SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12194-2021

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD. Applicant

and

CLIVE AUSTIN Respondent

Before:

Mr A. Ghosh (in the chair)
Mr B. Forde
Mrs L. McMahon-Hathway

Date of Hearing:
21 to 22 September 2021

Appearances

Rory Mulchrone, counsel, of Capsticks LLP for the Applicant

The Respondent represented himself

JUDGMENT

Allegations

1. The allegations against the Respondent were set out in a Rule 12 Statement dated 9 April 2021 and a Rule 14 Statement dated 6 August 2021 and were that:

1.1 While in practice as a solicitor at Giles Wilson LLP ("the Firm"), between January 2017 and December 2017, he made records as to the time spent by him working on a client matter which were inaccurate, misleading and in excess of the time actually spent on the client matter against which they were recorded, and in doing so breached one or more of Principles 2, 4 and 6 of the SRA Principles 2011 ("the Principles").

1.2 On or about 4 January 2019, while employed by Mullis & Peake LLP ("M&P"), he misappropriated client monies in the sum of £1,115 by paying into his personal bank account a cheque in that sum issued by HM Revenue and Customs ("HMRC") in relation to the Client B matter, in respect of which he was acting in the course of his employment, and in doing so breached Principles 2, 6 and 10 of the Principles and Rule 14.1 of the SRA Accounts Rules 2011 ("the SARs").

1.3 It was alleged that by reason of the matters set out at allegation 1.2 above the Respondent acted dishonestly, but dishonesty was not a necessary ingredient to allegation 1.2 above being proved.

Documents

2. The Tribunal considered all of the documents in the case which included:

Applicant

- Application and Rule 12 Statement dated 9 April 2021 with exhibits;
- Rule 14 Statement dated 6 August 2021 with exhibits;
- Costs schedules dated 9 April and 14 September 2021;
- Post issue correspondence with the Respondent dated 24 and 25 August 2021;
- "HMRC disclosure" documents and correspondence between Capsticks and HMRC;
- Statement of agreed facts dated 20 September 2021;
- Note on the legal and procedural status of the statement of agreed facts dated 20 September 2021;
- Correspondence between the Respondent and the Applicant's solicitors dated 20 September 2021

Respondent

- Answer to the Rule 12 Statement dated 28 May 2021;
- Answer to the Rule 14 Statement dated 20 August 2021 with exhibits.

Preliminary Matters

The extent of admissions made by the Respondent

3. Ahead of the hearing, the parties submitted a "statement of agreed facts" ("the Statement"). The Statement contained admissions by the Respondent to all of the allegations and alleged breaches of the Principles, SARs and the aggravating allegation of dishonesty. Details of the Statement and its effect are set out below under the Findings of Fact and Law.

The Respondent's application to withdraw an admission

4. After the Tribunal had found the matters set out in the Statement proved, taking account of the Respondent's admissions, the Respondent began outlining his mitigation. Amongst other matters, set out under Mitigation below, the Respondent stated that at the relevant time he had mistakenly believed that the client monies with which allegation 1.2 was concerned were his. The Tribunal Chair observed that there appeared to be some tension between admitting dishonestly misappropriating client money and maintaining that he had genuinely believed the money in question was his. In response to a direct question from the Chair the Respondent stated that he did not steal or misappropriate the money and that he had paid it into his own account in error. The Respondent then applied to withdraw his admission.

The Applicant's position

5. Mr Mulchrone, for the Applicant, directed the Tribunal to correspondence in which the extent of the Respondent's admissions had been queried and to the Respondent's unequivocal replies that they extended to the aggravating allegation of dishonesty. Mr Mulchrone submitted that there was no provision within the Solicitors (Disciplinary Proceedings) Rules 2019 ("SDPR") relating to the revocation of an admission once findings had been made by the Tribunal other than the Tribunal's power under Rule 6(1) to regulate its own procedure.

