted, of the failings in memory of events that had taken place some time ago, and was an independent indicator that Mr Kashdan's evidence was inherently difficult to rely on. Mr Nesbitt QC made no criticism of Mr Kashdan, who, it was submitted, was understandably mistaken, given the passage of time between the events in question, and his evidence before the Tribunal. Accordingly, it was submitted that the unreliability of the evidence was such that the Tribunal should dismiss allegation 1.3.

The Tribunal's Findings

22.18 The Tribunal found that Mr Kashdan was an honest witness who was doing the best he could to assist the Tribunal.

22.19 The Tribunal did not agree that the failure by Mr Kashdan to note that the details as regards the ring-fencing of the loans or SRA approval, was evidence that those representations were not made. Mr Kashdan explained that these were jottings made by him during the conversation, where he noted some matters and wrote down some of the things that he had questions about. It was clear from the format of the notes that this was not, and nor was it meant to be, a near verbatim account of the conversation between Mr Kashdan and the First Respondent.

22.20 The Tribunal noted that Mr Kashdan accepted that he was trying to piece together the events from the documentary evidence of matters that had taken place some time ago. It also noted that the handwritten notes taken by Ms Garrard when she spoke to Mr Kashdan seemingly made a specific reference to LF telling Mr Kashdan that the loans would be ring-fenced.

22.21 The Tribunal also noted that there was no evidence that the material provided to Mr Kashdan by LF was material that the First Respondent had ever seen or approved. That material made a number of claims that were evidently incorrect.

22.22 The Tribunal noted that it was Mr Kashdan's clear evidence that he considered that the information he received from LF as regards the scheme, was information that had emanated from, and thus he attributed it to, the First Respondent.

22.23 In all the circumstances, and without more, the Tribunal could not be satisfied that Mr Kashdan's recollection of the conversation with the First Respondent was accurate, or that the representations attributed to the First Respondent were in fact made by the First Respondent and not by LF. Accordingly, the Tribunal was not satisfied that the Applicant had proved allegation 1.3 on the balance of probabilities. Allegation 1.3 was therefore dismissed.

23. **Allegation 1.4 - In or about October 2014, the First Respondent made a number of false and misleading statements and/or representation to Ms Magee, in order to persuade the latter to purchase Loan Notes, and in so doing breached Principles 2 and 6 of the Principles.**

The Applicant's Case

23.1 Ms Magee loaned the Firm £50,000 on about 15 October 2014. The loan was advanced pursuant to the Loan Note scheme described above, and on the terms thereof.

23.2 Prior to advancing the £50,000, in early October 2014 Ms Magee had a conference call with the First Respondent. During this phone conversation, the First Respondent stated and/or represented:

- That the LEI project was approved by the SRA.
- That the Firm were the only solicitors approved by the SRA to offer the LEI scheme.
- That it would take at least a year for other solicitors wishing to offer a comparable scheme to be approved by the SRA.

23.3 The First Respondent made those representations and/or statements with a view to persuading Ms Magee to purchase Loan Notes in the Firm. Those representations and/or statements were false and misleading, as the First Respondent well knew:

- The LEI project was not approved or endorsed by the SRA in any meaningful sense, as RM well knew. The SRA does not hold any evidence indicating that it approved or endorsed the LEI project, nor that it was invited to consider doing so.
- It was not necessary for solicitors to secure specific approval from the SRA to offer a comparable scheme, so long as it was structured in accordance with existing regulatory requirements.

23.4 The First Respondent, it was submitted, in knowingly making false and misleading statements and/or representations had acted without integrity in breach of Principle 2, and had failed to behave in a way that maintained the trust the public placed in him and in the provision of legal services in breach of Principle 6.

23.5 Further, the First Respondent's conduct was dishonest, as he knew the statements and/or representations made were false and misleading. In the alternative, the First Respondent's conduct was reckless as he unreasonably ran the risk that the statements and/or representations made were false and misleading.

The First Respondent's Case

23.6 The First Respondent denied allegation 1.4 on that basis that he did not make the representations alleged. The First Respondent explained that whilst he did not specifically recall the content of the conversation he had with Ms Magee, he did not and would not have made the representations alleged.

23.7 As with allegation 1.3, Mr Nesbitt QC submitted that should the Tribunal find this matter proved, the allegations of professional misconduct alleged would follow. The question for the Tribunal was whether the First Respondent had made the representations alleged.

23.8 Mr Nesbitt QC highlighted a number of sequencing irregularities in Ms Magee's evidence. Whilst not critical of the sequencing errors, given the length of time between the events and the hearing, Mr Nesbitt QC submitted that Ms Magee's evidence was inherently unreliable.

23.9 In her evidence, Ms Magee confirmed that she attributed the information she received from LF as regards the investment to the First Respondent. Ms Magee was clearly surprised to learn that the First Respondent had sent an email to LF specifically stating that the funds were not ring-fenced. This was not an email that had been sent to her by LF at the time, and was not an email she had seen prior to her cross-examination in these proceedings.

23.10 When it was put to Ms Magee that she could be mistaken as to her recollection, Ms Magee accepted that she could be wrong and that this had happened some time ago. Mr Nesbitt QC repeated the submissions as regards the First Respondent's honest recollection of the conversation and there being no attempt on his part to provide a detailed account. Mr Nesbitt QC also repeated the submissions made about the frailty of organic human memory. In all the circumstances, it was submitted, there was no evidence upon which the Tribunal could find that the First Respondent had made the statements alleged. Accordingly, allegation 1.4 should be dismissed.

The Tribunal's Findings

23.11 The Tribunal considered that Ms Magee was an honest and credible witness who was doing her best to assist the Tribunal.

23.12 The Tribunal noted the admitted inconsistencies as regards the sequencing of events. For example, Ms Magee had referred in her statement to a document which it seemed was seen by her in 2014, but did not exist until 2015. The Tribunal also noted that Ms Magee was attributing statements made to her by LF to the First Respondent. The Tribunal did not consider that the error made by Ms Magee as to the date that the Loan Note was executed was material. In her statement, Ms Magee explained that she had entered into the Loan Note agreement on 2 October 2014, when in fact the Loan Note agreement was signed on 15 October 2014, in circumstances where the front of the Loan Note was dated 2 October 2014.

23.13 The Tribunal also noted that when Ms Magee was asked by Mr Nesbitt QC whether she agreed that who said what and when was a bit confused, Ms Magee agreed that it was. Further, when it was suggested to her that her recollection was incorrect, Ms Magee agreed that it could be.

23.14 The Tribunal considered that in circumstances where the only evidence upon which the Applicant relied was from a witness that could not fully recall the conversation had with the First Respondent, and had accepted that her recollection could be incorrect, it could not be satisfied that the First Respondent had made the representations and/or statements alleged. Accordingly, the Tribunal did not find allegation 1.4 proved thus dismissed that allegation.

24. **Allegation 1.5 - In the period from late 2014, the First Respondent allowed or encouraged the Firm's professional indemnity insurance cover to be presented to putative lenders as if it offered security in respect of their loans, thereby creating a misleading impression, and in so doing breached Principles 2 and 6 of the Principles.**

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

24.1 Mr Tabachnik QC submitted that it was common ground that the Firm's PII cover could not, in any way, contribute to providing security over the Loan Note monies, as indemnity insurance related to the Firm's practise activities and did not cover funding losses or debt arrangements. However, the First Respondent, it was submitted, allowed or encouraged the Firm's professional indemnity insurance cover to be presented to putative lenders as if it offered security in respect of their loans.

