SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12187-2021

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD Applicant

and

ELIZABETH ELLEN First Respondent
MdR Second Respondent
(A Firm formerly known as Mishcon de Reya Solicitors)

Before:

Mr A N Spooner (in the chair)
Mr R Nicholas
Mr R Slack

Date of Hearing: 14 – 17 September, 29 October and 6 December 2021

Appearances

James Ramsden QC, barrister of Astraea Group Ltd, 7 Down Street, London, W1J 7AJ and Rory Mulchrone, barrister, in the employ of Capsticks of 1 St George's Road, Wimbledon, London SW19 4DR, instructed by Ian Brook solicitor of 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant.

Richard Coleman QC and Marianne Butler, counsel of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH, instructed by Simon Morgan, solicitor of Barnfather Solicitors, 5 Chancery Lane, London EC4A 1BL, for the First Respondent.

Chloe Carpenter QC of Fountain Court Chambers, Fountain Court, Temple, London EC4Y 9DH, instructed by William Glassey, solicitor of Mayer Brown International LLP, 201 Bishopsgate, London EC2M 3AF, for the Second Respondent.

JUDGMENT

Allegations

1. The allegations made against the First Respondent by the Solicitors Regulation Authority Ltd ("SRA") were that while in practice as a Solicitor at MdR, formerly known as Mishcon de Reya Solicitors ("the Firm"), the First Respondent:

1.1. on or about the dates set out in Appendix 1 to this Statement, and in respect of one or more of the matters identified in Appendix 1 to this Statement, caused or allowed payments to be made into and from the Firm's Client Account in circumstances amounting to the provision of a banking facility and in doing so breached:

1.1.1. where such receipts and payments occurred on or before 5 October 2011, Rule 15 of the Solicitors Accounts Rules 1998 ("the SAR 1998");

1.1.2. where such payments or receipts occurred on or after 6 October 2011, Rule 14.5 of the SRA Accounts Rules 2011 ("the SAR 2011") and Principle 8 of the SRA Principles 2011 ("the Principles").

2. The allegations against the Second Respondent (the Firm) were that:

2.1 on or about the dates set out in Appendix 1 to this Statement, and in respect of one or more of the matters identified in Appendix 1 to this Statement, failed to take any or adequate steps to prevent payments to be made into and from the Firm's Client Account in circumstances amounting to the provision of a banking facility and in doing so breached:

2.1.1 where such receipts and payments occurred on or before 5 October 2011, Rule 15 of the SAR 1998;

2.1.2 where such payments or receipts occurred on or after 6 October 2011, Rule 14.5 of the SAR 2011 and Principle 8 of the Principles.

Documents

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

- Rule 12 Statement and Exhibit IWB1 dated 1 April 2021
- First Respondent's Answer and Exhibits dated 28 May 2021
- Second Respondent's Answer and Exhibits dated 28 May 2021
- Applicant's Schedule of Costs
- First Respondent's Schedule of Costs

Preliminary Matters

4. Joint Application of the Applicant and the Second Respondent for admission of a Statement of Agreed Facts and Admissions ("SAFA")

The Applicant's Submissions

4.1 Mr Ramsden QC explained that there had been a recent development as regards the Second Respondent. The Applicant had been able to agree on 13 September 2021 a SAFA which constituted the basis upon which the Second Respondent was prepared to admit all the allegations contained within the amended Rule 12 Statement. The SAFA was accompanied by a letter. The letter and the SAFA addressed the legal and procedural basis for the SAFA.

4.2 Mr Ramsden QC submitted the Applicant had considered with care what had been proposed, and was satisfied that the SAFA properly reflected the allegations against the Second Respondent. It was confirmed that the SAFA and accompanying letter comprised the entirety of the agreement between the Applicant and the Second Respondent. Mr Ramsden QC submitted that it was a reasonable and proportionate way to dispose of the application against the Second Respondent.

4.3 Mr Ramsden QC reminded the Tribunal that there was an imperative on the regulator to seek to resolve matters in an appropriate and proportionate way, that met the regulatory objectives. The SAFA, if accepted, obviated the need for an examination of the facts as regards the Second Respondent, as the facts were agreed. Mr Ramsden QC submitted that the SAFA had not been submitted as an expedient way of dealing with the case, but constituted an agreement by the Applicant in the proper discharge of its regulatory function.

4.4 As regards the timing of the SAFA, Mr Ramsden QC submitted that the Applicant could only respond to any proposal when invited to do so. The Second Respondent had made a number of admissions prior to its referral to the Tribunal.

4.5 The Tribunal was referred to Rule 27 of the Solicitors (Disciplinary Proceedings) Rules 2019 ("the SDPR") which provided, in material part:

> "(1) Without prejudice to the general powers in Parts 2 and 3 of these Rules the Tribunal may give directions in relation to an application relating to any of the following-
>
> ...
>
> (b) the provision by parties of statements of agreed matters"

4.6 Further, there was precedent for the SAFA at the Tribunal. An agreed statement of facts (as opposed to an Agreed Outcome Proposal) was considered and accepted by the Tribunal in SRA v Maher et al (Case No - 11655-2017). The Tribunal went on to determine sanction and consequential issues in that matter in the ordinary way.

4.7 The SAFA, it was submitted, was analogous to an Agreed Outcome Proposal to the extent that the legal ancestor of both was the 'Carecraft' procedure in directors disqualification proceedings, as developed by the Court of Appeal in Secretary of State for Trade and Industry v Rogers [1996] 1 W.L.R. 1569. In SRA v Panavides & Clifford Chance (Case No - 11716-2017), which concerned an Agreed Outcome Proposal, the Tribunal's attention was specifically drawn to the following passages from Rogers (1571H):

> "Where Carecraft procedure is employed, an agreed statement of facts is placed before the court, no oral evidence is given (so no cross-examination takes place), the court is informed of the bracket into which the parties agree the disqualification period should fall and the parties' counsel address the judge on that basis. The procedure enables the case to be disposed of expeditiously and with a substantial saving of costs that would be incurred in a full-blown trial."

and at (1573F):

> "It is for the Secretary of State (or the official receiver) and those advising him to decide what evidence to place before the court in support of an application under section 6 and in respect of the matters to which, under section 9, the court is required to have particular regard. If, having done so, the Secretary of State decides that certain allegations made in the affidavits filed in support of the application need not be pursued, it is not, in my opinion, the proper function of the court to insist that they be pursued. The function of the court, in directors disqualification proceedings as in civil litigation generally, is adversarial. It is for the applicant to decide what case to present to the court, what allegations to make and what allegations, once made, should be persevered with. It is for the respondent director to decide what allegations to dispute and what allegations to accept. If the Secretary of State and the respondent director place before the court an agreed statement of the facts that are agreed and of the facts that the respondent does not propose to dispute and invite the court to deal with the case on the basis of that agreed statement, it is not for the court, in my judgment, to insist that other allegations be pursued ... or that cross-examination of any deponent or of the director should take place. If the judge feels strongly enough that the course being taken by the Secretary of State is ill advised, he or she can, I would think, adjourn the case for a short period and invite the Secretary of State to reconsider. But, there apart, the function of the judge is to deal with the case that is put before the court by the parties. There is no impropriety in directors disqualification cases or in any other civil proceedings in placing before the court an agreed statement of facts and inviting the court to deal with the case on the basis of that statement."

4.8 At paragraph 55 of its Judgment the Tribunal accepted that it:

> "... could only consider the admitted allegations and facts as set out in the Statement of Agreed Facts and Outcome, and whether the sanction appropriately reflected those admitted facts. It could not consider any matters beyond those. Only if the Tribunal concluded that the agreed sanction did not adequately reflect the seriousness of the admitted breaches could it decide not to approve the Agreed Outcome; in which eventuality its only recourse would

be to refer the same allegations/ admissions to a substantive hearing for determination of the appropriate sanction on those same admitted breaches."

4.9 This was not a case in which an Agreed Outcome had been submitted as the Applicant and Second Respondent considered that sanction was a matter for the Tribunal to determine.

4.10 As regards the witness evidence filed and served on behalf of the Second Respondent, the statements did not deal with the transactions but set out the processes and procedures in place at the Firm. None of that evidence would be challenged by the Applicant. Whilst the denials were mentioned in the statements, the Firm was entitled to observe that the pleadings contained denials. There was nothing improper or irregular in a party denying matters in its pleaded case and thereafter making admissions. The change of plea was not a matter of concern and still less was it a cause for objection to the SAFA.

4.11 Mr Ramsden QC submitted that on each transaction, it was the First Respondent who introduced the clients to the Firm. The structure of the payments was agreed by the First Respondent with the respective clients prior to the clients instructing the Firm. The First Respondent was "front and centre" in relation to the payments into and out of the client account and liaised closely with the counterparties. As to the First Respondent's junior status, she was styled as the "head of football". It was clear from the First Respondent's evidence that she was the driver and inspiration for the development within the firm of football related transactions.

4.12 The Applicant, in agreeing the SAFA, had reflected on the First Respondent's role and the inter-relation between the First and Second Respondents. The Applicant concluded that it was still appropriate to proceed with matters against the First Respondent notwithstanding the Second Respondent's admissions. The key determinative fact to be decided regarding the First Respondent was whether she caused or allowed the payments to be made. This was not affected by the contents of the SAFA.

4.13 If it was the First Respondent's position that the SAFA created actual and tangible unfairness, the parties should be told what the unfairness was, and what accommodation could be afforded to the First Respondent to accommodate that unfairness. The Applicant accepted that it had to be fair to all parties in the proceedings, and considered that it had been. As to cross-examining the Second Respondent's witnesses, those witnesses were not compellable. If the First Respondent sought a witness summons in relation to any of those witnesses, they would become the First Respondent's witnesses which the First Respondent would not then be able to cross-examine.

4.14 Mr Ramsden QC commended the SAFA to the Tribunal.

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

4.15 Mr Coleman QC objected to the SAFA both as regards the manner of its submission and the content.

4.16 The SAFA was served on the First Respondent shortly before 5pm the day before the substantive hearing. This was far too late in circumstances where the investigation into

the conduct of the Respondents took place in 2018, with the case being issued in April 2021. The late service left the First Respondent with very little time to consider her position.

4.17 The SAFA, whilst not an Agreed Outcome document contained material features of an Agreed Outcome and was, in fact, more than a statement of agreed facts and admissions. The Tribunal was referred to the accompanying letter which stated (amongst other things):

> "The Firm's agreement to the terms of the Statement of Agreed Facts and Admissions is subject to and conditional upon the Tribunal's endorsement of the Statement of Agreed Facts and Admissions and the consequential matters set out in this letter. If the Tribunal does not endorse those matters, the Firm's position on Transaction 1 and Principle 8 will remain as set out in its Answer dated 28 May 2021 and the opening submissions filed on its behalf on 9 September 2021."

4.18 Such an assertion, it was submitted, was an indication that the documents had been put before the Tribunal in a rush.

4.19 Mr Coleman QC submitted that whilst this was not an application for an Agreed Outcome, the approach to Agreed Outcomes detailed in the SDPR applied with equal force to the SAFA. The Tribunal was referred to Rule 25(1) of the SDPR which provided:

> "The parties may up to 28 days before the substantive hearing of an application (unless the Tribunal directs otherwise) submit to the Tribunal an Agreed Outcome Proposal for approval by the Tribunal."

4.20 Paragraph 8 of Practice Direction Number 1: Agreed Outcomes provided:

> "… For applications made less than 28 days before the hearing the parties will need to apply for leave to submit the Agreed Outcome application and if leave is given the Tribunal will make appropriate directions taking into account all relevant factors including the position of any other respondent(s). In accordance with the SDPR the Tribunal would expect all parties to the proceedings to be served with any such application."

4.21 Paragraph 8, it was submitted, guarded against prejudice to any other Respondents in the proceedings. In the instant case, the application had been served the day before the proceedings.

4.22 There were serious flaws in the substance of the application.

4.23 The allegations against the First and Second Respondents arose out of the same facts. The First Respondent's defence inevitably raised matters of both fact and law. The Second Respondent admitted all allegations in the SAFA. The question of whether there was a breach of the banking facility rules was a question of both fact and law. In stating the SAFA was confined to the matters of fact, the Applicant and the Second Respondent were incorrect. The First Respondent disputed that the transactions were

in breach of the banking facilities rule or that if there was any breach (which was not accepted) that she caused or allowed any breach. The Applicant and Second Respondent were asking the Tribunal to make findings as to whether the banking facilities rule had been breached without first hearing any evidence. Mr Coleman QC submitted that if the Tribunal were to accept the SAFA it should only make findings against the Second Respondent without prejudice to the First Respondent's right to argue that there had been no breach of the banking facilities rule.

4.24 The SAFA gave rise to the risk of inconsistent findings of fact. The Tribunal was required to consider all the circumstances, including the conduct of others involved. The SAFA sought to cut across the Tribunal's ability to do so.

4.25 The SAFA asserted that the Second Respondent had policies and procedures in place at the time to prevent the client account being used as a banking facility, however there was no evidence before the Tribunal of any training provided to the partners or anyone else at the Firm as regards the banking facility rule.

4.26 The SAFA sought to put the Tribunal in the position where it would have to ignore any findings of fact it made when determining the case against the First Respondent. In paragraph 4 of the accompanying letter it was asserted that:

> "The Firm is to be sanctioned only on the basis of (i) the [SAFA] and (ii) the Firm's mitigation and sanction submissions. For example, any additional facts as may be proven by the SRA as against the First Respondent (whether pleaded in the Rule 12 Statement or not) are to be disregarded by the Tribunal when assessing sanction regarding the Firm, and any additional facts as alleged by the First Respondent are to be disregarded by the Tribunal when assessing sanction regarding the Firm."

4.27 Mr Coleman QC submitted that taking such a position was remarkable and unrealistic. The Applicant and Second Respondent were suggesting that if the Tribunal found that the responsibility for any breach lay with the Firm and its systems, the Tribunal could not take that into account when assessing the Firm's culpability. Such a position did not inspire confidence in the Tribunal or regulation. The question of where the blame lay was central to the Firm's mitigation. In its Answer, the Firm stated that the First Respondent had "the primary responsibility for the breach…" The First Respondent did not accept that she had any responsibility, let alone the primary responsibility for the breach. Mr Coleman QC submitted that the Tribunal was required to determine firstly whether there was any breach and thereafter the culpability of the Respondents. The SAFA invited the Tribunal to pre-determine those issues without hearing any evidence. Ignoring its own findings of fact was a wholly inappropriate basis on which to sanction the Second Respondent.

4.28 If the SAFA were to be accepted, the Firm would no longer be calling its witnesses who were required by the First Respondent for cross-examination. The entirety of the Firm's witness evidence was not agreed by the First Respondent. The witness evidence was crucial to the First Respondent's defence. It was unacceptable that they would not be available for cross-examination.

4.29 As regards the reliance on Panayides, this did not assist, as in that case it was not the position that the defence of one Respondent cut across the defence of the other.

4.30 Mr Coleman QC submitted that there was no objection to the Firm making admissions, nor was there any objection to a SAFA in principle. What was objectionable was the attempt to bind the Tribunal and subject it to stringent conditions in accepting the SAFA such that the Tribunal would be required to ignore and exclude its own findings of facts.

The Second Respondent's Submissions

4.31 Ms Carpenter QC endorsed and adopted the submissions made by Mr Ramsden QC. In addition to Rule 27 of the SDPR, the Tribunal was directed to Rule 38 which provided:

> "(3) Without restriction on the general powers in Parts 2 and 3 of these Rules, the Tribunal may, pursuant to the overriding objective set out in rule 4(1), give directions in relation to—
>
> (a) the provision by the parties of statements of agreed matters;"

4.32 Rule 38 was headed "Evidence and submissions during the hearing". It was clear that Rule 38 anticipated the provision of agreed facts at this stage of proceedings.

4.33 Mr Coleman QC objected to the following passage in the accompanying letter:

> "The Firm's agreement to the terms of the Statement of Agreed Facts and Admissions is subject to and conditional upon the Tribunal's endorsement of the Statement of Agreed Facts and Admissions and the consequential matters set out in this letter. If the Tribunal does not endorse those matters, the Firm's position on Transaction 1 and Principle 8 will remain as set out in its Answer dated 28 May 2021 and the opening submissions filed on its behalf on 9 September 2021."

4.34 Ms Carpenter QC explained that this paragraph was intended to set out that the Tribunal had a discretion as to whether or not to grant the application to deal with matters by way of the SAFA.

4.35 It would be an unusual case where a SAFA was determined not to meet the overriding objective. The SAFA assisted the Tribunal and saved time. It should only be rejected if it was incoherent, or its effect was unclear. That was not the position. The parties had set out the effect of the agreement in the accompanying letter. Importantly, the Applicant and the Second Respondent had paid scrupulous attention to the position of the First Respondent. She had been mentioned in the agreement as little as possible, and it was expressly stated that nothing in the SAFA was intended to affect the case against her. The First Respondent was able to rely on the admissions or any other information contained in the SAFA. On the contrary, the Applicant was not able to use anything contained in the SAFA in its case against her.

4.36 The Second Respondent had made extensive admissions from the outset. The issue of the Firm admitting a number of matters that were denied by the First Respondent had always been in issue in the proceedings. It was perfectly common for one party to admit

allegations that were denied by another. This did not put the Tribunal in an invidious position, and acceptance of the SAFA did not alter the position that Tribunal was already in when determining the allegations.

4.37 The First Respondent, in her Answer, had stated that whether or not the Firm's client account had been used in breach of the banking facility rule was "primarily an issue between the Firm and the SRA". Having made that point in her Answer, it was odd that the First Respondent, in objecting to the SAFA, was seemingly suggesting that it was not open to the Second Respondent to extend its admissions to include Transaction 1 (admissions having been made in relation to Transactions 2 – 5).

4.38 As regards Mr Coleman QC's submissions relating to the Second Respondent's witnesses, the only matters he suggested he would cross-examine them on, were matters that could be made by way of submission. It was not accepted that there was anything contained in the witness evidence that was prejudicial to the First Respondent. Further, the witness evidence was evidence in mitigation and did not form part of the Applicant's case against the First Respondent.

4.39 As regards complaints about the timing of the submission of the SAFA, this was the earliest that it could be produced. Any criticism of the Second Respondent as regards timing was not accepted. The Second Respondent, it was submitted, should be commended on the agreement. It now admitted a breach of Principle 8 in circumstances where the breach, whilst alleged, had not been particularised in the Rule 12 Statement. The Applicant's case as regards the Principle 8 breach had only recently become apparent. It was not the case that the Applicant considered that there were not suitable policies in place, rather that the Firm did not monitor those procedures sufficiently to ensure compliance. The Second Respondent had taken this onboard and had made admissions in the SAFA on that basis.

