SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12116-2020

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

NICHOLAS PETER WHIFFEN Respondent

Before:

Mr J Evans (in the chair)
Mrs A Kellett
Mr M R Hallam

Date of Hearing: 13-14 April 2021

Appearances

Alastair Willcox, solicitor of Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant.

The Respondent did not attend and was not represented.

JUDGMENT

Allegations

1. The Allegations against the Respondent were that he had:

1.1 Allowed a client account shortage in the sum of £195,867.59 to exist as at 31 December 2019 by:

1.1.1 Causing or permitting unpaid disbursements in the sum of £153,607.27 to be incorrectly held in the office account in breach of all or alternatively any of Principles 2, 6 and 10 of the SRA Principles 2011 and Rules 7, 17.1(b) and 20.1 of the SRA Accounts Rules 2011.

1.1.2 Causing or permitting improper payments in the sum of £30,012.82 to be made from the client account in breach of all or alternatively any of Principles 2, 6 and 10 of the SRA Principles 2011 and Rules 7, [17.1(b)] and 20.1 of the SRA Accounts Rules 2011 [and, to the extent that the alleged misconduct occurred on or after 25 November 2019, breached all or alternatively any of Principles 2, 4 and 5 of the SRA Principles 2019, Rules 2.1, 2.3, 5 and 6 of the SRA Accounts Rules 2019, Rule 5.2 of the SRA Code of Conduct for Firms 2019 and Rule 4.2 of the SRA Code of Conduct for Solicitors 2019]. **At the hearing the Tribunal was not invited to make a finding in relation to Rule 17.1.(b) of the SRA Accounts Rules 2011 or in respect of any of the alleged breaches of Principles or Rules that related to conduct on or after 25 November 2019.**

1.1.3 Causing or permitting client damages in the sum of £12,247.50 to be incorrectly held in the office account in breach of all or alternatively any of Principles 2, 6 and 10 of the SRA Principles 2011 and Rules 7, 17.1(b) and 20.1 of the SRA Accounts Rules 2011 and, to the extent that the alleged misconduct occurred on or after 25 November 2019, breached all or alternatively any of Principles 2, 4 and 5 of the SRA Principles 2019, Rules 2.1, 2.3, 5 and 6 of the SRA Accounts Rules 2019, Rule 5.2 of the SRA Code of Conduct for Firms 2019 and Rule 4.2 of the SRA Code of Conduct for Solicitors 2019.

1.2 In order to mislead the Court, signed a witness statement, verified by a statement of truth and dated 5 June 2019, in support of his application to set aside a Statutory Demand served by Ms JL, in which he stated that he disputed Ms JL's fees, thereby breaching all or alternatively any of Principles 2 and 6 of the SRA Principles 2011 and failing to achieve Outcome 5.1 of the SRA Code of Conduct 2011.

1.3 Misused client money between 1 January 2019 and 31 December 2019, thereby breaching all or alternatively any of Principles 2, 4, 5, 6, 8 and 10 of the SRA Principles 2011, Rules 1, 6, 7.1 and 7.2 of the SRA Accounts Rules 2011, failing to achieve Outcomes 1.1 and 1.2 of the SRA Code of Conduct 2011 and, to the extent that the alleged misconduct occurred on or after 25 November 2019, all or alternatively any of Principles 2, 4, 5 and 7 of the SRA Principles 2019, Rule 5.2 of the SRA Code of Conduct for Firms 2019 and Rule 4.2 of the SRA Code of Conduct for Solicitors 2019.

1.4 In his capacity as the Compliance Officer for Finance and Administration of the Firm at the material time, did not report the material breaches of the SRA Accounts Rules 2011, the SRA Code of Conduct 2011, the SRA Accounts Rules 2019, the SRA Code

of Conduct for Firms 2019 and the SRA Code of Conduct for Solicitors 2019 set out in this statement to the SRA, in breach of Rule 8.5 of the Authorisation Rules 2011, in breach of all or alternatively any of Principles 2, 6, 7, 8 and 10 of the SRA Principles 2011 and, to the extent that the alleged misconduct occurred on or after 25 November 2019, in breach of all or alternatively any of Principles 2, 4, 5 of the SRA Principles 2019 and Rules 3.6(a), 3.9, 5.2, 9.2(a) and 9.2(b) of the SRA Code of Conduct for Firms 2019 and Rule 4.2 of the SRA Code of Conduct for Solicitors 2019.

2. In addition, allegations 1.1, 1.2, 1.3 and 1.4 were advanced on the basis that the Respondent's conduct was dishonest. Dishonesty was alleged as an aggravating feature of the Respondent's misconduct but was not an essential ingredient in proving the allegations.

3. In respect of allegations 1.1, 1.3 and 1.4, for the misconduct which was alleged to have occurred either on or after 25 November 2019, a corresponding allegation had been made that the Respondent breached Principle 4 of the SRA Principles 2019.

Preliminary Matters

4. Application to Adjourn

4.1. The Respondent did not attend the hearing and was not represented. On 12 April 2021 the Respondent had emailed the Tribunal as follows:

> "Thank you for your E mail.
>
> I finally received the bundle of paperwork at about 11.30 am on Friday 9th April 2021.
>
> There is a vast amount of paperwork and I am in no position to be able to prepare for a four day tribunal hearing with no time to be able to read the papers. There are hundred of pages. [Redacted- reference to health matters]. The tribunal were fully aware that I did not have access to case lines.
>
> No one knew that we would still be in lock down in April when the last hearing took place.
>
> I will not be attending the hearing on the 13th April as I have not been allowed to prepare to defend myself. Therefore any hearing will be a travesty of justice as I cannot prepare for it. I have now been utterly prejudiced. I am not prepared to be part of some trial where I have been refused the right to defend myself.
>
> Secondly I am not prepared to breach Covid 19 regulations or risk catching Covid 19. I have no car. So I will have to take the bus to the train station, to get a train up to London and then the tube and travel into central London. I live in Kent. All of this during rush hour. I have been shielding due to my age. My health is not great [redacted- reference to health matters]. This is clearly a breach of government guidelines and your own guidelines. Your own email states that because of government guidance you are working remotely. No one

else is being asked to put their life at risk or breach the regulations. I am not able to work remotely. Therefore the hearing cannot take place.