24.2 An 18 December 2014 email to the marketing agent regarding Con Smith's interest in a conditional loan arrangement from the First Respondent stated:

> "Further to our recent telephone conversation I can confirm that we would be prepared to act for Con Smith free of charge (excluding any disbursements, e.g. counsel fees, expert fees, court fees etc.) in order to secure the release of his monies that subject to a legal charge.
>
> This would however be subject to:
>
> A £250k investment
>
> - 20% interest rate

- Interest to be repaid at 6, 12 and 18 months from date of investment
- Capital to be repaid after 24 months from the date of investment

I also confirm that in terms of security:

- Mallets Solicitors Ltd is authorised and regulated by the Solicitors Regulation Authority (registration number: 522381)
- Professional Indemnity Insurance up to £3m
- Accountants Letter confirm our ability to pay the interest and capital repayments

Finally, I attach an Application Form as requested."

24.3 Mr Smith was also supplied by the First Respondent (either directly or indirectly via the marketing agent) with various documents confirming the existence of professional indemnity insurance in favour of the Firm for 2014/15 with an indemnity limit of £3,000,000.

24.4 Mr Radford was (prior to his 25 March 2015 loan to the Firm) similarly supplied by the First Respondent (indirectly via the marketing agent, as was entirely foreseeable to the First Respondent) with the same documents confirming the existence of professional indemnity insurance in favour of the Firm for 2014/15 with an indemnity limit of £3,000,000.

24.5 The First Respondent thereby allowed or encouraged a misleading picture to be presented to, and/or inferred by, putative lenders. The Firm's professional indemnity insurance cover was relevant to claims arising from the legal services provided by the Firm. It did not cover trading losses, whether in respect of the Loan Note schemes or in respect of other loans to the Firm. Whilst the Applicant did not have the Firm's 2014/15 policy terms, there was no reason to consider that in material respects those terms differed from (for example) the terms of the Firm's cover for an earlier year with the same insurer. Those terms stipulated clearly that cover was limited to "Private Legal Practice" (defined as meaning the provision of services in private practice as a solicitor or REL), and that trading or personal debts were excluded.

24.6 Mr Tabachnik QC submitted that the First Respondent had acted without integrity, in breach of Principle 2; a solicitor acting with integrity would have been scrupulous as to the manner in which matters relevant to "security" were presented to potential lenders. Further, he had behaved in a way that failed to maintain the trust the public places in him and in the provision of legal services, in breach of Principle 6. In addition, his actions were also manifestly incompetent in creating the circumstances where potential lenders could wrongly infer that the Firm's PII cover provided security for their loans.

24.7 In allowing or encouraging a misleading picture to be presented to, and/or inferred by, putative lenders as to the relevance of the Firm's PII cover, the First Respondent's conduct had been dishonest. The First Respondent was well aware that the Firm's PII cover did not extend to trading liabilities, or any of the loans to the Firm he was seeking to solicit. He must have known, appreciated and intended that a misleading picture would be presented to, and/or inferred by, putative lenders as to the "security" such PII cover afforded.

24.8 Further or alternatively, his conduct had been reckless. The First Respondent unreasonably ran the risk that a misleading picture would be presented to, and/or inferred by, putative lenders as to the "security" such PII cover afforded.

The First Respondent's Case

24.9 The First Respondent denied allegation 1.5. The First Respondent explained that the email referred to was one that was sent to LF, Mr Smith's financial advisor. The email recorded the terms on which it was proposed that Mr Smith would lend money to the Firm. When he dealt with the Carey Group, the First Respondent had been directly asked to provide detail relating to the Firm, including information about its professional indemnity insurance cover. The First Respondent presumed that the PII information was requested to show that the Firm was a properly authorised and established legal practice. The First Respondent provided the same information to LF. He made it clear that the documentation provided was to assist with due diligence. When the original PII certificate expired, the new certificate was provided.

24.10 In making reference to the Firm's PII cover, the First Respondent was in no way intending to suggest that the PII cover would in some way provide security in respect of borrowing by the Firm, nor could the reference to it be reasonably interpreted in that way: PII cover would never cover any entity's commercial debts. The First Respondent considered that it was absurd for any professional advisor to think that the PII cover provided any form of security over the loans. Further, and in any event, the Loan Note and other documentation made it clear that the lending was unsecured.

24.11 In his evidence, the First Respondent stated that the 18 December 2014 email purportedly from him to LF was not a genuine document. The email contained strange gaps with different fonts. The First Respondent considered that it was a "cut and paste or concoction put together by LF". The First Respondent stated that he had not sent an email in those terms.

24.12 In his witness statement, the First Respondent explained that the Applicant relied upon a number of documents that it seemed LF provided to investors/lenders that he had either never seen, or which were never intended by him to be externally available. He considered that the source of the documents, or the person that presented them to investors, was LF. The documents misled investors in a number of serious respects. Further, LF had misrepresented the position to investors directly contrary to information the First Respondent had provided to LF. Disturbingly, it seems that LF had told investors that the loans were secured/guaranteed despite being expressly told that that was not the position.

24.13 Mr Nesbitt QC submitted it was the Applicant's case that the First Respondent represented to Mr Smith that the PII cover offered security for the loan, and invited the Tribunal to consider that the 18 December 2014 email was genuine. However, the email looked odd. The spacing and font sizes were not uniform. There was none of the usual email information seen when an email has been forwarded. In addition, the Applicant had been in possession of the Firm's server; no evidence had been admitted showing an email containing that information being sent by the First Respondent to LF. Mr Nesbitt QC submitted that there was no evidence, on any standard, that the First Respondent sent an email in those terms to LF. In considering this matter, the Tribunal

should also take into account that LF was making extravagant claims and was plainly dishonest. For the purposes of determining the allegation, the Tribunal was not required to make findings about LF. There was no satisfactory evidence that the First Respondent had sent any email in those terms.

24.14 In the event that the Tribunal considered it was the First Respondent who had provided the PII certificate, he had provided a clear and coherent explanation as to how the PII certificate came to be a part of the document package he provided. It was the First Respondent's case that to represent that the PII cover was security for the loans was an absurdity, and insofar as he provided the PII certificate, it was not the First Respondent's intention that it should be relied upon as a guarantee for the loans.

24.15 In all the circumstances, Mr Nesbitt QC submitted, there was no evidence upon which the Tribunal could find allegation 1.5 proved and the allegation should be dismissed.

The Tribunal's Findings

24.16 The Tribunal noted that in his Answer to allegation 1.5, the First Respondent did not question the authenticity of the 18 December 2014 email. On the contrary, he explained that the email was one "in which the First Respondent recorded the terms on which it was proposed Mr Smith would lend money to the Firm".

24.17 It was the First Respondent's case that he had not sent an email to LF in the terms set out, and that it was LF who had concocted the email. The Tribunal found that even if that was the case, the "concocted" email had been sent to the First Respondent via fax together with Mr Smith's application form on 22 December 2014. That this was the position was evident from the fax notification that appeared on each page of the faxed documents.

24.18 The application form was annotated in manuscript to include conditions which stated:

> "① Money will be paid on receipt of money owed from Gravity
>
> ② Terms as per Richard Malletts E-mail dated 18/12/2014 (attached)"

24.19 The Tribunal found that the First Respondent had received that fax (indeed, it was not submitted that he had not). That this was the position was plain; the annotated fax had been retrieved from the Firm's server. Further, it was the First Respondent's case that he was the person responsible for dealing with the investors and brokers. It was not credible that an application to purchase Loan Notes in the sum of £250,000 would not have been passed to the First Respondent to review.