4.40 Ms Carpenter QC submitted that the SAFA should be accepted as:

- It saved time for the Tribunal and the parties
- It saved costs
- It fairly reflected the case against the Second Respondent
- The SRA and the Second Respondent were both represented by leading Counsel
- The accompanying letter set out fully the effect of the SAFA and was legally correct

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

4.41 The Tribunal firstly considered the procedural position. The Tribunal was satisfied that pursuant to Rules 27(b) and 38(3)(a) of the SDPR, the parties were entitled to make the application.

4.42 The Tribunal had regard to the overriding objective which required the Tribunal to deal with cases justly and at proportionate cost, ensuring, so far as practicable, that the parties were on an equal footing.

4.43 The Tribunal was concerned with the lateness of the application, it being made shortly before 5pm, the day before the hearing was due to commence. Further, the First Respondent had not been consulted as regards the application and had been given no

opportunity to comment on the application before it was made. The Tribunal considered that the First Respondent had been ambushed by the application at a very late stage of the proceedings.

4.44 The investigation by the Applicant commenced in 2018. The Rule 12 Statement was signed on 1 April 2021 and amended in August 2021. The Tribunal considered that there had been sufficient time for the parties to engage in discussions at an earlier stage, such that a late application was not necessitated.

4.45 The parties submitted, and the Tribunal agreed, that the admission of the SAFA was a matter of judicial discretion. The Tribunal determined that the admission of the SAFA was unfair and prejudicial to the First Respondent. Accordingly, the joint application on behalf of the Applicant and the Second Respondent was refused.

5. Application for anonymisation of third parties

5.1 Mr Coleman QC applied for the individuals and entities who were not a party to the proceedings (save for any witnesses, or current and former partners and employees of the Firm) be anonymised and their identities are not disclosed or published. The Applicant and Second Respondent did not object to the application.

5.2 The Tribunal considered that the order requested was appropriate and proportionate given the underlying facts. The Tribunal Ordered as follows:

1. The individuals and entities identified in the 'Amended Consolidated Anonymisation Key' at M87 of CaseLines are to be anonymised in the Tribunal proceedings. No details of the individuals and entities identified in the proceedings are to be disclosed to non-parties or published without the permission of the tribunal, with the exception of the Respondents, the witnesses, and the current (or former) partners, employees or consultants of the Second Respondent.

2. The audio recording of the proceedings is not to be provided to non-parties without the permission of the Tribunal.

6. Order of closing submissions

6.1 Mr Coleman QC submitted that in its skeleton argument, the Second Respondent supported the Applicant's case against the First Respondent, stating that the First Respondent caused or allowed the payments in breach of the banking facility rule. Such a position, it was submitted, was wholly self-serving. In the circumstances, the First Respondent ought to be given the opportunity to respond to any submissions made in closing on behalf of the Second Respondent and thus should be the final party to provide closing submissions.

6.2 Ms Carpenter QC submitted that the Second Respondent did not state that there had been any breach but recited the factual circumstances. It was not in dispute that the First Respondent initiated the payment requests. It was open to the Tribunal to determine that the Second Respondent's admissions were not properly made. It was not accepted that there should be a reversal of the conventional order of closing.

6.3 Mr Ramsden QC made no submissions.

6.4 The Tribunal did not consider that there was any unfairness to the First Respondent in closing prior to the Second Respondent. The Tribunal did not consider that there was any reason to change the conventional order of closing submissions. Accordingly, the application to amend the order of closing submissions was refused.

Factual Background

7. The First Respondent was admitted to the Roll of Solicitors in September 2007. At the material times she was employed at the Firm as a solicitor. She became a Partner in the Firm in April 2015 and left the Firm in April 2020. The First Respondent held a current unconditional Practising Certificate.

8. The Second Respondent was at all material times, and remained, a recognised body regulated by the SRA. At the material time it used the trading style "Mishcon de Reya Solicitors".

9. The allegations arose from the First Respondent's conduct of a number of transactions, all involving the transfer of employment of professional footballers to or between Premier League clubs. The First Respondent and the Firm acted on behalf of the footballers involved in the transfers, taking instructions from the footballers themselves or their agents or associates. The First Respondent was also, at the material time, a football agent registered with the FA although it was not part of the SRA's case, or that of the First Respondent, that she was acting in this capacity during the transactions with which these proceedings are concerned.

10. The matter came to the attention of the SRA following a self-report by Mishcon de Reya LLP, the successor practice to the Firm. Thereafter, the SRA commissioned a Forensic Investigation Report.

Transaction 1

11. In or about June and July 2011 the Firm acted for Company B in Transaction 1, involving the transfer of Person A, a professional footballer, to Club D. Company B, which was owned by Person C, acted in Transaction 1 as agent for Club D.

12. The First Respondent was identified as the fee earner on the matter. The First Respondent originated the instruction and, effectively, introduced Person C to the Firm. Mr Morallee was identified as the matter partner.

13. A client care letter was sent by the Firm to Person C at Company B dated 20 June 2011 in the name of Mr Morallee. The letter defined the work to be undertaken by the Firm on the matter as: "Liaison with Club D in relation to the "Representation Contract" (under which Company B was to represent Club D in negotiations over the engagement of Person A); and Drafting contracts for services between Company B and four other companies.

14. The letter stated that "For the avoidance of doubt, the scope of our retainer is limited to" (the said work), and expressly excludes advice on the application of FIFA or national football regulations. No provision was made for payments to be received into or made from the Firm or its client account. The Representation Contract between Company B and Club D did not contain a provision to the effect that any payments should be made via solicitors.

15. A letter from Person C to Mr Morallee dated 17 June 2011 set out instructions from Company B to the Firm to the effect that Company B would cause its fee (by inference, due under the Representation Contract) to be paid into the Firm's Client Account, and to make six payments from sums received in relation to Transaction 1. The instructions included a number of payments to third parties. The Firm's ledger recorded (amongst other things) payments to third parties between 5 and 7 July 2011 consistent with the instructions set out in the letter from Company B of 17 June 2011.

16. In interview on 24 April 2018, the First Respondent explained that the purpose of making payments via the Firm's Client Account was to address a "lack of trust" between the participants in Transaction 1, and that the use of a firm of solicitors would enable the transaction to proceed.

17. The First Respondent did not recall advising in detail on the Representation Contract between Company B and Club D; she informed the SRA that the Representation Contract followed a standard form. In fact, the Representation Contract pre-dated the letter of instruction or client care letter in that it was dated 13 June 2011.

Transaction 2

18. In or about June 2011 the Firm acted for Company B in Transaction 2, involving the transfer of Person E, a professional footballer, to Club D. Company B, acted in Transaction 2 as agent for Club D. The First Respondent was identified as the fee earner on the matter, and Mr Morallee was identified as the matter partner.

19. A client care letter in the name of Mr Morallee was sent by the Firm to Person C at Company B dated 20 June 2011. The letter defined the work to be undertaken by the Firm on the matter as: "Advice in relation to your dealings with [Club D] in relation to the signing of [Person E]…"; and Drafting contracts for services between Company B and third parties.

20. As with Transaction 1, the letter stated that "For the avoidance of doubt, the scope of our retainer is limited to" (the said work), and excludes advice on the application of FIFA or national football regulations.

21. The letter gave hourly rates and agreed a fixed fee of £5,000 plus VAT. The letter made no provision for payments to be received into or made from the Firm or its client account other than in respect of costs. The Representation Contract between Company B and Club D did not contain a provision to the effect that any payments should be made via solicitors.

22. The Representation Contract between Company B and Club D was signed on 17 June 2011, three days prior to the client care letter. Accordingly, the services provided could not have included advice on entering into the Representation Contract.

23. A letter from Person C to Mr Morallee dated 20 June 2011 set out instructions from Company B to the Firm to the effect that Company B would cause its fee (by inference, due under the Representation Contract) to be paid into the Firm's Client Account, and to make four payments from sums received in relation to Transaction 2, including payments to third parties. The Firm's ledger recorded the payments in and out, including the payments to third parties in accordance with the instructions.

24. The First Respondent did not recall that, in relation to this transaction, there was a "trust issue" of the type recalled in respect of Transaction 1.

Transaction 3

25. In or about August to November 2011 the Firm acted for Company F in Transaction 3, involving the transfer of Person G, a professional footballer, to Club D. Company F acted in Transaction 3 as agent for Club D. The First Respondent was identified as the fee earner on the matter and Mr Morallee was identified as the matter partner.

26. A client care letter dated 30 August 2011 in the name of Mr Morallee was sent by the Firm to Person H at Company F. That letter defined the work to be undertaken by the Firm on the matter as: "Advice in relation to your dealings with [Club D] in relation to the signing of [Person G]…"; and Drafting contracts for services between Company F and third parties.

27. As with the previous transactions, the letter stated: "For the avoidance of doubt, the scope of our retainer is limited to" (the said work), and excludes advice on the application of FIFA or national football regulations."

28. Hourly rates and an agreed fixed fee of £5,000 plus VAT were detailed. The letter made no provision for payments to be received into or made from the Firm or its client account other than in respect of costs. The file did not contain a copy of a Representation Contract between Company F and Club D.

29. Parts of the wording in a letter from Person H to the First Respondent dated 30 August 2011 were identical to the wording of letters sent by Person C in Transactions 1 and 2. It was therefore to be inferred that the First Respondent provided a template letter to Person H for the purpose of giving instructions as to payment. The letter set out instructions from Company F to the Firm; these were that Company F would cause its fee (by inference, due under the Representation Contract) to be paid into the Firm's Client Account in two instalments, and to make payments from sums received in relation to Transaction 3. The Firm's ledger recorded payments into and out of the client account, including payments to third parties.

30. On 17 November 2011, a payment was made to a different third party to the one originally identified in the letter from Person H, but to whom Person H had given instructions that sums were to be paid. This redirection of the payment was effected

notwithstanding that the instruction to make a payment to a different recipient was stated, in the letter from Person H of 30 August 2011, to be "irrevocable".

Transaction 4

31. In or about January to April 2013 the Firm acted for Company J in Transaction 4, involving the transfer of Person I, a professional footballer, to Club D. Company J was wholly owned by Person K, who acted in Transaction 4 as agent for Club D and Person I. The First Respondent was identified as the fee earner on the matter and Mr Morallee was identified as the matter partner.

32. A client care letter dated 15 January 2013, in the name of Mr Morallee was sent by the Firm to Person K at Company J. That letter defined the work to be undertaken by the Firm on the matter as:

- Drafting an Introduction Agreement with a third party;
- "Contractual matters relating to the transfer of [Person I] to [Club D] including advising on representation contracts with the Club and Player";
- "Potentially providing further advice in respect of ongoing legal work in relation to [Person I]".

33. As with the earlier transactions for Company B, the letter stated that "For the avoidance of doubt, the scope of our retainer is limited to" (the said work), and excludes advice on the application of FIFA or national football regulations.

34. The letter gave hourly rates and indicated anticipated fees for the conduct of the matter. The letter made no provision for payments to be received into or made from the Firm or its client account other than in respect of costs. The file contained a Representation Contract, undated and signed by Person I and Person K but not by Club D, which contained no provision to the effect that payments were to be made to a solicitors' firm. The file also contained an undated Introduction Agreement between Company J and a third party company, which also contained no provision to the effect that payments were to be made to a solicitors' firm.

35. The Firm's ledger recorded payments into and out of the client account, including payments to third parties.

Transaction 5

36. In or about January 2013 and subsequently, the Firm acted for Person L and Person A in Transaction 5, involving the transfer of Person A from Club D to Club M. Person L acted in Transaction 5 as agent for Club M as well as agent for Person A. The First Respondent was identified as the fee earner on the matter, with Mr Morallee as the matter partner.

37. Client care letters were sent by the Firm to Person L and Person A, both dated 9 January 2013, in identical terms. At the time the letters were sent, Person A's transfer to Club M had already taken effect. They provided, in summary, for the following work:

- Incorporation of a company in the British Virgin Islands for Person L;
- Incorporation of a company in the British Virgin Islands for Person A's image rights;
- Assignment of Person A's image rights to the said company;
- Conclusion of an image rights agreement between Person A and Club M;
- Commissioning of specialist tax advice for Person L and Person A;
- "General advice and provision of certain ancillary services relating to transfer…"

38. The letters provided hourly rates, and an estimate of fees. There were no provisions for payments to be received into or made from the Firm or its client account other than in respect of costs. Reference was made in the letters to an expectation of an FA investigation into the transfer.

39. The Firm's ledger recorded payments into and out of the Firm's client account, including payments to third parties.

Witnesses

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

- Ian Brook – Solicitor employed by Capsticks for the Applicant
- Elizabeth Ellen – First Respondent
- James Libson – Managing Partner of the Second Respondent
- Hinesh Mistry – Senior Risk and Compliance Manager of the Second Respondent

41. 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

42. The Applicant was required to prove the allegations on the balance of probabilities. The Tribunal had due regard to the Respondents' rights to a fair trial and to respect for their private and family 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.

43. **Allegation 1.1 - on or about the dates set out in Appendix 1 to this Statement, and in respect of one or more of the matters identified in Appendix 1 to this Statement, the First Respondent caused or allowed payments to be made into and from the Firm's Client Account in circumstances amounting to the provision of a banking facility and in doing so breached: (1.1.1) where such receipts and payments occurred on or before 5 October 2011, Rule 15 of the SAR 1998; (1.1.2) where such payments or receipts occurred on or after 6 October 2011, Rule 14.5 of the SAR 2011 and Principle 8 of the Principles 2011.**

Allegation 2.1 - on or about the dates set out in Appendix 1 to this Statement, and in respect of one or more of the matters identified in Appendix 1 to this Statement, the Second Respondent failed to take any or adequate steps to prevent payments to be made into and from the Firm's Client Account in circumstances amounting to the provision of a banking facility and in doing so breached: (2.1.1) where such receipts and payments occurred on or before 5 October 2011, Rule 15 of the SAR 1998; (2.1.2) - where such payments or receipts occurred on or after 6 October 2011, Rule 14.5 of the SAR 2011 and Principle 8 of the Principles.

The Applicant's Case

The Banking Facility Rule

43.1 Note (ix) to Rule 15 of the SAR 1998 originally provided:

> "Solicitors may need to exercise caution if asked to provide banking facilities through a client account. There are criminal sanctions against assisting money launderers."

43.2 The 2nd edition of the Law Society Money-Laundering Legislation: Guidance for Solicitors", circulated in 2000 stated (amongst other things): "Solicitors should also be alert to any proposals which are an attempt to use the solicitor's firm for nothing more than banking services".

43.3 In Wood & Burdett (Case no 8669-2002), the Tribunal imposed severe sanctions (striking off and suspension) on two partners in a firm that had been using its client account to offer a banking facility (specifically, a cheque cashing service) to clients and non-clients alike. In doing so, the Tribunal held that:

> "It was not a proper use of a solicitor's client account to allow it to be used by clients and/or members of staff as a bare banking facility. The proper use of a solicitor's client account was to hold money and disburse it as required in connection with a client matter of which the solicitor has conduct on behalf of that client."

And

> "… a solicitor should not hold money simply because he has been asked to do so without his taking charge of that money and disbursing it in accordance with a client's instructions in connection with professional work undertaken on behalf of that client. It is not a proper part of a solicitor's everyday business or

> practice to operate a banking facility for third parties whether they are clients of the firm or not. To operate client account in such a way would be likely sooner or later to be subject to the attentions of the unscrupulous and the solicitor concerned might well find himself laundering money without being aware that he and his banking arrangements were being utilised for such nefarious purpose."

43.4 As a result, in or around March 2004, Guidance Note (ix) to Rule 15 of the SAR 1998 was updated. At all material times prior to 6 October 2011, it stated:

> "In the case of Wood and Burdett (case number 8669/2002 filed on 13 January 2004 [sic]), the Solicitors Disciplinary Tribunal said that it is not a proper part of a solicitor's everyday business or practice to operate a banking facility for third parties, whether they are clients of the firm or not. Solicitors should not, therefore, provide banking facilities through a client account. Further, solicitors are likely to lose the exemption under the Financial Services and Markets Act 2000 if a deposit is taken in circumstances which do not form part of a solicitor's practice. It should also be borne in mind that there are criminal sanctions against assisting money launderers."

43.5 In Gauntlett, Beveridge & Ford (Case Nos 8951-2003 and 9090-2004 – June 2007). The Tribunal stated:

> "This Tribunal repeats what it has said before, namely that a solicitor is paid for his expertise and legal knowledge. It is extremely likely that any client who wishes to pay money into client account and withdraw it without availing himself of the solicitors' advice and professional services is more likely arranging for the movement of money for nefarious purposes. The Respondents have accepted that they failed properly to supervise Mr Ford and they have also accepted that as a result of Mr Ford's illegal movements of money through client account they had as principals in the firm inevitably permitted their client bank account to be utilised to receive and make payments in circumstances where there were no underlying transactions and, indeed, where it transpired that those receipts and payments amounted to the laundering of the proceeds of crime."

43.6 Gauntlett also made it clear the SAR applied to all, including non-admitted members of staff.

43.7 On 6 October 2011, the SRA Handbook 2011 came into force and replaced, inter alia, the SAR 1998 and the Solicitors Code of Conduct 2007. Between 6 October 2011 and 24 November 2019, Principle 8 of the Principles provided: "You must… run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles."

43.8 During the same period, Rule 14.5 of the SAR 2011 provided: "You must not provide banking facilities through a client account. Payments into, and transfers or withdrawals from, a client account must be in respect of instructions relating to an underlying transaction (and the funds arising therefrom) or to a service forming part of your normal regulated activities."

43.9 Guidance note (v) to that rule stated:

> "Rule 14.5 reflects decisions of the Solicitors Disciplinary Tribunal that it is not a proper part of a solicitor's everyday business or practice to operate a banking facility for third parties, whether they are clients of the firm or not. It should be noted that any exemption under the Financial Services and Markets Act 2000 is likely to be lost if a deposit is taken in circumstances which do not form part of your practice. It should also be borne in mind that there are criminal sanctions against assisting money launderers."

