The Tribunal's order for costs in this matter was subject to appeal by the Respondent. On 8 February 2022 Cotter J, sitting in the Administrative Court of the High Court, allowed the appeal and determined that the Tribunal should have made 'No order for costs'.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12165-2021

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

MAXINE BARNES Respondent

Before:

Mr A N Spooner (in the chair)
Mrs C Evans
Mrs L McMahon-Hathaway

Date of Hearing: 5–9 July 2021

Appearances

Louise Culleton, barrister at Capsticks LLP, 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant.

Susanna Heley, Solicitor of RadcliffesLeBrasseur LLP, 7th Floor, 85 Fleet Street, London EC4Y 1AE for the Respondent.

JUDGMENT

Allegations

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

1.1 Between 30 September 2016 and 15 September 2017, she caused or allowed the Firm to undertake and charge for work done under a Lasting Power of Attorney ('LPA') for Client A in the knowledge that the LPA had been revoked. In doing so, she breached all or any of Principles 2, 6 and 10 of the SRA Principles 2011 ("the Principles").

2. Between 13 October 2014 and 30 September 2016, and in respect of Client A, she caused or allowed the Firm to withdraw monies from the client account for the Firm's costs without providing written notification to Client A of the costs incurred and in excess of what was agreed and/or fair and reasonable. In doing so, she:

2.1. Breached any or all of Rules 17.2, 20.1 and 20.3 of the SRA Accounts Rules 2011 ("the SAR");

2.2. Breached any or all of Principles 2, 4, 6, and 10 of the Principles;

2.3. Failed to achieve Outcomes (1.12) and (1.13) of the SRA Code of Conduct 2011 ("the Code").

3. During and after January 2017, while acting in the estate of JD (deceased), she caused or allowed the Firm to:

3.1. raise a bill of costs totalling £40,315.80, which exceeded the fixed fee agreed with the estate's executors;

3.2. withdraw monies totalling around £37,915.80 from the client account which was in excess of the agreed fixed fee.

In doing so, she breached all or any of:

3.3. Rules 6.1, 7.1, 7.2, 20.1 and 20.3 of the SAR;

3.4. Principles 2, 4, 6 and 10 of the Principles.

4. Between 18 April 2018 and 1 May 2018, she caused or allowed one or more improper transfers of client money to be made from the Firm's client account to an unregulated entity which did not operate a client account. In doing so she breached all or any of:

4.1. Rules 6.1, 7.1, 13.1 and 14.1 and 20.1 of the SAR;

4.2. Principles 2, 4, 6 and 10 of the Principles.

5. Dishonesty was expressly alleged in relation to allegation 1 above only. Recklessness was alleged in relation to allegation 1 only (in the alternative to dishonesty). Dishonesty

and recklessness were not essential ingredients to establish that allegation or any of its particulars, but were alleged as aggravating features of the Respondent's misconduct.

Preliminary Matter

6. The Applicant applied to amend the dates in allegations 1 and 2. The Respondent supported that application. The Tribunal determined that it was appropriate and in the interests of justice to allow the amendments. Accordingly, the application was granted. The amended dates were as they appear in the allegations detailed above.

Factual Background

7. The Respondent was admitted to the Roll in October 2001. At the start of the period covered by these allegations, the Respondent practised as the sole director, manager, Compliance Officer for Legal Practice (COLP) and Compliance Officer for Finance and Administration (COFA) of the Firm.

8. The Respondent held a practising certificate for the practice year 2019/2020 which was subject to the following conditions:

- She is not a manager or owner of any authorised body or authorised non-SRA firm.
- She does not hold or receive client money, or act as a signatory to any client or office account or have the power to authorise transfers from any client or office account.
- She may not practise on her own account under Regulation 10.2(a) and (b) of the SRA Authorisation of Individuals Regulations.

9. The Authorisation Officer gave the following reasons for the conditions:

- The Respondent's ability to manage a firm in accordance with proper governance and sound financial and risk management principles, and to make sure that she complies with her managerial regulatory requirements. This followed the liquidation and intervention into the Firm;
- The Respondent's ability and suitability to undertake the roles of manager or owner of a firm following the intervention into the Firm and the SRA's ongoing investigation into her conduct;
- The public's confidence in the Respondent's ability to hold and/or transfer client money.

10. The Firm commenced trading on or about 5 January 2016. The Applicant commenced an investigation of the Respondent's practice at the Firm on 6 June 2017 which was conducted by a Forensic Investigation Officer of the SRA ('the First FIO'). The First FIO produced a forensic investigation report dated 17 November 2017 ("FIR"). The Firm ceased trading on 30 April 2018 and entered a Creditors Voluntary Liquidation on 14 June 2018.

11. Following receipt of a confidential complaint on 26 and 27 April 2018, a further forensic inspection was commenced by a Forensic Investigation Officer ("the Second FIO") on 3 May 2018 without advance notice given to the Firm. The Second FIO produced a forensic investigation report dated 8 May 2019 ("FIR2").

12. On 27 July 2018, the Respondent was made bankrupt, and her practising certificate was automatically suspended as a result. On 17 August 2018, the Respondent's practising certificate was reinstated with conditions.

13. On 20 September 2018, the Firm was intervened into following a decision by an Adjudication Panel on 19 September 2018.

Witnesses

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

- Solicitor S
- Sue Corbin – Expert witness
- Maxine Barnes – Respondent

15. 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 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

16. 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 her private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Tribunal considered all the evidence before it, written and oral together with the submissions of both parties.

Dishonesty

17. 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."

18. 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.

Integrity

19. 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

20. 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."

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

22. When determining dishonesty, recklessness and integrity, the Tribunal had regard to the references supplied on the Respondent's behalf.

23. **Allegation 1 - Between 30 September 2016 and 15 September 2017, she caused or allowed the Firm to undertake and charge for work done under a LPA for Client A in the knowledge that the LPA had been revoked. In doing so, she breached all or any of Principles 2, 6 and 10 of the Principles.**

The Applicant's Case

23.1 Client A instructed the Firm to prepare a LPA for Property and Financial Affairs on or around 27 November 2014. The Respondent was appointed as sole Attorney under the LPA, which was registered with the Office of the Public Guardian ("OPG") on 29 April 2015.

23.2 The LPA stated on page 2 that the effect of the registration of the LPA was that the Respondent could make decisions for Client A, both when she had mental capacity and when she lacked mental capacity, subject to the principles of the Mental Capacity Act

2005 that she was required to follow. The LPA also stated on page 2 that Client A could cancel the LPA at any time, before or after it was registered, provided she had mental capacity to do so.

23.3 As regards fees, the LPA stated: "Charges can be made by a professional attorney while acting in their capacity as attorney". No further detail regarding fees was provided.

23.4 On 20 April 2016 the Firm deposited £40,000 into its client account which had been withdrawn from Client A's Santander account. On 28 April 2016, the Firm transferred £15,963 to the office account relating to the payment of raised bills, and transferred the remaining £24,037 to a deposit account.

23.5 In late July and early August 2016, Employee A became aware that Client A had instructed another firm to act on her behalf ("the Other Firm").

23.6 On 16 August 2016, the Respondent emailed a Regulatory Supervisor at the SRA following a complaint made to the SRA regarding Client A. The SRA told the Respondent that, at that stage, it intended to leave the matter for the respective solicitors to resolve as it did not consider that any regulatory action was required. The Respondent told the Regulatory Supervisor that the Firm would liaise with the Other Firm.

23.7 By letter dated 26 August 2016 addressed to the Respondent, the OPG stated that they had received a deed of revocation from Client A and "as a result" the OPG had cancelled the LPA and removed it from the register. The OPG notified the Respondent that, "This means that you are no longer allowed to use the LPA to make decisions on behalf of the donor".

23.8 By letter dated 26 August 2016 addressed to the Other Firm, the OPG revoked the LPA. Client A had signed a deed of revocation on 15 August 2016. The letter from the OPG stated: "We've removed the LPA from our register and told the attorney" (i.e. the Respondent).

23.9 On 30 August 2016 Employee B of the Firm, telephoned the Other Firm to discuss Client A. The Other Firm told Employee B that it had lodged a deed of revocation with the OPG to revoke the LPA. The Other Firm told Employee B that this was based on several meetings with Client A and a Mental Capacity Assessment performed by the Royal Borough of Greenwich on 27 June 2016 (the "Mental Capacity Assessment"). Also on 30 August 2016, the Other Firm emailed Employee B a copy of the Mental Capacity Assessment, which Employee B reviewed. The Mental Capacity Assessment concluded that Client A "has the mental capacity to make an informed decision with regard to the management of her finances… [Client A] is deemed to have capacity to make an informed decision about her finances".

23.10 On 31 August 2016, the Respondent, Employee B and Employee A had a conference call to discuss Client A. Ms Culleton submitted that it could be inferred that on this call they discussed (i) the Other Firm's confirmation that it had lodged a deed of revocation with the OPG and (ii) the Mental Capacity Assessment, because:

- The Respondent had told the SRA that the Firm would be liaising with the Other Firm regarding Client A, so would have discussed the contact between Employee B and the Other Firm.

- The call between Employee B and the Other Firm had taken place only the previous day, and the Mental Capacity Assessment had also only been received the previous day, so these would naturally have been discussed on this conference call.

- The narratives in the Firm's client ledger for Client A for this call were "Conference call with [the Respondent] and [Employee A] on way forward with this matter in view of receiving copy Report", and "Conference call with [the Respondent] discussing report…"

- The Respondent confirmed in interview that she had seen the Mental Capacity Assessment.

23.11 Accordingly, it was submitted, by 31 August 2016 the Respondent was (i) aware that the Other Firm had lodged a deed of revocation with the OPG, and (ii) aware of the conclusion of the Mental Capacity Assessment.

23.12 The Respondent and the Firm were only instructed by Client A to act under the LPA. Once the LPA was revoked, the Firm's retainer also ended. Accordingly, when the LPA had been revoked, the Respondent should have (i) ceased acting, and caused the Firm to cease acting, for Client A, and (ii) arranged the return of funds held on deposit.

23.13 However, the Firm, including the Respondent, continued to charge time to the Client A matter from 30 September 2016 to 15 September 2017. Further, between 30 September 2016 and 17 February 2017, the Firm made five transfers from the deposit account to the office account to pay for the Firm's bills.

23.14 Ms Culleton submitted that the Respondent therefore caused or allowed the Firm to bill Client A £7,302 and deduct the following amounts from the deposit account when the LPA had been revoked:

Date	**Bill no.**	**Relating to work done between**	**Amount (£)**
30 September 2016	36089	1 to 30 September 2016	1,539.60
3 November 2016	36237	5 October to 3 November 2016	1,536.00
24 November 2016	36338	8 to 24 November 2016	785.40
13 January 2017	36564	30 November to 13 January 2017	1,998.60
17 February 2017	36692	24 January to 17 February 2017	1,442.40
Total			**7,302.00**

23.15 The Respondent stated that she continued to act for Client A because she was concerned that Client A did not have capacity to revoke the LPA. However, the LPA had been revoked, irrespective of whether the Respondent considered that it should or should not have been. The Firm's retainer had ceased, and the Respondent and the Firm should have ceased to act.