24.20 The Tribunal considered that the First Respondent would not only have reviewed the application form, but would also have reviewed and considered the email attached, particularly in circumstances where the application for the Loan Notes was expressly contingent on the conditions said, by Mr Smith, to be set out in the attached email.

24.21 It was plain on the face of the email that PII was being offered as security. The email detailed the "Professional Indemnity Insurance up to £3m" "in terms of security". Having received the email and application form together in the fax of 22 December

2014, the First Respondent, it was determined, was on notice that it had been represented to Mr Smith, (and thus potentially to other putative investors) that the PII cover was security for the loan.

24.22 The Tribunal determined that no finding as to the author of the email was required in circumstances where the First Respondent was plainly on notice of what had been said, and was under a duty to correct the misrepresentation. The First Respondent did nothing to correct this false representation. Nor was it of any assistance to the First Respondent to highlight that the Applicant had not produced an email from the First Respondent to LF in the terms contained in the 18 December 2014 email. The evidence clearly demonstrated that the email containing the false representation had been provided to the First Respondent by way of the 22 December 2014 fax, and was then retained on the Firm's server.

24.23 That such conduct was in breach of Principle 6 was clear. Members of the public did not expect a solicitor to allow the Firm's PII cover to be presented to putative investors as if it provided security for a loan, thereby creating a misleading impression.

24.24 The Tribunal found that the First Respondent's conduct lacked integrity in breach of Principle 2. A solicitor acting with integrity would not have allowed the misleading impression to go uncorrected so as to ensure that the loan they were seeking would not be jeopardised.

24.25 As detailed above, the Tribunal found that the First Respondent knew, from the fax that he received from Mr Smith containing the email and application form, that it was expressly stated that the Firm's PII cover was a form of security for the loan. The First Respondent knew that this was not the case, and had described it as "absurd". The Tribunal found that ordinary and decent people would consider that it was dishonest for a solicitor not to inform a potential investor that the Firm's PII cover did not provide security for the potential loan in circumstances where that solicitor knew that the investor was under the impression that it did. Accordingly, the Tribunal found that the First Respondent had acted dishonestly.

24.26 Given its dishonesty finding, the Tribunal did not consider whether the First Respondent's conduct was reckless.

24.27 Accordingly, and for the reasons stated above, the Tribunal found allegation 1.5 proved on the balance of probabilities, including that the First Respondent's conduct was dishonest.

25. **Allegation 1.6 - He failed, in the period after the matter had been drawn to his attention on 28 July 2016, to take any or any sufficient steps to remedy the ongoing breach of an undertaking he had given to Hall Smith Whittingham LLP on 25 May 2016, and thereby failed to achieve Outcome (11.2) of the Code, and breached Principles 2 and 6 of the Principles.**

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

25.1 The First Respondent continued to act for Mr Smith in order to recover the monies Mr Smith had invested in Gravity. In this regard, Mr Smith held security by way of

registered charges over various properties. The firm of Hall Smith Whittingham LLP ("HSW") were acting for the defendant to Mr Smith's claims.

25.2 On 25 May 2016, the First Respondent provided HSW with the following signed "Undertaking":

> "We hereby confirm that we are holding an executed DS1 in relation to the property … registered under [Title Number] and land at the rear of the property … registered under [Title Number].
>
> We hereby Undertake to file the same within two working days of receipt of £60,000 (sixty thousand pounds sterling) cleared funds in the following bank account …".

25.3 Mr Tabachnik QC submitted that the "Undertaking" was an "undertaking" as defined in the Code (as to which see allegation 2.4 below).

25.4 The purpose of submitting a DS1 to the Land Registry was to secure the removal of Mr Smith's charges over the said properties. Accordingly, it was an implied term of the Undertaking (to be implied as a matter of obviousness and/or commercial necessity) that the First Respondent would file the DS1 with the Land Registry in such a manner as to secure this objective.

25.5 On 7 June 2016, the First Respondent informed HSW by email that the funds had been received and "the DS1 has been lodged with the Land Registry".

25.6 The papers submitted to the Land Registry were returned to the Firm as ineffective, because in the absence of an application form, the application was defective under the relevant rules. The Land Registry so informed the Firm in a letter dated 13 June 2016.

25.7 Solicitors at HSW chased the First Respondent's failure to carry out his undertaking in emails to him dated 28 July, 12 August and 30 August 2016.

25.8 Mr Tabachnik QC submitted that the First Respondent ignored those emails. He did not respond to HSW. He did not investigate why the charges remained registered. He took no step to remedy the position, i.e. making a suitably formulated application to the Land Registry. The SRA did not regard as credible the First Respondent's denials in interview that he had not received any chasing email from HSW. Even if it were the case that the First Respondent did not receive the emails, it was plain that he was made aware that the failure to file the DS1 had been brought to his attention. The action taken by the First Respondent fell far below what was expected in circumstances where he had been made aware that the undertaking had been breached.

25.9 HSW secured the removal of charges themselves, but only by liaising directly with Mr Smith.

25.10 In his Answer, the First Respondent sought to argue that in sending the DS1 to the Land Registry, he had complied with the undertaking given. Mr Tabachnik QC submitted that in applying common sense, the filing of a defective form could not equate to

performance of the undertaking. It was obvious that the undertaking was to file the DS1 in such a way as to secure the removal of the charge.

25.11 Mr Tabachnik QC submitted that in failing to take any or any sufficient steps to remedy the ongoing breach of the Undertaking once it was drawn to his attention, the First Respondent:

- failed to achieve outcome 11.2 of the Code of Conduct 2011.
- behaved in a way that failed to maintain the trust the public places in him and in the provision of legal services, in breach of Principle 6 of the Code of Conduct 2011.
- failed to act with integrity, in breach of Principle 2 of the Code of Conduct 2011. A solicitor acting with integrity would have investigated and taken steps to ensure expeditious compliance with the Undertaking, once alerted to the fact that the Land Registry had not removed the charges.

The First Respondent's Case

25.12 The First Respondent denied allegation 1.6 in its entirety in his Answer. Having reflected on the matter during the course of the hearing, the First Respondent admitted that he failed to achieve Outcome (11.2). The First Respondent maintained that his conduct was not in breach of Principles 2 and 6.

25.13 The First Respondent explained that once the monies were received from HSW, he arranged for the DS1 to be sent to the Land Registry in accordance with the undertaking given. He did not receive the letter from the Land Registry which had been addressed to the Second Respondent at the Kings Lynn office. The emails sent by HSW were sent to an email address that he utilised on a Blackberry, as opposed to his office email. The Blackberry was unreliable in that the First Respondent did not receive emails or emails would fail to send. The First Respondent did not believe that he received the emails from HSW. Had he done so, he would have responded and remedied the position as there was no reason for him not to do so. The First Respondent regretted that this matter was not dealt with properly.

25.14 Mr Nesbitt QC submitted the failure to comply with the undertaking was an inadvertent mistake which did not give rise to a breach of the Principles as alleged.

The Tribunal's Findings

25.15 The Tribunal found that the First Respondent had failed to comply with his undertaking in breach of Outcome (11.2). The Tribunal found the First Respondent's admission to be properly made.

25.16 The Tribunal considered whether that admitted failure also amounted to a breach of the Principles as alleged.

25.17 During cross-examination, the First Respondent explained that having had the failure to register the DS1 brought to his attention by the telephone messages from HSW, he instructed the Second Respondent to "sort it". He had not dealt with it himself as it

seemed a simple thing to do. With hindsight he considered that he could perhaps have taken more responsibility. He accepted that he had not followed the matter up. The First Respondent explained that he considered that he had dealt with the undertaking and that the steps he had taken were sufficient.