43.10 In Patel v Solicitors Regulation Authority [2012] EWHC 3373 (Admin), the Appellant had provided banking facilities absent an underlying legal transaction because, owing to a lack of "trust" between the parties, investors to the underlying scheme were not prepared to provide funds to his client directly. Mr Patel appealed against the Tribunal's finding of professional misconduct and the fine of £7,500.00 imposed. Dismissing the appeal, Cranston J held:

> "[18] … rule 14.5 is a crystallization of the principle established in Wood and Burdett… The first sentence of the rule contains the prohibition on the use of a client account to provide banking facilities. Use of the term "instructions" in the next sentence of the rule implies professional instructions, in other words instructions relating to the accepted professional services of solicitors. The term is being used in rules concerned with the work of solicitors and takes its meaning from that context. Thus the import of the first limb of the second sentence of rule 14.5 is that movements on a client account must be in respect of instructions relating to an underlying transaction which is part of the accepted professional services of solicitors. In shorthand the instructions must relate to an underlying legal transaction. The other limb of that second sentence requires that movements on a client account must be in respect of instructions related to a service forming part of the normal regulated activities of solicitors. That is a provision the ambit of which is to be measured in terms of the regulatory regime for solicitors…
>
> "… [34] For my part I cannot accept the submission that the principle in Wood and Burdett should somehow be limited because its origins lie in a concern with money laundering or the prevention of illegal activity of a similar nature. That is certainly one of the legal purposes behind the principle but by no means the only one. In Wood and Burdett itself a rationale referred to at paragraph 141, quoted earlier in this judgment, is that solicitors maintain a client account to protect clients' moneys which they holding in connection with professional work undertaken on their behalf. The revised guidance note to rule 15 states that it is not a proper part of a solicitor's everyday business or practice to operate a banking facility for third parties, whether clients or not. One element of that might well be the purpose for the Wood and Burdett principle suggested by Mr McLaren QC, that if solicitors could operate a banking facility for third parties, without doing any legal work for them, they would be trading in effect on the trust and reputation which they acquired through their status as solicitors."

43.11 In Fuglers v Solicitors Regulation Authority [2014] EWHC 179 (Admin), the Appellants had allowed the Firm's client account to be used by a client of the Firm, Portsmouth City Football Club Limited, as a banking facility over a four month period between 5 October 2009 and 8 February 2010. Popplewell J upheld fines totalling £75,000.00 and explained (at [39] to [42]) the mischief at which note (ix) to Rule 15 (and subsequently Rule 14.5) was aimed:

> "[39] … it is objectionable in itself for a solicitor to be carrying out or facilitating banking activities because he is to that extent not acting as a solicitor. If a solicitor is providing banking activities which are not linked to an underlying transaction, he is engaged in carrying out or facilitating day to day commercial trading in the same way as a banker. This is objectionable because solicitors are qualified and regulated in relation to their activities as solicitors, and are held out by the profession as being regulated in relation to such activities. They are not qualified to act as bankers and are not regulated as bankers. If a solicitor could operate a banking facility for clients which was divorced from any legal work being undertaken for them, he would in effect be trading on the trust and reputation which he acquired through his status as a solicitor in circumstances where such trust would not be justified by the regulatory regimen …
>
> "[40] In my view it is for these reasons that irrespective of a risk of the abuse of the account for money laundering, providing banking facilities through a client account is objectionable per se...

43.12 Mr Ramsden QC submitted that the banking facility rule was clear, and that it applied to the payments as alleged. The Firm and the First Respondent had made and caused or allowed payments to be made to third parties in circumstances where those payments were not a necessary part of the legal services being provided. The First Respondent's assertion that the banking facility rule was not clear was not accepted and not correct. The First Respondent's submissions in that regard were completely contrary to the rules and to settled caselaw.

The Warning Notice

43.13 On 18 December 2014 the SRA issued an official Warning Notice to the profession, entitled "Improper use of a client account as a banking facility" ("the Warning Notice"), accompanied by four illustrative case studies. Mr Ramsden QC submitted that the Warning Notice was not a declaration of new principles but a reminder of existing ones. It set out the text and history of Rule 14.5, and made clear that a breach was "a serious matter", which might also involve a breach of the SRA Principles 2011, including Principle 8. The Warning Notice drew attention to relevant authorities and stated, amongst other things, that solicitors should be aware that:

> "Providing banking facilities through a client account is objectionable in itself - For the avoidance of any doubt, our view is that you should only receive funds into client account in relation to an underlying transaction that you or your firm is advising on. It is not sufficient that there is an underlying transaction if you are not providing legal advice to one of the parties.

> "There must be a reasonable connection between the underlying legal transaction and the payments - Whether there is a reasonable connection is likely to depend on the facts of each case but where the legal services are purely advisory, it will clearly be more difficult to show a reasonable connection. The fact that you have a retainer with a client does not give you licence to process funds freely through client account on the client's behalf. Throughout a retainer, you should question why you are being asked to receive funds and for what purpose. You should only hold funds where necessary for the purpose of carrying out your client's instructions in connection with an underlying legal transaction or a service forming part of your normal regulated activities. You should always ask why the client cannot make the payment him or herself. The client's convenience is not the paramount concern and, if the client does not have a bank account in the UK, this considerably increases the risks. You should be prepared to justify any decision to hold or move client money to us where necessary."

43.14 The Warning Notice addressed a practice historically adopted by some private client solicitors of agreeing to receive and hold funds for clients to enable them to pay routine bills and invoices on their clients' behalf, predominately for the client's convenience. The Warning Notice was clear that allowing client account to be used in this way was "no longer appropriate".

43.15 Mr Ramsden QC submitted that the receipt of sums pursuant to the Representation Contracts, and payments out to third parties were not necessary parts of the provision of the agreed services. As regards Transaction 1, a perceived or reported lack of trust between the parties was not of itself a rationale for the provision of such services. As regards Transaction 3, the Applicant further relied on the fact that payments were redirected to different third party recipients.

43.16 In Transaction 5, the Firm was instructed after the transfer was completed. Given that the transfer had already occurred, there was no need for the Firm to be involved with the payments made and received. In the circumstances it was very difficult, if not impossible, to see how what the Respondents did for Person L was, in principle, any less serious than the conduct which was criticised and sanctioned by the Tribunal in Wood & Burdett. The Respondents were sending large sums of money overseas, to third parties about whom they knew little if anything, based on little more than the say so of Person L. It was evident that the First Respondent (and therefore the Firm) was acting as a banker – a role she/it was not qualified or regulated to undertake – with none of the safeguards that a regulated bank would have had in place. In doing so, she and the Firm would have exposed themselves to all of the serious risks identified by Popplewell J in Fuglers.

43.17 In each of the transactions, the Respondents' had provided a banking facility in breach of guidance note (ix) to Rules 15 of the SAR 1998 and/or Rule 14.5 of the SAR 2011. The First Respondent was aware of the payments, and accepted (as regards transactions 2 – 5) that the Accounts Rules had been breached in her early correspondence (although that was denied in the proceedings). The Second Respondent was also aware of the payments as the holder of the accounts, and accepted (as regards transactions 2 – 5) that the SAR had been breached.

The First Respondent

43.18 Mr Ramsden QC noted that in correspondence, the First Respondent accepted that her conduct had been in breach of the banking facility rule. In a letter dated 24 May 2019, it was stated:

> "[The First Respondent] does not claim that her conduct as a young solicitor was not capable of improvement and … with the benefit of hindsight and significantly more experience, she has accepted: (i) that were she to be placed in the same position now, she would act differently; and (ii) that there are certain respects in which there were, very regrettably, breaches of her professional obligations, in particular with regard to the use of the firm's client account as a banking facility. She is naturally disappointed to have discovered many years later that the SRA has legitimate grounds to criticise her conduct in this respect, for which she wishes to apologise unreservedly. However, as explained below she did not have primary responsibility for this breach."

43.19 Further, in a letter dated 20 May 2020, it was stated:

> "From the very outset, [the First Respondent] recognised in her 2017 letter (as did the firm) the risk that SAR 14.5 had been breached. That recognition reflected: (i)[the First Respondent's] understanding of the Rule as it is now understood to operate (following extensive guidance from the SRA including its 2014 Warning Notice (as now updated in November 2019)) in a markedly different environment to that which existed at the time of the transfers; and (ii) the fact that in the intervening years, [the First Respondent] has had the benefit of considerably more experience than she had at the time, as a 3-year qualified associate working under the supervision of Mr Morallee.
>
> Consistent with that recognition, [the First Respondent] accepted candidly, and with sincere regret, in the 2019 letter that the SRA had legitimate grounds to criticise her conduct in this respect, and accepted that in respect of the transfers identified in the EWW letter, guidance note (ix) to Rule 15 of the Solicitors' Accounts Rules 1998, and subsequently Rule 14.5 of the SRA Accounts Rules 2011 (collectively "the Accounts Rules"), as they are now understood to operate, were breached unwittingly. Ms Ellen made it clear that she apologised unreservedly for that failing. She maintains that apology here … It does not follow, however, that she ought to be held responsible, as a matter of professional conduct, for those breaches. They do not give rise to the necessary level of seriousness to justify bringing disciplinary proceedings many years later."

43.20 In her Answer, the First Respondent stated:

> "It is not admitted that any payments were made into and from the firm's client account in circumstances amounting to the provision of a banking facility. Whether or not the firm's client account was used in this way, is primarily an issue between the firm and the SRA"

43.21 Mr Ramsden QC noted that until the service of the First Respondent's skeleton argument in the proceedings, the First Respondent had either admitted the breach, or had not advanced any positive case.

43.22 The positive case now advanced, it was submitted, was unsustainable. The First Respondent argued that the Applicant sought "impermissibly" to expand the banking facility rule to apply to fee earners whereas it only applied to authorising partners and firms. It was plain that the SAR applied to all solicitors. Rule 4 of the SAR 1998 expressly stated that the SAR applied to solicitors, including associates, assistants, consultants and locums and that all employees of a recognised body were directly subject to the SAR. Rule 4 of the SAR 2011 was equally as clear.

43.23 In the Tribunal case of Bown (Case No 12060-2020), Mr Bown was a salaried employee, was not a partner and was not a signatory to client account. The Tribunal found that he had caused or allowed the firm's client account to be used as a banking facility. The First Respondent complained of the way that the case against her had been framed. The case had been framed in the same way against Mr Bown, and the Tribunal had found it proved. Mr Ramsden QC accepted that the Tribunal was not bound by its previous decisions. Reliance was placed on Bown as it demonstrated, and the Tribunal in that case found, that the SAR applied to all. Such a decision disposed of the First Respondent's assertion that the banking facility rule did not apply to her as she was not an authorising partner. The First Respondent's position, it was submitted was wholly incorrect.

43.24 The underlying facts (as detailed in the factual background above) were not in dispute. That included each of the documents showing the First Respondent's involvement in the receipt and payment of monies. While she did not authorise them, it was quite evident that the First Respondent personally instigated a very large number of the impugned payments into and out of the client account, in breach of the Prohibition. These were far from being technical or trivial breaches.

43.25 As to the Tribunal case of Langford et al (Case No 11686-2017), relied upon by the First Respondent, it was perfectly clear that this first instance decision turned on its own unusual facts (including an allegation, not upheld, that the SRA had reneged on an agreement not to prosecute). Unlike the instant case, it was decided on the criminal standard of proof and it involved only a single client ("Mr A"). It did not purport to lay down any wider declaration of principle, still less to declare how other divisions should approach other cases. The declaratory nature of the common law was such that the meaning of the Prohibition as explained by the High Court in Patel and Fuglers had retrospective effect.

43.26 The First Respondent denied that her conduct was in breach of Principle 8. In her Answer the First Respondent stated that it was not her role "to authorise payments into and out of the client account. She complied with sound financial and risk management principles by keeping Mr Morallee informed in relation to the Transactions and by obtaining authority for the payments from the relevant partners." The Applicant acknowledged that the First Respondent was a relatively junior solicitor at the Firm and that Mr Morallee was the named matter partner; however:

- The SAR 1998 applied, not merely to partners, but "to all those who carry on or work in a practice and to the practice itself" (see note (i) to Rule 2 and also Rule 4).

- The SAR 2011 applied, not merely to partners, but "to all those who carry on or work in a firm and to the firm itself" (see Introduction and also Rule 4).

- Compliance with Principle 8 required, at a minimum, that solicitors made themselves aware of and heeded their obligations under the Accounts Rules.

- At material times, the First Respondent styled and held herself out to clients and the wider market as the Firm's "Head of Football". It was therefore all the more incumbent upon her to ensure that those matters being conducted by her and in her role as Head of Football were compliant with the Accounts Rules.

43.27 Given that the First Respondent personally, and in her role as Head of Football, instigated the receipt into client account and payment out of huge sums of money contrary to Rule 14.5 SAR 2011, it was submitted that she (as well as the Firm) plainly breached Principle 8. It was not accepted that her role in the transactions through client account was in any way less significant than any others who also had responsibility for compliance with the Accounts Rules in the Firm.

The Second Respondent

43.28 The Firm admitted that, in respect of Transactions 2 - 5 and each of them it provided a banking facility in breach of either note (ix) to Rule 15 SAR 1998 or Rule 14.5 SAR 2011. Mr Ramsden QC submitted that the Second Respondent's admissions were properly made and responsible. That the admissions were made promptly stood to the Second Respondent's credit.

43.29 For the avoidance of doubt, it was not accepted that these were merely technical or trivial breaches. On the contrary, they were profoundly serious, involving as they did many millions of pounds and a large number of third parties in this jurisdiction and abroad. The breaches occurred in the context of the Money Laundering Regulations 2007 and the FA Agents Regulations 2009, both of which made punctilious compliance with the Prohibition all the more important. In contrast to Fuglers, where the breaches occurred over only four months and involved a single client, the Prohibition in this case was repeatedly breached on multiple occasions, involving multiple clients and third parties, over a period of several years.

43.30 The Firm denied that Transaction 1 involved such a breach. In its Answer the Second Respondent stated:

> "The Firm relies on the First Respondent's answers in interview with the SRA in which she stated that on Transaction 1 there was a reason for the funds to pass through the Firm's client account, namely a lack of trust between the parties…"

43.31 Such a stance, it was submitted, was misconceived. A lack of trust between parties did not, without more, justify the provision of a banking facility absent an underlying legal transaction or a service forming part of the normal regulated activities of solicitors. In

any case, as correctly observed by the SRA's officers in interview, had Person C failed to make the payments he had contracted to make, the counterparties would have had a remedy against him in contract.

> "The monies were received in order that they could be paid out to 4 counterparties under 4 contracts which the Firm had drafted".

43.32 This was plainly not a sufficient justification to receive the monies. As the SRA's officers aptly observed in interview, the draughtsman of a contract of employment would not receive or pay out the employee's salary through client account. In order for the Firm properly to receive and disburse the monies, the payments had to be in respect of instructions relating to an underlying legal transaction or service forming part of solicitors' normal regulated activities. These payments were not. The Firm's involvement was "ancillary" to the player transfer. Company B/ Person C could and should have received his fees and then (if proper to do so) paid the third parties himself.

> "The monies were received pursuant to a letter from the client to the Firm dated 17 June 2011".

43.33 Leaving aside that the letter in question had been drafted by the First and/or Second Respondents, this point was irrelevant. Solicitors were not entitled to follow client instructions blindly and doing so certainly did not excuse a material breach of the Accounts Rules. Again, the question was whether the payments were in respect of instructions relating to an underlying legal transaction or service forming part of solicitors' normal regulated activities. They were not.

> "The monies were received from a genuine and trustworthy source, namely the FA".

43.34 The trustworthiness or otherwise of the payer was immaterial to whether a banking facility was provided or not. The fact that the funds emanated from the FA did not render it proper or acceptable to receive them into client account or thereafter to provide a banking facility.

> "The monies were paid out to 4 counterparties under 4 contracts which the Firm had drafted".

43.35 Leaving aside that the "services" purportedly provided under those contracts was and remained entirely opaque, it was no answer to say that the payments out had been documented by the Firm. The prohibition on providing a banking facility could not be avoided by writing a breach of that prohibition into a contract. The payment must relate to an underlying legal transaction or regulated service. These payments did not.

> "The monies were paid out pursuant to a letter from the client to the Firm dated 17 June 2011".

43.36 Again, the letter was of no relevance. Solicitors could not escape liability for breaches of the rules by relying on their instructions to do so (especially where self-drafted).

> "There was a reason for the monies to pass through client account, namely the lack of trust between the parties to the 4 contracts which the Firm had drafted".

43.37 Again, as per Patel, a lack of trust between parties does not, without more, justify the provision of a banking facility absent an underlying legal transaction or a service forming part of the normal regulated activities of solicitors.

> "It is clear from the SRA's current guidance on rule 3.3 of the current Solicitors Accounts Rules that lack of trust between the parties provides a reason for monies to pass through client account."

43.38 This proposition was denied and the case studies relied upon did not, on analysis, support it. The case studies were not applicable to the facts in this matter. The question was whether the movements on client account were in respect of an underlying legal transaction or normal regulated service. They were not.

43.39 Mr Ramsden QC submitted that the only real difference between Transaction 1 and Transactions 2 – 3, was the lack of trust. As already detailed, a lack of trust was not sufficient, without more, to justify the payments. There was, it was submitted, a disjoint between the Second Respondent's denial as regards Transaction 1, and its admissions as regards Transactions 2 and 3. In circumstances where the Second Respondent accepted the breach as regards Transactions 2 and 3, it ought to accept the breach as regards Transaction 1.

43.40 The Second Respondent accepted, during the course of the proceedings, that its conduct amounted to a breach of Principle 8.

The First Respondent's Case

43.41 The First Respondent denied that she had caused or allowed the Second Respondent's client account to be used as a banking facility or that her conduct was in breach of Principle 8 as alleged. Mr Coleman QC confirmed that the underlying facts were largely agreed. There were 12 facts that were undisputed which, it was submitted, compelled the dismissal of the allegations against the First Respondent:

43.41.1 At the time the First Respondent was a relatively junior solicitor.

43.41.2 At the material time the First Respondent was a conscientious and highly regarded solicitor, who had undertaken additional work in order to advance her career.

43.41.3 Prior to her work on the transactions, the First Respondent had very little experience of client accounts and transactional work. Her previous experience had mainly been in consumer credit and estate agency matters. Her only experience of client account payments related to settlement monies in litigation. The First Respondent had no experience of what was permitted or prohibited in the context of transactional work.

43.41.4 The First Respondent had received no training or guidance from the Second Respondent as regards the banking facility rule.

43.41.5 The First Respondent had no responsibility for, and exercised no control over the client account. She was not on the bank mandate. The client account was controlled by partners of the Second Respondent.

43.41.6 It followed from 5 above that she did not and could not authorise payments out of the client account. All payments were authorised by Mr Morallee. Payments out were authorised by two partners in accordance with the Second Respondent's processes. There were 12 separate partners that authorised the complained of payments.

43.41.7 The Authorising Partners understood what the payments were for and were satisfied that they were proper payments to make. It was the Second Respondent's case that the Authorising Partners were not aware that the payments were improper. Mr Coleman QC submitted that such an assertion was not open to the Second Respondent in circumstances where its policies and procedures were clear, and in the absence of evidence to the contrary, it was to be inferred that the Authorising Partners discharged their obligations. It was no part of the Applicant's or the Second Respondent's case that the Authorising Partners failed in their duties.