23.16 The Respondent was aware that the LPA had been revoked by 13 September 2016 or, at the latest, by 30 September 2016, because of the following matters:

- By letter dated 26 August 2016, the OPG wrote to the Respondent and the Other Firm informing them that the LPA had been revoked and stated: "We've cancelled the LPA and removed it from our register. This means that you are no longer allowed to use the LPA to make decisions on behalf of the donor".

- On 13 September 2016, the narrative in the client ledger for Client A recorded that Ms A emailed the Respondent "updating her on the matter". It was to be inferred that Ms A's email informed the Respondent that the LPA had been revoked.

- On 30 September 2016 the client ledger for Client A recorded that the Respondent spent 30 minutes reading and reviewing the Client A file. The Respondent would have become aware during this review (if she was not already aware) that the LPA had been revoked.

- On 19 December 2016 Employee B emailed the SRA and stated that "we [the Firm] received notification from the [OPG] on the 12th September 2016 informing us of the cancellation of the LPA".

23.17 Ms Culleton submitted that it was inconceivable that the Respondent was not aware that the LPA had been revoked, because she was the sole attorney under the LPA and knew that the Other Firm had lodged a deed of revocation with the OPG.

23.18 Additionally, the chronology attached to the Respondent's letter to the SRA dated 22 March 2018 contained evidence of contact between the Respondent and Employee B on 30 January 2017 described as "Re getting a copy of the LPA from the COP" and on 2 February 2017 described as "No official record of LPA registered for [Client A]". The Firm would not have carried out a search of the LPA register unless there was doubt that the Respondent remained appointed under the LPA, and would have been aware on 2 February 2017 (at the very latest) that no LPA was registered with the OPG in respect of Client A as at that date.

23.19 Ms Culleton submitted that the Respondent's conduct was likely to diminish public trust in her and in the provision of legal services, in breach of Principle 6, because the public would rightly expect solicitors appointed under LPAs to cease acting once the LPA had been revoked. Further, by charging for and deducting costs from funds held on account for Client A without a proper basis for doing so or allowing this to occur as the retainer had ended, the Respondent failed to protect client money, contrary to Principle 10.

23.20 Ms Culleton submitted that the Respondent's conduct lacked integrity in breach of Principle 2 - a solicitor instructed under an LPA and acting with integrity would be expected to cease acting once the LPA had been revoked. Instead, the Respondent and the Firm continued to charge Client A. Acting with integrity required acting with "moral soundness, rectitude and steady adherence to an ethical code" (as per paragraph 19 of Hoodless v FSA [2003] UKFTT 7). A solicitor acting with integrity would not have continued to deduct funds held on account for a client when the Firm's retainer had ended. In Wingate & Evans v SRA [2018] EWCA Civ 366, [2018] 1 WLR 3969,

the Court held at paragraph 101 that: "It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors: … Subordinating the interests of the client to the solicitors' own financial interests… Making improper payments out of the client account."

Dishonesty

23.21 The Applicant relied on the test in Ivey, detailed above. Ms Culleton submitted that in addition to the Principle breaches detailed above, which did not require proof that the Respondent knew that the LPA had been revoked, it was the Applicant's case that the Respondent knew that the LPA had been revoked. In so acting, the Respondent's actions were dishonest as Client A's money should have been returned to her.

23.22 Ms Culleton submitted that it was significant to, and indicative of, dishonesty that the Respondent knew that the LPA had been revoked, yet continued to cause and/or allow the Firm to charge time for, and deduct funds held on account for, Client A. As an experienced solicitor the Respondent would have been aware that those monies held on account by the Firm should be returned to Client A as the Firm were no longer instructed under the LPA. Despite this, the Respondent went on to make several deductions from the client account in payment for fees incurred by the Firm when it was no longer instructed. Ordinary and decent people would consider this behaviour to be dishonest.

Recklessness

23.23. Alternatively, if she was not dishonest, it was the Applicant's case that the Respondent was reckless. The Applicant relied on the test in R v G and as adopted in Brett detailed above. The facts and matters demonstrated that the Respondent was at least reckless as she was aware of a risk that the LPA had been revoked and continued to cause and/or allow the Firm to charge time for, and deduct funds held on account for, Client A.

The Respondent's Case

23.24 The Respondent admitted that her conduct was in breach of Principles 6 and 10 on the basis that she was the Principal of the Firm with ultimate responsibility for its compliance. The Respondent denied that her conduct was in breach of Principle 2, or that she was dishonest or reckless. The Respondent noted that only two of the bills complained of carried her reference, and thus would have been authorised by her. Both bills were prior to the revocation of the LPA. In her Answer the Respondent explained that Client A did not have or operate an online banking facility and used either cheques or her debit card. The Firm did not have a cheque book or debit card for Client A's account. Although Client A appeared to have a computer, all communication with her was either by telephone, letter or personal contact.

23.25 It was not unusual not to put fee details in an LPA, which could be valid for a number of years. Any fee details could become outdated, requiring the preparation of a new LPA at the client's expense. The Respondent submitted that there was no evidence that Client A had not been provided with a list of fees and charges. Client A had full control of her finances at the time the LPA was being prepared. It was inconceivable that Client A would not have known or asked for a list of fees and charges. Further, Client A had

a number of other matters that the Firm dealt with. The Applicant failed to investigate or take note of those other matters.

23.26 The Respondent was aware that Client A required the Firm to continue to pay bills. A cheque in the sum of £20,000 was requested but not received. As it has been some time since the request was made, and in the knowledge that Client A might need to go into a home if her health deteriorated, the Respondent attended the bank to request the funds.

23.27 The Respondent accepted that the Other Firm stated that it had lodged a deed of revocation with the OPG based on meetings with Client A and a Mental Capacity Assessment, however it was considered that the report was fraudulent. When the Firm contacted Greenwich council, they were told that the person was unknown to the council. The Respondent submitted that it was unknown whether Client A attended the Other Firm's office alone or was accompanied and if so, by whom. It was the Firm and the Doctor's view of Client A's mental capacity that Client A would not be able to do this on her own. Accordingly, there was a question as to the validity of Client A's instructions. It was therefore questionable whether the revocation was valid, in which case the LPA remained valid.

23.28 Further, it was considered that the medical report conducted by a social worker was not a proper assessment. The report seemed totally focused on whether Client A could handle her financial affairs. Having already seen a fraudulent email from someone claiming to be Client A, it was believed that the report was not genuine. A proper assessment would have assessed Client A's needs and would have been a single assessment dealing with both Client A's personal and financial needs.

23.29 As to the conference call on 31 August 2016, an attendance note of that call would have been in a sub-file. The Respondent submitted that the Applicant either did not seek this, or failed to enquire as to whether the attendance note existed. Any inferences suggested by the Applicant were speculative.

23.30 The letter from the OPG dated 26 August 2016, was not received by the Respondent until 12 September 2017.

23.31 As regards the bills from 30 September 2016 – 17 February 2017 in the total sum of £7,302.00, the Respondent explained that the Firm continued to act as it had Client A's best interests in mind. It was clear that Client A was not taking care of her financial affairs, and further, that there was no one else doing so. The Respondent noted that at no point during the Applicant's investigation and prosecution had it given the Firm a formal Practice Advice advising that monies should be returned to the client account. Funds could have been paid back into the client account prior to the Firm's closure. The Respondent did not accept that the Firm was at fault in continuing to act in Client A's best interests, having noted that no-one else was acting for her and that Client A was not taking control of her own finances at the time. By not providing the Firm with guidance, had not acted in Client A's best interests and had, by its negligence, breached its own principles.

23.32 It was the Applicant's case that the Respondent, irrespective of her concerns, should have ceased acting once the LPA had been revoked. The Respondent considered that the Applicant was therefore suggesting that the Firm should have "washed their hands

of Client A". The Firm had dealt with Client A for 9 years. Three members of staff felt that Client A had intermittent capacity. Further, her behaviour evidenced that she was unable or unwilling to take control of her financial affairs.

23.33 The Applicant's submissions as to the check of the OPG register were incorrect. The Firm became aware that Client A had been transferred to a home that specialised in dementia patients. The reason for the search was to establish whether a new LPA had replaced the one which had been revoked. The Respondent queried why a solicitor would take steps to revoke an existing LPA until a new LPA had been registered. To do so left Client A without anyone having the authority to take control of her finances when Client A was in a care home.

23.34 As to the Applicant's case on dishonesty, the real position was that the Respondent was doing all she could to protect Client A's welfare. It was clear from Client A's actions that she considered the Firm was acting for her and dealing with her affairs.

23.35 Ms Heley submitted that the Applicant's case as regards the termination of the retainer was premised on the revocation of the LPA. However, the LPA was distinct from the retainer. It was possible for the LPA to be revoked and for Client A to still have a retainer with the Firm and the Respondent. In order for the Applicant to prove its case, it needed to demonstrate that the Respondent was not only aware of the revocation of the LPA, but that such a revocation also terminated the retainer. The Applicant, it was submitted, had failed to do so.

23.36 The Tribunal was referred to an email to the Applicant of 19 December 2016, in which a fee earner in the Firm stated: "Although the LPA had been revoked we still had our concerns and [Client A] was still our client." Ms Heley submitted that there was nothing to suggest that the belief that Client A was still a client of the Firm was not genuinely held.

23.37 The test in Ivey was clear. In considering whether the Respondent's conduct was dishonest, the Tribunal had to consider whether the Respondent genuinely believed (whether reasonably or not) that the Firm was still retained by Client A, notwithstanding the revocation of the LPA. Ms Heley submitted that the contemporaneous evidence supported the Respondent's evidence that she considered that Client A was still a client of the Firm, and that the Firm was still retained to act for her. That genuine belief, it was submitted, was fatal to the Applicant's case on dishonesty and recklessness.

23.38 The Respondent's evidence was that she was muddled and mistaken. The Respondent had also given evidence as to her suspicions as regards communications received and the authenticity of the deed of revocation. The Respondent accepted that the deed of revocation terminated the LPA. It was noted that Client A's name had been misspelt in the deed, and also that the deed did not contain her full name. In circumstances where she was already suspicious, the typographical errors did not help to alleviate those suspicions.

23.39 The Respondent accepted with hindsight that the retainer had arguably been terminated on the revocation of the LPA and had thus accepted that her conduct was in breach of Principles 6 and 10 as alleged. Those admissions were made with hindsight and did not reflect her genuine belief at the time. It was clear and apparent from her evidence

that the Respondent considered that she was still retained to act for Client A. Accordingly, the Respondent's conduct was not in breach of Principle 2, nor was her conduct dishonest or reckless.

The Tribunal's Findings

23.40 In her oral evidence the Respondent accepted that she knew by 30 September 2016 that the LPA had been revoked and that she probably knew that that was the case by 13 September 2016, the letter from the OPG having been received by the Firm on 12 September 2016.

23.41 As regards her authority to continue acting following the revocation of the retainer, it was the Respondent's evidence that she had a general file for Client A and had conducted work under that general retainer. The general file had been opened on Client A's behalf in relation to a personal injury matter on which the Respondent was unable to advise. The general file was created in 2012 and a general client care letter was provided to Client A. It was the Respondent's evidence that her work on the LPA (save for the creation of the LPA where there was a separate retainer) was undertaken on the general file, and the work of Employee A was on the LPA file. The time accrued by the Respondent following the LPA and for her work as the attorney was charged on the general file. The Respondent explained that she had been muddled, and that work undertaken by her appeared on the LPA ledger when it should have been on the general ledger.