25.18 The Tribunal considered that the First Respondent knew the importance of providing an undertaking, and ensuring that the undertaking was complied with. Having discovered that the undertaking had not been complied with, the First Respondent took insufficient steps to ensure compliance. He made no enquiries as to why the undertaking had not been complied with, nor did he seek to ensure that it had been after his instruction to "sort it".

25.19 Members of the public would expect a solicitor to comply with an undertaking given, and having been informed of the breach of the undertaking, to ensure that all necessary steps are taken so as to comply. The Tribunal found that in failing to take any sufficient steps to remedy the ongoing breach, the First Respondent failed to maintain the trust placed in him and in the provision of legal services in breach of Principle 6.

25.20 The Tribunal considered that a solicitor acting with integrity would have done more than give an instruction to "sort it" in circumstances where there was an ongoing breach of an undertaking. Members of the profession would expect a solicitor, once an ongoing breach of an undertaking is brought to his attention, to ensure that the breach is remedied. Members of the profession would not expect a solicitor to take no further action other than to instruct that the matter be dealt with. At the very least, it would be expected that the solicitor would seek to be informed of the action taken so as to satisfy himself that the promise he had given has been complied with. The First Respondent failed so to do. The Tribunal found that in all the circumstances, it was plain that the First Respondent's conduct lacked integrity in breach of Principle 2. Accordingly, the Tribunal found allegation 1.6 proved, including that the First Respondent's conduct was in breach of Principles 2 and 6 as alleged.

26. **Allegation 2.3 - In a 21 June 2016 Defence which she completed, the Second Respondent made a number of false and misleading statements, and in so doing breached Principles 1, 2 and 6 of the Principles.**

The Applicant's Case

26.1 On 14 October 2014, SL of the Firm contacted Cubit Consulting Ltd ("Cubit") to inquire whether Cubit had capacity to produce a surveyor report in respect of a property in London.

26.2 Mr DH, of Cubit, (who attended the property), sought an undertaking from the Firm in relation to payment of Cubit's fees. At 6:02pm, on 22 October 2014, Mr F of the Firm emailed Mr DH in the following terms:

> "The firm undertakes to pay your fees in the sum of £2,900.00 inclusive of VAT in respect of the surveyors report to be commissioned in respect of [the property]".

26.3 The undertaking was the subject of internal emails, which included the Second Respondent. Within 3 minutes of the undertaking being given to Cubit on 22 October2014, the Second Respondent was provided with a copy of the same by email. In her EWW response, the Second Respondent confirmed that she received the emails.

26.4 Cubit's report was finalised and sent to the Firm on 30 October 2014. The invoice was sent to the Firm on the same day. The Firm failed to pay the same.

26.5 On 29 April 2016, Mr DH emailed the Second Respondent chasing payment of the invoice. Included within the email to the Second Respondent was an email from SL to Mr DH dated 19 November 2014 which stated [underlining supplied]:

> "Thank you for your assistance to date. We would comment that your report provided was of an extremely high quality and standard and we will not hesitate to use your services in the future. Please note that we will be seeking to pay your costs as per your last invoice."

26.6 Mr Tabachnik QC submitted that the 19 November 2014 email made it clear that (a) Cubit had prepared a report, on the Firm's instructions, and (b) the Firm had received Cubit's invoice for the report.

26.7 On 13 May 2016, Mr DH emailed the Second Respondent, chasing payment once again, as she had not responded to his 29 April 2016 email (which was included in the 13 May 2016 email chain), and threatening legal proceedings. Mr Tabachnik QC noted that in the EWW response it was stated that "correspondence was later received in 2016 in relation to this". It was submitted that this was an acknowledgement that the emails of 29 April and 13 May 2016 were received by the Second Respondent.

26.8 On 25 May 2016, Cubit issued proceedings against the Firm for its unpaid invoice of £2,900.

26.9 In a 21 June 2016 Defence completed by the Second Respondent (and which contained a "statement of truth" in the name of the Firm which the Second Respondent completed), the Second Respondent stated:

> "The Defendant has no record of any invoice being submitted by the Claimant nor any fees being incurred with them. Accordingly the Claimant is put to strict proof that the Defendant is indebted to them in the amount claimed or at all".

26.10 Mr DH emailed the Second Respondent the next day (22 June 2016) to express his astonishment at the contents of the Firm's Defence. The Second Respondent did not reply to or acknowledge Mr DH's email, nor did she re-consider and correct her material statements in the Defence.

26.11 Mr Tabachnik QC submitted that the Defence was false and misleading in that:

- The Firm had a "record" of Cubit's invoice, as its receipt by the Firm was evidenced in the 19 November 2014 email; and

- The Firm had a "record" of incurring fees with Cubit, inter alia from (a) the 19 November 2014 email, and (b) the emails of 21 and 22 October 2014, which the Second Respondent accepts she received.

26.12 Mr Tabachnik QC submitted that in completing a Defence which she knew to be false and/or which she had no proper basis for considering to be correct and/or in respect of which she did not investigate before completing the same, the Second Respondent acted without integrity in breach of Principle 2, failed to uphold the rule of law and the proper administration of justice in breach of Principle 1, and failed to behave in a way that maintained the trust the public placed in her and in the provision of legal services in breach of Principle 6.

Dishonesty

26.13 Mr Tabachnik QC submitted that the Second Respondent must have known (and did know) that the statements in the Defence which she completed were false and misleading. Only a few weeks before, the Second Respondent had been provided by Mr DH with an email chain which clearly evidenced that Cubit had performed services for the Firm and had provided an invoice to the Firm in respect of the same. If and insofar as the Second Respondent failed to investigate Cubit's claim (including by reading Mr DH's 29 April 2016 email), the Second Respondent had no honest basis for completing the Defence in the terms she did. In any and all the premises, SM acted dishonestly.

Recklessness

26.14 Further or alternatively, the Second Respondent failed to make the appropriate inquiries before completing the Defence, unreasonably running the risk the contents thereof were false and misleading. Accordingly the Second Respondent acted recklessly.

The Second Respondent's Case

26.15 The Second Respondent admitted that her conduct was in breach of Principles 1 and 6. It was denied that the conduct was in breach of Principle 2, dishonest or reckless.

26.16 The Second Respondent did not dispute the underlying facts relied upon by the Applicant in support of allegation 2.3. In her evidence, the Second Respondent accepted that she would have received the emails, including the email which contained the undertaking, however she had no specific recollection of receiving any of the emails.

26.17 The Second Respondent explained that at the time of receipt of the Claim Form, she was dealing with a number of pressing matters. The Firm was under huge financial pressure, and the Second Respondent was dealing with numerous financial claims against the Firm. The Second Respondent was also suffering from health related issues (and having to deal with other distressing personal circumstances) and now understood that she had not coped well.

26.18 At the time the Claim Form was received, the Second Respondent's accounts assistant was no longer with the Firm. The Second Respondent explained that she checked the accounts files for a copy of the invoice. As she was unable to locate any invoice, she stated in the Defence that the Firm had no record of it, and put the Claimant to proof.

26.19 The Second Respondent accepted that she should have undertaken a more thorough search of the Firm's systems before completing the Defence in the way that she did. However, her failure to take proper care was an error and was not deliberate.

26.20 Ms Mahmutaj submitted that whilst on a cursory view the errors made by the Second Respondent would be considered worrying, the position was different when one understood the position the Second Respondent was in at the time. The Claim was received at a time of real turmoil. The financial position of the Firm was dire and at that time the Firm was considering and consulting in relation to a voluntary liquidation. The financial position of the Firm meant that it was losing its staff, including the accounts manager upon whom the Second Respondent relied.