43.41.8 The First Respondent did not perceive that there was any regulatory objection to the payments, which related to genuine transactions. Mr Morallee and the Authorising Partners expressed no concerns about the use of the client account to make the payments. All payments were properly and fully documented.

43.41.9 No-one involved with authorising the payments considered that there was a regulatory issue.

43.41.10 Mr Morallee had overall responsibility for the conduct of the transactions and the use of client account as the Matter Partner. The Second Respondent's policies as regards the role of the Matter Partner made it clear that Matter Partners were responsible for finance, the conduct of the matter and the supervision of fee earners and support staff.

43.41.11 Mr Morallee discharged his obligation. He was fully aware of all aspects of the retainers and the way in which the client account was used. The First Respondent had daily contact with Mr Morallee. It was implausible that there was any feature of which Mr Morallee was not aware. This, it was submitted, was an important feature that was unchallenged by the Applicant or the Second Respondent.

43.41.12 Insofar as the First Respondent initiated requests for payments, she did so in her capacity as a fee earner under Mr Morallee's direction and supervision, with his knowledge and approval.

43.42 Mr Coleman QC submitted that two conclusions followed from those undisputed facts:

- The First Respondent was entitled to trust the judgement of the partners that the payments were appropriate transactions to be conducted through the client account; and

- On any fair view, the First Respondent's contribution to a breach of the banking facility rule in comparison to the Second Respondent itself and the Authorising Partners was relatively small.

The Banking Facility Rule

43.43 The Applicant sought, Mr Coleman QC submitted, to prejudice the First Respondent's position by asserting that the First Respondent had made a 180 degree *volte face* from her previously stated acceptance that her conduct was in breach of the SAR. As to that, the First Respondent's position as to the facts had been consistent. It was accepted that if judged on the current understanding of the banking facility rule, the transactions were in breach. The First Respondent considered on her current understanding of the SAR, she would not undertake the transactions today. The only respect in which the First Respondent's position had altered related to the legal question as regards the current and former understanding of the banking facility rule. In the pre-proceedings correspondence, the First Respondent accepted that the transactions should be determined according to the current understanding. In her written Answer, the First Respondent formally reserved her position.

43.44 The First Respondent was entitled to, and had properly, advanced her case on the basis of the understanding of the profession at the time. This was a proper point of law to be determined, and was not a factor that could be held against the First Respondent. It had been the First Respondent's position throughout that she should not be subject to regulatory action. Further, the First Respondent had never acknowledged that she caused or allowed banking facilities to be provided.

43.45 As to the Second Respondent's admissions, those were made on the basis of how the banking facility rule was now understood to apply, not on the understanding of the profession at the material time. Mr Coleman QC submitted that the approach of the Second Respondent was incorrect; the question of breach should not be determined by reference to SRA guidance issued after the material period; the current guidance could not be applied retrospectively. In any event, it was open to the Tribunal not to accept the Second Respondent's admissions

43.46 Mr Coleman QC submitted that the scope of the banking facility rule was not clearly defined in the wording of the rule. The SRA had found it necessary to supplement the rule with detailed and lengthy guidance since December 2014.

43.47 This case raised two important points of principle regarding the correct approach to the interpretation and application of the banking facility rule. Firstly, it could only properly be applied to cases clearly falling within its scope. That was required by the principle of "doubtful penalisation", which is one of the cardinal precepts of statutory interpretation. In Bennion on Statutory Interpretation (8th Edition.) at [26.4] it was stated:

> "It is a principle of legal policy that a person should not be penalised except under clear law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take into account".

43.48 This meant that any reasonable doubts about the meaning and effect of a rule should be resolved in the solicitor's favour.

43.49 Secondly, a question of professional misconduct in respect of an alleged rule breach must be determined on the basis of how a reasonable, competent solicitor might have understood the rule to apply at the material time. The banking facility rule must, therefore, be interpreted and applied in the light of the professional consensus during the material period as to what was and what was not prohibited by the banking facility rule.

43.50 The current professional consensus could not be invoked retrospectively to prove breaches in respect of conduct committed prior to the emergence of that consensus. A solicitor who acts in accordance with an interpretation of a rule that a reasonable, competent solicitor might have placed on it at the material time did not commit professional misconduct, even if the professional consensus or judicial decisions as to the meaning and effect of the rule subsequently changed such that the conduct would no longer be regarded as acceptable.

43.51 In Patel, Cranston J made some observations regarding the approach that a Tribunal should take when determining whether solicitors have breached the standards of expected of them which resonated in the present case. After citing at [12] a statement in Cordery on Solicitors that professional misconduct "is simply conduct which is regarded as such from time to time by the Solicitors Disciplinary Tribunal and the judges", he said at paragraph 13 (emphasis added):

> "The latter proposition is no mandate for the Tribunal to characterise a solicitor's behaviour as professional misconduct in an arbitrary fashion. One aspect of the principle of legality [i.e. the rule of law] is that solicitors should be able to ascertain what is demanded of them. At the same time the Tribunal must be able to stigmatize behaviour as unacceptable against a background of societal changes or technological developments. One basis for the Tribunal to move with the times is if public confidence would be undermined should solicitors be able to act in a certain way. Another is if there is a consensus with the profession that certain conduct is wrong. "

43.52 It was the Applicant's case that the rule existed; the issue to be determined was not the existence of the rule but the scope as understood at the time. Further, it was the Applicant's case that the declaratory nature of the law was such that the meaning of the banking facility rule as explained in the High Court in Patel and Fuglers had retrospective effect. Such rigidity, it was submitted, was misplaced in the present context for two reasons:

- It was inherent in a broad rule of professional conduct which is not drafted in precise and exhaustive terms, and which must be applied in the many different contexts in which money is held in client account, that its meaning and effect may change over

time. This has been acknowledged by the SRA itself in the December 2014 Warning Notice

- A mere mistake by a solicitor as to the meaning and effect of a rule of law was not sufficient to establish professional misconduct such as to engage the public interest or to impact on public confidence in the profession. It was well established that the meaning and effect of statutes may change with the times (sometimes expressed as "statutes are always speaking"). That was also true of rules of professional misconduct, as the remarks cited above from Patel made clear.

43.53 Mr Coleman QC submitted that the Applicant's submissions missed the point. The central point on retrospectivity was not that the Applicant was seeking to apply Patel and Fuglers retrospectively. Rather it was that the Applicant sought to judge the First Respondent's conduct in the light of the professional consensus as to meaning and effect of the banking facility rule which had emerged following the publication of the SRA's Warning Notice on 18 December 2014.

43.54 The premise of the case against the First Respondent was that the firm provided banking facilities through the client account. That was primarily an issue for the SRA, the firm and its partners, who had control over it. Nonetheless, it was submitted that no such banking facilities were provided, such that the first step in the case against the First Respondent fell away. The use of the client account was consistent with the consensus of the profession during the material period as to the meaning and effect of the banking facility rule.

43.55 Mr Coleman QC submitted that at the material time, a competent solicitor could have reasonably understood that the relevant payments did not infringe the banking facility rule because they were made on the instructions of a client for whom the firm was providing legal services. That was the approach of the Tribunal in Patel (Case No 10511-2010) from which there was no appeal by the SRA. The Tribunal took a different approach in that case where it considered that there were underlying legal transactions. Allegations of a breach of the banking facility rule were found not proved, whereas where there were no underlying legal transactions, the Tribunal found that the banking facility rule had been breached.

43.56 That it was not understood by the profession at the time that the now complained of conduct as in breach of the SAR was evidenced by the fact that, of the twelve partners who authorised the payments, not one of them identified any concern with them. The Second Respondent, in its Answer stated:

> "…the general understanding of the legal profession in 2012 was that a solicitor who had done legal work, such as drafting an agreement which provided for payments to third parties, could receive money into client account and disburse that money to third parties. This had been accepted by the Tribunal in SRA v Patel where the Tribunal [had] dismissed charges against solicitors on those cases where the solicitor had drafted a joint venture agreement and had received and disbursed monies in accordance with that agreement which he had drafted."

43.57 The Applicant, it was submitted, had not sought to engage with this aspect of the First Respondent's case.

43.58 The Applicant also relied on the Warning Notice in support of its case. The Warning Notice post-dated all five of the Transactions and all but one of the payments in issue in these proceedings. That payment did not engage the banking facility rule at all (as the money was returned to the client).

43.59 The SRA had recognised the need to issue detailed and lengthy written guidance to support a shortly stated rule; this could be taken as indication of the uncertainty inherent in the rule and the difficulty in identifying its scope and applying it. The 2014 Warning Notice did not merely record the propositions of law set out in the developing caselaw of the Tribunal and the High Court in relation to the banking facility rule. It set out the SRA's view as to the correct interpretation of the rule and the caselaw, and of what was permitted and prohibited by the rule. The caselaw at the time of the 2014 Warning Notice had either simply repeated or paraphrased the language of the banking facility rule. For example, it was said that payments on client account needed to "relate to" an underlying legal transaction or legal work, or be "connected to" or "linked to" and not "divorced from" an underlying transaction or legal work.

43.60 The 2014 Warning Notice, however, went further and identified what, on the basis of that caselaw, the SRA considered was meant by the requirement for payments to be "relating to an underlying transaction". In particular, the 2014 Warning Notice said that (emphasis added):

> "For the avoidance of doubt, our view is that you should only receive funds into client account in relation to an underlying transaction that you or your firm is advising on. It is not sufficient that there is an underlying transaction if you are not providing legal advice to one of the parties … Whether there is a reasonable connection is likely to depend on the facts of each case but where the legal services are purely advisory, it will clearly be more difficult to show a reasonable connection. The fact that you have a retainer with a client does not give you licence to process funds freely through client account on the client's behalf. Throughout a retainer, you should question why you are being asked to receive funds and for what purpose. <u>You should only hold funds where necessary for the purposes of carrying out your client's instructions in connection with an underlying legal transaction or a service forming part of your normal regulated activities</u>. You should always ask why the client cannot make the payment him or herself. The client's convenience is not the paramount concern and, if the client does not have a bank account in the UK, this considerably increases the risks. You should be prepared to justify any decision to hold or move client money to us where necessary."

43.61 The SRA was setting out its view as to what the banking facility rule prohibited. In particular, it expressed the view that holding client money must be necessary for the purposes of carrying out the client's instructions in connection with an underlying legal transaction or legal service ("the necessity requirement"). The necessity requirement was articulated for the first time in the 2014 Warning Notice, such that December 2014 was the first occasion that the solicitors' profession was made aware of the SRA's view that, regardless of existence of an underlying legal transaction or of a connection

between the monies being held by the firm and such a transaction, a solicitor should only hold funds where it was, specifically, "necessary for the purpose of carrying out your client's instructions in connection with an underlying legal transaction or a service forming part of your normal regulated activities".

43.62 The uncertainty inherent in the banking facility rule was illustrated by the SRA's acknowledgement in the notice that in the past (i.e. prior to December 2014) solicitors could in certain circumstances use their client account in a way that was no longer regarded as appropriate: "Historically, some solicitors have agreed to receive and hold funds for clients to enable them to pay routine bills and invoices on their clients' behalf….In view of technological advancements, in particular the ease of internet and telephone banking, we consider that allowing client account to be used in this way is no longer appropriate" (emphasis added).

43.63 The Warning Notice, although in the form of guidance, shifted the professional consensus as to what was and what was not an acceptable use of client account. As the Tribunal said in SRA v Langford, Gummers, Amandini, Johnstone and Howard Kennedy LLP (Case No 11686-2017): "the SRA clarified the import of Rule 14.5 when it issued its warning notice on 18 December 2014".

43.64 The SRA had not provided any adequate explanation as to why the First Respondent, the firm and the twelve Authorising Partners ought to have appreciated, prior to the publication of the Warning Notice on 18 December 2014, that the necessity requirement applied. Prior to December 2014, it could not be said that on the basis of the existing caselaw and guidance that any reasonably competent solicitor ought to have understood that the banking facility rule incorporated the necessity requirement (such that any failure to have done so constituted professional misconduct). Indeed, no such allegation was made by the Applicant in its Amended Rule 12 Statement.

43.65 The allegations against both Respondents, it was submitted, proceeded on the basis of an interpretation of the banking facility rule that had not been clearly established during the material period, with the result that the allegations must fail on that ground alone. Whilst the SRA's interpretation of the banking facility rule may today be generally accepted by the profession as setting the limits of the rule, it could not be applied retrospectively to penalise the use of the client account in a way that a reasonably competent solicitor at the material time could have viewed as not infringing the banking facility rule.

43.66 Mr Coleman QC submitted that even if the Tribunal found that a banking facility had been provided, the case against the First Respondent ought still to be dismissed. The First Respondent had not provided the banking facility. The prohibition against providing banking facilities through the client account applied only to a firm or solicitor who provided the facilities. There was no allegation that the First Respondent herself 'provided' banking facilities through the client account. Nor could there be; she did not authorise any of the payments (the firm's partners did). She had no authority to do so. She did not have any control over the operation of the client account. It was implicit in the Applicant's case that it was the Second Respondent that provided the banking facility.

43.67 In light of the wording of the allegation, the SRA sought impermissibly to expand the relevant rules to apply to a solicitor who was alleged to have "caused or allowed" payments thorough the client account in circumstances amounting to the provision of a banking facility. That the banking facility rule could not be so extended was plain given the language of the rule.

43.68 Mr Coleman QC considered the Applicant's alternatives:

43.68.1 Allow – It was submitted that the First Respondent could not have 'allowed' the payments in circumstances where she had no power to authorise payments. It was irrefutable and obvious that it was the Authorising Partners who allowed the payments in accordance with the Second Respondent's policies.

43.68.2 Cause – When considering causation in the context of professional misconduct, simple 'but for' causation was not the appropriate mechanism for analysis of conduct. The question for the Tribunal was whether or not, having regard to all the circumstances, the First Respondent should be regarded as the person with professional responsibility for causing the Second Respondent to make the payments. Mr Coleman QC submitted that the answer to that question was 'no' in circumstances where:

- The First Respondent had no control of the client account and did not authorise the payments.
- All Payments were authorised by Mr Morallee or other Authorising Partners.
- As the Matter Partner, Mr Morallee was expressly responsible for the conduct of the matters and the transactions.
- Under the SAR's and the Second Respondent's own policies, the Authorising Partners were responsible for ensuring compliance with the SAR's.
- The Second Respondent acknowledged that it had failed to adequately monitor compliance

43.69 Mr Coleman QC submitted that on the Applicant's pleaded case and on the evidence, it was plain that the First Respondent's conduct was inadvertent. It was no part of the case against her that the First Respondent acted dishonestly or recklessly. She was a junior solicitor with no direct experience of the banking facility rule.

43.70 The Applicant's cross-examination of the First Respondent was premised on a misunderstanding of her case. It was not the First Respondent's case that the SAR's and the banking facility rule did not apply to her; it was accepted that SAR applied to all solicitors. Rather, it was the First Respondent's case that in circumstances where she had not provided a banking facility (this was provided by the Firm) the banking facility rule could not be extended to apply to the First Respondent.

43.71 Mr Coleman QC submitted that on a proper analysis of the circumstances, the First Respondent neither provided a banking facility, nor allowed a banking facility to be provided.

43.72 As to the allegation that the First Respondent's conduct was in breach of Principle 8, this was a make-weight and added nothing to the allegation. It was derivative of the allegation that the First Respondent caused or allowed banking facilities to be provided. In any event, the First Respondent complied with sound financial and risk management principles by keeping Mr Morallee properly informed in relation to the Transactions and by obtaining authority for the payments from the relevant partners. No case was advanced on the basis that the First Respondent exceeded her authority, departed from the firm's processes, failed to comply with her obligation properly to update Mr Morallee, or any other such failing in relation to the Transactions. The SRA's case on Principle 8 therefore added nothing to its case on the banking facility rule and must similarly fail.

The Second Respondent's Case

43.73 The Second Respondent admitted that it had breached the banking facility rule in relation to Transactions 2 – 5. Ms Carpenter QC explained that prior to the hearing, the basis upon which a breach of Principle 8 was alleged had not been sufficiently particularised. The Second Respondent had understood the Applicant's case to be a failure to have appropriate policies and procedures in place. To that end, the Second Respondent had provided the Applicant with a copy of its policies and procedures. It was during the course of the proceedings that the Applicant fully particularised its case as regards Principle 8. The Second Respondent, having understood the way that the Applicant put its case accepted that its conduct was in breach of Principle 8 as follows:

> "The Firm has provided evidence of its policies and procedures during the period identified, 2011 to 2015. As set out in its oral opening, the SRA accepts that the Firm had policies and procedures in place to prevent the use of its Client Account as a banking facility. The SRA does not allege that the Firm's policies and procedures in themselves were defective or breached Principle 8. However, the SRA notes (and the Firm accepts) that the payments to or from third parties referred to in the Rule 12 Statement were authorised by a number of its partners, that no or no adequate steps were taken to prevent those payments, and that, as regards payments to or from third parties on or after 6 October 2011 in respect of Transactions 3 to 5, the Firm failed to adequately monitor compliance with its policies and procedures and Principle 8 was thereby breached."

43.74 This reflected the agreed position between the Applicant and the Second Respondent.

The Banking Facility Rule

43.75 Ms Carpenter QC set out the history as regards the development in the SAR and caselaw of the banking facility rule. It was submitted that as a result of the developments as regards the banking facility rule, the general understanding of the profession at the material time was:

- In 2011 there was much less clear understanding in the profession as to the rule against acting as a banking facility and as to what that rule meant.

- In 2011 it was a common understanding in the profession that guidance note (ix) of Rule 15 of the Solicitors Accounts Rules 1998 and rule 14.5 of the SRA Accounts

Rules 2011 did not expand the concept of acting as a banking facility further than had previously been set out in cases such as Wood and Burdett. i.e. that the guidance/rule was to prevent solicitors taking money into client account and paying it out where the solicitor was not acting on any transaction and was simply acting as a bank.

- In 2011 it was widely thought in the solicitors' profession that as long as a firm was acting on a matter (even in an administrative capacity only) it could receive monies into its client account and pay out those monies. This point went to the Divisional Court in 2012 in Patel where counsel for the solicitor argued (unsuccessfully) that if a solicitor was acting on a matter in a purely administrative capacity, then the solicitor could receive money into its client account and pay out monies in respect of that matter.

- Even after the judgment in Patel was handed down on 29 November 2012, the general understanding of the legal profession remained that a solicitor who had done legal work, such as drafting an agreement which provided for payments to third parties, could receive money into client account and disburse that money to the third parties. This had been accepted by the Tribunal in SRA v Patel where the Tribunal has dismissed the charges against the solicitor on those cases where the solicitor had drafted a joint venture agreement and had received and disbursed monies in accordance with that agreement which he had drafted.