23.42 The Tribunal observed that the Respondent had not in any previous communication mentioned that there was a general file under which the Respondent was retained and was undertaking work. The first mention of a general retainer was during her oral evidence. The Tribunal found that the Respondent's explanation as regards a general retainer under which she was conducting work relating to the LPA to be incredible. The Tribunal did not accept that in circumstances where the Respondent had a specific retainer for the creation of the LPA, and later created a further retainer for her work as the attorney, she was conducting work in the interim, or after termination, under a general retainer. The Tribunal determined that had the Respondent considered at the time that she was working under a general retainer, her time would have been attributed to that general ledger and not to the LPA ledger. The Tribunal also noted that it was not the Respondent's case that subsequent to the revocation of the LPA, the work undertaken was pursuant to the retainer of 6 April 2016, instead, it was pursuant to the general retainer created 4 years earlier. The Tribunal did not accept that the Respondent had been muddled and that she had "intermingled" the separate files and retainers. The Tribunal considered that the Respondent's evidence as regards working under a general retainer was a recent justification and was not in the Respondent's mind at the time the work was undertaken.

23.43 The Tribunal found that as at 30 September 2016 by the latest, the Respondent was aware that she was no longer retained to act for Client A either as her attorney or in relation to any work related to the LPA, which she knew had been revoked. Thereafter, the Respondent sought to continue charging for work related to the LPA, including reviewing the file, dealing with complaints raised and checking with the Court of Protection as to the registration of any further LPA's.

23.44 The Respondent accepted in her oral evidence that she ought not to have charged Client A for the time taken in dealing with complaints raised. The Tribunal found that that concession by the Respondent was properly made. Even in circumstances where there was a retainer, (which as detailed the Tribunal found was not the case) the Respondent was not entitled to charge for that work.

23.45 The Tribunal determined that the Respondent knew that she was no longer retained once she had received the letter from the OPG. Much of the work conducted by the Respondent subsequent to the revocation of the LPA was to try to disprove that Client A had the capacity to instruct that the LPA be revoked. The Tribunal did not accept that the Respondent genuinely believed that she was still retained by Client A to conduct work relating to the LPA. She knew that the LPA had been revoked and that Client A had instructed the Other Firm. The Tribunal found that in the knowledge that she was no longer instructed, the Respondent continued to work and charge fees to Client A.

23.46 The Respondent admitted that her conduct was in breach of Principles 6 and 10. The Tribunal found breaches of Principles 6 and 10 proved on the balance of probabilities. The Tribunal considered the Respondent's admissions to be properly made.

23.47 The Tribunal found that a solicitor acting with integrity would not undertake work and charge for that work in the knowledge that there was no retainer in place and that other solicitors had been instructed. Nor would a solicitor seek to charge for work that they were not entitled to charge for. The Tribunal did not accept that the Respondent had continued to undertake work on behalf of Client A as she was concerned that there was no-one else doing so, or that she was worried that Client A was being taken advantage of by family members, or that she was concerned that the report regarding Client A's capacity was not genuine. As detailed above, the Tribunal determined that the Respondent knew the retainer had been terminated when she received notice of the revocation of the LPA. A solicitor acting with integrity would have ceased acting once they were aware that the retainer had been terminated. In failing to do so in the circumstances, the Tribunal found that the Respondent's conduct lacked integrity in breach of Principle 2.

23.48 The Tribunal found that the Respondent continued to charge Client A for work when she knew that she was no longer retained to act for Client A in relation to the LPA, and thus knew that she was not entitled to charge for any work. The Tribunal rejected the Respondent's explanation as regards a general retainer for the reasons detailed above. The Tribunal found that ordinary and decent people would consider that it was dishonest for a solicitor to continue to charge for work and to deduct monies for that work when they knew that they were no longer instructed. Accordingly, the Tribunal found that the Respondent's conduct was dishonest. Given that finding, the Tribunal did not consider whether the Respondent's conduct was reckless, recklessness being alleged in the alternative to dishonesty.

23.49 The Tribunal found allegation 1 proved on the balance of probabilities, including that the Respondent's conduct was dishonest.

24. **Allegation 2 - Between 13 October 2014 and 30 September 2016, and in respect of Client A, she caused or allowed the Firm to withdraw monies from the client account for the Firm's costs without providing written notification to Client A of the costs incurred and in excess of what was agreed and/or fair and reasonable. In doing so, she: [2.1] Breached any or all of Rules 17.2, 20.1 and 20.3 of the SAR; [2.2] Breached any or all of Principles 2, 4, 6, and 10 of the Principles; [2.3] Failed to achieve Outcomes (1.12) and (1.13) of the Code.**

The Applicant's Case

24.1 The Firm's invoices for the work done on the Client A matter totalled £26,956 + VAT. The only Terms of Business or Client Care Letter sent to Client A was dated 13 October 2014 (signed on 15 October 2014). This related to Firm's preparation of the LPA, and said that the fee would be £650 + VAT + £110 OPG fee.

24.2 The Firm did not send another Terms of Business or Client Care Letter to Client A at any stage. The matter file contained a Terms of Business from Ms S to the Respondent dated 7 April 2016, but there was no evidence that this was sent to Client A. The matter file also contained invoices but there was no evidence any invoice was ever sent to Client A.

24.3 In interview, the Respondent admitted that she did not send any costs information to Client A. She sought to justify this on the basis that in 2007 she had done work for Client A. If this was correct (which the Applicant did not accept), the Respondent had no evidence (i) that Client A recalled that work, (ii) that Client A would assume that the Respondent's hourly rate would be the same despite her new work taking place several years later, at a different firm, and (presumably) in a different capacity, (iii) that Client A was aware of the costs of other fee earners at the Firm, or (iv) that Client A was aware of all the Firm's charging practices, such as its practice of billing one unit for scanning documents into its case management system, its mileage rate, interest etc.

24.4 In her EWW response, the Respondent said that she did not think it was right to send detailed correspondence to Client A at her home which could confuse her further, and this would not have been in her best interests. This was not accepted. The Respondent's obligations included providing Client A with the best possible information about the likely overall cost of her matter (Outcome (1.13)), and acting in her best interests (Principle 4). While in certain circumstances acting in a client's best interests might involve sending simplified costs information, Client A had capacity at all times; there was no or no adequate reason that she would be confused by the provision of normal costs information; and the Applicant did not consider that it was appropriate or acceptable for the Respondent to omit to send her any costs information at all.

Charging in excess of what was agreed and/or was fair and reasonable

24.5 In non-contentious business, solicitors' remuneration was governed at all material times by the Solicitors (Non Contentious Business) Remuneration Order 2009. This stated at article 3 that a solicitor's costs must be fair and reasonable having regard to all the circumstances of the case and in particular to:

- the complexity of the matter or the difficulty or novelty of the questions raised;

- the skill, labour, specialised knowledge and responsibility involved;
- the time spent on the business;
- the number and importance of the documents prepared or considered, without regard to length;
- the place where and the circumstances in which the business or any part of the business is transacted;
- the amount or value of any money or property involved;
- whether any land involved is registered land within the meaning of the Land Registration Act 2002;
- the importance of the matter to the client; and
- the approval (express or implied) of the entitled person or the express approval of the testator to (i) the solicitor undertaking all or any part of the work giving rise to the costs; or (ii) the amount of the costs.

24.6 The report of Sue Corbin, Costs Lawyer dated 30 May 2019, established the following:

- The Firm invoiced £26,956 on the Client A matter, but the reasonable total cost was £966.50. This was an overcharge of 2,289%.
- The Firm was not entitled to charge for any of the work prior to the retainer dated 7 April 2016, apart from the agreed fee for creating the LPA. The client could not possibly have known the extent of the work being carried out, the hourly rates charged, or the running total.
- The client care letter dated 7 April 2016 gave no indication of costs incurred to date or an estimate of likely future costs.
- The revocation of the LPA terminated the retainer, and the Firm was not entitled to charge for any work after 12 September 2016. There is no evidence that the Firm informed Client A that it was invoicing her for work done after this date.
- The Firm charged Client A over £500 for addressing a complaint investigation by the SRA. This was neither reasonable nor appropriate.
- The Firm charged for time spent in encouraging Client A to attend memory clinics, speaking to her GP and memory specialist to chase the diagnosis, and letters and telephone calls concerning Client A’s hospital appointments. It was not reasonable to charge for this time because the retainer and LPA only related to the LPA for property and finance, not health and welfare.
- The average charge for processing a premium bond prize of £25 was £62.50, which was not fair or reasonable.

- The time recorded for the preparation of attendance notes was excessive, as was the time and expense claimed for scanning items of post into the case management system, charged at £9.50 per item.

- Little if any of the work justified a senior fee earner and should reasonably have been delegated to more junior fee earners, although they too mostly had unreasonably high charging rates.

24.7 Ms Culleton submitted that the Respondent was aware of the matters set out above as she was the attorney appointed under the LPA and carried out periodic reviews of the client matter file. Further, the Respondent was expressly aware of concerns within the Firm about its intended charging practices regarding the Client A matter. On 6 April 2016 Ms S emailed the Respondent as follows:

> "Hi Maxine… One thing that concerns me a little Maxine – last week you asked me to prepare a form of authority to withdraw monies to settle your bill – I sent this to [name] and believe she has sent the same. However, you did say that until [Client A] had the capacity test you was (sic) unsure as to who should sign the client care letter – you or her – at the moment nothing has been signed and if you take a bill now I think the family may well say that you did not have the authority to do so. If it is proved that [Client A] has capacity I really do think that the family will ask for all the papers to be returned to her – if they see that you have made a withdrawal of £20,000 I don't think they will be very happy. Let me know what you think – I know you have done a lot of work on the matter but I just want to save you from any problems with the family who have already threatened to report the firm to Law Society".

24.8 The Respondent replied on the same day:

> "Hi [Ms S] I don't think we need to worry about this, we have carried out a lot of work and [name] is her next of kin not these relatives who actually have no rights at all especially as I am her attorney for finance and property and she has me down as her next of kin at the hospital. The Law Society are the wrong people for them to go to and I shall fight any argument by them to the Ombudsman or the SRA. I change the letter to BACs the payment oppose (sic) to send a cheque to an office only manned 3 days a week. I am not prepared to not take costs for work she knew we were carrying out for her in any case. So under the circumstances do the care letter to me for the time being. We have not acted unreasonably so I am not worried about the family's threats."

24.9 Ms Culleton submitted that the time could be split into 3 different periods:

- 13 October 2014 to 2 December 2014 when there was a retainer for the creation of the LPA.

- 2 December 2014 to 6 April 2016 when there was no retainer in place following the creation of the LPA.

- 6 April 2016 to 30 September 2016 when the Firm sent the Respondent a retainer letter for ongoing work as the Attorney.

24.10 It was the Applicant's case that in the absence of any retainer for ongoing work as the Attorney, the Firm was not entitled to undertake any work and that all charges were therefore unfair, unreasonable and excessive. Further, even if there was a retainer in place (which was not accepted) what was charged by the Firm was considerably more than the work undertaken. It was Ms Corbin's evidence that the Firm had overcharged Client A in the sum of £19,904.50 during that period. Accordingly, the Firm's charges were unfair, unreasonable and excessive in any event.