26.21 In addition, the Second Respondent was suffering from her own health issues as well as dealing with other extremely distressing personal circumstances.

26.22 When taking all of those matters into account, it was clear that this was not a case where the Second Respondent was simply trying to buy time to evade the payment of an invoice in the sum of £2,900. There were numerous other claims against the Firm at that time. It was of no benefit to the Firm, or to the Second Respondent personally, to deliberately complete the Defence in a misleading manner.

26.23 Ms Mahumtaj submitted that the Tribunal, when considering whether the Second Respondent had failed to act with integrity, dishonestly or recklessly, should have regards to her unblemished career history and her personal background. It was untenable that the Second Respondent would risk her career in all the circumstances. It was clear that the Second Respondent had failed in her regulatory duties, but those failings did not extend beyond the admissions already made by her.

26.24 Accordingly, the Tribunal should dismiss the allegation that the Second Respondent's conduct was in breach of Principle 2, dishonest or reckless.

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

26.25 The Tribunal found that the Second Respondent's conduct was in breach of Principles 1 and 6. The Tribunal found the Second Respondent's admissions in that regard properly made. The Tribunal considered whether the Second Respondent's conduct amounted to a breach of Principle 2 as alleged.

26.26 The Tribunal found that the Second Respondent had failed to make any adequate enquiries as regards the invoice prior to completing the Defence. The Second Respondent was an experienced solicitor and understood the importance of ensuring that any Defence submitted to the Court was accurate. The Tribunal accepted and understood the personal and professional pressures that the Second Respondent was facing at the time the Defence was received. Notwithstanding that, the Tribunal considered that the actions taken by the Second Respondent were woefully inadequate

and fell far below the standards expected of her. Her personal circumstances, whilst extremely difficult, did not prevent her from taking the very basic steps necessary to ascertain what the true position was as regards the invoice

26.27 It would have been a simple task for the Second Respondent to search her emails for any communication to her from Cubit or Mr DH. As the person responsible for dealing with the Firm's invoices and authorising payments, the Second Respondent knew that any invoice would have been provided to her. The Tribunal considered that a solicitor, acting with integrity would have done far more that the Second Respondent did to ascertain the true position before completing a Defence and signing a statement of truth that admittedly contained false and misleading statements.

26.28 The Tribunal found that in all the circumstances, the Second Respondent had failed to act with integrity. Accordingly, the Tribunal found that the Second Respondent's conduct was in breach of Principle 2 as alleged.

26.29 The Tribunal did not find that the Second Respondent had submitted the Defence knowing that the information contained therein was false and misleading. The Tribunal had found that the Second Respondent had failed to ascertain the true position, and had completed the Defence based on what she believed was the position at the time. The Tribunal found that whilst this error was culpable, it did not amount to dishonesty. Ordinary and decent people would not consider that in unknowingly providing false and misleading information, the Second Respondent's conduct was dishonest. Accordingly, the Tribunal dismissed the allegation that the Second Respondent's conduct had been dishonest.

26.30 The Tribunal considered that in failing to make the appropriate inquiries before completing the Defence, the Second Respondent unreasonably ran the risk the information contained in the Defence was false and misleading. The Tribunal did not expect the Second Respondent to do anything more than was reasonable in all the circumstances. It had been the Second Respondent's evidence that other than looking in the accounts files, she took no further steps. In circumstances where proceedings had been issued against the Firm for a debt, it was incumbent on the Second Respondent to do more than she did. In failing to take any adequate steps, the Second Respondent knew that there was a risk that the information in the Defence was inaccurate. In failing to make any further inquiries, the Second Respondent, it was determined, had unreasonably and knowingly taken that risk. Thus, the Tribunal found that the Second Respondent's conduct had been reckless.

26.31 Accordingly the Tribunal found allegation 2.3 proved on the balance of probabilities, including that the Second Respondent's conduct lacked integrity in breach of Principle 2 and was reckless. The Tribunal did not find that the Second Respondent's conduct had been dishonest.

27. **Allegation 2.4 - Without good reason, she failed to perform an undertaking (alternatively, promise) given by her in a 9 December 2014 email, whether within a reasonable amount of time or at all, and in so doing she failed to achieve Outcome (11.2), and breached Principles 2 and 6 of the Principles.**

Allegation 2.5 - In the period March – early November 2016, she failed to respond to numerous requests from the SRA for an explanation regarding the failure to perform the undertaking (or promise) given by her in the said 9 December 2014 email, and she thereby breached Principles 2, 6 and 7 of the Principles.

The Applicant's Case

27.1 In 2014, Warren's Law and Advocacy ("Warrens") were instructed by client E in place of the Firm. In September 2014, client E's litigation was settled on terms whereby the defendant agreed to pay client E's reasonable legal costs.

27.2 Mr AC, (the solicitor with conduct of the matter at Warrens, explained that it had been agreed that his firm would instruct a costs draftsman for all the legal costs incurred by both firms. It was further agreed that the cost of that instruction would be split between the firms and apportioned according to the value of the costs billed.

27.3 The costs draftsman's fees, apportioned to the Firm were £1,250 plus VAT. Having been informed of the fee due, the Second Respondent emailed Mr AC on 9 December 2014 stating

> "I will arrange to pay the invoice from Masters Costs …"

27.4 Mr Tabachnik QC submitted that reliant on that email, Mr AC negotiated with the defendant (for no charge) in respect of the Firm's fees. In February 2015, Mr AC secured a settlement in the Firm's favour of £38,794.50, and which he paid to the Firm in full without deducting the fees of the costs draftsman.

27.5 The Second Respondent failed to honour the promise in her 9 December 2014 email, notwithstanding numerous emails and telephone messages chasing up the same. Mr AC explained that further requests for payment were made either by email or letter on 22 January, 20 April, 2 July and 11 December 2015.

27.6 Following the non-payment of the Firm's share of the costs. Warrens settled the relevant fees. Warrens were unable to recover those costs from the Firm.

27.7 As a result of the Firm's failure to pay the costs, Warrens complained to the SRA. On 23 March 2016, the SRA sought an explanation from the Second Respondent. The Second Respondent did not reply to that email, nor was there any reply to further emails sent by the SRA to the Second Respondent dated 4 May, 22 June, and 9 September 2016.

27.8 In response to queries in the FIO's 10 November 2016 email, on 15 November 2016, the Second Respondent responded stating that "the invoice was not paid as the Company did not have the funds available", and that she no longer had access to her email account at the Firm, so could not answer questions as to whether she or anyone else had responded to Warrens' chasing emails or the SRA's inquiries. In fact, the SRA had received no response to any of its emails, and there was no evidence on the Firm's server of any reply either to Warrens' chasing emails or to the SRA's inquiries.

27.9 Outcome 11.2 of the Code of Conduct 2011 provided that:

> "you perform all undertakings given by you within an agreed timescale or within a reasonable amount of time".

27.10 The Glossary to the Code defined an "undertaking" as meaning:

> "… a statement, given orally or in writing, whether or not it includes the word "undertake" or "undertaking", made by or on behalf of you or your firm, in the course of practice, or by you outside the course of practice but as a solicitor or REL, to someone who reasonably places reliance on it, that you or your firm will do something, or cause something to be done, or refrain from doing something."

27.11 Mr Tabachnik QC submitted that the Second Respondent's 9 December 2014 promise was an "undertaking" as defined. It was an unambiguous promise, arising in the course of practice, to do something, on which Warrens reasonably relied.