- After the decision in Fuglers in February 2014, the profession's understanding of the rule against acting as a banking facility was enhanced. In particular, Fuglers was the first case to state that a solicitor who was instructed on a legal transaction and who received and paid monies could breach the rule against acting as a banking facility. This would occur if there is not a reasonable connection between the legal transaction and the receipt of monies, even if:

  (a) there is no risk of money laundering and no insolvency context – because acting as a banking facility is objectionable in itself, even where there are no such risks; and

  (b) the solicitor has acted in good faith and not recklessly i.e. the solicitor did not think they were breaching any rule and did not recognise any risk that they were doing so.

- Even after Fuglers, the SRA presumably thought there remained a lack of clarity in the profession and so issued its Warning Notice and case studies on 18 December 2014. The issuing of the Warning Notice made clear that this was an issue on which the profession would benefit from detailed guidance.

43.76 Ms Carpenter QC submitted that the points detailed above were supported by the decision in Langford and also by comments made by the SRA's own FI officer when he interviewed Mr Morallee. During this interview the FI officer stated, "well to be fair to you there, there is a change [in the understanding of the accounts rule against acting as a banking facility] during this period". The FI officer also alluded to the fact that he had been the FI officer who had investigated Fuglers, which had led to a developed understanding of the banking facility rule.

43.77 The Applicant, it was submitted, could not rely on points in its Warning Notices in December 2014, August 2018 or November 2019; these were not reflected in the Tribunal decisions or caselaw at the relevant time on the banking facility rule because (i) the Warning Notices post-dated the relevant events and (ii) unlike case-law, the SRA had no power to make declaratory judgments which also applied to past events.

43.78 The Firm admitted that, regrettably, it breached guidance note (ix) to Rule 15 of the Solicitors Accounts Rules 1998 or rule 14.5 of the SRA Accounts Rules 2011 in respect of Transaction 2 to 5. This was because, having reviewed the contemporaneous documents and other relevant documents, the Firm accepted that:

(i) there was no reason for the funds to be paid into its client account in these cases;

(ii) in some cases, that there was an insufficient connection between a payment made out and the underlying legal transaction; and

(iii) it followed that the First Respondent and Mr Morallee breached guidance note (ix) to Rule 15 of the Solicitors Accounts Rules 1998 or rule 14.5 of the SRA Accounts Rules 2011 in respect of Transaction 2 to 5; and

(iv) the Firm was strictly liable for that breach.

43.79 The Applicant referred to the principle that the common law was declaratory. The declaratory theory of law was, in short, that Judges did not make the law, but simply stated what the law was, and what it always had been. The principle of the declaratory theory of law was not in dispute and was the very reason why the Firm has made the admissions it had. However, the fact that the understanding of the profession at the time was different was highly relevant to culpability and mitigation. This was why the Firm referred to the understanding of the profession of the issue at the relevant time. The material difference between the First and Second Respondents was that the First Respondent considered that the changing understanding amounted to a defence, whereas the Second Respondent considered that it was mitigation. As to which was correct was a matter for the Tribunal. If the Tribunal accepted the First Respondent's position, then the Second Respondent's admissions would be found to be improperly made and those matters, notwithstanding the admissions, would be found not proved.

Transaction 1

43.80 The Second Respondent maintained its denial that Transaction 1 breached the banking facility rule.

43.81 Ms Carpenter QC submitted that the Firm was entitled to receive its client's monies from the FA and pay out those monies on its client's instructions, but only if this process was sufficiently related to legal work or other regulated activities undertaken by the Firm. It appeared that the receipt of the monies into, and the payments out of the Firm's accounts were each sufficiently related to legal work or other regulated activities the Firm was doing for any or all of the following reasons:

43.81.1 The monies were received in order that they could be paid out to 4 counterparties under 4 contracts which the Firm had drafted and advised upon. The receipt and payments may have been ancillary to the transfer of the player. But that did not mean that they were ancillary to the service provided by the Firm. On the contrary they were paid pursuant to the contracts drafted by the Firm.

43.81.2 The monies were received following instructions in a letter from the client to the Firm dated 17 June 2011. The fact that the letter may have been drafted by the First Respondent or Mr Morallee was irrelevant. The Second Respondent did not disagree that solicitors were not entitled to follow client instructions blindly and that doing so did not excuse a breach of the Solicitors Accounts Rules. Indeed, the Second Respondent had never contended otherwise. The Firm's position was that the receipt and payments were (as the SRA contended they must be) in respect of instructions relating to an underlying legal transaction.

43.81.3 The fact that the Firm was to receive the monies was referred to in the retainer letter "Our [fixed fee of £5000 plus VAT] will be deducted from the sums we receive from the Club (being Company B's fee for the Transfer) via the Football Association's clearing system";

43.81.4 The monies were received from a genuine and trustworthy source, namely the FA.

43.81.5 The monies were paid out to 4 counterparties under 4 contracts which the Firm had drafted. Mr Ramsden QC submitted that "One cannot escape the prohibition on providing a banking facility by writing a breach of that prohibition into a contract". It had never been the Second Respondent's case that one could do this, as evidenced by its admissions as regards Transactions 2-5. The point being made by the Second Respondent was that the receipts and payments were connected to legal work the Firm undertook (namely the drafting of the contracts) and that in this case there did appear to be a reason for the monies to come into client account. Drafting contracts plainly was legal work/a legal transaction or regulated service.

43.81.6 The monies were paid out pursuant to a letter from the client to the Firm dated 17 June 2011. Mr Ramsden QC disagreed with this point on the basis that "Solicitors cannot escape liability for breaches of the rules by relying on their instructions to do so". Again, this was not disputed. It was the Second Respondent's position that the receipts and payments were connected to legal work the Firm did (namely the drafting and advising on the contracts) and that in this case there did appear to be a reason for the monies to come into client account.

43.81.7 There was a reason for the monies to pass through client account, namely the lack of trust between the parties to the 4 contracts which the Firm had drafted. The Applicant, it was submitted, had failed to properly engage with this point. They (the Applicant) asserted that a lack of trust did not, without more, justify the provision of a banking facility. However, the Firm has never said

there was a lack of trust without more or that it provided a banking facility on Transaction 1. The documents evidenced that the Firm did legal work on this file (namely drafting and advising on the 4 contracts plus other work such as structuring the transaction, drafting the letter dated 17 June 2011, advising the client etc); that the legal work was connected to the receipts and payments and, in addition, there was a lack of trust and therefore a reason for the client account to be used. The SRA's other point (that the counterparties could have sued Person C if he did not make payment) did not meet the lack of trust point as a commercial party would always prefer to have cash rather than a right to sue an individual of unknown means.

43.81.8 It was clear from the SRA's 2014 case studies on Rule 14.5 that Transaction 1 would not fall within any of the examples of breach of the rule against acting as a banking facility. Therefore Transaction 1 would not even breach the stricter guidance which applied from 2014 onwards. Further, in case study 3 the SRA expressly stated that if a solicitor provided tax advice, it would be accepted that the payment of tax liabilities would be sufficiently connected to the legal work. They (the SRA) also accepted that if a solicitor were to draft a commercial lease for a lessor and advise the lessor on it, then receiving deposits from tenants would be sufficiently connected to that legal work. Similarly drafting and advising on the 4 contracts with the suppliers and advising on the representation contract would be sufficiently connected to receiving and making payments under those contracts, particularly with the addition of the lack of trust issue.

43.81.9 It was clear from the SRA's current (and stricter) Warning Notice and case studies on rule 3.3 of the current Solicitors Accounts Rules that lack of trust between the parties provided a reason for monies to pass through client account. If this provided a reason for money to pass through client account under today's stricter Warning Notice, then the position as at 2011 is *a fortiori*.

43.82 Accordingly, it was submitted, there was no breach of the Solicitors Accounts Rules on Transaction 1 for which the Firm would be strictly liable. Ms Carpenter QC submitted that if, contrary to the above, Transaction 1 also breached guidance note (ix) to rule 15 of the Solicitors Accounts Rules 1998, then the Firm's culpability was very low; the Firm also had significant mitigation for the same reasons as in respect of the other Transactions.

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

43.83 The Tribunal determined that notwithstanding the lengthy and detailed submissions of the parties, the issues for determination were narrow, and its reasoning would be confined to those issues. In those circumstances it was neither necessary nor appropriate to address every point raised by the parties.

43.84 As regards the banking facility rule, the issue to be determined was whether by receiving and making payments, that rule had been contravened (and thus whether the Second Respondent's admissions had been properly made). Further, the Tribunal was required to determine whether the First Respondent had caused or allowed the banking

facility rule to be contravened and, if so, whether her conduct was in breach of Principle 8.

The Banking Facility Rule

43.85 The Tribunal considered that it was appropriate to first deal with whether there had been a breach of the banking facility rule. The Tribunal noted the history of the development of the banking facility rule as helpfully detailed by the parties. The declaratory theory of law, with retrospective effect was relied upon by the Applicant in response to the submissions regarding the profession's understanding of the banking facility rule over time.

43.86 The declaratory theory of law was, in short, that Judges did not make the law, but simply stated what the law was, and what it always had been. The Tribunal noted that Mr Coleman QC did not make any submissions suggesting that this principle was incorrect or not appropriate in the circumstances. The Tribunal considered that it applied in this case such that the current stated position as to the meaning of the banking facility rule had always been what the rule meant. Accordingly, the Tribunal determined (as the Applicant and Second Respondent agreed) that the relevance of the profession's understanding at the time was to mitigation only, and could not provide a defence to the substantive allegations.

43.87 As to any reliance on the Tribunal's findings in SRA v Patel, the Tribunal had made clear in that Judgment that its findings were based on the "very restrictive" wording of the allegation Mr Patel faced, namely that Mr Patel "permitted his client bank account to be utilised by a client and/or third parties to receive and pay out monies where there were no underlying legal transactions" (the Tribunal's emphasis). The Tribunal in that matter found that, in relation to some transactions, there were underlying legal transactions, thus the Applicant's case failed in that regard. The allegation faced by the Respondents in the instant case were not so narrowly defined; reliance on the previous Tribunal's decision was therefore of no assistance to the parties. That this was the case was amplified by the accepted position that the decision of one panel of the Tribunal was not binding on any other division.

43.88 In oral evidence, the First Respondent suggested that where a solicitor's conduct was in compliance with a firm's policies and procedures, that solicitor would not be culpable for breaching the SAR's. The Tribunal rejected that position. It was plain that the SAR's applied to all solicitors (as well as others). No policies or procedures could remove that obligation.

43.89 It was the First Respondent's case that the conduct complained of was in breach of the banking facility rule according to the current understanding of that rule. Indeed, it was the First Respondent's position in evidence that she would not allow the payments on the current understanding of the rules and her current knowledge and experience thereof. The Tribunal noted that Mr Coleman QC had not argued that on the current understanding, the payments were not in breach of the banking facility rule in any event, but rather that the First Respondent's conduct should be judged on the profession's understanding at the time (and further that she had not caused or allowed any breach).

The Second Respondent

43.90 The Tribunal examined the receipt and payment of monies on Transactions 2–5. The Tribunal determined, as the Applicant had submitted, that there was no reason for the payments to have been made by the Firm, and the complained of receipts and payments amounted to the provision of a banking facility as alleged. Accordingly, the Tribunal found the Second Respondent's admissions as regards Transactions 2–5 to have been properly made.

Transaction 1

43.91 Notwithstanding that it was unnecessary for the Tribunal to make findings in relation to Transaction 1 (given its findings as regards Transactions 2–5), for the sake of completeness and for the avoidance of doubt, the Tribunal detailed its findings.

43.92 It was common ground that the monies were received and payments were made as detailed in the factual background above. The Tribunal considered that the scope of the retainer, as detailed in the client care letter, was to liaise with Club D in relation to the Representation Contract. (This stated that Company B was to represent Club D in negotiations over the engagement of Person A). It also included drafting contracts for services between Company B and other third parties.

43.93 The Tribunal considered that whilst the monies were paid to the third parties pursuant to contracts drafted by the Firm, the payment of the monies by the Second Respondent was not a necessary part of the legal services provided. The Tribunal did not accept that the lack of trust between the parties altered the status of the receipt and payment of monies, such that they were allowable within the banking facility rules. In receiving monies and making payments, the Second Respondent was therefore in breach of the banking facility rule as alleged.

43.94 As detailed, the Second Respondent admitted that its conduct was in breach of Principle 8. The Tribunal thus found allegation 2.1 proved in its entirety.

The First Respondent

43.95 Having found that the banking facility rule had been breached as regards all transactions, the Tribunal considered whether the First Respondent had caused or allowed the prohibited receipts and payments as alleged. Mr Coleman QC's submissions that there had been no breach of the banking facility rule were rejected.

43.96 The Tribunal accepted Mr Coleman QC's submissions as regards the twelve important and undisputed facts. (See paragraphs 43.41.1-12). Further, the Tribunal agreed that the express wording of the banking facility rule was clear. It related to the provider of the facility, be that a firm, an authorising partner or an employed solicitor. It was clear, on the evidence and the Tribunal had found, that it was the Second Respondent that had provided the banking facility in contravention of the SAR's. The Tribunal accepted that where a solicitor recklessly or deliberately caused his firm to provide a banking facility, that facility had still been provided by the firm, and not the solicitor (save where the solicitor had made the payments). The appropriate regulatory complaint in that circumstance would be an allegation of a breach of the Principles, which was the

position as regards the transactions falling under the SAR 2011. It was also clear, given that there was no allegation of a breach of Principles 2 or 6, that the Applicant accepted that the breaches were inadvertent.

43.97 As detailed above, the Tribunal found that policies and procedures of a firm could not negate a solicitor's responsibility under the SAR's, and that accordingly, the First Respondent was still subject to the SAR's.

43.98 The Tribunal considered whether the First Respondent had caused or allowed the payments.

43.98.1 Allowed – the Tribunal agreed with the submissions of Mr Coleman QC. In circumstances where the First Respondent had no power to authorise the payments (either 'in' or 'out'), she could not be said to have allowed the payments.

43.98.2 Cause – The requests for payments had been made in circumstances where they had to firstly be authorised by the Matter Partner, and thereafter by the Authorising Partners. The Matter Partner and the Authorising Partners were each responsible for ensuring that any payments made were in compliance with the SAR's. The Tribunal considered that in the circumstances, there had been a break in the chain of causation, such that it could not be said that the First Respondent had caused the payments to be made.

43.99 Accordingly, the Tribunal found that the First Respondent had neither caused nor allowed the payments to be made. Having determined that the First Respondent had not caused or allowed the breach of the banking facility rule, it followed that her conduct was not in breach of Principle 8 as alleged.

43.100 Accordingly, the Tribunal found the allegation against the First Respondent not proved.

Previous Disciplinary Matters

44. There were no previous disciplinary matters at the Tribunal for the Second Respondent.

Mitigation

45. Ms Carpenter QC submitted that the Second Respondent admitted breaching the Rules as regards Transactions 2–5 from the outset and prior to any proceedings being brought. During the hearing, when the Applicant fully particularised its case as regards Principle 8, the Firm also admitted breaching that Principle. The firm regretted and apologised for what were unwitting and unintentional breaches of the Rules and Principles.

46. It was submitted that the facts of the case were unusual. The SRA has in its discretion decided to bring this case against the Firm (rather than deal with the case internally) notwithstanding that: (i) it was the Firm that brought the matter to the SRA's attention; (ii) the matters were historic; and (iii) the SRA had not proceeded against the client matter partner, Mr Morallee.

47. Ms Carpenter QC submitted that there were 3 stages to the approach of setting sanction:

- Firstly, an assessment of the seriousness of the misconduct;
- Secondly, consideration of the purpose for which sanctions are imposed; and
- Thirdly, choosing sanction which most appropriately reflected the seriousness of the conduct in question, starting from the least serious option.

48. In assessing seriousness, the Tribunal must take into account the following factors:

- Culpability for the misconduct;
- The harm caused by the misconduct;
- Any aggravating features in respect of the misconduct; and
- Any mitigating factors in respect of the misconduct.

49. Ms Carpenter QC submitted that the Firm's culpability was very low.

- There had been a total amount paid into the Firm totalling approximately £10.019 million, of which approximately £5 million was paid out in breach of the Rules, the remainder being paid to clients. Of the 26 payments referred to by the Applicant, 7 of those were payments to clients and did not breach the Rules. The earliest receipt of monies was in July 2011, and the latest payment of monies was in August 2014.

- The breach was unintentional; the Firm was not aware that its conduct was in breach of the Rules.

- The Firm had failed to adequately monitor compliance with the banking facility rule. The systems in place at the time were adequate, and there had been no intention to contravene the banking facility rule. The Firm was Lexcel accredited. In the Lexcel report for 2013, the Firm was described as having its own quality framework in place that exceeded Lexcel requirements.

- The Firm was not aware until 2017 that it might have been in breach of the Rules.

- The Firm earned modest costs from the work and did not earn any costs arising from the breaches.

- When the conduct took place, the understanding of the profession of what was permissible was different to the current understanding following the clarification provided in caselaw and the warning notices issued by the SRA. It was essential, when considering the culpability of the Firm that the Tribunal considered the understanding of the profession at the time.

- There was no evidence that the payments involved money laundering or concealed monies due to creditors.

- Whilst it was accepted that the Firm was in breach, Mr Morallee, as the matter partner, should have spotted that the receipt and payments were in breach and taken action to prevent any breach of the banking facility rule.

50. Ms Carpenter QC noted that it was suggested that the Authorising Partners should have considered and noted the breach. Their position was different. When asked to authorise the payments out, the monies were already in the Firm's client account. They did not have conduct of the files and had no involvement in the Firm receiving the monies into its client account. When they were asked to authorise the payments, they were unaware (and were not advised otherwise) that the monies ought not to be in the client account.

51. The Tribunal should note that the breach of Principle 8 arose from the Firm's failure to adequately monitor its systems and not from positive acts undertaken by the Firm causing a breach.

52. As regards harm, it was submitted that there had been no harm caused by the Firm's conduct, nor was there any risk of harm as a result of the conduct. Additionally, there were no aggravating factors. On the contrary, there were numerous mitigating factors:

- The Firm was unaware of any potential breach until 2017 when it was put on enquiry following the draft production notice from HMRC. The Firm then commenced an investigation, appointing external solicitors and leading counsel.

- The Firm self-reported.

- When events were known, the Firm placed the First Respondent under supervision. This was a fair and proportionate response in order to protect the public and comply with the Firm's regulatory obligations.

- The Firm fully co-operated with the SRA during the 4 year investigation from its self-report to the issuing of proceedings.

- The Firm sought to assist the Tribunal throughout by providing relevant documents which the SRA had failed to provide. Some of those documents were also relevant to the defence of the First Respondent.

- Open and frank admissions had been made from the outset and before the referral to the Tribunal was made.