I am not prepared to risk catching Covid 19 and possibly beaching Covid 19 regulations. I find it hard to believe that you are asking me to breach such rules. I have only just had the first vaccination of the astra Zenica [sic]and am at risk for three weeks. If the hearing takes place when I am unable to attend then I will be appealing and asking advice as to whether my human rights have been breached.

There is no urgency and no public interest in this matter. I am not working in the law or on a regulated area. There is no prejudice to anyone except me. [Redacted – reference to health matters].

I am utterly impecunious. I have attempted to agree an outcome but the SRA have refused. A bankruptcy petition is to be heard on the 28th June. Due to lock down it has been impossible to sort anything out. I hope with the lifting of lock down as things are now moving this will now change. During lock down I have had so many problems that I have not been coping. I have had to deal with so many issues will still holding down a full time job. Lock down has still not been lifted.

I am not sure the Tribunal has taken into consideration that I have not had the resources to properly prepare for this hearing nor to instruct solicitors on my behalf to defend the serious allegations that have been made against me of dishonesty which I vehemently deny. This is an obvious denial of my right to a fair hearing against the SRA who have unlimited resources. If I do not attend I am sure the outcome will cause me to lose my ability to practice as a solicitor which will cause me further prejudice and drastically affect my ability to work and find remuneration.

Therefore I cannot attend and if the hearing does goes ahead I put you on notice that I will be appealing any decision on the grounds of non-attendance as I am unable to prepare and being refused the right to attend."

4.2. In response to this email, the clerk to the case, Mr White, replied to the Respondent the same day as follows:

"I confirm receipt of your email below.

From my review of the file, it appears that the Tribunal only became aware of possible difficulties you were having accessing CaseLines last week, which was when I asked Mr Willcox to send you a hard copy of the papers. I note that he has now done this.

The Tribunal has not required you to "breach Covid 19 regulations". The arrangements for the hearing, including the granting of leave for you to attend Gate House to use our equipment is entirely in line and complaint with all Covid 19 regulations and government guidance.

> Your email will be placed before the Tribunal in advance of tomorrow's hearing. If Mr Willcox wishes to provide a written response then this will similarly be placed before the Tribunal."

4.3. The Respondent sent a further email, again on 12 April, on a different thread but plainly in response to Mr White's email as follows:

> "Thank you for your E mail.
>
> I disagree with the fact Tribunal did not know that I could not get on to Case Lines.
>
> Secondly whether your offices are safe are irrelevant. I have not travelled on public transport for a year because of the fear of contracting Covid 19. I get to the office with Case lines I will have to get a bus to the train station, catch a train from Strood in Kent to London and then get a tube. I will have to do this twice a day for four days during rush hour in Central London.
> Your offices might be safe however you cannot guarantee my safety using public transport. I have only just had the first jab and so am still vulnerable to catching Covid 19. I am not prepared to risk catching and or spreading Covid 19 from having to use public transport.
>
> I am not prepared to put my health and other peoples health at risk. So I will not be attending your offices. As I cannot use another computer, I will be unable to attend the hearing.
> Yours Faithfully
>
> Nicholas Whiffen
>
> I am not seeking to be obstructive or to avoid attending a hearing, I am just asking for sufficient time to regain [Redacted – reference to health matters] and financial stability which allows me to properly prepare and defend myself before the SDT."

4.4. The Tribunal took the view that although a formal application to adjourn had not been made, it would treat the Respondent's emails as such an application.

Applicant's Submissions

4.5. Mr Willcox opposed an adjournment of the matter. The Respondent had only recently stated that he was not prepared to attend the Tribunal offices in person as he had to use public transport. The Respondent had access to the papers, as was evident from the fact that he had instructed solicitors to prepare his Answer earlier in the proceedings. The Tribunal had sent the papers by secure email at the start of the proceedings. In respect of the medical matters raised in his emails, Mr Willcox noted that there had been no medical evidence served. In response to a point raised by the Chair, Mr Willcox did confirm that medical evidence had been provided in advance of the adjourned hearing in December 2020 but submitted that this would now be out of date and no further medical evidence had been submitted.

The Tribunal's Decision

4.6. The Tribunal referred to Rule 23 of the Solicitors Disciplinary Proceedings Rules 2019 ("SDPR") and the Guidance Note attaching to that, which dealt with Adjournments. The Tribunal reviewed the email correspondence leading up to this hearing and noted the history of the matter. It considered all points raised by the Respondent, notwithstanding the fact that they had not been supported by a statement of truth, despite the lateness of the application.

4.7. The Respondent had raised a number of reasons why he claimed he could not attend the hearing and why it should not go ahead. The Tribunal considered each of these carefully.

4.8. The Respondent had claimed that he did not have access to CaseLines and that he had therefore not had a chance to prepare for the hearing. The Tribunal found this unpersuasive. The Respondent had been sent the papers by email at the start of the proceedings in August 2020. He would have been aware of the fact that the case would be operating using CaseLines from the outset. The Respondent had clearly had access to the papers as he would not otherwise have been able to provide instructions to his then-solicitors in order to prepare his Answer to the Allegations. Further, the Tribunal staff had made themselves available to assist him with any technical difficulty he may have encountered with CaseLines. The papers had also then been sent by hard copy the week before the hearing. The Tribunal, therefore, did not find this argument should be the basis for an adjournment.

4.9. The Respondent had raised issues relating to his health. While they are not set out in detail here, the Tribunal had regard to those submissions. However, none of them were supported by any medical evidence, let alone the reasoned opinion of an appropriate medical examiner. There was therefore no basis to adjourn on medical grounds.