24.11 After 6 April 2016, when there was a retainer in place, the costs charged were unfair, unreasonable and excessive, with Client A being charged for matters that the Firm could not charge for.

24.12 Ms Culleton submitted that by failing to provide the requisite written notification of the costs prior to transferring money from the client account, the Respondent and/or the Firm breached Rules 17.2, 20.1 and 20.3 SAR. The Respondent was strictly liable for those breaches under Rule 6.1 SAR.

24.13 The Respondent failed to act in the best interests of her client in breach of Principle 4. Client A paid, without prior notification, greater fees than had been agreed and/or than were fair and reasonable. Such conduct failed to protect Client A's monies and assets in breach of Principle 10. Members of the public would not expect a solicitor to fail to keep clients informed as to work undertaken and costs. In so failing, the Respondent had failed to maintain the trust the public placed in her and in the provision of legal services in breach of Principle 6.

24.14 Further, the Respondent failed to act with integrity in breach of Principle 2 in that that she charged, or caused or allowed the Firm to charge, in excess of what had been agreed and/or was fair and reasonable. A solicitor acting with integrity would have ensured that the Firm only charged what was reasonable, and that the required written advanced notification of costs was provided.

24.15 The Respondent failed to achieve Outcome (1.13) because Client A did not receive any information about the likely overall cost of her matter, whether at the time of the engagement or as the matter progressed, let alone the best possible information about those matters. As a result, Client A was not in a position to make informed decisions about the services she needed, how her matter was being handled, or the options available to her, meaning the Respondent failed to achieve Outcome (1.12).

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

24.16 The Respondent denied allegation 2, save that it was admitted that she failed to achieve Outcomes (1.12) and (1.13).

24.17 The Respondent explained that the SRA had not provided the core bundle nor any pre-retainer costs information that would have been a sub-file. It was the Firm's practise to send both invoice and time ledger to the clients at the time of issuing the invoice, and that this would have occurred on all matters. If there was no cause or necessity to write anything to the client the cashiers would print the bill, attach the time record, and post it to the client with a compliments slip. There was no evidence that this had not

occurred for Client A's matter, nor had the SRA spoken to Client A to ascertain whether, or not, she received bills or was aware of costs

24.18 Further, the Firm maintained a separate core bundle sub-file both electronically and physically which would keep: pre-instruction correspondence and attendance notes, initial instructions, signed terms of business, ID, lists of assets and liabilities and all invoices for Client A. This file would contain evidence to support my case and has not been produced by the SRA nor did it form part of their investigation reports.

24.19 The Respondent denied that the costs incurred where in excess of what was agreed and/or not fair and unreasonable as Client A was constantly requiring the Firm's assistance with her financial affairs. The Respondent, as Attorney, was the client on behalf of Client A and therefore the client care letter was properly addressed to the Attorney.

24.20 Subsequent to that time and after the LPA had been revoked all staff were acting on the basis of the previous retainer. Evidence of the previous general retainer was not sought by the SRA during the investigation. Following the closure of the Firm, the Respondent no longer had access to the documents so as to prove the existence of the general retainer.

24.21 Ms Heley submitted that in determining this allegation, it was helpful to consider the legal framework. The Applicant relied on the report of Mrs Corbin. The Respondent disagreed with Mrs Corbin's analysis of the law. Mrs Corbin, it was submitted, had misunderstood the law and failed to put relevant caselaw before the Tribunal. In her report, Mrs Corbin had failed to address issues such as whether an implied retainer existed. Those issues, it was submitted, ought to have been addressed in order to assist the Tribunal in determining the allegation. Further, the report referred to law that was not applicable to this matter either because it was irrelevant, or because it had been superseded by subsequent legislation.

24.22 Mrs Corbin had assessed much of the work done as not-chargeable based on the status of the person doing the work, without paying proper regard to her experience. It was of concern that Mrs Corbin had not referred to Fladgate LLP v Harrison 2012 WL 280466 (2012) where it was held that the giving of instructions by a client to a solicitor constituted the solicitor's retainer by that client and it was not essential that the retainer be in writing. The Tribunal was referred to Ghadami & Ghadami v Lyon Cole Insurance Group Ltd [2010] EWCA Civ 767 which further confirmed that a retainer could be implicit, and that failure to comply with the client care code did not prevent a solicitor from recovering fees.

24.23 Mrs Corbin had also failed to refer to Garbutt v Edwards [2006] 1 WLR 2907, where it was held that the failure of a solicitor to provide a client with an estimate of costs did not render the retainer unenforceable. Ms Heley submitted that the Tribunal was not assisted by the report of Mrs Corbin, and that it was unusual for a costs expert to be required in proceedings generally.

24.24 Ms Heley submitted that the Firm was undertaking work on behalf of Client A. The existence of a written retainer was therefore not determinative of the Firm's entitlement to be paid; Mrs Corbin was wrong to suggest that it did. In those circumstances the

Firm was entitled to charge Client A under the charging provisions contained in the LPA. Client A requested work be undertaken and the Firm was entitled to charge for that work. Ms Heley submitted that the absence of complete files from the Firm and the summary commentary of Mrs Corbin was deeply unhelpful. The Tribunal was in possession of the Firm's time records. It was clear from those records that the Firm had not, contrary to Mrs Corbin's evidence, charged for everything that it could. A lot of time had been recorded by the Firm that had not been billed for, following a proper review and assessment of what it was proper to bill.

24.25 Ms Heley explained that allegation 2.1 was specifically predicated on the failure to send invoices to Client A. It had been the Respondent's evidence that invoices were sent directly to Client A from the accounts department at the Firm. If that evidence was accepted, allegation 2.1 failed. The Applicant, it was submitted, had failed to prove that invoices were not sent to Client A in circumstances where the invoices were addressed to Client A on the Firm's headed paper.

24.26 The principle complaint levelled at the Respondent derived from the hourly rates charged and the status of the fee earner undertaking the work. When considering the fairness of the hourly rates charged, the Tribunal should have regard to the Respondent's evidence as to how the hourly rates were set. The Respondent had explained how she had taken account of the rates charged for similar work for other firms operating in the same or a nearby location when determining the appropriate hourly rate to charge Client A. That evidence should be preferred to the Guideline hourly rates that were last reviewed in 2010 and which were, in any event, only a starting point. It was clear from the Respondent's evidence that the hourly rate charged had been set after careful and proper consideration of what could be properly billed.

24.27 The Tribunal was referred to Section 57 of the Solicitors Act 1974. Section 57(1) permitted clients to enter into an agreement as regards remuneration before, after or during the course the transaction of any non-contentious business. Section 57(5) provided that if on an assessment of costs a solicitor relied on the agreement but the client objected to it, enquiries could be made into the facts. If it appeared to the court that the agreement should be set aside, or the amount payable under it reduced, the court could so order. Section 57(7) provided that if the agreement was relied on and the client objected to the quantum claimed, enquiries could be made into the number of hours worked and whether they were excessive. There was no scope under section 57(7) to interfere with the hourly rate charged. Accordingly, the Tribunal should not interfere with the hourly rates charged. There was no complaint about the number of hours claimed.

24.28 The Respondent, it was submitted, had properly conceded that charges made by the Firm for communication with the SRA ought not to have been made. It was for the Tribunal to determine whether that factual admission by the Respondent amounted to a breach of the Principles as alleged. Ms Heley reminded the Tribunal that in order to find a breach of the Principles, the Tribunal needed to assess the personal conduct of the Respondent and not attribute failings of the Firm to the Respondent.

The Tribunal's Findings

24.29 The Tribunal found that the Respondent had failed to achieve the Outcomes as alleged. The Tribunal determined that the Respondent's admissions were properly made. As regards the general retainer, the Tribunal repeated its findings detailed at allegation 1 above.

24.30 In her letter to the Applicant of 22 March 2018, the Respondent stated: "I decided that it was prudent to have the terms of business and most invoices submitted to myself in my capacity as Attorney and client of the firm in this matter" and "your comments as to the amounts billed between 26 April 2016 and 17 February 2017 and my alleged failure to provide [Client A] with cost information or bills to explain the charges are due to the fact that I did not think it right to send detailed correspondence to [Client A] at her home which could confuse her further."

24.31 In interview the Respondent stated that costs information would have been provided if it was considered that Client A was capable, but as she was not capable, the Terms of Business letter was sent to the Respondent as Client A's Attorney. The Tribunal noted that in email of 17 March 2016, written on Client A's behalf, it was expressly stated that Client A had no "written communication of any charges" that would be incurred for the Respondent acting as Client A's attorney. Thereafter the Respondent caused the Terms of Business letter to be sent to herself, without sending a copy to Client A, despite the express request for costs information.

24.32 In oral evidence the Respondent stated that as the bills were addressed to Client A, there was nothing to suggest that they had not been sent to Client A. As regards her admission in the interview that she had not sent Client A costs information, the Respondent explained that she was talking about sending it personally. This did not mean that bills had not been sent, just that they had not been sent by the Respondent. As regards what had been said about Client A knowing her costs due to work undertaken in 2007, the Respondent explained that she had been "incorrect to say it. It wasn't true. It was a stressful time" and that there had been no explanation as to why the questions were being asked. Further, had the Respondent known why questions were being asked, she would have answered them differently.

24.33 The Tribunal found the Respondent's answers during cross-examination to be extraordinary. It was not accepted that the Respondent did not understand the context of the questions being put to her during the interview. The Tribunal found it concerning that the Respondent considered that she would have provided different answers if she had known why the questions were being asked. The context and reasons for the questions asked were clear. The Respondent's suggestion that she would have provided different answers was astonishing.

24.34 The Tribunal did not accept that bills had been sent to Client A by the Respondent or by any other person at the Respondent's Firm. It was clear that the Respondent had seized control of Client A's financial affairs in her role as the Attorney. She considered herself to be the client and had sent herself the Terms of Business. It followed that the Respondent had, as she had admitted in her letter to the Applicant, not sent any bills to Client A. It was also clear from the ledger that on 22 April 2016, following the Respondent taking control of Client A's financial affairs, the interim bill was sent to

the Respondent. The Firm's invoices of 19 May and 6 June 2016 were addressed to the Respondent.

24.35 It was the Applicant's primary case that no retainer existed following the creation of the LPA until 6 April 2016 and thus the Firm was not entitled to charge for any work during that period. Thereafter the charges were unfair, unreasonable and excessive. The Applicant's secondary case was that even if a retainer did exist, the charges were unfair, unreasonable and excessive in any event. In support of those submissions, the Applicant relied on the report of Mrs Corbin.

24.36 It was the Respondent's case that a general retainer existed and the work undertaken was properly charged for pursuant to that retainer. Ms Heley submitted that Mrs Corbin's report was unreliable for the reasons detailed above, and that at the very least, an implied retained existed.

24.37 The Tribunal considered that Mrs Corbin's report was clear. It was thorough and detailed the basis on which her findings were predicated. Mrs Corbin had detailed matters in the report that she considered ought not to have been charged for by the Respondent. The Respondent had, in her oral evidence, conceded that she ought not to have charged Client A for the time spent dealing with the SRA in relation to the complaints made.