- The Firm admitted a breach of Principle 8, following its being properly particularised by the SRA during the hearing. The Principle 8 breach contained in the Rule 12 Statement was generic and was only particularised by the Applicant when the SAFA was created. Further, Principle 8 had not been consistently alleged. In the notification of referral to the Tribunal, there was no allegation of a Principle 8 breach.

- The Firm had shown genuine insight into the misconduct. Its policies and procedures had changed such that there was no risk of repetition.

- The delay in bringing the proceedings should be taken into account. Whilst delay was not decisive "significant or excessive delay in bringing a matter … before the appropriate tribunal causes considerable distress to the subject of the proceedings, and it is normally appropriate to bear this in mind in the question of disposal". (Graham v NMC [2008] CSIH 45).

53. The SRA, in prosecuting the Firm and not the matter partner, was not sending an appropriate message to the profession. The SRA had resolved to refer Mr Morallee to the Tribunal in October 2020. Following receipt of representations made on Mr Morallee's behalf, the SRA reviewed the referral decision and on 13 May 2021 the SRA rescinded the referral. It was unclear why the SRA only chose to unilaterally review its decision to refer Mr Morallee to the Tribunal and not to also review its decision to refer the Firm to the Tribunal. The reason for rescinding the referral appeared to be that it was not in the public interest given the proceedings against the Firm. But if that was correct, then it could just as easily be said that it was not in the public interest to proceed against the Firm given the proceedings against the First Respondent; or that it was not in the public interest to proceed against the Firm and that the public interest could instead be met by proceedings against Mr Morallee. In weighing the public interest the SRA appeared to have omitted the following highly relevant factors (i) the Firm, and not Mr Morallee, reported these matters to the SRA and (ii) the Firm had shown insight, admitting that, as regards Transactions 2 to 5, it had breached the banking facility rule. Conversely, Mr Morallee was denying that any breach had taken place as regards any of Transactions 1 to 5.

54. In considering the appropriate sanction, the Tribunal should impose a sanction that protected the public and the reputation of the profession taking into account the seriousness of the misconduct and ensuring that the sanction was proportionate to the misconduct.

55. The Tribunal was directed to paragraph 23 of its Guidance Note on Sanctions which stated:

> "The Tribunal may conclude that, having regard to all the circumstances, and where the Tribunal has concluded that the level of seriousness of the misconduct is low, that it would be unfair and disproportionate to impose a sanction. In such circumstances, the Tribunal may decide not to impose a sanction, save for an order for costs".

56. Ms Carpenter QC submitted that in some situations, the Tribunal imposed no order where it considered that even though Respondent was technically in breach of a rule, the SRA should not, in its discretion, have brought the particular Respondent before the Tribunal or the Tribunal considered the SRA had acted unfairly towards a particular Respondent in bringing them before the Tribunal. It was submitted that given the circumstances and the compelling mitigation, this was a case where the SRA should not have referred the Firm to the Tribunal. The misconduct had been unintentional and had occurred at a time when the understanding of the profession was different to the current understanding. Once the Firm became aware of its failings, it introduced new systems and procedures such that there was no risk of repetition. The Firm self-reported and had co-operated fully with the SRA throughout.

57. It was submitted that if the Tribunal did not consider that no order was appropriate, it should consider whether a reprimand would be an appropriate sanction if it were available for a Firm. If it was the Tribunal's view that a reprimand would have been appropriate, then the Tribunal should still impose no order, as the sanction should not be more severe in circumstances where a particular appropriate sanction was not available.

58. In the event that the Tribunal considered a financial penalty was the appropriate sanction, it was submitted that the fine should not exceed £30,000. Ms Carpenter QC directed the Tribunal to a number of other analogous matters and the sanctions imposed to justify the amount that it was considered was appropriate in all the circumstances.

Sanction

59. 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.

60. The Tribunal found that the Second Respondent had not been motivated to commit misconduct. Its misconduct has arisen as a result of its failure to properly monitor its own policies and procedures. The Tribunal determined that there was no evidence of any harm caused as a result of the Second Respondent's failings. The misconduct was aggravated as it had continued over a period of time. The Tribunal noted the points made by Ms Carpenter QC in mitigation. The Tribunal recognised the work undertaken by the Firm to ensure that there would be no repetition of such breaches. It also noted that the Firm had self-reported and had co-operated throughout with the SRA.

61. The Tribunal accepted, as was agreed, that the misconduct was unintentional and unwitting. The Tribunal considered that whilst that was the case, the mistakes made by the Firm were serious and that the Firm was culpable. The Tribunal did not consider that making no order adequately reflected the seriousness of the Firm's misconduct. Nor did it consider that a reprimand (if one were available) would adequately reflect the seriousness of the Firm's culpable mistakes.

62. The Tribunal considered that a fine was the only appropriate sanction. The Tribunal assessed the misconduct as serious. Taking into account that the misconduct arose by acts of omission, in circumstances where the understanding of the profession as to the meaning of the banking facility rule was different, the Tribunal agreed that any fine imposed should not exceed £30,000. The Tribunal determined that a fine in the sum of £25,000 adequately reflected the seriousness of the Firm's misconduct but took into account the compelling mitigation advanced on the Firm's behalf.

Costs

63. <u>The Second Respondent</u>

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

63.1 Mr Ramsden QC sought costs against the Firm. Given the Tribunal's findings, there was no application for costs against the First Respondent. The total costs claimed were in the sum of £74,895.50. Mr Ramsden QC submitted that the Tribunal would want to make a fair apportionment of those costs. No particular apportionment was advanced as the SRA considered that an assessment of the proportion to be paid by the Second Respondent was a matter for the Tribunal to determine.

The Second Respondent's Submissions

63.2 Ms Carpenter QC submitted that there should be no order as to costs, or alternatively, if the Tribunal considered that costs should be paid, it should be a proportion of the costs claimed. Ms Carpenter QC made plain that nothing in the submissions on behalf of the Firm was intended to suggest that the First Respondent should pay the SRA's costs. On the contrary, if the Tribunal considered that either Respondent should pay the SRA's costs, the Firm would wish (as between itself and the First Respondent) for itself to pay the SRA's costs. However, it was Ms Carpenter QC's primary submission that neither of the Respondents should be ordered to pay the SRA's costs.

63.3 It was submitted that the SRA has acted unreasonably and/or unfairly vis-à-vis the Firm in this case. The SRA brought proceedings, despite the Firm's self-report, and despite the Firm making admissions from the outset and seeking a consensual resolution from 2019 onwards.

63.4 In addition to the attempts made in open correspondence to resolve this matter of which the Tribunal was already aware, the Firm also attempted to resolve this matter in without prejudice correspondence/discussions. Those discussions having been unsuccessful, and following the SRA issuing the proceedings, the Firm's solicitors engaged in without prejudice save as to costs correspondence seeking to resolve this case with the SRA ("WPSATC"). The SRA refused to engage with the Firm's solicitors' WPSATC correspondence, not even replying to it for two months, and then (wrongly) claiming that the principle of WPSATC did not apply in the Tribunal. In particular:

63.5 On 28 May 2021, the same day as the Firm's Answer was served, the Firm's solicitors sent a letter to the SRA's solicitors WPSATC. This letter referred to the disparity in treatment between the Firm and Mr Morallee and then stated:

> "Having said all that, as you know, our client has at all times hoped to resolve this matter with the SRA and still wishes to achieve a consensual outcome if at all possible. We remain open to discussions with you as to how best to achieve that. Our client would also be willing for there to be three-way without prejudice discussions between you, us and the First Respondent's solicitors if your client considers that would be a better way of achieving a consensual outcome.
>
> We suggest that we have a telephone call between your firm and ourselves in the first instance, to be held WPSATC, to consider whether an agreed outcome is something which your client is willing to consider and, if so, to discuss how that could be achieved."

63.6 The SRA's solicitors sent no response to this letter. Therefore, on 12 July 2021 the Firm's solicitors sent a further WPSATC letter to the SRA's solicitors stating:

> "We refer to our without prejudice save as to costs letter dated 28 May 2021 to which we have received no response.

> The Firm self-reported this matter to the SRA. Further, the Firm made frank admissions in respect of four of the five transactions in issue at the earliest possible stage, which narrowed the issues between it and the SRA. For the reasons set out in our client's Answer, we consider that there is substantial mitigation available to the Firm, such that the range of sanctions which would be appropriate is also narrow. As you and your client know, the Firm has at all times been open to discussing whether this matter can be resolved by agreement.
>
> In those circumstances, it seems to us that the parties are in a good position to have productive discussions as to a possible consensual outcome, and it is therefore disappointing that you have not accepted the invitation in our letter dated 28 May 2021 to discuss how this might be achieved or even responded to our letter dated 28 May 2021.
>
> Our client remains open to discussions about a possible consensual outcome, in the interests of avoiding the time and costs associated with contested proceedings. We note that according to the Tribunal's Practice Direction No 1 on Agreed Outcomes any agreed outcome should be submitted to the Tribunal at least 28 days before the substantive hearing. We look forward to receiving your response to the proposal in our letter dated 28 May 2021 that we arrange a telephone call to discuss whether an agreed outcome is something which your client is willing to consider.
>
> We reserve the right to refer to this letter, and to our previous correspondence, on the question of costs in due course."

63.7 On 26 July 2021, the Firm's solicitors sent a third WPSATC letter to the SRA, asking why a response that the SRA's solicitors had now sent on 15 July 2021 was headed 'without prejudice' rather than WPSATC, and whether it was the SRA's position that such response could not be shown to the Tribunal in due course on the question of costs.

63.8 On 29 July 2021, the SRA's solicitors sent a letter headed WPSATC, stating that it was the SRA's position that the principle of WPSATC did not apply in the Tribunal, and that the SRA would correspond without prejudice (i.e. in a way such that its correspondence could not be placed before the Tribunal on the question of costs). As a result, all subsequent non open discussions/correspondence reverted to being conducted without prejudice.

63.9 Ms Carpenter QC submitted that the SRA's approach as set out in its without prejudice save as to cost letter dated 29 July 2021 was incorrect. Three separate issues arose, namely:

Can the SRA and a Respondent engage in WPSATC correspondence?

63.10 Plainly the answer was yes. This did not appear to be disputed. However, the SRA referred its Policy Statement on the Settlement of Regulatory and Disciplinary Cases which stated: "All discussions with a view to agreement being reached will be conducted "without prejudice" and, subject to order of the SDT or the court, are therefore not admissible in investigations or proceedings upon the same principles that apply to "without prejudice" communications as a matter of law". This appeared to

distinguish without prejudice discussions from open discussions; it did not distinguish without prejudice discussions from WPSATC discussions. Ms Carpenter QC submitted that it was difficult to see why the SRA would intend to preclude WPSATC discussions.

63.11 Further, and in any event:

- This was a statement of the SRA's usual approach and did not stop the SRA entering into WPSATC discussions or correspondence in a particular case.

- It was unclear why the SRA has adopted such a policy. The Tribunal was not bound to agree with the SRA's policy. Further, even if the SRA was indeed bound by its own Policy, and was precluded from entering into a two-way WPSATC dialogue with a regulated party, there was no restriction on a regulated party unilaterally making a WPSATC or Calderbank offer to the SRA. That is what has occurred here: having not made any headway via its open and without prejudice efforts, the Firm issued repeated WPSATC invitations to the SRA to negotiate, with the intention that the Tribunal, at the stage of deciding costs, should see those.

63.12 The SRA in its letter dated 29 July 2021 cited the Tribunal case of SRA v Attwells (Case No 11454-2015). Nothing in that case stated that the SRA and a Respondent could not enter into WPSATC correspondence. Indeed, it was recorded in the Judgment at [53] that the Second Respondent and the SRA had entered into WPSATC correspondence in that very case. Further, in the case of SRA v Naqvi [2019] EWHC 1420 the SRA, acting through the same firm who act in this case (Capsticks), made a WPSATC offer to Mr Naqvi which the SRA's counsel specifically referred the court to in support of a costs application against Mr Naqvi. This was a case where the SRA applied to the High Court to set aside witness summons which a respondent to disciplinary proceedings had obtained, but it was not understood why the SRA considered there to be a distinction between entering into WPSATC correspondence in such a case and in this case.

63.13 Therefore, it was submitted, if the SRA declined to enter into WPSATC correspondence, that was because the SRA refused to do so, not because it could not do so.

If so, can that WPSATC correspondence be shown to the Tribunal when it comes to consider the question of costs?

63.14 Again, the answer is plainly yes. In SRA v Attwells (Case No 11454-2015), on the question of costs, the Respondents' counsel specifically referred the Tribunal to the WPSATC correspondence and neither the SRA's counsel nor the Tribunal indicated that the Tribunal could not be shown this or told of this. On the contrary, the SRA's counsel specifically referred to the WPSATC correspondence in his submissions and the Tribunal specifically referred to the WPSATC correspondence in its reasoning on the First Respondent's costs application.

If so, what is the effect and relevance of the WPSATC correspondence to the Tribunal's determination on costs?

63.15 At common law, correspondence or discussions can take place WPSATC, meaning that the correspondence/discussions can be looked at when the court comes to consider costs (Calderbank v Calderbank [1975] WLR 586). In Attwells, the First and Second Respondents applied for a costs order against the SRA on various grounds, including the contention that the case against them had been improperly brought by the SRA and including reliance on WPSATC correspondence. The Tribunal stated that the effect of the WPSATC correspondence in disciplinary proceedings before the Tribunal was not that if the SRA had failed to beat the offer made by the Respondents, then the SRA must, just for that reason, be ordered to pay the Respondents' costs. The Tribunal made an order for costs against the SRA as regards the case against the First Respondent in that case because the case against the First Respondent had been improperly brought by the SRA. The Tribunal did not make an order for costs against the SRA as regards the case against the Second Respondent because the Tribunal found that case had been properly brought. However, the allegations against the Second Respondent having failed, the Tribunal made no order as to costs as between the SRA and the Second Respondent.

63.16 Ms Carpenter QC submitted that it was unclear why the SRA's solicitors referred to Attwells because the Firm has never contended in these proceedings that the rule in CPR part 36 applied. The Firm had not contended that it automatically followed that if the SRA failed to beat an offer, then the SRA will be subject to an adverse costs order. However, that did not mean that WPSATC correspondence was irrelevant when the Tribunal came to consider the appropriate costs order. The Tribunal could be referred to WPSATC correspondence as part of its consideration when considering the appropriate costs order. It was open to Respondents to contend that the proceedings were unnecessary or that matters should have been resolved without proceedings before the Tribunal. Such arguments could be supported with evidence of WPSATC correspondence.

63.17 Ms Carpenter QC submitted that it seemed, as a matter of policy, that the SRA was only willing to engage in attempts to resolve cases via without prejudice correspondence/discussions if the Tribunal could not see those discussions when it came to consider the question of costs. Such a policy, it was submitted, was contrary to the public interest of matters being dealt with efficiently and at proportionate cost.

63.18 In this case, as could be seen from the open correspondence and from the WPSATC correspondence, the SRA's approach to the Firm's attempts to resolve this case was unfortunate, unhelpful and slow. This case was eminently suitable for an Agreed Outcome with the Firm, and the SRA should have been willing to reach a consensual outcome with the Firm a long time ago. In the circumstances, the SRA should not recover its costs but should bear its own costs of these proceedings.

63.19 Alternatively, in light of the points above, the SRA should have the quantum of its recoverable costs reduced. If the Tribunal was minded only to reduce the SRA's claim for costs, then in addition to the points above, the SRA's claim for £13,658.09 in costs for the costs of the FI officer should be substantially reduced because the vast majority

of the FI report considered matters which the SRA never pursued before the Tribunal (i.e. allegations which the SRA abandoned during the investigation stage).

The Applicant's Reply

63.20 Mr Ramsden QC submitted that if any form of without prejudice offer was applicable at the Tribunal, it could only be a Calderbank offer. In Attwells, the Tribunal determined that "Calderbank is not a concept applicable to proceedings before the Tribunal". There were important policy reasons for that. Respondents who appeared before the Tribunal should not be entitled to buy their way out of disciplinary proceedings. This was of even more import when considering the position of a large profitable firm.

63.21 The Tribunal had asked, during the course of Ms Carpenter QC's submissions about the amount of any offer made. There had been no offer made, either beaten or unbeaten. The reality of the Second Respondent's complaint was that the SRA had not been willing to enter into discussions. This was plainly wrong as demonstrated by the SAFA. The notion of the SRA being unwilling to engage in constructive discussion was unsustainable.

63.22 Further, the matters denied by the Second Respondent had been found proved by the Tribunal. The SRA took the view (which it maintained) that the level of any fine was a matter for the Tribunal, notwithstanding that the SRA recognised that the level of fine the Tribunal might impose could be much lower than the Firm was prepared to agree. There was nothing in the WPSATC correspondence that could militate from the SRA's application for costs.

The Tribunal's Decision

63.23 The Tribunal considered that the essence and most important part of the Second Respondent's complaint as regards costs was that the SRA had not entered into an Agreed Outcome or other alternative disposal. As a matter of policy, it could not be that the SRA should not recover its costs when it had successfully prosecuted a Respondent, on the basis that the Respondent had sought an alternative disposal. The SRA should not have to bear its own costs because it had rejected an alternative disposal. The Tribunal agreed with the submissions of Mr Ramsden QC; Respondents should not be able to buy their way out of disciplinary proceedings, nor should the SRA be penalised when it did not consider that a case should be diverted from a hearing before the Tribunal.

63.24 Having considered the WPSATC correspondence with care, the Tribunal did not find anything within that correspondence that should cause the Applicant to bear its own costs in circumstances where its prosecution of the Second Respondent had been successful.

63.25 The Tribunal considered that the appropriate apportionment of costs for the Second Respondent was 50%. The Tribunal agreed that there should be a further reduction in the costs claimed by the FI Officer in circumstances where a number of the matters investigated were not pursued. The Tribunal determined that the appropriate and reasonable costs that should be paid by the Second Respondent was £32,500.

64. The First Respondent

The First Respondent's Submissions

64.1 Mr Coleman QC submitted that the order sought by the First Respondent was for costs to be assessed on an indemnity basis with an interim payment of £155,000 to be paid by 20 December 2021.

64.2 Mr Coleman QC set out the legal framework. Pursuant to Rule 4 of the SDPR:

(1) the overriding objective of the Rules is to enable the Tribunal to deal with cases justly and at proportionate cost;

(2) the Tribunal must seek to give effect to the overriding objective when it exercises any power under the Rules or interprets any rule or practice direction; and

(3) the parties are required to help the Tribunal to further the overriding objective. Pursuant to Rule 43(1) and at any stage of the proceedings, the Tribunal may make such order as to costs as it thinks fit.