4.10. The Respondent had also raised the fact that he was not represented. This was not generally a reason to adjourn. The Respondent had previously had legal assistance in this matter and he had been given ample time to arrange representation if he so wished.

4.11. The arguments raised by the Respondent about not wishing to travel to London were similarly not persuasive, particularly in light of the fact they had only been raised the day before the hearing. The Tribunal had granted leave for the Respondent to attend its offices, which were otherwise closed, to use its IT equipment on account of his stated lack of appropriate IT equipment. Tribunal staff had attended those offices in order to make those facilities available to him. The arrangements made for his attendance were entirely in line with Covid-19 regulations and guidance. There was therefore a safe alternative to participating remotely and the Respondent, when requesting such alternative arrangements had not raised his concern about travelling at that time. This was therefore not a basis on which an adjournment could be justified.

4.12. There were, therefore, no grounds advanced by the Respondent which would justify an adjournment of the matter. The Tribunal noted that he was not practising and acknowledged that there was little ongoing risk to the public. However, that was only one factor and could not in itself justify an adjournment. The Tribunal therefore declined to adjourn the matter.

5. Application to Proceed in Absence

5.1 Mr Willcox applied to proceed in absence pursuant to Rule 36 of the SDPR and referred the Tribunal to in R v Hayward, Jones and Purvis [2001] QB 862 and to GMC v Adeogba [2016] EWCA Civ 162.

5.2 Mr Willcox took the Tribunal through the history of the case and reiterated the submissions made earlier about service of the documents. The Respondent was clearly aware of the hearing date and had voluntarily absented himself, thus waiving his right to appear.

The Tribunal's Decision

5.3 Rule 36 of the SDPR gave the Tribunal the power to proceed in absence if it was satisfied that the Respondent had received notice of the hearing. The Respondent was aware of the date of the hearing, as evidenced by his emails relating to it, and SDPR Rule 36 was therefore engaged. The Tribunal had regard to the criteria for exercising the discretion to proceed in absence as set out in Hayward, Jones and Purvis by Rose LJ at paragraph 22 (5) which states:

> "In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:
>
> (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;
> (ii) …;
> (iii) the likely length of such an adjournment;
> (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;
> (v) …;
> (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;
> (vii) …;
> (viii) …;
> (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;
> (x) the effect of delay on the memories of witnesses;
> (xi) …;"

5.4 In Adeogba Leveson P noted that in respect of regulatory proceedings there was a need for fairness to the regulator as well as a respondent. At [19] he stated:

> "…It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate

> the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage with the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed".

5.5 Leveson P went on to state at [23] that discretion must be exercised "having regard to all the circumstances of which the Panel is aware with fairness to the practitioner being a prime consideration but fairness to the GMC and the interests of the public also taken into account".

5.6 The Tribunal had in mind the circumstances of the Respondent's absence as set out under the consideration of the adjournment.

5.7 The Tribunal accepted that the public interest was not harmed by the matter not proceeding as the Respondent was not practising. However, there was a general public interest in serious allegations being determined in a reasonable timescale.

5.8 The Tribunal was not persuaded that an adjournment would secure the Respondent's attendance given all the measures that had been put in place for this hearing to enable him to participate. The Respondent had access to the papers, knew of the hearing and of the particular arrangements made for him to attend it. The Respondent had provided his dates to avoid in advance of the date being set. The Respondent had been engaging until the last moment, at which point he had stated that he was not attending. The reasons for his non-attendance were not accepted as being good reasons by the Tribunal, as set out above. The Tribunal was satisfied that the Respondent had chosen not to attend and had thereby waived his right to do so. It was therefore in the interests of justice that the hearing should proceed, notwithstanding the Respondent's absence.

5.9 The application to proceed in absence was therefore granted.

Factual Background

6. The Respondent was admitted to the Roll of Solicitors on 17 March 1997. At the time of the hearing he did not hold a current practising certificate. At the time of the alleged misconduct, the Respondent was the sole practitioner of Hesling Henriques Solicitors ("the Firm") the address of which was Suite 20, 30 Churchill Square, Kings Hill, West Malling, Kent, ME19 4YU. He was the firm's Compliance Officer for Legal Practice ("COLP") from 3 May 2019 to 26 June 2019, when it was a partnership, and from 27 June 2019 to 24 March 2020, when it was a sole practice. He was also the firm's Compliance Officer for Finance and Administration ("COFA") from 14 November 2012 to 26 June 2019 when it was a partnership, and then from 27 June 2019 to 24 February 2020. On 20 March 2020 a SRA Adjudication Panel resolved to intervene into the firm.

7. On 3 July 2019, the SRA received a report from JL, a barrister, in respect of nonpayment of fees on three clinical negligence claims which the Firm had instructed her on, between July and October 2015, those being SH, JH and RC. JL stated that she had received her instructions on all three matters on Conditional Fee Agreements, and that all three matters had settled. The total of her outstanding fees was £28,265.00. JL

stated that she had evidence which confirmed that the Respondent had received settlement of costs for pursuing the claims, including monies for the purpose of discharging her professional fees, but that he had failed to pass on the costs received by way of fee payment to her.

8. JL had instructed WE Solicitors in an attempt to recover her fees from the Respondent and a statutory demand had been served on the Respondent. The Respondent had made an application to set this statutory demand aside. A hearing was due to take place in the Maidstone County Court on 20 August 2019. As a result of JL's report, an Investigation Officer in the SRA's Investigation and Supervision Department commissioned a Forensic Investigation of the firm. Sarah Taylor, a Forensic Investigation Officer ("the FIO"), commenced her inspection on 7 January 2020. Her findings were set out in her report ("the FIR") dated 25 February 2020.