24.38 The Tribunal analysed the matters charged for by the Respondent to determine whether the charges were fair and reasonable. The Tribunal considered that the costs claimed by the Respondent were excessive, for example:

- On 28 October 2014, Client A was charged £59 for a call to Client A to check that Client A was not waiting to hear back from the Respondent.

- On 26 April 2016, Client A was charged £147.50 for the Respondent setting up a financial statement template and from page.

- Client A was charged a significant amount for confirmation of medical appointments, and reminders to attend those appointments or book transportation. None of those matters related to the LPA, and were therefore not charged pursuant to any retainer.

- On 4 May 2016, Client A was charged £106 for listening to a voicemail message and sending an email to the caller confirming that his call would be returned.

- There were charges for the Respondent and other employees reading the same correspondence.

- Time recorded for the preparation of attendance notes was excessive, and often exceeded the time of the attendance.

- Client A was charged for the time taken communicating with the SRA in response to complaints made.

- From 30 September 2016, following the revocation of the LPA, Client A was charged for the Firm's attempts to prove that she did not have capacity and discussions with family members.

- Client A was charged £62.50 for processing her premium bond of £25.

24.39 The Tribunal noted that the issue of the retainer and who ought to sign the client care letter was expressly raised. The Respondent was unconcerned as she was Client A's Attorney and next of kin. The Respondent dismissed the legitimate concerns raised. The Tribunal considered that the Respondent had acted in a high-handed manner in relation to Client A's affairs. It was clear that Client A had no idea of the costs being charged by the Respondent. The Respondent had knowingly and deliberately decided not to provide Client A with that information irrespective of the express request for that information.

24.40 The Tribunal determined that the costs claimed by the Respondent were unfair, unreasonable and excessive. Even if, as per the Respondent's case, the hourly rate charged was reasonable, the Respondent had charged for numerous matters where no charge should have been incurred, or the charge incurred was in excess of what was reasonable. Given those findings, the Tribunal did not consider that it was necessary to make a finding as to whether an implied retainer existed, or whether the charging provision in the LPA constituted a retainer.

24.41 The Tribunal found that the Respondent, in transferring monies from the Client account without providing written notification of costs, had breached Rule 17.2 as alleged. Further, in transferring client monies that were not properly required, and in transferring office monies that were not properly required, the Respondent had breached Rules 20.1 and 20.3 as alleged.

24.42 The Tribunal determined that it was not in Client A's best interests to pay charges that were unfair, unreasonable and excessive. In settling and receiving costs that were excessive, the Respondent had failed to protect Client A's monies and assets. Accordingly the Tribunal was satisfied that the Respondent's conduct was in breach of Principles 4 and 10.

24.43 Members of the public would be concerned to know that a solicitor was charging clients in excess of what was fair and reasonable, and was transferring monies to settle those charge without first informing their client. Accordingly, the Tribunal was satisfied that the Respondent's conduct failed to maintain the trust the public placed in her and in the provision of legal services in breach of Principle 6.

24.44 The Tribunal considered that no solicitor acting with integrity would have charged, or caused/allowed her Firm to charge fees that were excessive, unfair and unreasonable. Nor would a solicitor acting with integrity transfer those costs without first informing her client. Not only had the Respondent charged excessively, she had charged for matters that were not properly chargeable, as was conceded by the Respondent in the course of her evidence. Accordingly, the Tribunal found that the Respondent had acted without integrity in breach of Principle 2.

24.45 Accordingly, the Tribunal found allegation 2 proved on the balance of probabilities.

25. **Allegation 3 - During and after January 2017, while acting in the estate of JD (deceased), she caused or allowed the Firm to: (3.1) raise a bill of costs totalling £40,315.80, which exceeded the fixed fee agreed with the estate's executors; (3.2) withdraw monies totalling around £37,915.80 from the client account which was in excess of the agreed fixed fee. In doing so, she breached all or any of: (3.3) Rules 6.1, 7.1, 7.2, 20.1 and 20.3 of the SAR; (3.4) Principles 2, 4, 6 and 10 of the Principles.**

The Applicant's Case

25.1 By letter dated 11 June 2014 the Firm concluded a Client Care Letter and Terms of Business with three executors (together 'the Executors' and respectively 'Executor A, B and C') of the JD Estate to act in the administration of that estate.

25.2 The Firm's Terms of Business recorded that the Firm had agreed to conclude the administration of the estate for a fixed fee of £2,000 plus VAT and disbursements:

- "We try and be open and reasonable about our fees and discuss our charging arrangements with our clients. We have agreed in your matter to a fixed fee of £2000 plus VAT and disbursements".

- "Our charges are usually calculated according to the time spent by solicitors, legal staff and employees or consultants dealing with the matter or case. On your matter, however, we have agreed to a fixed fee of £2000 plus VAT".

- "An estimate of fees is only a guide and must not be considered a firm quotation unless we have agreed a fixed quotation in writing".

- "You may wish to set a limit on the overall fees at which point you wish to be informed once the limit is reached or exceed if a piece of work is carried out. We will not carry out further work unless we receive confirmation from you".

25.3 The Client Care Letter similarly stated:

- "Our charges are usually calculated according to a time element as below although we have agreed in this matter to a fixed fee of £2000 plus VAT".

- "It is difficult at the beginning of an administration of an estate to say how much work will be involved but my experience allows me to estimate that 12-15 hours work, spread over several months will be needed. [Time estimates for different types of work were then given]. Although my work will be time recorded as above I confirm that following our recent correspondence and having discussed the needs of the estate I will carry out the above work on a fixed fee basis of £2,000 plus VAT plus disbursements as detailed below".

25.4 Neither the Terms of Business or the Client Care Letter reserved any rights for the Firm to revise the agreed fee if the administration of the JD Estate proved more time-consuming and/or costly than was anticipated. The agreed fee of £2,000 + VAT and disbursements could therefore not be varied upwards.

25.5 The Firm's matter file contained invoices totalling £2,000 dated 26 August 2014 (for £1,000 + VAT), 21 November 2014 (for £500 + VAT) and 17 February 2015 (for £500 + VAT).

25.6 By 2 February 2015, the Firm's matter ledger recorded that the incurred WIP was £11,958.50. By email of that date DS, an employee of the Firm, emailed Executor A, updating him on the administration of the estate and detailing problems which the Firm had encountered.

25.7 Executor A responded: "I need you to please keep on top of this and put pressure on [*Executor C*] when these failings and problems arise, even if it incurs further expense. If it means your costs increase because of having to chase [*Executor C*] or correct his mistakes, please detail these costs to me so I can hold him directly accountable and liable for them".

25.8 DS replied the same day:

> "At the moment the costs are on a fixed fee. I agreed at the outset to £2000 plus VAT. Since then, however, there has been a considerable amount of work needed that we did not anticipate, such as the holocaust payments, and now the extra work needed to sort out the shares.
>
> The costs to date have far exceeded the £2000 although I am aware that the fee was fixed at that. I am going to consult the principal of the firm and see what the position is on increasing that fee as £2000 is far below the actual cost.
>
> This will of course make problems with [*Executor C*] although I believe yourself and [*Executor B*] will agree that the fixed fee is no longer reasonable".

25.9 Executor A then replied on the same day:

> "If you can detail why your costs are to be increased, and associate these costs to [*Executor C's*] failings, then we can hold him liable for the[m]. I understand that the estate may be legally liable, but if you are able to demonstrate that it is solely [*Executor C*] who has caused these additional costs, then the family can hold him accountable and put pressure on him to be responsible for them".

25.10 Ms Culleton submitted that the email exchange demonstrated that Executor A proposed that <u>if</u> the Firm could demonstrate that it had incurred increased costs because of the conduct of Executor C, then Executors A and B would put pressure on Executor C to be responsible for those costs. There is, however, no evidence that (i) the Firm and the Executors reached any agreement to amend the fixed fee, or (ii) that the Firm ever detailed which (if any) of its increased costs were caused by Executor C.

25.11 The Firm continued to work on the estate for more than a year. By an email of 19 August 2016, Ms S emailed the Executors stating that the next matter involved reporting to HMRC, and would involve a minimum of 6 hours work at an hourly rate of £265 plus VAT.

25.12 DS had "quoted a fixed fee of £2,000 if the matter proceeded without any complications – the client care letter shows that she anticipated the matter would take between 12 and 15 hours to complete. Having read the file it would appear to me that this estate was not straightforward and we have some 168 hours 42 mins recorded on the time ledger".

25.13 Ms S then asked the Executors for their instructions, saying either they could sign a new client care letter for the HMRC work, or the Firm would finalise the accounts and account to the Executors for the funds held on deposit.

25.14 Executor C wrote to the Firm by handwritten letter dated 15 September 2016, stating that the Firm had agreed a fixed fee of £2000 plus VAT, and "under no circumstances are [the Firm] to bill the Estate more than 2000 pounds plus VAT".

25.15 Also on 15 September 2016, the Firm prepared a further client care letter relating to the matters referred to in Ms S's email dated 19 August 2016. By letter dated 30 September 2016 the Firm wrote to the Executors again, stating:

> "I confirm that we had a telephone conversation this week concerning my letter of the 15th September enclosing a client care letter in which we quoted 6 hours to complete the matter at my hourly rate of £265 plus VAT with [the Respondent] supervising the matter at her hourly rate of £310 plus VAT. You advised that you thought this was far to[o] high and requested that I consult with [the Respondent] with a view to her reducing this quote. I confirm that I have now spoken to [the Respondent] and she is not prepared to reduce the fee quoted. She takes the view that this matter has cost our company greatly with over 168 hours of time recorded on the same, she is not prepared to incur the company in any further losses. I accordingly await your further instructions for me to either prepare estate accounts and report to you with the monies we are holding or if you wish us to deal with the Revenue we look forward to return of the signed client care letter."

25.16 By email dated 15 November 2016 Executor C emailed the Firm, relying on the fixed fee of £2000 plus VAT, but stating that the Executors could make a further, goodwill payment of £530 plus VAT to finalise the estate if the Firm accepted the offer by 26 November 2016.

25.17 There was no evidence of a response to this offer by the Firm.

25.18 By letter dated 6 January 2017, DS (who had now moved to another Firm) wrote to the Firm, asking it to make its files available for collection by the Executors. DS also said that the Firm had carried out its work on a fixed fee of £2000 plus VAT and disbursements, and gave bank details for the transfer of the estate funds.

25.19 On 19 January 2017 the Firm wrote a letter to Executor C which alleged that he had "significantly misrepresented to the firm that this matter was simple and you maintained that it could be concluded within 12-15 hours. This was agreed at a fixed fee of £2000 plus VAT which is in itself a discounted rate for the maximum number of hours, namely 15… However, it is clear that as the matter was/is not simple and is far more complex than you represented to the firm and as you continued to instruct this firm to continue to work on the file in excess of the 15 hour maximum and did so in the full knowledge

that this was over the agreed 15 hours… This estate was neither simple nor quick as represented by you. So we have billed the additional work and time over the agreed £2000/15 hours…".