64.3 By Rule 43(4) of the SDPR, when deciding whether to make an order for costs, against which party and for what amount, the Tribunal will consider all relevant matters including the conduct of the parties and whether any or all of the allegations were pursued or defended reasonably.

64.4 Mr Coleman QC submitted that CMA v Flynn Pharma Limited [2020] EWCA Civ 617 set out the relevant principles to be considered:

- the default position is that no order for costs should be made against a regulator who has brought proceedings in its regulatory capacity;
- the default position may be departed from for good reason;
- a good reason will include unreasonable conduct on the part of the regulator; and
- there may be additional factors, specific to a particular case, which might permit a departure from the starting point.

64.5 As regards any possible 'chilling effect' on the SRA of a costs order, paragraph 100 of Flynn Pharma stated: "in so far as it has potential to exist, I consider that it is already accommodated within the principles developed by the cases in this court".

64.6 Mr Coleman QC submitted that Flynn Pharma incentivised regulators to exercise their powers diligently and responsibly, and provided a check against a regulator's failure to exercise its powers reasonably, fairly and carefully.

64.7 It was the Applicant's case that Flynn Pharma had not changed the position set out in Baxendale-Walker v The Law Society [2007] EWCA Civ 233). Mr Coleman QC submitted that Baxendale-Walker and Flynn Pharma were not inconsistent, and that Flynn Pharma was a more refined and complete statement of the approach to be taken.

It was clear that Baxendale-Walker was not intended to be a complete statement of the approach to be taken as a case being a shambles from start to finish was cited as an example of where costs might be awarded against the regulator. Flynn Pharma, it was submitted, struck the balance between minimising the chilling effect on the regulator and the countervailing reasons which might mean that it was just to order costs in favour of the successful Respondent.

64.8 Mr Coleman QC submitted that there were three distinct factors which, whether taken individually or cumulatively, supported the conclusion that it was not reasonable for the SRA to bring these proceedings, and in particular that the case against the First Respondent had not been considered with sufficient care. The First Respondent only needed to show, pursuant to Flynn Pharma, that there was good reason to depart from the norm of no order for costs being made against the SRA. Good reason was not limited to there being unfair or unreasonable conduct on the part of the SRA.

There was no public interest in pursuing the disciplinary proceedings against the First Respondent

64.9 There was, objectively, no public interest in pursuing disciplinary proceedings against the First Respondent, in particular in circumstances in which the SRA had itself decided that there was no public interest in pursuing them against Mr Morallee, the supervising Matter Partner who, it was common ground, had overall responsibility for the conduct of the five Transactions. In doing so the SRA had acted inconsistently and unfairly.

64.10 Pursuant to Section 28 of the Legal Services Act 2007, the SRA was statutorily obliged to discharge its functions in a transparent, accountable, proportionate and consistent way. This statutory duty was reflected in the SRA's Regulatory and Disciplinary Procedure Rules and its Enforcement Strategy which recognised the duties to act reasonably, consistently and fairly. The Enforcement Strategy stated:

> "…the public and the profession have a right to expect that wrongdoing will be met by robust and proportionate sanctions, and that we as a regulator will enforce our standards or requirements evenly, consistently and fairly. We need to be accountable for our actions and to demonstrate that we will act fairly and proportionately.
>
> …
>
> We recognise that certain stages in an individual's career can present a steep learning curve such as becoming a trainee, a newly qualified solicitor, or a partner for the first time. We would expect solicitors to gain a deeper understanding of appropriate behaviour and of the law and regulation governing their work, as their career progresses. And for those with more seniority and experience to have higher levels of insight, foresight, more knowledge and better judgment. Part of being fair and proportionate is ensuring that those within an organisation, with real control and influence over the situation, are held accountable."

64.11 The SRA ought to have recognised Mr Morallee's seniority, and the higher degree of insight he should have had in comparison to the First Respondent, who was a relatively junior solicitor at the time. Mr Coleman QC submitted that the SRA's approach to Mr Morallee served to underline the unfairness in singling out the First Respondent for disciplinary action. In circumstances where it was considered that there was no public interest in bringing disciplinary proceedings against Mr Morallee, there could be no objectively rational basis for bringing proceedings against the First Respondent.

64.12 It was common ground that Mr Morallee was the Matter Partner in respect of each of the Transactions, who, pursuant to the client care letters, was "the partner with overall responsibility...". He accepted that (amongst other things) that it was his duty as Matter Partner to make sure that the matter was conducted appropriately and that he investigated things he was asked to approve.

64.13 Having initially referred Mr Morallee's conduct to the Tribunal (for proposed allegations that were materially the same as those proposed in respect of the First Respondent), the SRA's Head of Legal and Enforcement decided on 13 May 2021 to overturn the referral decision in respect of Mr Morallee on the basis that "the current insufficiency of public interest (as required by Rule 6.1(b) [of the Regulatory and Disciplinary Procedure Rules]) in progressing the case renders the original decision materially flawed". The application to review the SRA's decision to refer Mr Morallee to the Tribunal had been brought by the SRA itself on 29 March 2021 pursuant to its own internal review powers under rule 3.1(b) of the Application Notice, Review and Appeal Rules ("the ANRARs"). The application was prompted by the receipt of further submissions from Mr Morallee's representatives.

64.14 The First Respondent specifically raised the fact that "there is no public interest in bringing these proceedings against Ms Ellen and the pursuit of the allegations against her is unfair and disproportionate in all the circumstances" and particularised the events that had led the SRA to overturn the decision to refer Mr Morallee to the Tribunal.

64.15 On 29 June 2021, the First Respondent sent a detailed letter to the SRA inviting it to apply of its own initiative, pursuant to the ANRARs, to review the decision to refer her conduct to the Tribunal. On 14 July 2021, those acting for the First Respondent wrote to the SRA's solicitors (on a WPSATC basis) in terms that, in the event that the SRA were to accede to their request to overturn the referral decision, the First Respondent would consent to an application being made to the Tribunal to withdraw the proceedings against her on the basis that there be no order as to costs. That letter was criticised by the SRA as "a naked and inappropriate attempt to pressure the SRA to revisit its considered referral decision using the threat of a costs application". Such criticism, it was submitted, was incorrect; the purpose of the letter was to remove costs as an obstacle to the SRA making the correct, fair and appropriate decision.

64.16 On 22 July 2021, the SRA replied stating that it did not intend to review the referral decision. As regards the contention that the reasons given for the review of the decision to refer Mr Morallee to the Tribunal applied with even greater force in respect of Ms Ellen, it said: "That Decision considered Mr Morallee's conduct and his role as matter partner. His conduct and role in the matters which form the basis of the allegations before the Tribunal were different to that of Ms Ellen, and were considered

separately in the Decision. Your letter does not provide new information in respect of Ms Ellen's conduct".

64.17 Mr Coleman QC submitted that the SRA had never explained (in a Reply, in correspondence, in its skeleton argument, its opening submissions or during the First Respondent's cross-examination) the justification for pursuing the First Respondent, the junior solicitor working under the supervision of the Matter Partner, in circumstances where it recognised there was no public interest in pursuing Mr Morallee.

64.18 In circumstances where there was no public interest in pursuing Mr Morallee, there was even less public interest in pursuing the First Respondent. It was obvious that there can be no rational, objective justification.

The case against the First Respondent was legally and factually misconceived

64.19 Mr Coleman QC submitted that the SRA sought wrongly to apply the banking facility rule to the First Respondent in circumstances where it recognised that she had not herself provided any banking facility (and that it was the firm and/or its Authorising Partners that had provided the facility) but contended that the First Respondent had nonetheless caused or allowed the facility to be provided despite the facts that: (i) she had no control over the client account, (ii) she did not authorise the payments, and (iii) she followed the firm's processes by which payments were authorised by the partners who were required to satisfy themselves that they complied with the SARs (in particular, it was no part of the SRA's case that she misled the Authorising Partners or failed to disclosure relevant facts).

64.20 There was very little by way of particulars in the Amended Rule 12 Statement to explain the SRA's case. All that was said in the Statement was that the First Respondent knew about the payments and that the payments out of the client account were made at her request. There was nonetheless no analysis provided by the SRA as to how the First Respondent could have caused or allowed payments to be made. Nor was there any acknowledgement that the payments in and out were all authorised by either Mr Morallee or the Authorising Partners.

64.21 Following service of the First Respondent's Answer and despite the fact that there was plainly an onus on the SRA to have properly thought its case through before bringing proceedings against the First Respondent for professional misconduct, the SRA at no stage sought to grapple with, let alone to answer, the submission that, in a context in which she had no control over the account, the First Respondent could not have caused or allowed a banking facility to be provided. The SRA elected not to serve a Reply and did not address the point in its skeleton argument, in its opening or in its cross-examination of Ms Ellen or even in its oral Reply submissions. Nor could the SRA cite a single analogous decision where an associate solicitor with no authority over the client account has been found liable for breaching the banking facility rule by providing a banking facility through client account. The SRA detailed 3 matters in its skeleton argument, however in all of those matters, the Respondent's had control or authority to make transfers from the client account.

64.22 As to the suggestion that the certification of the case by the Tribunal, that was irrelevant to a consideration of whether the case against the First Respondent was misconceived. Additionally, the fact that the First Respondent did not make an application to dismiss the proceedings, or make a submission of no case to answer at the conclusion of the prosecution case, did not mean that the case was not misconceived, or that the First Respondent was not entitled to recover her costs having successfully defended the prosecution.

The offer of a regulatory settlement agreement

64.23 On 10 February 2021, prior to proceedings being issued, the First Respondent wrote to the SRA, on a WPSATC basis, as to the possibility of settling the proceedings with the First Respondent making admissions to the allegations detailed in the EWW letter ("the February WPSATC letter"). That letter made it clear that the admissions were based on the heavy toll that the SRA's lengthy investigation (which commenced in February 2018 and followed an internal investigation by the firm commencing in April 2017) had taken on her health and her wish to avoid the further stress, time and resources that contesting the allegations through a Tribunal hearing would entail at a time when she needed to protect her health and wished to pursue a new direction in her life.

64.24 Mr Coleman QC submitted that rather than agreeing to the proposal and imposing an appropriate internal sanction, or even seeking to engage in constructive discussions with her, the SRA instead issued these proceedings against her on 1 April 2021.

64.25 Mr Coleman QC submitted that the February WPSATC letter was of obvious relevance to the question of whether it was reasonable for the SRA to have brought these proceedings. Contrary to the SRA's position the Tribunal's decision in Attwells was not a decision to the contrary. All that the Tribunal appeared to have been saying in Attwells was that, if the SRA failed to beat an offer made by a Respondent on a WPSATC basis, it did not follow that the SRA should for that reason alone be ordered to pay the respondent's costs (in the way that they would in a civil litigation context where an offer had been made that complied with CPR Part 36). It was common ground that the rule in CPR Part 36 did not apply to proceedings in the Tribunal. There was no reason, however, why a Tribunal would not (or should not) look at WPSATC correspondence/discussions and take it into account in reaching its discretionary decision on costs. In SRA v Naqvi [2019] EWHC 1420, the SRA itself relied on WPSATC correspondence on the issue of costs.

64.26 In any event, it was not being suggested that the SRA should be penalised for not accepting a "settlement offer" in respect of proceedings that were properly brought. The February WPSATC letter did not make a "settlement offer" to the SRA on behalf of the First Respondent, nor did she seek to "buy herself out" of the Tribunal proceedings. On the contrary, in that letter, the First Respondent stated her willingness to admit, in their entirety, the allegations that were being advanced against her in respect of the banking facility. Those allegations were not merely being advanced in materially identical terms to Allegation 1 that was pleaded in these proceedings; they were in fact being advanced in more serious terms than the case that the SRA ultimately decided to prosecute having passed the evidential and public interest thresholds. Mr Coleman QC submitted that it was clearly unreasonable, in the light of that offer, for the SRA to have simply ignored the proposed admissions (which on their face would have warranted no

more than an internal disciplinary sanction) and instead to have issued these proceedings against her in respect of Allegation 1.

64.27 The SRA did not reply in writing to the February WPSATC letter. There was no evidence before the Tribunal as to the SRA's reasons for declining the offer. There was a subsequent telephone call between the solicitors acting for the SRA and Ms Ellen, conducted on a without prejudice basis, before these proceedings were commenced. Ms Ellen would wish to place her solicitor's note of that telephone call before the Tribunal, but it is understood that the SRA is not prepared to waive privilege.

64.28 Mr Coleman QC referred to the decision in SRA v Langford and others (11686-2017) in which, notwithstanding the admissions made by the Second, Third and Fourth Respondents, the Tribunal determined that no costs order should be made against them in circumstances in which, whilst the admissions had been properly made, "These matters could have been dealt with by the Applicant using its internal powers which were sufficient given the nature of the misconduct" and it was disproportionate and unfair for the Second, Third and Fourth Respondents to bear any of the costs.

64.29 Mr Coleman QC submitted that there were two further aspects of the conduct of the proceedings that were unreasonable. Firstly, the SRA presented its case in terms that went well beyond the pleaded case and sought to present a significantly more serious case than was justified by the Amended Rule 12 statement. That approach was all the more even more worthy of criticism given that, following an exhaustive investigation, the SRA had elected to abandon any such wider case (on the basis that it evidently did not pass the evidential and or public interest thresholds). This was manifestly unfair and stressful for the First Respondent, especially since, as the SRA must have known, the proceedings would attract significant press interest. It amounted to breaches by the SRA of Rule 4(4) (the requirement that the parties help the Tribunal to further the overriding objective to deal with cases justly) and Rule 12 (pleading the allegations and the facts and matters relied on to support them), as well of a breach of the SRA's duty as regulator to act fairly. The SRA had been expressly reminded in correspondence of the unfairness of exceeding the pleaded case. The SRA ignored these reminders. In its skeleton argument and during the course of the proceedings unpleaded criticisms of the First Respondent were made. Mr Coleman QC submitted that it was simply not open to the SRA to make serious criticism of the First Respondent's conduct that had not been advanced in the Amended Rule 12 statement.

64.30 Secondly, the SRA acted unreasonably in presenting the 'Statement of Agreed Facts and Admissions in respect of the Second Respondent' to the Tribunal and the First Respondent at shortly before 5pm on the evening before the substantive hearing was due to begin. The Tribunal, it was submitted, was right to reject the proposal and to find that the First Respondent had been effectively ambushed by the lateness of an application which had been made without notice to her and was unfair. In circumstances in which the submissions in respect of that proposal resulted in a day of the hearing being lost, and the parties and the Tribunal being required to go part-heard and relisted on 29 October 2021, on any view the First Respondent's costs relating to the resumed hearing on 29 October 2021 must be paid by the SRA. Those costs amounted to £11,155.50 + VAT (£13,386.60).

The Applicant's Submissions

64.31 Mr Ramsden QC submitted that the First Respondent's application for costs was firmly resisted. There had been no unreasonable conduct by the SRA, nor was there any other good reason to justify departure from the default position that no costs order should be made against a regulator bringing proceedings in its regulatory capacity.

64.32 The First Respondent's submissions as to Rule 4 of the SDPR were accepted. It was noted that the submissions did not mention Rule 4(3) of the SDPR detailing that dealing with cases "justly and at proportionate cost includes, so far as practicable– … (c) saving expense" and "(d) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues." Mr Ramsden QC submitted that the First Respondent's costs schedule demonstrated that she had done neither of these things. She spared no expense and paid no heed to proportionality in defending what was, on any view, a fairly straightforward and conservative charge, containing no attack on her character or competence.

64.33 Whilst drawing the Tribunal's attention to the "relevant matters" for its consideration under Rule 43(4), "including the conduct of the parties and whether any or all of the allegations were pursued or defended reasonably", it was striking that the First Respondent omitted to mention other, equally "relevant matters" under that rule, namely "(c) whether the amount of time spent on the matter was proportionate and reasonable" and "(d) whether any hourly rate and the amount of disbursements claimed is proportionate and reasonable". That omission, it was submitted, was regrettable in circumstances where the First Respondent, in her request for costs to be assessed on the indemnity basis, claimed (wrongly) that there was "no proportionality requirement" in respect of such costs. While that may be the case under the Civil Procedure Rules, it was plainly not the case under the Tribunal's rules.

64.34 Mr Ramsden QC submitted that it was not in dispute that the relevant principles were set out Flynn Pharma. However, the First Respondent's summary of the relevant principles conspicuously omitted to mention that "[t]he mere fact that the regulator has been unsuccessful is not, without more, a good reason".

64.35 It was submitted that when considering allegedly 'unreasonable conduct' on the part of the regulator, a margin of appreciation must be applied; there may be more than one 'reasonable' approach, and an order should not be made unless no reasonable regulator could have acted in the manner complained of. The bar was deliberately set high because "there is a public interest in encouraging public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice" (Flynn Pharma at [106]). There also needed to be a causative connection between the unreasonable conduct alleged and the costs claimed, i.e. it must be proved that those costs would not have been incurred but for the unreasonable conduct alleged and proved.

64.36 The First Respondent referred to paragraph 74 of the Tribunal's Guidance Note on Sanction which quoted in turn from Flynn Pharma at [100]. Mr Ramsden QC submitted that with great respect to the draughtsman of the Guidance Note, the quotation contained therein was materially incomplete. The full quotation read:

> "I would not regard the "chilling effect" on the CMA as self-evident. But in so far as it has potential to exist, I consider that it is already accommodated within the principles developed by the cases in this court" (Mr Ramsden QC's emphasis).

64.37 This followed on from a discussion at [99] as to "the potential "chilling effect" on the CMA "of adopting a particular starting point" in the Flynn Pharma case itself (a point not dealt with in the ruling then under appeal). Significantly, it appeared that "the CMA was able to use monies collected by way of penalties in offsetting its legal costs". At this Tribunal, any fine imposed was forfeit to HM the Queen, not to the SRA, and was therefore unavailable to defray the SRA's costs (which are ultimately borne by the profession). Mr Ramsden QC submitted that read in context, it was clear that the passage did not create any new law or alter the existing law regarding the "chilling effect" of an adverse costs order upon a statutory regulator acting in the public interest, but simply directed attention to "the principles developed by the cases in this court".

64.38 Pre-eminent among those cases, so far as this Tribunal was concerned, and one expressly considered and approved by the Court of Appeal in Flynn Pharma, was its earlier judgment in Baxendale-Walker. The following passage required particular emphasis:

> "… One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage."

64.39 While it was accepted that there was no 'requirement' as such for the case to have proceeded as "a shambles from start to finish" and that the test was one of "good reason", that test was by no means a departure from, or dilution of the principles originally developed in Baxendale-Walker. On the contrary, the phrase "good reason" was used by Moses LJ in the Divisional Court ([2006] EWHC 643 (Admin) at [43]). A prosecution that was improperly brought or which proceeded shambolically would amount to unreasonable conduct and therefore to a good reason. Mr Ramsden QC submitted that it could not be seriously suggested that the case against the First Respondent amounted to such a prosecution.