Allegation 1.1

9. The FIR reported that "due to various irregularities of the firm's accounting records, Miss Taylor was not able to rely on the books of account or calculate the full extent of the firm's liabilities to its clients." The FIO was able to calculate a minimum cash shortage as at the extraction date of 31 December 2019 in the sum of £195,867.59. This was caused by unpaid disbursements incorrectly held in the office account in the sum of £153,607.27 (Allegation 1.1.1), payments from the client bank account in the sum of £30,012.82 (Allegation 1.1.2) and client damages incorrectly held in the office account in the sum of £12,247.50 (Allegation 1.1.3).

Allegation 1.1.1

10. The FIO asked the Respondent to provide a 'Creditors' List' which detailed where the Firm had received payment from a third-party insurer, or the Government Legal Department and the supplier had not been paid. On 26 January 2020, the FIO received a list from the Respondent which showed an amount owed as £13,108.48. The FIO made her own enquiries and provided the Respondent with a revised 'Creditors' List' totalling £153,607.27.

Exemplified matter of CW

11. On 16 August 2017, CW signed a Conditional Fee Agreement in respect of a personal injury he had sustained whilst serving a prison sentence. On 25 October 2019, a schedule of costs was sent to the Government Legal Department in the sum of £4,602.00. The client matter ledger showed that the costs and disbursements were received in full from the Government Legal Department on 19 November 2019.

12. The schedule of costs detailed an invoice for a medical report totalling £1,200.00 produced by Ather Medical Limited. On 19 November 2019, the Firm raised a bill and transferred the full amount from client account, including the £1,200.00 due to Ather Medical Limited.

13. The bill included CW's damages, together with the Firm's costs and disbursements which totalled £6,802.00. A transfer from the client account to the office account in the sum of £6,700.86 then took place, leaving a debit balance on the client matter ledger in

the sum of £2,098.86. The Firm received CW's damages in the sum of £2,200.00 from the Government Legal Department on 20 November 2019, replacing the client account shortage in the sum of £2,098.86 and bringing the balance on client account to £101.14.

14. On 5 January 2020, the Firm authorised an office account to client account transfer in the sum of £1,648.86, the Firm having deducted its success fee of 25% from CW's total damages of £2,200.00. The FIO noted that that, as at the date of her report, CW's damages remained in the firm's client account. On 29 January 2020, the FIO wrote to Ather Medical Limited to ask them if they had received payment for the medical report.

15. On 30 January 2020, at 09:06, Dr A replied that, "despite sending…various reminders and threat of legal action…" the Firm had failed to discharge the fees for the medical report in the sum of £1,200.00. He further confirmed that his payment terms with the Firm were 12 months from the date of the invoice. The FIO reported that although 12 months had not elapsed since the invoice, the Firm had not retained the disbursement money in the Firm's client bank account or paid Dr A promptly."

Exemplified matter – JH

16. JH instructed the Firm to act on his behalf in a clinical negligence action against a NHS Trust. The Firm reached a settlement whereby he was awarded £100,000.00 in damages. The Firm received those damages on 26 March 2018. The damages were incorrectly paid into the office account. The same day, £75,000.00 was transferred to the Firm's client account. The £75,000.00 represented JH's damages less the Firm's success fee of 25%.

17. The Firm received costs and disbursements on the matter totalling £34,500.00 on 29 May 2018 and 25 June 2018. The Firm paid JH his damages in three instalments of £25,000.00 on 30 May 2018, 19 June 2018, 30 November 2018.

18. The FIO set out the disbursements which remained unpaid on this matter, and incorrectly held in the Firm's office bank account, as at the date of her report. The FIO questioned the Respondent about the unpaid disbursements during an interview that took place on 11 February 2020 as follows:

"NW [Respondent]:	Well I was under mistaken because it was CFA work so the client never paid us, that it wasn't client's money.
ST [FIO]:	Yeah but what, what are you not understanding. Why do you think it's your money? Why do you think,
NW:	Well no, I've said that…
ST:	that they got, yeah, but why do you think Dr [T] is your money and then you don't pay him. That's, that's ethically not right, is it? Why, why do you think that?
NW:	Well it's not, as I say, I was under the mistaken belief that that wasn't client's money. So, and I've, I've said that.

ST: But it's not yours, but why do you think it's your money? Why do you think that's your money to use to pay your office overheads, because that's what's, that's what's been happening, hasn't it?

NW: So as I say, that's why I've been trying to sort this all out.

ST: So do you agree then that's a shortage on your client account of £152,407.27?

NW: Well I would have said we owe to the experts and as I say, we're getting that sorted very quickly. But as I said I was under the mistaken belief because of the CFA, that wasn't client money but, you know, I've made mistakes."

19. These exemplified matters were in addition to the fees owed to JL, referred to above.

Allegation 1.1.2

20. The FIO reviewed the Firm's cash book from January 2019 to December 2019 and discovered, "50 payments from the client bank account (36832468) to the personal account of Mr Whiffen, staff wages and office overheads totalling £30,012.82." All of the payments were authorised by the Respondent. The FIO noted that the dates on which the Respondent authorised the payments, the balance on the Firm's office account was either over the overdraft limit or very close to it.

21. The 50 payments were recorded on a client matter ledger called 'Miscellaneous' and the client matter ledger detailed office to client transfers with the narrative "Wrong bank."

22. In the interview the Respondent confirmed that he had authorised the payments from the Firm's client bank account. When the FIO questioned the Respondent on how the books of account could reconcile at the end of every month, the Respondent had replied, "Well on the bank reconciliation we sorted all the money out."

Allegation 1.1.3

23. The sum of £12,247.50 also featured in the total client account shortage of £195,867.59. This was due to client damages being held incorrectly in the Firm's office account.

24. On the exemplified matter of AG, the Firm had not retained, in the client account, monies in the sum of £1,156.24 for the disbursements which should have been paid to Speed Medical and Quest Partnership, in the sums of £654.00 and £502.24.