6. Drawing an analogy to criminal proceedings, Mr Mulchrone referred the Tribunal to the judgment of the Court of Appeal in R v KC [2019] EWCA Crim 1632. At paragraph 19 of his judgment Green LJ had observed "*A plea of guilty may be withdrawn at any stage before the passing of sentence. This has long been the law.*" Mr Mulchrone submitted that whilst the facts of this case were not relevant the principle was, and he accepted that the Tribunal had the discretion to grant the application. He also referred the Tribunal to Rule 25.5 of The Criminal Procedure Rules 2020 which sets out the form that an application to vacate a guilty plea must take (including that it be made in writing and before disposal of the case by sentencing).

7. On behalf of the Applicant, Mr Mulchrone did not oppose the application but submitted that the discretion to allow a withdrawal of an admission should be exercised sparingly and that the relevant cases showed that a refusal to accept such an application can be fair. Mr Mulchrone submitted that in any event the Respondent should apply in writing in unequivocal terms and stated that the Applicant would then require time to consider its position and if necessary re-warn its witnesses.

The Tribunal's Decision

8. The Respondent's admissions, including that his conduct in paying client monies into his own account had lacked integrity and had been dishonest had been made in unequivocal terms. This was set out in recent correspondence with the Applicant and in the Statement. However, the account he had given when outlining his mitigation, that he had genuinely believed the money to be his, was consistent with the account he had given M&P and gave to the Applicant during the investigation.

9. The Tribunal had an obligation to be fair to both parties and to have due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 respectively of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Tribunal considered that the Respondent had appeared somewhat hesitant and unfocused when addressing the Tribunal on the first day of the hearing and when initially confirming the extent of his admissions. Having made wide ranging admissions, the Respondent had then reverted when making his plea in mitigation to the account he had consistently given prior to his formal Answer to the Rule 14 Statement.

10. The Tribunal was satisfied that it had the discretion to grant the application to withdraw the admissions under Rule 6(1) SDPR. The case of KC, to which it had been referred, supported the existence of such a discretion. Whilst in that case the refusal of such an application was held to have been fair, the Tribunal noted that at paragraph 24 of his judgment Green LJ had highlighted the fact that in that particular case the defendant had been represented and advised by experienced counsel and solicitors. In this case the Respondent was unrepresented and this heightened the Tribunal's concern at holding him to an admission which did not appear to reflect his settled and considered belief.

11. The Tribunal considered that the interests of justice favoured granting the application. The Tribunal duly granted the application for the Respondent to withdraw his admission that he had misappropriated client funds in relation to allegation 1.2. This included the withdrawal of his admissions that he had thereby acted without integrity in breach of Principle 2 and dishonestly. The remaining admissions, and all of the admitted underlying facts set out in the Statement, were unaffected and are described below under Findings of Fact and Law

Factual Background

12. The Respondent was admitted to the Roll on 17 September 2001. At the date of the hearing he remained on the Roll but did not hold a current practising certificate entitling him to practise as a solicitor in England and Wales.

13. From about October 2015 until December 2017, the Respondent was employed by the Firm to undertake probate work. On 21 December 2017, the Firm made a report to the Applicant about the Respondent's time recording in respect of a client file ("the Client A matter").

14. Between 5 March 2018 and 18 March 2019 the Respondent was employed by M&P and during the course of this employment he had the conduct of a client matter which involved the administration of the estate of Client B ("the Client B matter").

Witnesses

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

- MT, solicitor and member of M&P
- the Respondent

Findings of Fact and Law

16. The Applicant was required by Rule 5 of The Solicitors (Disciplinary Proceedings) Rules 2019 to prove the allegations to the civil standard of proof – i.e. on the balance of probabilities. The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 respectively of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

17. **Allegation 1.1: While in practice as a solicitor at the Firm, between January 2017 and December 2017, the Respondent made records as to the time spent by him working on the Client A matter which were inaccurate, misleading and in excess of the time actually spent on the client matter, and in doing so breached one or more of Principles 2, 4 and 6 of the Principles.**

<u>The Statement</u>

17.1 As set out above, the parties jointly submitted the Statement which included agreed facts and admissions. Relevant extracts relating to this allegation are set out below. Relevant submissions made by the parties are then also summarised.

The Agreed Facts

17.2 While working at the Firm, and from about October 2015, the Respondent had been responsible for the day to day conduct of the Client A matter. The Client A matter involved the administration of the estate of Client A, who had died on 27 September 2015. From about October 2015, the Respondent was responsible for the day-to-day conduct of Client A's estate.