64.40 Mr Coleman QC had submitted that there was no requirement to establish unreasonable conduct by the SRA in order to secure a costs award in favour of the First Respondent. Mr Ramsden QC considered that if the matters relied upon did not amount to unreasonable conduct (and they plainly did not), it followed that the regulator had therefore acted reasonably. Mr Ramsden QC queried how, in circumstances where the regulator had not acted unreasonably, there could be any good reason to depart from the default position. It was noted that there had been no attempt by the First Respondent to answer that question.

64.41 Mr Ramsden QC addressed the three factors upon which the First Respondent relied as demonstrating that there was good reason to depart from the default position of making no order for costs against the regulator.

There was no public interest in pursuing the disciplinary proceedings against the First Respondent

64.42 The First Respondent asserted that there was, objectively, no public interest in pursuing disciplinary proceedings against her in circumstances where the SRA had decided that there was insufficient public interest to continue the prosecution of Mr Morallee. That position was not accepted. On the face of the evidence, the First Respondent was the fee earner who sourced and had conduct of these matters and it was she who instigated most if not all of the impugned transactions. Mr Morallee authorised only a small minority of the payments, most of which were authorised by partners other than him. In those circumstances, it was reasonable for the SRA to conclude that the public interest in pursuing Mr Morallee was adequately and proportionately met by prosecuting the firm in which he had been a partner at the material time. That was far from being a decision which no reasonable regulator could have reached and the SRA had been completely transparent about how that decision was made. Mr Ramsden QC submitted that in the circumstances, the decision to pursue disciplinary proceedings against the First Respondent was coherent, consistent, reasonable and in the public interest.

64.43 The Tribunal had found that the Second Respondent's processes and the authorisation of the payments amounted to a break in the chain of causation such that the First Respondent could not be said to have caused or allowed the payments. Such a finding, it was submitted, amounted to a clear answer to a clear and permissible case, brought in circumstances where the First Respondent had originated the instructions to make the payments. If that was correct, the position as regards Mr Morallee was irrelevant.

64.44 Mr Ramsden QC submitted that decisions about whom to refer to and, if a case is certified, whom to prosecute before the Tribunal were quintessentially matters for the SRA as the regulator. They were not matters for the Tribunal and were certainly not matters for the First Respondent. The SRA made such decisions having regard to its published prosecutorial test (including the public interest limb of that test) and with the benefit of legal advice, which was subject to legal advice privilege. Mr Ramsden QC submitted that it would be wrong in principle for the Tribunal to penalise the SRA in costs for electing not to prosecute a non-party having given careful consideration to the representations made on his behalf and to its own duties (particularly in circumstances where the SRA had prosecuted the firm in which all of the authorising partners were operating).

64.45 Even if the SRA's decision not to prosecute Mr Morallee was (i) wrong and (ii) capable of being properly impugned by this Tribunal (which would be tantamount to the Tribunal certifying a case to answer against a non-party without notice), it would not follow that the SRA's decision to pursue the First Respondent was 'unreasonable conduct' or any other good reason. Not only had the First Respondent sourced and instigated most if not all of the impugned transactions as the solicitor with conduct, but she had also unequivocally admitted the substance of the charge in open, pre-issue correspondence from her solicitors. It was entirely right and proper to bring the First

Respondent before the Tribunal and thereafter (when she resiled from her admissions) to test what Ms Carpenter QC aptly described as her "volte face". Such an approach, it was submitted, was in the public interest and was a reasonable and inherently responsible approach to adopt.

The case against the First Respondent was legally and factually misconceived

64.46 Mr Coleman QC submitted that the SRA's case against the First Respondent was "obviously legally and factually misconceived". If that were so, the Tribunal would never have certified it. Mr Coleman QC suggested that the Tribunal certified a matter on the basis that the facts contained in the Rule 12 Statement were true. Mr Ramsden QC submitted that this was a muddled submission; the Tribunal could not assess whether facts were true or correct until it had heard a case. When considering certification, the Tribunal was considering whether there was a case to answer. The suggestion that the case against the First Respondent was misconceived from the outset was unjustified. Mr Ramsden QC submitted that it was telling that there had been no submission at the end of the prosecution case that there was no case to answer; there plainly was a case to answer. Mr Coleman QC's submission that such an application was not made due to the time it would have taken was not accepted.

64.47 The SRA did not yet have the benefit of the Tribunal's written reasons for acquitting the First Respondent. From the oral reasons announced on 29 October, the SRA understood the ratio of that decision to be that because all the relevant payments were authorised by one or more partners who were obliged to ensure the Firm's compliance with the prevailing Accounts Rules, there had been "a break in the chain of causation", such that it could not be said that the First Respondent "caused" those payments to be made. Whilst the Judgment would be considered when available, it was not considered that the Tribunal regarded the SRA's case as "obviously legally and factually misconceived" as alleged by the First Respondent. The SRA's case, it was submitted, was adequately pleaded and properly arguable.

64.48 Further, the First Respondent's criticisms of the SRA appeared unattractive in circumstances where (i) she had expressly and unequivocally admitted the substance of the charge in open, pre-issue correspondence from her solicitors, (ii) accepted that "the SRA had legitimate grounds to criticise her conduct" and (iii) "apologised unreservedly". Her pleaded position on breaches of the Prohibition was that she recognised "the risk that the prohibition against providing banking facilities through the client account may have been breached" but she made no admissions in this regard and averred that this was "primarily an issue between the firm and the SRA". It was only in her skeleton argument that the First Respondent belatedly raised a positive case denying liability for breach of the Prohibition (resiling from her earlier, unequivocal admissions and apologies in this regard). The SRA nonetheless sought to meet that novel legal argument on its merits.

64.49 As to the submission that the SRA had been unable to "cite a single analogous decision where an associate solicitor with no authority over the client account has been found liable for breaching the banking facility rule by providing a banking facility through client account", the SRA had cited the cases of Ford and Bown both of whom were rightly convicted of breaching the Prohibition, despite being (in the case of Mr Ford) an unadmitted person and (in the case of Mr Bown) an employed solicitor (but not a

partner). Additionally, on 24 September 2021, after the conclusion of the main hearing on 17 September but before the acquittal of the First Respondent on 29 October, the Tribunal approved an agreed outcome in the case of Tudur (Case No 12224-2021), which concerned (among other things) a breach of the Prohibition by an associate solicitor. Mr Tudur was not authorised unilaterally to operate the client account. The improper use of the monies was identified by Mr B who brought that to the attention of both Mr Tudur and the client. Mr Tudur continued to use the client account in breach of the banking facility rule. That case was a further example of an employed solicitor acting in breach of the banking facility rule.

64.50 Mr Ramsden QC submitted that the unsaid premise on which the First Respondent's submissions were made was that there could be no circumstances in which a solicitor could breach the banking facility rule when the payment was authorised by another. Such a contention, it was submitted, was incorrect. It was accepted that there might be cases where the person requesting payment to be made in breach was liable and other cases where the person authorising the payment was liable. It was proper and appropriate for the regulator to test culpability in those cases.

64.51 In summary, it was not accepted that the SRA's case was "obviously" misconceived, legally or factually. On the contrary, it was properly arguable and appeared to have failed on a relatively narrow, possibly novel basis. In any event, the way the case was framed and prosecuted did not begin to approach unreasonable conduct or to demonstrate any other good reason to depart from the default position on costs.

The offer of a regulatory settlement agreement

64.52 The Tribunal had expressly and unequivocally declared that WPSATC or 'Calderbank' correspondence "is not a concept applicable to proceedings before the Tribunal": Atwells. It therefore followed that Respondents ought not to enter into such correspondence (which, by its very nature, could only be seen as an attempt to pressure the regulator into basing its decisions on inappropriate financial considerations in the event of a loss, rather than upon the evidence and the prosecutorial test). Such correspondence could not properly be deployed against the regulator in support of an application for costs.

64.53 In Attwells the Tribunal stated: "The Tribunal asked itself whether a Regulator should be penalised for not accepting a settlement offer by a Respondent in proceedings that the Tribunal considered were properly brought. The Tribunal rejected this as a general proposition on public policy grounds. The Regulator should not be in jeopardy of having to pay a respondent's costs where it had lost but the case had been properly brought." Mr Ramsden QC submitted that the reasons given by the Tribunal for this declaration were plainly correct. Whilst it was accepted that the decision in Attwells was not binding, it was of considerable weight given that the decision was reached as a matter of public policy and was thus applicable to all matters.

64.54 Mr Ramsden QC submitted that where a case had been properly brought, WPSATC correspondence was not relevant. WPSATC correspondence was not a relevant consideration for the Tribunal as it added nothing to the already existing position as regards costs. Mr Ramsden QC submitted that even if this Division were to hold that Atwells was wrongly decided on this point, it could not be unreasonable conduct for

the SRA to be guided in its approach to WPSATC/Calderbank correspondence by a public judgment of the Tribunal. The SRA's stance (explained to both respondents) was both principled and reasonable. It did not disclose any good reason to depart from the default position.

64.55 Further, even if the Tribunal considered that the WPSATC correspondence should be weighed in the balance, there was nothing in that correspondence which justified reaching the conclusion that the SRA, in rejecting the First Respondent's offer, had acted unreasonably.

64.56 The relevance of Langford et al was entirely unclear. The SRA had not sought any order that the First Respondent, as opposed to the Firm, should pay its costs. Further, there was no costs order against the SRA in that case.

64.57 The First Respondent's reliance on Naqvi, it was submitted, was entirely misconceived. The WPSATC offer made by the SRA in that case was made during in the course of proceedings before the High Court to set aside a number of witness summonses, i.e. it was made, quite properly, during the course of civil litigation. It was not made with a view to applying undue pressure on Mr Naqvi to admit the allegations against him in the disciplinary proceedings before the Tribunal or to agree any particular outcome in those proceedings.

64.58 In any case, as Ms Ellen herself appears to accept, she has at no stage made a proper offer of settlement on a WPSATC basis. Her letter of 10 February 2021 (pre-issue) contained an offer to admit the substance of the charge of which she has now been acquitted and indeed to admit a breach of Principle 6 (on one view a more serious charge than the one ultimately framed). But that went little further than her previous admissions in open correspondence and there were also no proposals as to sanction. It could not possibly be 'unreasonable conduct' for the SRA to proceed to issue proceedings in the face of both open and WP admissions and/or in the absence of any proposals on sanction. Nor did the letter disclose any other 'good reason' to award costs to the First Respondent.

64.59 Mr Ramsden QC submitted that the First Respondent's criticisms in this regard were unhelpful to her. From an early stage, the First Respondent appeared to accept that the banking facility rule had been breached and that there were legitimate grounds to criticise her conduct. Taking that as a starting point, it was impossible to conclude that the decision to proceed against her was unreasonable. If it was the case that it was always the First Respondent's position that there had been no breach of the banking facility rule, then the SRA was entirely correct to air the matter before the Tribunal. It was noted that that during the course of the proceedings, the First Respondent launched and continued an extensive assault of the SRA's case on the breach of the banking facility rule which failed in its entirety. That being the case it was not just reasonable and in the public interest to prosecute the matter, but it was also necessary. The fact that the Tribunal found matters against the First Respondent not proved did not render the decision to proceed against her as unreasonable.

64.60 In summary, it was submitted that the WPSATC correspondence added nothing and should be disregarded.

64.61 As regards the alleged additional unreasonable conduct:

64.62 Firstly, as was made clear in oral submissions, it was simply not accepted that the SRA went beyond its pleaded case in any of the skeleton argument, opening submissions or cross-examination, impermissibly or at all. At no stage did the Tribunal rule that any question asked on behalf of the SRA was impermissible. In the circumstances, the alleged breaches of Rule 4, Rule 12 and the duty to act fairly were unwarranted and firmly denied.

64.63 Secondly, as to the proposed SAFA, it was accepted that, ideally, this would have been lodged sooner than it was. The delay in doing so however was not properly or fairly attributable to the SRA but rather to the Firm's failure to make full admissions in a timely manner. The Firm had since been found guilty of all disputed matters. It could and should have admitted them sooner, i.e. in its Answer. Pursuant to the Overriding Objective, the SRA had an ongoing duty to narrow the issues if it could; its attempts to do so in good faith could not sensibly be characterised as unreasonable conduct or as any other good reason to penalise the SRA in costs.

The First Respondent's Reply

64.64 Mr Coleman QC submitted that the parties were in agreement as regards there needing to be good reason to depart from the default position. Unreasonable conduct should be construed broadly such as to include irrational, unfair and inconsistent conduct. It should also include the bringing of a case that was flawed and had not been considered with care and diligence.

64.65 Mr Ramsden QC submitted that the First Respondent was the common denominator for all the transactions. This highlighted the incorrect analysis as to where the regulatory culpability lay. Mr Morallee was the matter partner and could therefore also be seen as a common denominator. The SRA, it was submitted, had failed to make a proper assessment of where the responsibility and culpability lay for any breaches. The Tribunal could properly find that such a serious error of judgement meant that the SRA failed to act fairly and reasonably.

64.66 The SRA failed, throughout the entirety of the proceedings to explain how the First Respondent caused or allowed the payments.

64.67 It was not the First Respondent's case that she could not breach the banking facility rule as an employed solicitor, but that in the particular circumstances she had not caused or allowed the banking facility rule to be breached.

64.68 There was no reason in principle for the Tribunal not to consider the WPSATC correspondence when assessing whether the SRA had acted reasonably.

The Tribunal's Decision

64.69 The Tribunal agreed with the parties as regards the legal framework. The Tribunal considered that both Flynn Pharma and Baxendale-Walker were relevant decisions. The Tribunal did not find that Flynn Pharma applied differently to the Tribunal than it

did to other regulators as Respondents at the Tribunal were (in the main) qualified solicitors.

There was no public interest in pursuing the disciplinary proceedings against the First Respondent

64.70 The Tribunal considered the reasoning for reviewing (and rescinding) the referral of Mr Morallee to the Tribunal. It was the SRA's position that it considered that in prosecuting the Firm, and given Mr Morallee's role, it was not in the public interest to prosecute him. His conduct was considered to be adequately met by the prosecution of the Firm. The Tribunal did not consider that this was an unreasonable decision to make. Indeed, it was not Mr Coleman QC's case in making the application for costs, that the decision not to proceed against Mr Morallee was wrong or unreasonable. Rather, it was the First Respondent's case that having decided not to proceed against Mr Morallee, the SRA should have made the same decision as regards its referral of her to the Tribunal.

64.71 The Tribunal accepted that the SRA considered that the First Respondent's conduct was different to that of Mr Morallee (and indeed all the Authorising Partners). The First Respondent, as was agreed, was instrumental in the firm being instructed and was the fee earner on all matters. Whilst Mr Morallee was the matter partner, he was not involved in the day-to-day running of the case. As regards his involvement with the breach of the banking facility rule, the Tribunal considered that his conduct was more akin to that of the Authorising Partners. It had not been suggested that each of the Authorising Partners should have been individually prosecuted. The prosecution of the firm adequately reflected their roles.

64.72 In circumstances where the SRA viewed the conduct of the First Respondent and her role as different to that of Mr Morallee and the Authorising partners, the Tribunal did not consider that in treating her differently to Mr Morallee the SRA acted inconsistently, unfairly or disproportionately.

64.73 Further, even if (which the Tribunal neither found nor considered) it was the case that Mr Morallee's referral should not have been reviewed, and he should have been a Respondent in the proceedings, that did not render the SRA's decision to proceed against the First Respondent as unfair.

64.74 Accordingly, having found that there was no unfairness, inconsistency or disproportionality, the Tribunal found that there was no reason to depart from the default position of no order for costs.

The case against the First Respondent was legally and factually misconceived

64.75 The Tribunal considered that the case against the First Respondent was properly brought. The First Respondent denied that there had been any breach of the banking facility rule, and had argued that this was the case notwithstanding the firm's admissions. The Tribunal considered that the case against the First Respondent was properly arguable and properly argued. Having assessed all the circumstances and facts the Tribunal found, as detailed above, that notwithstanding the banking facility rule breaches, the First Respondent had not caused or allowed those breaches. The Tribunal

did not find that the case was "obviously" legally or factually misconceived. The fact that the SRA were not successful in the prosecution did not mean that the case was not properly brought, but meant that it had failed to discharge the evidential burden. Accordingly, the Tribunal did not find that there was any reason to depart from the default position as regards no order for costs.

The offer of a regulatory settlement agreement

64.76 The Tribunal considered that Mr Coleman QC's submissions were premised on the basis that the SRA's internal powers were sufficient given the nature of the misconduct alleged, and the nature of the admissions made. As detailed above, the Tribunal found that the breaches by the firm were serious. The Tribunal did not consider that, had matters been proven against the First Respondent, it would have imposed a sanction that could have been imposed by the SRA using its internal powers.

64.77 The Tribunal considered that it was a matter for the SRA as to whether it was willing to enter into a regulatory settlement agreement. The Tribunal did not find that having failed in its prosecution of the First Respondent, the refusal to enter into a regulatory settlement agreement was thereby rendered unfair.

64.78 Accordingly, the Tribunal did not find that the SRA's failure to enter into a regulatory settlement agreement was unreasonable such that there should be a deviation from the default position as regards any costs order.

64.79 As to the submission that the SRA went beyond its pleaded case, the Tribunal made its decisions on the pleaded allegations. Any unpleaded matters that were not relevant would not (and did not) form part of the reasoning for the Tribunal's decisions.

64.80 As regards the SAFA, the SRA and Second Respondent were entitled to make that application pursuant to the SDPR. The Tribunal had found that the admission of the SAFA was unfair and prejudicial to the First Respondent. However, this did not amount to a good reason to order the SRA to pay costs. Further, it would be inappropriate to order that the SRA pay the entirety of those costs in circumstances where the lateness of the application was attributable to both the SRA and the Second Respondent.

64.81 Accordingly, and for the reasons stated, the Tribunal did not consider that there was any good reason to make a costs order in favour of the First Respondent against the SRA.

Statement of Full Order

65. The Tribunal Ordered that the allegations against ELIZABETH ELLEN, solicitor, be DISMISSED. The Tribunal further ORDERS that there be no Order as to costs.

66. The Tribunal ORDERS that the Respondent, MdR Solicitors of Weston House, 242-246 High Holborn, London, WC1V 7EX, Recognised Body, do pay a fine of £25,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Orders that they do pay the costs of and incidental to this application and enquiry fixed in the sum of £32,500.00.

Dated this 11th day of January 2022
On behalf of the Tribunal

A N Spooner
Chair

JUDGMENT FILED WITH THE LAW SOCIETY
11 JAN 2022