25. The following exchange took place between the FIO, the Respondent and Mr Chambers, also a Forensic Investigation Officer at the SRA during the interview:

"JC: Because this bill includes [AG's] damages so it, it seems a curious

NW: Yeah, no

JC: situation.

NW: and I didn't draw the bill up so, I would have to look at the file. I don't know why…

JC: But, but this is,

NW: Yeah, no, no.

JC: but this is systematic, this is not just this one bill

ST: No.

JC: It's on a series of bills that Sarah has looked at

NW: Right.

JC: that you are raising bills that include your client's damages.

NW: Right.

JC: and on the strength of that bill.

NW: I would have to look at that. I, I didn't know.

ST: Well I think you did because I, I've got a whole bunch of them that we can go through if you want. Because that you know whose, whose preparing these bills? You must be looking at them to transfer the money over?

NW: Yes. So, so if there were mistakes done, we've corrected everything. We've brought in new procedures."

26. As at 25 February 2020, the Respondent had replaced £20,787.66 of the shortage, leaving £175,079.93 outstanding.

Allegation 1.2

27. As noted above, on 17 May 2019, JL served a Statutory Demand on the Respondent in respect of her outstanding fees. In the section headed "Demand," Ms JL provided the following details:

> "The creditor claims that you owe the sum of £29,900.27 full particulars of which are set out on page 2, and that it is payable immediately and, to the extent of the sum demanded, is unsecured."

28. On 5 June 2019, the Respondent applied to set aside the Statutory Demand. He made his application in the form of a witness statement which read as follows:

> "The respondents fees are disputed. This is because of the amount of time charged for the work done. Secondly the work in relation to the cases was all done under the terms of a Conditional Fee Agreement (CFA) and so only due and payable on the successful conclusion of each case. The Statutory Demand states that the cases concluded on certain dates. The dates are inaccurate and misleading, and the fees are not owing as of yet under the terms of the CFA."

29. In the interview with the Respondent, the following exchange ensued:

> "ST: Well that's wrong, isn't it?
>
> NW: Well the dates were wrong she gave. Secondly, we were going to dispute because we had quite a few problems, but obviously, at the time I was dealing with [RH's] death, so I just didn't have the time so, I just agreed to pay it.
>
> ST: But that statement is wrong, isn't it, what you said because on the [JH]…
>
> NW: Well, because we never got most of the money the…
>
> ST: You got – you did. So the J…H…case,
>
> NW: Well no, we got…
>
> ST: so the J…H…case, if you just let me finish. You received the money on 29 May 2018. So, she says the case settled on or before 20 December 2018. So that's right, isn't it?
>
> NW: I don't know. I'd have to look in the file, I can't remember.
>
> ST: Well that, that's – do you want me to show you the ledgers?
>
> NW: Well no, as I say, you asked me a date which off the top of my head I can't remember. I was…
>
> ST: Yeah, but when you're doing, when you're doing a witness statement to the court surely, you're going to be checking to make sure whether it's right or wrong, aren't you?
>
> NW: Well I thought I looked at the time and the dates were incorrect. But as I say, off the top of my head I can't remember.
>
> …
>
> ST: And then R…C…, that was the one date that she did get wrong. She said it settled on or before 25 October 2018, and actually you didn't receive your costs until 8 May 2019. But when you

did the Stat Demand you'd actually had still received the costs, because that was on 5 June 2019.

JC: Yeah but we, we have seen no evidence at all that you had any dispute with these Counsel's fees…

NW: Well I was going to get to it but just didn't and when – by the time we were paying fees and as I say, I just, I should have, I didn't. You know I was going to and then obviously [RH] fell ill and when it would have, should have been dealt with but so I apologise."

30. The Respondent's application to set aside the Statutory Demand was unsuccessful and both parties reached a settlement agreement under which the Respondent agreed to pay £5,000.00 on the 5th of every month until the debt was cleared.

Allegation 1.3

31. This Allegation related to the 50 payments from the client account referred to in Allegation 1.1.2

32. As at 10 February 2020, the Firm had outstanding business loans totalling £452,998.28. The Respondent confirmed that all of the loans were unsecured apart from one in the sum of £160,000.00 which had been taken out in November/December 2018, in respect of which there was a charge over the Respondent's personal property.

Allegation 1.4

33. The Respondent was the Firm's COFA at the time the alleged material breaches at Allegations 1.1-1.3. The Applicant's case was that the Respondent was responsible for taking all reasonable steps to ensure compliance with: the SRA Accounts Rules 2011, the SRA Code of Conduct 2011, the SRA Principles 2019, the SRA Accounts Rules 2019, the SRA Code of Conduct for Firms 2019 and the SRA Code of Conduct for Solicitors 2019 and that he had failed in that duty by not reporting the breaches.

Findings of Fact and Law

34. The Applicant was required to prove the Allegations on the balance of probabilities. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

35. The Tribunal considered carefully all the documents and witness statements presented. In addition it had regard to the submissions of both parties, which are briefly summarised below.

36. Allegation 1.1.1.

Applicant's Submissions

36.1 Mr Willcox submitted that the factual basis of the Allegation demonstrated that the Respondent had breached the Rules and Principles pleaded in the Rule 12 statement.

36.2 In respect of all Allegations, Mr Willcox invited the Tribunal to draw an adverse inference from the Respondent's failure to give evidence, pursuant to Practice Direction 5.

Respondent's Submissions

36.3 In his Answer the Respondent stated the following:

> "The Respondent accepts there was a shortfall but not the amount that was alleged regarding disbursements. The Respondent will say that he was attempting to deal with this particular issue but was under a mistaken belief that it was not client money. That said, as the Principal of the firm he accepts the matters that are alleged."