27.12 There was no good reason, it was submitted, for the Second Respondent to fail to perform the said undertaking within a reasonable period of time. It was not credible (contrary to the email of 15 November 2016 email) that the Firm lacked £1,500 in the whole period between 9 December 2014 and the commencement of its insolvent liquidation in November 2016. For example, the Firm could have used some of the £38,794.50 recovered for it by Warrens to discharge the relevant obligation, or it could have used monies that were otherwise paid to the Second Respondent in the period from 9 December 2014.

27.13 In the premises, the Second Respondent:

- failed to achieve outcome 11.2 of the Code.

- behaved in a way that failed to maintain the trust the public places in her and in the provision of legal services, in breach of Principle 6, as the public would expect a solicitor to comply expeditiously with the promise (whether an "undertaking" or not) set out in the 9 December 2014 email.

- failed to act with integrity, in breach of Principle 2. A solicitor acting with integrity would have complied expeditiously with the promise (whether an "undertaking" or not) set out in the 9 December 2014 email, there being no cogent reason why the promise was not and could not have been so complied with.

27.14 Further, in failing to respond to the SRA's numerous requests for an explanation in the period March – September 2016, the Second Respondent:

- failed to act with integrity, in breach of Principle 2. A solicitor acting with integrity would have responded to the numerous inquiries from her regulator.

- behaved in a way that failed to maintain the trust the public places in her and in the provision of legal services, in breach of Principle 6.

- failed to comply with her regulatory obligations and deal with her regulators in an open, timely and co-operative manner, in breach of Principle 7.

The Second Respondent's Case

27.15 The Second Respondent admitted allegations 2.4 and 2.5, save that it was denied in respect of each allegation that the Second Respondent's conduct was in breach of Principle 2.

27.16 During the time period in which this happened the Second Respondent was under huge pressure at work, and was suffering with her health and mental exhaustion and not coping with the number of things she had to do. The Second Respondent stated that she did not recall or believe that she consciously failed to deal with the payment, but accepted she should have managed this better than she did and arranged the payment promptly.

27.17 In relation to her failure to respond to respond to the emails sent to her by the SRA, the Second Respondent did not recall the emails. She explained that she would not have wilfully ignored correspondence from the SRA. The emails were (from the dates they bear) sent in the period of time when the Second Respondent was suffering with her health condition and personal circumstances. She was also under huge pressure with the amount of things she had to deal with at the Firm. The Second Respondent suspected that in the circumstances, she either did not see or did not read the emails.

27.18 Her failures as regards allegations 2.4 and 2.5 were inadvertent. Given her particular circumstances, it was denied that the Second Respondent's conduct was in breach of Principle 2.

27.19 Ms Mahmutaj submitted that the Second Respondent's failings were a perfect illustration of the Second Respondent cracking under the parallel pressures of her personal and professional life. It had been put to the Second Respondent in cross-examination that she had no good reason for failing to pay the costs draftsman or failing to respond to correspondence from the SRA. The Second Respondent explained that she had tried her best to cope with all that she was required to do, however she had not performed to her usual standard as a result of her personal and professional difficulties. The Applicant, it was submitted, had not challenged the Second Respondent as regards her circumstances at the time. It was accepted that the Second Respondent had found herself "going through the motions" when at the office as it was difficult for her to focus on work.

27.20 The Second Respondent accepted that her failures were culpable; given her circumstances, it was submitted that her misconduct went no further than breaches of the Code and Principles already admitted.

The Tribunal's Findings

27.21 The Tribunal found that the Second Respondent's conduct as regards allegation 2.4 was in breach of Principle 6 and failed to achieve Outcome (11.2). The Tribunal further found that the Second Respondent's conduct as regards allegation 2.5 was in breach of

Principles 6 and 7. The Tribunal considered that the Second Respondent's admissions were properly made.

27.22 The Tribunal considered whether her conduct was also in breach of Principle 2 as alleged.

27.23 During cross-examination, the Second Respondent explained that she would have provided the invoice for payment of the costs draftsman's fee to the accounts department. Had she instructed them to pay it, it would have been paid. When asked why she had not so instructed the accounts department, the Second Respondent stated: "I don't know. I can't recall what I was thinking when the invoice came in". The Second Respondent also accepted that when the reminder email as regards payment came in, she should have told accounts to pay it however she could not recall what the reason could have been for not telling accounts to pay.

27.24 The Second Respondent accepted that a payment was received from Warrens in full for the Firm's share of the costs, but that the costs draftsman's fee was still not paid. It was also accepted that there were a number of requests for payment, none of which were responded to and no payment was made.

27.25 The Tribunal determined that notwithstanding that the Second Respondent was not aware that her email of 9 December 2014 provided an undertaking, she was aware that she had confirmed that she would pay the Firm's share of the costs draftsman's bill, and would have been aware of that each time she received a further request for payment. The Second Respondent failed to ensure the bill was paid even after having been paid in full for costs due to the Firm. The Tribunal noted that during the time in which the Second Respondent failed to pay the costs draftsman, there were payments made by the Firm to both the First Respondent and Second Respondent.

27.26 The Tribunal whilst sympathetic to the Second Respondent's personal circumstances, found that a solicitor acting with integrity would comply with an undertaking given to satisfy the Firm's liability. Further, a solicitor acting with integrity would not have continued to fail to pay, having been paid in full for its share of the costs. Accordingly, the Tribunal found that the Second Respondent's conduct lacked integrity in breach of Principle 2.

27.27 Following the complaint by Warrens to the SRA, the SRA sent the Second Respondent a number of emails requiring an explanation. The Second Respondent did not respond to any of those emails. The Tribunal determined that the Second Respondent was fully aware of the importance of responding to enquiries from her regulator. By that time, the Firm had been investigated by Mr Carruthers as regards the Accounts Rules breaches. On 14 June 2016, the Respondents were sent an EWW letter. That letter was responded to in August 2016. At around the same period of time, namely on 22 June and 9 September 2016, the SRA was seeking an explanation as regards the failure to satisfy the costs draftsman's fees. The Tribunal determined that the Second Respondent chose not to respond to the SRA as regards this matter. It did not accept that the time it took to respond to the EWW letter had an effect on other matters. The importance of compliance with Principle 7 would have been something of which the Second Respondent was acutely aware when she failed to respond to the queries from the SRA. The Tribunal found that a solicitor acting with integrity would respond to queries from

their regulator in circumstances when the regulator was investigating a complaint against the firm. Accordingly, the Tribunal found that the Second Respondent's conduct was in breach of Principle 2 as alleged.

27.28 The Tribunal thus found allegations 2.4 and 2.5 proved on the balance of probabilities, including that the Second Respondent's conduct lacked integrity in respect of both allegations.

28. **Allegation 1.7 the First Respondent failed to ensure compliance with Rules 14.1, 16.1(e), 17.1(b) and 29.1229.14 of the Accounts Rules in relation to unpresented cheques sent to counsel.**

Allegation 2.6 – the Second Respondent failed to ensure compliance with Rules 14.1, 16.1(e), 17.1(b) and 29.1229.14 of the Accounts Rules in relation to unpresented cheques sent to counsel.

The Applicant's Case

28.1 On 23 December 2014, the Firm transferred £39,959.48 from client account to office account in respect of the intended payment of the same to counsel (Mr P QC) for work on client D's matter. The corresponding cheque in the same amount did not reach counsel. The Firm reversed the transfer on 24 April 2015. Mr P QC's total relevant fees were settled by the Firm on 11 or 12 June 2015.