25.20 Also on 19 January 2017, the Firm issued an invoice for £33,596.50 + VAT, less £2,400 paid on account, totalling £37,915.80. This was the total WIP on the Firm's internal client time ledger as at that date. The Firm transferred the amount requested in this invoice from its client account ('the Deducted Amount') before transferring the remainder of the estate to the new firm instructed by the Executors.

25.21 Ms Culleton submitted that it was to be inferred from the following matters that the Respondent caused or allowed the Firm to retain the Deducted Amount requested in its invoice of 19 January 2017:

- The Firm's client ledger recorded that the Respondent recorded:

  "On 12 January 2017, 5 hours and 42 minutes, described as "Checking balanced Estate Accounts", "Reading correspondence file towards final review of file" and "Checking through documents folder before releasing file".

  On 13 January 2017, 1 hour 48 minutes, described as "Reading further folder of correspondence prior to releasing file" and "Final correspondence reading through the same", and a further 30 minutes described as a file review."

- During these reviews, the Respondent would have read the letter of 6 January 2017. She would also have been aware of the large discrepancy between the Firm's WIP of over £30,000, and the agreed fixed fee of £2000. As the sole director and manager of the Firm carrying out a final review of this matter before it closed, she would have been aware of whether the Firm would be deducting the incurred WIP from the estate, contrary to the fixed fee.

- On 19 January 2017, the Firm wrote to the Executors enclosing their final bill and stated that, "- we have billed the additional work and time over the agreed £2000/15 hours".

- On 20 January 2017, Ms S informed Executor B with the subject tile "RE: transference of money" and stated "Dear [Executor B] – I confirm the transfer of monies will take place today – once I receive confirmation from my accounts department that it has been sent I will email your Solicitor". The Respondent was copied into this email.

25.22 It was further apparent from correspondence between the Executors and the Firm dated 9, 14, 15, and 17 February 2017, 30 March 2017, 6, 18 and 21 April 2017, and from Preliminary and Final Decisions of the Legal Ombudsman dated 24 September 2018 and 29 November 2018 respectively, that by 29 November 2018 the Firm had not refunded the Deducted Amount. As the sole director and manager of the Firm, it was to be inferred that the Respondent was aware of the disputes and did not arrange for the return of the Deducted Amount.

25.23 The Respondent's case was that Executor C had misrepresented the amount of work that would be required to administer the estate. However, that was not credible:

- The Applicant had not seen any or any adequate evidence that Executor C did make any such statement.

- Even if Executor C did say that the estate would be easy/quick to administer, the Firm was in the position of knowing how long it would take to administer the estate. The Firm relied upon its own estimate of the time required to complete the administration of the estate: the client care letter records that "my experience allows me to estimate that 12-15 hours work, spread over several months, will be needed" (Applicant's emphasis added). This was further apparent because the Firm did not reserve itself a right to increase the fixed fee during the lifetime of the retainer.

- It would have been apparent very early on in the retainer (and was evident by at the latest 2 February 2015) that the administration of the estate was taking far longer than expected. However, it was not until the Executors had moved to another Firm that the Firm alleged a misrepresentation by Executor C. This undermined the credibility of the Respondent's case, because if she considered that such a misrepresentation had in fact been made and which entitled the Firm to rescind the retainer, the Firm would have raised that fact years earlier.

- The Firm attempted to re-negotiate the fixed fee on 19 August 2016 for a minimum of 6 hours work at an hourly rate of £265 plus VAT. Ms S referred to the amount of WIP on the file, but did not indicate that a bill would be raised in respect of that amount.

25.24 Ms Culleton submitted that the Firm was only entitled to charge the Estate the fixed fee of £2,000 + VAT and disbursements ('Fixed Fee'). While there were discussions between the Firm and the Executors regarding the number of hours being incurred by the Firm and the possibility of increasing the Fixed Fee, no agreement was ever reached. The Fixed Fee was an agreed fee within Rule 17.5 of the SAR.

25.25 Pursuant to Rule 6.1 of the SAR, the Respondent (as Principal of the Firm) was strictly liable for ensuring that the Firm complied with the SAR. By Rules 7.1 and 7.2, the Respondent was under a duty to remedy any breaches of the SAR promptly upon discovery. By Rule 20.1, there were limited circumstances in which client money may be withdrawn from client account, none of which could apply to an overcharge. Finally, by Rule 20.3, office money could only be withdrawn from a client account when it was properly required for payment of the Firm's costs under Rules 17.2 and 17.3 SAR.

25.26 In retaining the Deducted Amount the Firm was in breach of Rules 20.1 and 20.3. Payment for an un-agreed fee in excess of a Fixed Fee was not 'properly required' within Rule 20.3. The Respondent was strictly liable for those breaches under Rule 6.1. She was also in breach of Rule 7.1 in failing to remedy the breach promptly upon discovery.

25.27 In causing and/or allowing the bill to be raised and/or funds to be transferred and retaining the Deducted Amount was also not in the best interests of the Executors because in doing so the overall estate was reduced and therefore the Respondent's

conduct was in breach of Principle 4. Further, she had failed to protect client money in breach of Principle 10. The Firm had no authority to retain the Deducted Amount and, further, once the funds had been transferred out of the client account into the Firm's office account, they lost the protections of the client account. That should not have taken place without the express agreement of the executors.

25.28 The Respondent failed to behave in a way that maintained the trust the public placed in solicitors and in the provision of legal services in breach of Principle 6. The public would expect solicitors to seek and obtain their express instructions agreeing to any increase in fees before causing or allowing a bill to be issued and transferring those monies from client to office account in payment of a disputed bill.

25.29 The Respondent's actions amounted to a failure to act with integrity in breach of Principle 2. Her conduct was lacking in integrity in that she was aware that the Firm had retained the Deducted Amount without proper justification, and was aware that the Executors had withdrawn their instructions to the Firm. Retaining the Deducted Amount lacked integrity because a solicitor acting with integrity would not have retained the Deducted Amount and would have returned client money when requested. A solicitor acting with integrity would not have caused or allowed a bill to be issued in place of a Fixed Fee agreement, and would not have caused or allowed the sums sought in such a bill to be transferred from the Firm's client account to its office account.

The Respondent's Case

25.30 The Respondent denied allegation 3, save that it was admitted that her conduct was in breach of Rule 20.1, Principle 6 and Principle 10.

25.31 In her Answer the Respondent explained that Executor A accepted that the estate was liable for the increased costs, but Executor C did not. This was not a straightforward and simple case as had been represented. The Respondent considered that Executor C had either colluded with Solicitor S to hide the extent of the work involved, or he had deliberately mispresented the matter to Solicitor S, or both. It was also believed that Executor C was using his position as a solicitor to manipulate the other Executors.

25.32 The Respondent discovered that Solicitor S was hiding her time recording to make it look as if it was only slightly above the costs quoted. Solicitor S did not inform either the Respondent or the Practice Manager of the time recording. When the estate transferred to the Firm that Solicitor S joined on leaving the Firm, this reinforced the view that there had been collusion.

25.33 The Executors continued to instruct the Firm after Solicitor S was no longer working there and in the knowledge that there would be further costs. After the file was transferred to another firm, the Executors did not make any formal complaint about costs, save for Executor C.

25.34 Ms Heley referred the Tribunal to Section 1 of the Misrepresentation Act 1967 which provided that a contract could be set aside after a misrepresentation had been made without alleging fraud. In her evidence the Respondent explained that the advice she received from the Practice Manager, who was an experienced accountant, was that as a

result of the misrepresentation made by Executor C as regards the amount of work, the Firm could pursue the estate for its costs.

25.35 Ms Heley submitted that the Applicant had conflated the Respondent and the Firm. None of the letters or emails sent to the Executors in relation to the fixed fee and misrepresentation were sent by the Respondent; they were sent by the Practice Manager. The Tribunal was not considering the failings of the Firm (if indeed there were any), but the failings of the Respondent personally.

25.36 Ms Heley submitted that pursuant to Section 69 of the Solicitors Act 1974, the Respondent was required to issue a bill before any claim could be made. In the circumstances, it was appropriate for the Firm to issue a bill in the full amount. Following the issuance of the bill, Rule 17.3 of the SAR required that where a bill had been issued, the money earmarked for costs became office money and had to be transferred out of the client account within 14 days. The Respondent conceded in her evidence that it would have been more appropriate to hold the additional funds subject to any further action to recover the additional fees.

25.37 As to the alleged SAR breaches, Ms Heley submitted:

- Rule 6.1 – This was the mechanism by which all Principals were bound to ensure compliance with the SAR. It was not capable of breached in and of itself;

- Rules 7.1 and 7.2 - It was clear that the breach had to be remedied promptly <u>on discovery</u>. The Respondent did not discover that there had been any breach until the intervention. By that time, the Applicant had seized control of the client account under its statutory powers, and the Respondent no longer had access to the client account;

- Rule 20.1 – In evidence, Solicitor S explained that she may have over-recorded time on the file due to pressure to achieve her targets. In those circumstances, Ms Heley did not contest the allegation of a breach of Rule 20.1

25.38 Ms Heley submitted that the alleged breach of Principle 4 was inappropriate in circumstances where the conduct complained of occurred after the retainer had been terminated.

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

25.39 The Tribunal found that the Respondent's conduct was in breach of Principles 6, 10 and Rule 20.1 of the SAR on the facts and the evidence. The Tribunal found the Respondent's admissions were properly made.

25.40 The Tribunal found the evidence of Solicitor S to be credible. Solicitor S denied that she had colluded with Executor C as asserted by the Respondent. She also explained that during the course of the retainer, it transpired that there was more work than had been originally anticipated, with some of that work being more complex than envisaged.

25.41 It was not disputed that a fixed fee had been agreed on for the work to be undertaken. The Respondent was fully aware of the fixed fee as a result of her review of the file. She was also fully aware of the value of the work in progress. The Respondent was aware, the Tribunal determined, that she was limited to the amount of the fixed fee in terms of what she was entitled to take in costs from monies held on account.

25.42 It had been the Respondent's case that she had not sent the correspondence to the Executors, and that it was the advice of the Practice Manager that she might have an action in misrepresentation. It was clear that the Respondent had discussed the matter with the Practice Manager and was aware of the steps that he was taking. The Respondent, it was determined, could not escape liability on the basis that the letters were not written by her in circumstances where she knew of the action being taken. The Tribunal considered that the Respondent was aware of her obligations under the SAR. She was also aware that she could not simply take monies in excess of a fixed fee on the basis that the value of the work undertaken exceeded the agreed amount, or on the basis that there had been a misrepresentation. The Tribunal did not accept that the Applicant had conflated the Respondent and the Firm.

25.43 The Tribunal did not accept that having improperly withdrawn monies from the client account, the Respondent was afforded protection by virtue of Rule 17.3. Rule 17.3 only applied to monies that could be properly withdrawn in settlement of fees. The Respondent, as was accepted, should not have taken the monies from the client account. If she intended to take an action in misrepresentation she ought to have retained the monies in client account.