The Tribunal's Findings

36.4 The Respondent had admitted the factual basis of this Allegation, albeit not the precise amount. The Tribunal noted that he had provided very little by way of explanation, either in his interview or in his Answer, as to how the figures in the Rule 12 statement were in fact wrong. The FI Officer's evidence had not been challenged. The monies should not have been in the office account as they were to have been used to pay disbursements. The Tribunal found the admissions to have been properly made and the factual basis of Allegation 1.1.1, including the breaches of the SAR were proved on the balance of probabilities. It followed as a matter of logic that Principle 10 was also breached by this conduct, as the monies had been client monies that were earmarked for paying disbursements, not for remaining in the office account.

36.5 In relation to Principle 2, the Tribunal applied the test for integrity set out in Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366. At [100] Jackson LJ had stated:

> "Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse".

36.6 In light of the Tribunal's findings in relation to dishonesty, which are set out below, it followed as a matter of logic that the Respondent had displayed a serious lack of integrity. It further followed that the trust the public placed in the Respondent and in the provision of legal services was undermined by the Respondent's misconduct.

36.7 The Tribunal therefore found Allegation 1.1.1 proved in full on the balance of probabilities.

37 **Allegation 1.1.2**

Applicant's Submissions

37.1 Mr Willcox submitted that the factual basis of the Allegation demonstrated that the Respondent had breached the Rules and Principles pleaded in the Rule 12 statement.

Respondent's Submissions

37.2 In his Answer the Respondent stated the following:

> "It was the First Respondents understanding that Client's damages, if paid before the firm's costs under the CFA, they could then be claimed by the firm before the costs were paid. Any improper payments, if mistakes were made, were corrected in the same month. This 30,000 was corrected and is not owing. At the end on each month The Respondent was informed by his legal cashier that client account was correct at the end of each month. However, as Principal of the firms [sic] the breaches as alleged are admitted."

The Tribunal's Findings

37.3 The Tribunal noted the Applicant's invitation concerning the scope of the breaches alleged in relation to this Allegation and proceeded on that limited basis.

37.4 The Respondent had admitted this Allegation and the Tribunal found those admissions properly made based on the evidence before it.

37.5 The Tribunal found the breaches of Principles 2, 6 and 10 proved on the balance of probabilities for the same reasons as Allegation 1.1.1 and on the basis of the analysis set out in relation to dishonesty below.

37.6 The Tribunal found Allegation 1.1.2 proved in full on the balance of probabilities.

38. Allegation 1.1.3

Applicant's Submissions

38.1 Mr Willcox submitted that the factual basis of the Allegation demonstrated that the Respondent had breached the Rules and Principles pleaded in the Rule 12 statement.

Respondent's Submissions

38.2 In his Answer the Respondent stated the following:

> "The Respondent will say that if money was held incorrectly in office account then it was under an honest mistaken belief. He did not do anything intentionally, any mistakes were made at a time when he was dealing with RH

> whilst she was in hospital. However, as Principal of the firms the breaches as alleged are admitted."

The Tribunal's Findings

38.3 The Respondent had admitted this Allegation and the Tribunal found those admissions properly made based on the evidence before it.

38.4 The Tribunal found the breaches of Principles 2, 6 and 10 proved on the balance of probabilities for the same reasons as Allegation 1.1.1 and on the basis of the analysis set out in relation to dishonesty below.

38.5 Allegation 1.1.3 was therefore proved in full on the balance of probabilities.

39. **Allegation 1.2**

Applicant's Submissions

39.1 Mr Willcox submitted that the factual basis of the Allegation demonstrated that the Respondent had breached the Rules and Principles pleaded in the Rule 12 statement.

Respondent's Submissions

39.2 In his Answer the Respondent stated the following:

> "The Respondent totally refutes that he deliberately mislead the court and that he acted dishonesty. He did not think that the money was owing at the time and his intention was to dispute JL's fees. However, because of the RH's illness he never managed to address this problem. This allegation is denied."

The Tribunal's Findings

39.3 The Tribunal reviewed the wording of the witness statement made by the Respondent before the County Court. It was not in dispute that the Respondent had signed this witness statement verified by a statement of truth. The Respondent had stated "The Respondent's fees are disputed". The Respondent did not state that he had disputed them. The way in which the Allegation was pleaded in the Rule 12 statement required the Tribunal to find that the Respondent had dishonestly set out to deliberately mislead the Court. The pleading left no room for the possibility of error, carelessness or recklessness on the part of the Respondent. There was no way that a solicitor could sign a witness statement in order to mislead the Court without being dishonest.

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

> " the test of dishonesty is as set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan and by Lord Hoffmann in Barlow Clowes: ….. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in

> practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledgeable belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

39.5 The Tribunal applied the test in Ivey and in doing so, when considering the issue of dishonesty adopted the following approach:

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

- Secondly, once that was established, the Tribunal then considered whether that conduct was honest or dishonest by the standards of ordinary decent people.

39.6 In establishing the Respondent's state of knowledge, the Tribunal noted that he had taken issue with the fees, even if he had not formally raised a dispute, as he had explained in his interview. The Tribunal was not satisfied on the balance of the probabilities that the Respondent knew that his witness statement was misleading. The Tribunal was therefore not satisfied on the balance of probabilities that the Respondent had set out to mislead the Court. The statement could have been clearer, but that did not equate to a deliberate act with the intention of misleading the Court.

39.7 The Tribunal therefore found Allegation 1.2 not proved.

40. Allegation 1.3

Applicant's Submissions

40.1 Mr Willcox submitted that the factual basis of the Allegation demonstrated that the Respondent had breached the Rules and Principles pleaded in the Rule 12 statement.

Respondent's Submissions

40.2 In his Answer the Respondent stated the following:

> "The Respondent did not believe that client money was misused. These events took place when RH was ill and then in the aftermath of here death. The Allegations are denied."