28.2 On 4 September 2014, the Firm transferred £11,000 from client account to office account in respect of the intended payment of the same (together with other monies) to counsel (Mr S) for work on client S-M's matter. The corresponding cheque in the sum of £17,000 did not reach counsel. The Firm reversed the transfer on 18 March 2015.

28.3 On 3 October 2014, the Firm transferred £124,020 from client account to office account in respect of the intended payment of the same to counsel (Mr K QC - £88,860; and Mr H - £35,160) for work on client L's matter. The corresponding cheques in the same amount did not reach either counsel. The Firm paid the relevant sums to counsel to Mr H on 18 December 2014 and to Mr K QC on 5/6 January 2015.

28.4 Mr Tabachnik QC submitted that in all the above cases, retention of the monies in office account for the periods in question amounted to breaches of Rules 14.1, 16.1(e), 17.1(b) and 29.12-29.14 of the Accounts Rules. As directors of the Firm at the material times (and hence principals for purposes of Rule 6.1), both Respondents were required to ensure compliance with the Accounts Rules by themselves and by everyone employed in the Firm.

28.5 In their joint EWW response of 27 March 2018 the Respondents stated:

> "The former Directors accept that [allegations regarding the above matters are] correct, although at the time the cheques were initially written there was no improper transfer. It was only later on when the payment did not clear through the office account that the transfer became improper and the onus was then on the Company to identify and put it right quickly. They accept that the circa 3 months it took was too long. SM was aware prior to the visit from Mr Carruthers

that there were some entries on the office bank reconciliation which needed investigation and action being taken – hence the 2 payments on 23 December and 6 January. Again, they accept this process took too long. In making this admission they have accepted that the client account was overdrawn for short periods of time. However this was not deliberate and not intentional and arose from deficiencies in their accounting systems which was recognised and remedied both before and during the course of the investigation".

The First Respondent's Case

28.6 The First Respondent admitted allegation 1.7. In his Answer he explained that although he was a director of the Firm, and therefore accepted that he was strictly liable for any Accounts Rules breaches, he had no direct day to day involvement in the management and administration of any of the Firm's accounts. Nor did he play any part in making arrangements for the payment of disbursements.

28.7 Notwithstanding his ignorance as regards the issuing of the cheques and the corresponding transfers, he admitted the allegation on a strict liability basis by virtue of his duties as a director of the Firm.

The Second Respondent's Case

28.8 The Second Respondent admitted allegation 2.6. It was accepted that the non-presentation of the cheques referred to gave rise to the Accounts Rules breaches which, as a director of the Firm, she was strictly liable for.

The Tribunal's Findings

28.9 The Tribunal found allegations 1.7 and 2.6 proved on the facts and the evidence. The Tribunal found that the First and Second Respondents' admissions were properly made.

Previous Disciplinary Matters

29. There were no previous adverse disciplinary findings for either Respondent.

Mitigation

First Respondent

30. Mr Nesbitt QC submitted that in light of the Tribunal's findings, the First Respondent did not offer any mitigation and the inevitable outcome on sanction was accepted.

Second Respondent

31. The Tribunal was referred to the comments of Flaux LJ in SRA v James, MacGregor and Naylor [2018] 4 WLR 163. When considering exceptional circumstances, matters of personal mitigation including mental health and workplace pressures could be taken into account. The important factor was the duration of the misconduct and the Second Respondent's culpability.

32. Ms Mahmutaj submitted that exceptional circumstances existed for the Second Respondent such that striking her off the Roll would be disproportionate. As regards her culpability, the Second Respondent had a secondary role; it was the First Respondent who was at the forefront of the projects and who had had contact with the brokers and investors. The application was made not only on the basis of the stress and turmoil suffered by the Second Respondent as a result of her health and the pressures of the Firm, but also due to her particular personal circumstances at the time. The nature and duration of the stress suffered by her at the time were more than those referred to in James such that her case was one which was deserving of falling into the small category where a strike off was inappropriate.

33. In that very dark period, the Second Respondent had cracked under the pressure. The reference provided on her behalf demonstrated that she had been working for the last 4½ years with great professionalism and professional conduct. A strike off would not just prevent the Second Respondent from working, but it would also have an isolating effect. She remained the primary carer for a family member who was wholly dependent upon her. A finding of exceptional circumstances was in the best interest of the Second Respondent's welfare and in the best interests of the welfare of her dependent family member.

Sanction

34. The Tribunal had regard to the Guidance Note on Sanctions (8th Edition – December 2020). 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.

The First Respondent

35. The Tribunal determined that the First Respondent was motivated by his desire to obtain and commence the various projects that he was in the process of negotiating. In order to do so, he needed to keep the Firm afloat. The Tribunal considered that the First Respondent's actions were planned. He knew that he ought not to have spent the Loan Monies in the way that he did. He also knew that he ought to have corrected the position as regards the PII insurance having received and read the 18 December 2014 email. The First Respondent breached the trust placed in him by the investors to use the Loan Note monies for the purposes specified in the agreements. The First Respondent was an experienced solicitor.

36. The First Respondent had caused immense harm to the investors and Mr Smith, all of whom had lost significant amounts of money. The investors and Mr Smith did not receive any of their capital back from the Firm. A small number of investors received some interest payments. The monies lost to the Firm by Mr Dodman constituted his life savings. The harm caused to the reputation of the profession was significant.

37. The Respondent's conduct was aggravated by his proven dishonesty, which was in material breach of his obligation to protect the public and maintain public confidence in the reputation of the profession; as per Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin:

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

38. The First Respondent's misconduct, the Tribunal found, was deliberate, calculated and repeated, and had continued over a period of time.

39. Given the serious nature of the allegations, the Tribunal considered and rejected the lesser sanctions within its sentencing powers such as no order, a reprimand or restrictions. The Tribunal had regard to the case of Bolton v Law Society [1994] 2 All ER 486 in which Sir Thomas Bingham stated:

> "….Lapses from the required standard (of complete integrity, probity and trustworthiness)….may….be of varying degrees. The most serious involves proven dishonesty….In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced by the solicitor, ordered that he be struck off the roll of solicitors."

40. The First Respondent did not submit, and the Tribunal did not find, any exceptional circumstances in this case. The only appropriate and proportionate sanction, in order to protect the public, and maintain public confidence in the integrity of the profession and the provision of legal services, was to order that the First Respondent be struck off the Roll.

The Second Respondent

41. The Tribunal found that like the First Respondent, the Second Respondent was motivated by her desire to keep the Firm running until such time as the projects were providing the Firm with the anticipated high levels of income. Whilst the Second Respondent was not the driving force behind the negotiations, she authorised the expenditure of the monies in circumstances where she knew that she should not have. She failed in her compliance duties, and had been reckless as regards her obligation to uphold the rule of law.

42. She acted in breach of the trust placed in her both as a solicitor and a compliance officer to only spend the Loan Note monies for the purposes for which they were provided. Given her knowledge of Clause 4, such conduct, it was determined, was planned. She had direct control of the circumstances giving rise to the misconduct. She failed to protect the loan monies, failed to respond to her regulator and made very little attempt to establish the facts prior to submitting the false and misleading Defence to the Court. The Second Respondent was an experienced solicitor who understood what her obligations and duties were.

43. The Tribunal repeated its findings detailed above as regards the harm caused by the Second Respondent's conduct.

44. The Second Respondent's conduct was deliberate, calculated and repeated, and had continued over a period of time. Given the serious nature of the allegations, the Tribunal considered and rejected the lesser sanctions within its sentencing powers such

as no order, a reprimand or restrictions. The Tribunal had regard to the comments in Bolton detailed above.