25.44 The Tribunal did not accept that Rule 6.1 was a mechanism to ensure compliance and was not capable of being breached. It provided that the Respondent ensure compliance with the SAR. The Respondent had failed to do so. Accordingly, the Tribunal found that the Respondent's conduct was in breach of Rule 6.1. The Respondent had not remedied the breach promptly upon discovery. Whilst the client account was controlled by the SRA or its agents, this did not prevent the Respondent from returning the monies to client account through the SRA. Accordingly, the Tribunal found that the Respondent's conduct was in breach of Rules 7.1 and 7.2 as alleged. The Tribunal did not find that there was a breach of Rule 20.3. The proportion of the monies transferred in settlement of the Respondent's fixed fee was properly withdrawn, a bill of costs having been sent to the Executors. The Deducted Amount was not office money, notwithstanding that a bill including the Deducted Amount had been delivered to the Executors. Accordingly, the Respondent had not improperly withdrawn office monies from the client account.

25.45 The Tribunal did not accept that as the matter was transferred to another firm, the Respondent could escape her responsibility to act in her clients' best interests. In this case, the Respondent had transferred the file but had retained the monies which she later sent to the other firm, having removed what she considered she was entitled to in respect of costs. The Tribunal found that in retaining the Deducted Amount in the way that she did, the Respondent had failed to act in the best interests of her clients in breach of Principle 4.

25.46 The Tribunal considered that a solicitor acting with integrity would not have withdrawn monies that were in excess of the agreed fixed fee on the basis that the fixed fee did not reflect the actual work undertaken. Nor would a solicitor acting with integrity have removed those monies from the client account in advance of any order from the Court stating that notwithstanding the agreed fixed fee, the solicitor was entitled to those monies in settlement of her costs. The Tribunal found that in retaining and transferring the Deducted Amount, the Respondent acted without integrity in breach of Principle 2.

25.47 Accordingly, the Tribunal found allegation 3 proved on the balance of probabilities, save that it did not find that the Respondent's conduct was in breach in Rule 20.3.

26. **Allegation 4 - Between 18 April 2018 and 1 May 2018, she caused or allowed one or more improper transfers of client money to be made from the Firm's client account to an unregulated entity which did not operate a client account. In doing so she breached all or any of: (4.1) Rules 6.1, 7.1, 13.1 and 14.1 and 20.1 of the SAR; (4.2) Principles 2, 4, 6 and 10 of the Principles.**

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

26.1 In April 2018 Ashfords LLP prepared a report described as a Contingency Planning Report. The report, dated 30 April 2018, stated among other things that the Firm was intending to enter into administration, and to agree an administration sale of all of its probate client files to one law firm, and all of its conveyancing files to a different law firm. The report further stated:

- Para 2.2 - that "the Firm are also obtaining specialist restricting advice from David Kirk a specialist restructuring and recovery solutions partner from KH1 Limited (T/A Kirks) [address omitted]. Mr Kirk has been working with the Firm to examine all appropriate solutions. Mr Kirk has also instructed legal restructuring experts from Ashfords Restructuring and Insolvency Team for legal advice in connection with the proposed sale and purchase agreement".

- Para 2.4 that Ashfords LLP understood that, as regards the Firm's probate files, "planning steps are underway to ensure that all client files, subject to informed client consent, will be safely transferred to [another firm]. In addition, we are also instructed that all client funds together with informed client consents, will be safely transferred into [another firm]'s client account as part of the Firm's organised wind down".

26.2 However, and contrary to the understanding of Ashfords LLP, the Respondent made 18 bank transfers from the Firm's client account totalling £608,434.43 to an unregulated entity named Furse Legal Services Limited ('FLSL').

26.3 FLSL was incorporated on 22 March 2018 and Mr B, the Respondent's husband, was listed as the sole director of the company. FLSL was not authorised or regulated by the SRA. There was no evidence that the bank account to which the funds were transferred was, or had any of the protections of, a client account.

26.4 On 2 May 2018 Ashfords LLP contacted the Respondent to understand who authorised the transfers to FLSL and why they were authorised. The Respondent told Ashfords LLP that she had authorised the transfers and they related to client files which she had been appointed either as Deputy or an Executor. The Respondent confirmed that the client money would be transferred back to the Firm and returned the client files.

26.5 On 3 May 2018, the sum of £608,434.43 was returned to the Firm's client account from FLSL. On a call with the Second FIO the same day, the Respondent told the Second FIO that she was entitled to transfer the files and the funds because she was the client in all of the matters.

26.6 On 4 May 2018 in a letter to the SRA the Respondent stated that she did not tell Ashfords or Kirks of the transfers because: "I was the Executor I intended these files b[e] transferred to Furse Legal Services rather than to go through the process of them being included in the sale and sent to the buyer only to be transferred back at my request".

26.7 However, the matters transferred to FLSL included four matters where the Respondent was either not the client at all, or not the only client. The transactions consisted of the following:

Matter Nº	**Transfer date**	**Client/matter**	**Amount**
1.	18 April 2018	Client D	£23,831.71
2.	27 April 2018	Client E	£668.88
3.	30 April 2018	Client F	£232,190.83
4.	1 May 2018	Client G	£7,327.26

Matter 1

26.8 Matter 1 was the estate of Client D. The executors of the estate were Executors H and I who were clients of the Firm.

26.9 There was no evidence that the Respondent sought the consent of the clients before transferring the client files or client money held in respect of the estate to FLSL, and the Second FIO recorded that there was no instruction on the Firm's client file to transfer the funds to FLSL.

26.10 The Respondent told the second FIO in interview that the transfer of this client matter "was a mistake".

26.11 The client ledger showed that the sum of £23,831.71 was debited on 16 April 2018 and was credited back to the client account on 3 May 2018.

Matter 2

26.12 Matter 2 was the estate of Client E. The executors of the estate were the Respondent and Executor J. Executor J was therefore a client of the Firm.

26.13 There was no evidence on the Firm's client file that Executor J had been informed or consulted about the transfer of the matter to FLSL. The Respondent claimed that she had informed Executor J in a telephone conversation. Ms Culleton invited to the Tribunal to reject this claim because there is no attendance note of the conversation on the client file.

26.14 The client ledger showed that the sum of £668.88 was debited on 27 April 2018 and was credited back to the client account on 3 May 2018.

Matter 3

26.15 Matter 3 was the estate of Client F. The executors of the estate were the Respondent and Executor K. Executor K was therefore a client of the Firm.

26.16 There was no evidence that the Respondent sought the consent of Executor K before transferring the client files or client money held in respect of the estate to FLSL.

26.17 The client ledger showed that £232,190.83 was debited from the client account on 27 April 2018 and was credited back to the client account on 3 May 2018.

Matter 4

26.18 Matter 4 was the estate of Client G. The administrators of the estate were Executor L and possibly the Respondent. Executor L was therefore a client of the Firm.

26.19 There was no evidence that the Respondent sought the consent of Executor L before transferring the client files or client money held in respect of the estate to FLSL.

26.20 The client ledger showed that £7,327.26 was debited from the client account on 27 April 2018 and was credited back to the client account on 3 May 2018.

26.21 Rule 13.1 required that client money must be kept in a client account unless exempt under SAR Rules 8, 9, 15 or 16.

26.22 Rule 13.2 stated that a client account is an account of a practice kept at a bank or building society for holding client money in accordance with Part 2 of the SAR.

26.23 By Rule 13.3 the client account of an incorporated practice must be in the company name as registered at Companies House

26.24 By Rule 14.1 client money must be held in a client account except when the SAR provide the contrary.

26.25 By Rules 15.1 and 20.1(f) client money may be held outside a client account but only if the client instructs the solicitor to that effect for the client's own convenience and only if the instructions are given or confirmed in writing.

26.26 Ms Culleton submitted that in transferring the client funds held for Matters 1-4 to FLSL without the consent of the Firm's clients, the Respondent breached Rules 13.1 and 14.1.

The Respondent was strictly liable for those breaches under Rule 6.1. She was also in breach of Rule 7.1 in failing to remedy the breach promptly upon discovery.

26.27 The effect of transferring the client money to FLSL was as follows:

- Firstly, clients did not have their money held in a ring-fenced client account. The funds would therefore have been generally available to the creditors of FLSL had that entity gone insolvent.

- Secondly, clients lost the protections of being able to claim on the Firm's professional indemnity insurance. The Respondent informed the SRA on 3 May 2018 during an interview with the FIO that FLSL had professional indemnity insurance. The Applicant has not been provided with any evidence to support that a policy of insurance was in place, and the Tribunal is invited to reject that assertion.

- Thirdly, clients may not have been entitled to claim under the SRA's compensation fund. Under Rule 5 of that scheme, the fund applies to a solicitor who at the date of the relevant act or omission was practising in an authorised body. Clients may not have had an actionable claim under the fund because FLSL was not authorised by the SRA.

26.28 The Respondent stated that the "joint executors" had a good relationship with her and she was "certain that they would not disagree". This it was submitted, was irrelevant in circumstances where the Rules require that the consent of clients should be obtained.

26.29 At a meeting with the SRA on 28 June 2018, when asked "Did you inform or obtain consent from any co-executors?" the Respondent stated, "[Executor Y] - I didn't at the time as I was protecting the clients. SRA contacted him to ask if he knew – he didn't but he was ok about that. [Executor J] knew – spoke over the phone. No file note on the file. [Executor X] and the remaining clients did not know". As stated above, the Respondent's assertion that Executor J consented to the transfer is not accepted by the SRA as there was no evidence to support that this discussion took place.

26.30 In failing to obtain client consent for the transfers made the Respondent did not ensure that:

- the clients had properly understood the risks of their money being held outside of an SRA-regulated client account;

- the clients had been properly advised and given sufficient information about where their money would be held. An explanation should have been given to explain that their money would not be held in a client account or specifically ring fenced as the money was held FLSL's business account;

- the clients understood that FLSL was an unregulated and unauthorised entity;

- the clients understood that their money was held in a bank account in the name of, and belonging to the director of, FLSL who was not regulated by the SRA.

26.31 The Respondent acted in breach of the requirement to act in the best interests of the clients in Matters D, E, F and G in breach of Principle 4. It was not in the best interests of the clients to transfer client money from the Firm to an unregulated company, thereby losing the protections of having their matter dealt with by a regulated entity and a possible claim under the SRA compensation scheme if their money was placed at risk. In so doing the Respondent also failed to protect client money in breach of Principle 10.

26.32 Further, the Respondent failed to behave in a way that maintains the trust the public placed in her and in the provision of legal services in breach of Principle 6. Members of the public would expect solicitors to maintain client funds in a client account in accordance with their professional obligations and seek their express instructions before paying those monies away. The Respondent thereby failed to maintain the trust the public places in her and in the provision of legal services.

26.33 Additionally, the Respondent's actions amounted to a failure to act with integrity in breach of Principle 2 in that she was aware that the Firm had not obtained client consent when transferring client money in respect of the four matters exemplified above. The conduct lacked integrity in breach of Principle 2, because a solicitor acting with integrity would not have transferred significant sums of money out of its client account to an unregulated entity operating an account which was not identified as a client account without client consent.

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

26.34 The Respondent denied allegation 4 save that it was admitted that her conduct was in breach of Rule 20.1.

26.35 The Respondent did not dispute the facts, and accepted that the monies had been transferred as detailed. The Respondent explained that the account to which the monies was paid at FLSL was ringfenced account, and that FLSL had indemnity cover. As soon as the Respondent was aware that there was an issue as regards the transfer or the monies, she immediately returned the monies to the Firm. The Respondent accepted that the transfer in relation to Client D was improper. As soon as she became aware of the error, the monies were immediately returned to the Firm.