The Tribunal's Findings

40.3 The Tribunal noted that this Allegation was related to the sums of money that formed the basis of Allegation 1.1.3. The client monies had, by the Respondent's admission, been incorrectly held in office account. This Allegation related to the dispersal of those sums, as detailed above under 'factual background'. The Respondent had not

challenged the evidence of the FI Officer. The payments identified were clearly in breach of the SAR and the Tribunal found that the Respondent was effectively running the client and office accounts as one.

40.4 This was an obvious breach as the purpose of segregating client monies was so that if the Firm became insolvent then client monies would be protected. The points the Respondent had raised did not amount to a defence but fell to be considered by way of mitigation.

40.5 The Tribunal found the breaches of the SAR proved on the balance of probabilities. In view of the significant sums of client monies that were misused, the breaches of the Outcomes and Principles were also proved on the balance of probabilities. The alleged breach of Principle 4 of the 2019 Code of Conduct, which alleged dishonesty, is dealt with under Allegation 2 below.

41. **Allegation 1.4**

Applicant's Submissions

41.1 Mr Willcox submitted that the factual basis of the Allegation demonstrated that the Respondent had breached the Rules and Principles pleaded in the Rule 12 statement.

Respondent's Submissions

41.2 In his Answer the Respondent stated the following:

> "The Respondent accepts that as the Compliance Officer within the firm for Finance and Administration, that he had responsibility to ensure full compliance, whilst there is strong mitigating circumstances concerning RH he accepts that he fell below the very high standards expected of a solicitor in practice in this regard and in doing so the Allegations are accepted."

The Tribunal's Findings

41.3 The Respondent had admitted this Allegation and the Tribunal found those admissions properly made based on the evidence before it.

41.4 The Tribunal found this Allegation proved in full on the balance of probabilities. The alleged breach of Principle 4 of the 2019 Code of Conduct, which alleged dishonesty, is dealt with under Allegation 2 below.

42. **Allegation 2 - Dishonesty**

Applicant's Submissions

42.1 Mr Willcox submitted that in respect of each Allegation, the Respondent's conduct was dishonest. He referred the Tribunal to the test for dishonesty as set out in Ivey.

42.2 Mr Willcox submitted that at the time the Respondent was incorrectly holding unpaid disbursements in the office account, making improper payments from the client bank account into his personal account, paying staff wages and overheads, and incorrectly holding client damages in the office account, he knew, as the Firm's COFA, that what he was doing was in breach of the rules and that he should not have been treating client money in that way.

42.3 In respect of Allegation 1.2, Mr Willcox submitted that at the time the Respondent signed and dated his witness statement he knew that it was not true to say that he disputed Ms JL's fees because he had not disputed her fees and was no evidence to suggest that he had done so. Mr Willcox submitted that the irresistible inference to be drawn was that the Respondent deliberately provided untruthful information in his witness statement in order to mislead the Court, so that the Court would set aside the statutory demand. His conduct was therefore dishonest.

42.4 In respect of Allegation 1.3, Mr Willcox submitted that at the time the Respondent was misappropriating client money, in his capacity as an experienced solicitor and as the Firm's COFA, the Respondent knew that he should not have been conducting his business in that way. Mr Willcox submitted that his conduct was therefore dishonest.

42.5 In relation to Allegation 1.4, Mr Willcox submitted that as the Firm's COFA at the material time, the Respondent knew or believed it was incumbent upon him to report the material breaches set out in this statement to his regulator. By deliberately not doing so in order to conceal his wrongdoing the Respondent's conduct was dishonest.

Respondent's Submissions

42.6 The Respondent had strongly denied acting dishonesty in respect of any of the Allegations.

The Tribunal's Findings

42.7 The Tribunal applied the test set out in Ivey in respect of Allegations 1.1.1, 1.1.2, 1.1.3, 1.3 and 1.4

42.8 In respect of Allegation 1.1.1, and indeed all the Allegations, the Tribunal recognised that the Respondent was dealing with RH's illness and that this represented a very difficult time in the Respondent's life. This had not been disputed by the Applicant. However the Tribunal noted that there was considerable activity in the bank accounts around this time and so it was not merely a case of money passively sitting in the office account unbeknown to the Respondent. The Tribunal found that the Respondent knew that the monies were in the office account and he knew that the disbursements were unpaid. The Tribunal found that the Respondent took a decision to withhold payments for these legitimate disbursements due to the parlous state of the Firm's finances, which he was also aware of.

42.9 The Tribunal was satisfied on the balance of probabilities that knowingly withholding payment of monies owed by holding the monies in the office account would be considered dishonest by the standards of ordinary decent people.

42.10 In respect of Allegation 1.1.2, the Respondent's actions were even more pro-active as they involved making improper payments from the client account. These were substantial sums and the Respondent was aware of the payments and aware they had come from client account. The attempt to blame the cashier was not plausible as the Respondent was the only person who could have authorised such payments. The Tribunal noted that some of the payments were made to the Respondent's own bank account and others were for the Firms' overheads. The Tribunal was satisfied on the balance of probabilities that knowingly making improper payments from the client account would be considered dishonest by the standards of ordinary decent people.

42.11 In respect of Allegation 1.1.3, the same analysis applied as in relation to Allegation 1.1.1, only this time the monies were client damages. The Tribunal again found that these monies had been incorrectly retained knowingly. The Tribunal was satisfied on the balance of probabilities that knowingly withholding payment of client damages by holding the monies in the office account would be considered dishonest by the standards of ordinary decent people.

42.12 In respect of Allegation 1.3, this was the next stage of the monies being dishonestly held as discussed in relation to Allegation 1.1.3. The same analysis as Allegation 1.1.2 was applicable in that the Respondent was aware of the payments and would have been fully aware that they were not proper uses of the monies. The Tribunal found that misusing client monies that were client damages would be considered dishonest by the standards of ordinary decent people.