45. Ms Mahmutaj submitted that this was a case where exceptional circumstances applied. The Tribunal noted the comments of Flaux LJ in James:

> "…where the SDT had concluded that, notwithstanding any mental health issues or work or workplace related pressures, the Respondent's misconduct was dishonest, the weight to be attached to those mental health and working environment issues in assessing the appropriate sanction will inevitably be less than is to be attached to other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused, all of which must be of more significance. Certainly, it is difficult to see how in a case of dishonesty, as opposed to some lesser professional misconduct, the fact that the Respondent suffered from stress and depression (whether alone or in combination with extreme pressure from the working environment) could without more amount to exceptional circumstances …"
>
> …..
>
> "… I do not consider that mental health issues, specifically stress and depression suffered by the solicitors as a consequence of work conditions or other matters can, without more, amount to "exceptional circumstances", justifying a lesser sanction than striking off where the SDT has found dishonesty…"
>
> …..
>
> "… the most important factor to be accorded most weight is the nature and extent of the dishonesty and the degree of culpability…"

46. The Tribunal considered the degree of the Second Respondent's culpability. The Respondents agreed, and the Tribunal found that it was the Second Respondent who dealt with and authorised financial transactions. Accordingly, it was the Second Respondent who directly authorised that the Loan Note monies be used to satisfy the Firm's liabilities in circumstances, the Tribunal had found, where she knew that the use of those monies in that way was not authorised. Further, the medical evidence provided by the Second Respondent did not suggest that her circumstances at the time were such as to cause her to act in the way that she did. Her conduct had had a serious adverse effect on a number of people and was of benefit to the Firm and thus the Second Respondent.

47. The Tribunal had found that notwithstanding the Second Respondent's extremely difficult personal circumstances, her conduct was dishonest. The Tribunal did not agree that the Second Respondent's personal circumstances were such that her case was distinguishable from James. The Tribunal did not find that the Second Respondent's case fell within the category of cases where it would be disproportionate to strike the Second Respondent off the Roll. Accordingly, the Tribunal considered that the only appropriate and proportionate sanction, in order to protect the public, and maintain public confidence in the integrity of the profession and the provision of legal services, was to order that the Second Respondent be struck off the Roll.

Costs

48. Mr Tabachnik QC applied for costs in the sum of £151,009.45 which was comprised of internal investigation costs of £34,009.45 and Capsticks fee of £97,500 (+VAT). Costs should be awarded on a joint and several basis. If the Tribunal were not minded to award costs on that basis, then an apportionment of 60% and 40% to the First and Second Respondents respectively would be an appropriate apportionment taking into account the matters found proved and their culpability.

49. As regards quantum, it was submitted the costs claimed followed a substantial investigation and lengthy hearing were low. The costs of instructing Mr Tabachnik QC were a disbursement that Capsticks were liable for and had not been added to the costs claim.

50. Mr Nesbitt QC submitted that there ought to be a reduction in the costs claimed. A substantial part of the hearing bundle had been redacted as it related to matters not pursued before the Tribunal. The Applicant's internal investigation costs ought to be reduced so as to take account of the matters that were not pursued by at least 25%.

51. The Tribunal had found that there was a delay in breach of the First Respondent's Convention rights. That delay should be taken into account of in the assessment of costs. The delay was for approximately one ninth of the investigation and costs should accordingly be reduced by that fraction. Additionally, the Applicant had failed to prove allegations 1.3 and 1.4. As regards allegation 1.1, whilst it was the primary allegation and the First Respondent was the main point of contact for negotiating the finance, he was not the compliance officer for the Firm. The Second Respondent was both the COLP and COFA and directly authorised the spending. In addition, the First Respondent had admitted allegation 1.7, but was not directly responsible for those admitted breaches.

52. Mr Nesbitt QC did not accept that costs should be awarded on a joint and several basis. Such an order was unfair and would result in the Respondents paying for costs that was not properly attributable. As to an apportionment between the Respondents, it was submitted that a 50/50 split. The First Respondent, it was accepted, had not provided a means statement to the Tribunal. He was currently not employed and did not possess any assets.

53. Accordingly, there should be a reduction in the costs to reflect the delay occasioned by the Applicant, the unproven matters and the investigation into matters that were not pursued before the Tribunal.

54. Ms Mahmutaj agreed that there should be separate costs orders as between the Respondents. It was submitted that a 75% and 25% apportionment between the First and Second Respondents respectively was appropriate. The First Respondent faced the majority of the allegations and played the primary role as regards allegation 1.1. Further, the Second Respondent had made a number of admissions as regards the allegations she faced. Ms Mahmutaj echoed the submissions of Mr Nesbitt QC as regards the investigation costs and delay. Additionally, it was submitted that the Tribunal's discretion to reduce costs to mark the breach of Article 6 did not relate to

additional costs incurred, but was to mark the additional strain and anxiety caused to the Second Respondent as a result of the delay.

55. In reply Mr Tabachnik QC submitted that any reduction in the investigation costs as regards the matters that were not pursued before the Tribunal would be very small. As to allegations 1.3 and 1.4, the Tribunal had found dishonesty proved against the First Respondent. As had been submitted by Mr Nesbitt QC, the Tribunal's findings were ruinous of the First Respondent's career. This was not a case where the Applicant's failure to prove all allegations was going to make any material difference.

56. As to a reduction in the costs due to the breach of the Respondents' Convention rights:

- There was no evidence that the delay of six months had any effect on the costs claimed. Additionally, Capsticks fee was a fixed fee. Whilst there might be a reduction in the hours claimed, this would not affect the costs claimed.

- The costs claimed were not linear so there was no correlation between the time of the delay and the costs claimed. A reduction of one ninth as the delay was one ninth of the period was not appropriate.

- The Respondents had in effect, had a free abuse application that had taken a day of hearing time; there was no additional costs claimed for that application.

57. The Tribunal noted that whilst the Respondents had faced some allegations that were the same (or substantially the same), each Respondent had a number of matters that did not relate to the other. The Tribunal considered that in the circumstances, each Respondent should be made subject to independent costs orders. The Tribunal did not accept Mr Tabachnik QC's submission that any costs order should be made on a joint and several basis. The Tribunal, in reaching that determination was mindful of the decision in Tinkler v SRA [2012] EWHC 3645 Admin, in which it was found that any costs order should fairly and reasonably relate to the process faced by the Respondent. The Tribunal determined that a joint and several order would mean that each of the First and Second Respondents could be required to pay the costs of matters that did not relate to their conduct. The Tribunal considered the culpability of each Respondent, the matters they faced and the issues to be considered. The Tribunal did not accept that a 50/50 split (as submitted by the First Respondent) or a 75/25 split (as submitted by the Second Respondent) properly reflected the matters the Tribunal had to take into account. The Tribunal determined that a 60/40 split adequately took into account the matters detailed above, and reflected a fair and reasonable apportionment of each Respondents liability.

58. The Tribunal considered that there should be a small reduction in the costs to mark the breach of the Respondents' convention rights and the matters that were not proceeded with by the Applicant. In the circumstances, the Tribunal considered that £140,000 was the appropriate, proportionate and reasonable amount of recoverable costs.

Statement of Full Order

59. The Tribunal Ordered that the Respondent, RICHARD MALLETT, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £84,000.00.

60. The Tribunal ORDERS that the Respondent, SHARON MALLETT, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £56,000.00.

Dated this 31st day of March 2021
On behalf of the Tribunal

A E Banks
Chair