26.36 The Respondent explained that she was aware that as at 1 May 2018 the Firm did not have professional indemnity insurance and that as far as she was aware, there was no run-off cover in place. The Respondent was concerned to safeguard the matters where she was a client. The Respondent intended to deposit the monies into the account at FLSL until such time as she found a firm to take over conduct of those matters. The Respondent explained that she had obtained consent from all clients to move the matters, but had no evidence to prove that.

26.37 Ms Heley submitted that these transfers were made during the winding up of the Firm. The Respondent believed that she was entitled to transfer the matters as the client.

26.38 There had been criticism of the entity to which the monies were transferred, however there was nothing improper in transferring monies to an unregulated entity if the clients had consented to that transfer.

26.39 As to the SAR breaches Ms Heley submitted:

- Rule 6.1 – Ms Heley repeated the submissions detailed at allegation 3 above.

- Rules 7.1 and 7.2 – The evidence clearly showed that the Respondent had remedied the breaches as soon as she was aware of them. It was the discovery of the breach, and not the commission of the breach that triggered the duty to act. This was clear from the wording of the Rules.

- Rule 13.1 – This related to keeping a client account. There was no suggestion that the Firm did not have a client account in which to hold client funds.

- Rule 14.1 – The Respondent intended to pass the funds on to a successor to undertake the work, and was safeguarding the money in the FLSL client account in the interim.

- Rule 20.1 – A breach of Rule 20.1 was admitted.

26.40 Ms Heley submitted that the administration of estates was not a reserved legal activity. Criticism of the transfer of matters to an unregulated body was regulatory overreach by the Applicant. The Respondent considered that as the client, and in circumstances where the Firm was closing, the transfer of those matters was in the best interests of the clients and would avoid duplication of work, and thus costs. Acting in the best interests of one's clients was about more than the location of client monies; it necessitated considering what was in the best interests of clients as a whole.

26.41 The Respondent had consistently maintained that there was professional indemnity insurance in place at FLSL, and that monies were in the client account (albeit not a solicitor's client account). It was wrong in law to suggest that a client account that was not a solicitor's client account was not protected. Such an account was a trust account and the funds contained therein were protected from liquidators. The real issue, it was submitted, was the want of authority for the transfer of the funds. As to that, Ms Heley submitted, the Respondent was operating in a fast-paced environment during the administration of the Firm. In the circumstances it was understandable that mistakes were made. Wingate recognised that solicitors could not be paragons of virtue and that mistakes would be made. In order to cross the line into professional misconduct, there needed to be professional opprobrium. It was not sufficient to say that as the Rules had been breached, there had also been a breach of the Principles.

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

26.42 The Tribunal found that the Respondent's conduct was in breach of Rule 20.1 of the SAR as alleged on the facts and the evidence. The Tribunal found the Respondent's admission to have been properly made.

26.43 The Tribunal noted that in the 4 matters relied upon by the Applicant, the Respondent was either not the client, or not the sole client in any matter. There was no evidence that the Respondent had sought the consent of any of the clients to transfer the funds as she did. Further, there was no evidence that the Respondent had informed any of the Executors of how the estate monies would be held when it was no longer in the Firm's

client account. In moving monies out of the Firm's client account in the way that she did, the Respondent removed the protection of those monies afforded by the SAR and the compensation fund.

26.44 The Respondent admitted that her conduct was in breach of Rule 20.1. It followed that she had failed to ensure compliance with the SAR in breach of Rule 6.1. The Tribunal noted that the Respondent had immediately replaced the funds once she had been informed of the breach. The Tribunal agreed with the submissions made by Ms Heley in that regard. The time for remedying the breach ran from discovery of the breach and not commission. The Tribunal found that the Respondent had not failed to return the monies promptly on discovery. Accordingly, the Tribunal did not find that the Respondent's conduct was in breach of Rules 7.1 and 7.2 as alleged.

26.45 Rule 13.1 provided: "If you hold or receive client money, you must keep one or more client accounts…" The Tribunal noted that it was no part of the Applicant's case that the Respondent did not hold a client account, on the contrary, the complaint was about the improper removal of monies from the Firm's client account. Accordingly, Rule 13.1 did not apply; the allegation that the Respondent's conduct was in breach of Rule 13.1 was not substantiated.

26.46 Rule 14.1 provided that client monies be paid into a client account without delay and must be held in the client account, except when the rules provide to the contrary. The Tribunal considered that Rule 14.1 did not substantially add to the Applicant's case. However, in removing client monies in breach of Rule 20.1, it followed that such conduct was also in breach of Rule 14.1. Accordingly, the Tribunal found that the Respondent's conduct was also in breach of Rule 14.1.

26.47 The Tribunal considered that it was neither in her client's best interests, nor were client monies protected by moving client monies from the safety of the client account to a different company in circumstances where clients had not given their consent, and the monies were not subject to the same protection as they would be if held in a solicitors client account. Accordingly, the Tribunal found that the Respondent's conduct was in breach of Principles 4 and 10.

26.48 Members of the public would be concerned to learn that during the administration of the Firm the Respondent unilaterally decided to remove client monies and place it into an account that did not afford the monies the same protection as the monies had when in a solicitor's client account. The Tribunal found that the Respondent had failed to maintain the trust placed in her and in the provision of legal services in breach of Principle 6.

26.49 By transferring the monies in the way that she did, the Respondent failed to uphold the standards expected of her by other members of the profession. A solicitor acting with integrity would not transfer monies away from the client account knowing that they did not have the consent of their clients to do so. The Tribunal considered that the Respondent conduct was more than just a mistake. She knew that she required the consent of her clients to remove monies from the client account and did not obtain that consent. Accordingly, the Tribunal found that the Respondent's conduct was in breach of Principle 2.

26.50 The Tribunal found allegation 4 proved on the balance of probabilities save that it did not find that the Respondent's conduct was in breach of Rules 7.1, 7.2 and 13.1.

Previous Disciplinary Matters

27. None.

Mitigation

28. Ms Heley submitted that given the Tribunal's findings in relation to allegation 1, no mitigation was offered.

Sanction

29. 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.

30. The Tribunal considered that the Respondent was motivated by financial gain. She did all that she could to try to disprove that Client A had capacity to instruct the revocation of the LPA. She also charged her for numerous items that were not relevant to her role as the Attorney, and for matters that were not properly chargeable in any event. She waited until she had seized control of Client A's finances before issuing any invoices and then did not send those invoices to Client A. Her misconduct was planned and was a flagrant breach of the trust placed in her by her elderly and vulnerable client. The Respondent had direct and sole control and responsibility for the circumstances giving rise to the misconduct. Even when she was questioned by another member of staff regarding the production of an invoice, the Respondent was dismissive and proceeded to remove monies from the client account in settlement of her invoice, on that basis that she was "not prepared to not take costs…" The Respondent was an experienced solicitor who ought to have understood her obligations to her clients. The Tribunal found that the Respondent was wholly and solely culpable for her misconduct.

31. The Respondent had caused harm to her clients. The estate of JD had been diminished by the improper retention of the Deducted Amount, and Client A had paid fees that were excessive, unreasonable and unfair. Further, she had caused harm to the reputation of the profession as per the findings of 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"."

32. The Respondent's conduct was aggravated by her proven dishonesty, which was in material breach of her obligation to protect the public and maintain public confidence in the reputation of the profession. Her conduct was deliberate, calculated and repeated and had continued over a period of time. The Respondent had taken advantage of her position in being the keeper of client monies to transfer those monies as she saw fit.

She had sought to place the blame for her retention of the Deducted Amount on the practice manager employed at the time.

33. In mitigation it was determined that the Respondent had displayed limited insight into her misconduct. The Respondent had a previously unblemished record and had cooperated with the Applicant's investigation.

34. 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, as they were not proportionate to the seriousness of her proven misconduct. 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."

35. The Tribunal did not find any circumstances (and indeed none were submitted) that were enough to bring the Respondent in line with the residual exceptional circumstances category referred to in the case of Sharma. The Tribunal decided that in view of the serious nature of the misconduct, in that it involved dishonesty, the only appropriate and proportionate sanction was to strike the Respondent off the Roll of Solicitors.

Costs

36. Ms Culleton applied for costs in the sum of £31,281.35. It was submitted that the applicant was entitled to its full costs particularly in light of the Tribunal's findings. Further, there had been an aspect of financial gain as a result of the Respondent's conduct in regards to allegations 1 and 2. It was unfair for the profession to bear those costs.

37. As regards the internal investigation costs, the cost of the first investigation was £15,229.04. That had been reduced to £5,076.35, as not all matters investigated were pursued. Similarly, the cost of the second investigation was £16,020.00. That had been reduced to £4,005 as not all matters investigated were pursued. The total investigation costs claimed were therefore £9,081.35. The costs claimed by Capsticks were limited to the fixed fee of £18,500 + VAT, which was the lowest possible fixed fee category rate. There had been no additional claim for counsel drafting the Rule 12 statement or the expert report. The firm had spent 329.6 hours in preparation and presentation of the case, which equated to a notional hourly rate of £50.33. Ms Culleton submitted that the costs claimed were proper and reasonable in all the circumstances.

38. Ms Heley submitted that no point was taken regarding the general principle that the Applicant should recover its costs. It was accepted that the legal fees charged by Capsticks were reasonable. Ms Heley referred the Tribunal to the principles established in SRA v Davis & McGlinchey [2011] EWHC 232 (Admin). The Respondent had provided the Tribunal with information regarding her means. It was evident from that

information that the Respondent was of limited means. Ms Heley submitted that it was not for the Tribunal to saddle the Respondent with an insurmountable debt such that the Respondent would have no recourse but to declare herself bankrupt. On the Respondent's current income, it would take her 27 years to pay the costs claimed by the Applicant. The Respondent did not own her family home and had no other assets with which she could repay the debt. The appropriate order, given her means, was no order for costs. In the alternative, the Tribunal could impose an order that the Respondent pay the costs but direct that the costs order not be enforced without leave of the Tribunal, and that no interest or a commercial interest rate accrues, rather than the 8% judgment rate.

39. The Tribunal considered that the costs claimed were reasonable and proportionate in all the circumstances. The Tribunal noted that the Respondent was still employed and that it had not been submitted that following the Tribunal's findings, the Respondent would lose her employment. The Tribunal was mindful of the Respondent's limited means, but did not consider that this was a case in which the profession ought to bear the full costs. Nor did it consider that this was an appropriate case whereby the enforcement of any costs order should be deferred. As detailed, the Respondent remained employed and had some income by which she could pay the costs in instalments. The Tribunal was aware that the Applicant would be reasonable about the collection of costs owed, and would come to an arrangement with the Respondent in that regard.

40. The Tribunal determined that whilst the costs were reasonable and proportionate, there should be a reduction in the amount of costs the Respondent should pay so as to reflect her limited means. The Tribunal considered that in all the circumstances it was just and proportionate to reduce the costs by approximately 33% such that the Respondent pay costs in the sum of £20,000.

Statement of Full Order

41. The Tribunal Ordered that the Respondent, Maxine Barnes, 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 £20,000.00.

Dated this 26th day of August 2021
On behalf of the Tribunal

A N Spooner
Chair