42.13 In respect of Allegation 1.4, the Tribunal found that the Respondent knew he had a duty to report these very serious breaches as he would have been aware of this as part of his role as COFA. The Respondent knew that he had not reported the breaches and the reason he had not done so was that he was responsible for them and had committed them knowingly. The decision not to report could only be seen as part of an attempt by the Respondent to conceal his own wrongdoing.

42.14 The Tribunal found that failing to report to the SRA in these circumstances would be considered dishonest by the standards of ordinary decent people.

42.15 The Tribunal therefore found Allegation 2 proved on the balance of probabilities.

Previous Disciplinary Matters

43. There was no record of any previous disciplinary findings by the Tribunal.

Mitigation

44. In his Answer, the Respondent provided background to these matters. He set out the background to the ill-health of his personal and business partner, RH, who subsequently passed away. The Respondent set out the "devastating" impact of this on him personally and on the Firm. The Respondent explained that as a result of these events, he did not supervise the legal cashier as he should have done. The Respondent accepted that he had allowed matters to "run out of control" and that failing to properly supervise and oversee the accounting systems had ultimately led to the closure of the Firm. The Respondent stated that he had sought professional advice from an Insolvency

Practitioner at any early stage but now realised that specialist legal assistance may have allowed him to avoid an intervention and to deal more competently with the matters that had arisen.

45. The Respondent vehemently denied any allegations that he ever acted dishonestly. He stated that he valued his role as a solicitor and his former practice had an extremely good reputation in the field of work that was being undertaken. The Respondent apologised for the situation "that ultimately led to Regulatory action".

Sanction

46. The Tribunal had regard to the Guidance Note on Sanctions (December 2020). The Tribunal assessed the seriousness of the misconduct by considering the Respondent's culpability, the level of harm caused together with any aggravating or mitigating factors.

47. In assessing culpability, the Tribunal identified the following factors that led to the conclusion that the Respondent's culpability was high:

- The motivation was financial;
- The misconduct was planned as it took place over a considerable period of time;
- There was a clear breach of trust – client money was involved and such monies were sacrosanct;
- The Respondent was a sole practitioner and so had direct control and responsibility for the matters giving rise to the misconduct;
- The Respondent was significantly experienced, having been qualified for over 20 years.

48. In assessing the harm caused, the Tribunal identified the following factors:

- The Tribunal noted that there was no direct evidence of loss but it also noted that the Respondent was the subject of a bankruptcy petition;
- The risk of harm was significant and the Respondent would have known this at the time;
- The harm to the reputation of the profession was also significant. Many of the clients were vulnerable and were looking to him and were dependent on him. The clients were medical negligence and/or prisoner claims and as such the clients were ill-equipped to deal with the consequences of the Respondent's misuse of their monies.

49. The misconduct was aggravated by the Respondent's dishonesty. Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin observed:

> "34. there is harm to the public every time 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"."

50. The misconduct had been deliberate, calculated and repeated and had continued over a period of time. The Respondent knew that he was in material breach of his obligations.

51. The misconduct was mitigated to a limited extent by the fact that some of the disbursements had been paid and there had been some admissions to the Allegations.

52. The misconduct was so serious that a Reprimand, Fine or Restriction Order would not be a sufficient sanction to protect the public or the reputation of the profession from future harm by the Respondent. The misconduct was at the highest level and the only appropriate sanction was a strike-off. The protection of the public and of the reputation of the profession demanded nothing less.

53. The Tribunal had regard to Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin). The circumstances in which such a sanction was not imposed were exceptional, described in Sharma as "a small residual category where striking off will be a disproportionate sentence in all the circumstances ...".

54. In Solicitors Regulation Authority v James [2018] EWHC 3058 (Admin) at [101], Flaux LJ set out the basis of which question of exceptional circumstances was assessed:

> "First, although it is well-established that what may amount to exceptional circumstances is in no sense prescribed and depends upon the various factors and circumstances of each individual case, it is clear from the decisions in Sharma, Imran and Shaw, that the most significant factor carrying most weight and which must therefore be the primary focus in the evaluation is the nature and extent of the dishonesty, in other words the exceptional circumstances must relate in some way to the dishonesty."

55. The Tribunal considered whether the circumstances in this case were exceptional, having regard to James.

56. The Tribunal recognised that the Respondent's partner had been severely ill and had subsequently passed away and left him bereft. The Tribunal had great sympathy with the Respondent in that regard. However, the financial problems of the Firm, which gave rise to the serious misconduct had pre-dated RH's illness. The difficult personal circumstances could not obscure the fact that the Respondent would have been aware of his professional duties, particularly in relation to client monies. The Tribunal found it as rather unpalatable that the Respondent had sought to justify dishonest withdrawals from the client account by reason of RH's illness and death.

57. The Tribunal did not find that the circumstances were exceptional and there was therefore nothing that would justify a lesser sanction. The only appropriate and proportionate sanction was that the Respondent be struck off the Roll.

Costs

58. Mr Willcox applied for an order that the Respondent pay the Applicant's costs in the sum of £18,577.05. This included a reduction of £1,040 to reflect the fact that the hearing had taken one and a half days rather than three days as originally estimated. Mr

Willcox told the Tribunal that the Applicant would seek to prove any costs order in the bankruptcy and would rank with other creditors.

59. The Tribunal reviewed the schedule of costs and did not consider them too excessive. The FIR would have been complicated in this case given the financial state of the Firm. The matter had been listed for a three-day, contested hearing and it was only the day before that the Respondent had confirmed that he would not be attending. The Applicant had therefore had to prepare on the basis that the Respondent would be attending and defending many of the Allegations.

60. The Tribunal reviewed the Respondent's personal finances and noted the Applicant would seek to recover its costs through the bankruptcy process. There was no basis to reduce the costs further, beyond rounding them down to £18,500.

Statement of Full Order

61. The Tribunal Ordered that the Respondent, NICHOLAS PETER WHIFFEN 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 £18,500.00.

Dated this 10th day of May 2021
On behalf of the Tribunal

J Evans
Chair