17.3 On the Respondent's own account, he "believed he had successfully completed the administration of the Estate and a final bill was issued …in January 2017 for £2950." Some residual work was carried out on the Client A matter during 2017. The Firm

raised invoices in the total sum of £19,598.98 including VAT and disbursements in relation to the Client A matter, including three invoices issued during 2017 in the sum of £7,116 including VAT.

17.4 At the material time, the Firm used a time recording system called Osprey, to which fee earners had access and which was used as the basis for establishing time spent by fee earners, and calculating the amount to be billed for work undertaken. During the period between 6 January 2017 and 18 December 2017, the Respondent recorded 529 hours and 24 minutes of time on the Client A matter, in circumstances in which the work recorded against the file, and attendance notes and other records, indicated that he had not in fact spent that amount of time working on the Client A matter.

17.5 The Firm concluded that a reasonable and proportionate amount of time to have been spent on the Client A matter during 2017 was about 15 hours. By way of example of recording of time not properly chargeable, the Firm concluded that no time could be charged for work undertaken in July 2017; however, the time records for July show that the Respondent recorded 89.9 hours on the Client A matter during the month between 3 July and 31 July 2017.

17.6 The Respondent accepted, when enquiries were made of him by the Firm about his time recording, that he had recorded time against the Client A matter in excess of the time actually spent. While the Respondent claimed that this was a result of issues with the Firm's IT system, he was able to record time effectively on other unrelated client chargeable matters.

The Agreed Admissions

17.7 The Respondent admitted that he recorded time against the Client A matter which was inaccurate and in excess of time actually spent, and that he knew, when doing so, that the records he was making were inaccurate and could cause others to believe that time had been spent on the Client A matter by the Respondent consistent with such records. The Respondent accepted that his purpose in doing so was to seek to demonstrate to the Firm that he was meeting his target hours.

17.8 The Respondent accepted that in so acting, he acted in a manner likely to undermine public confidence in him and in the delivery of legal services (in breach of Principle 6). He further accepted that in so acting he failed to act with integrity (in breach of Principle 2).

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

17.9 Mr Mulchrone set out the legal and procedural basis on which he submitted the Tribunal had the power to accept the Statement as dispositive of the fact-finding element of the case. He stated that the Statement confirmed the agreed factual basis upon which the Respondent's earlier admissions had been made. After close consideration, it was acceptable to the Applicant. He respectfully invited the Tribunal to find that the Respondent's admissions were properly made and to approve the Statement. The Tribunal should then go on to determine sanction and consequential issues in the ordinary way.

17.10 In relation to Principle 2, the obligation to act with integrity, it was submitted that a solicitor acting with integrity would not knowingly and systematically, over a prolonged period, record time against a client matter in the knowledge that such time had not in fact been spent in furtherance of instructions on that matter. The Applicant relied on Wingate v Solicitors Regulation Authority v Malins [2018] EWCA Civ 366, in which it was said that integrity connotes adherence to the ethical standards of one's own profession.

The Respondent's Submissions

17.11 The Respondent had stated in his Answer that the allegation was "true" and had made the admissions set out in the Statement. His application to withdraw admissions relating to misappropriation of client money did not apply to this allegation.

The Tribunal's Decision

17.12 The underlying facts as summarised above were admitted. The breach of Principles 2 and 6 were admitted. The Tribunal found that the admissions were properly made and that the alleged breaches were proved to the requisite standard.

17.13 Whilst the alleged breach of Principle 4 (the obligation to act in the best interests of each client) was not particularised in detail, the Rule 12 Statement alleged a breach of that Principle in paragraph 1 and Appendix 1. The agreed and admitted conduct was plainly not in the interests of Client A's estate. The Respondent's Answer had stated that the allegation was "true" and during the hearing he had confirmed his admission to allegation 1 generally. The Tribunal found that the admission in relation to Principle 4 was also properly made and that this alleged breach was also proved to the requisite standard.

18. **Allegation 1.2: On or about 4 January 2019, while employed by M&P, the Respondent misappropriated client monies in the sum of £1,115 by paying into his personal bank account a cheque in that sum issued by HMRC in relation to the Client B matter, in respect of which he was acting in the course of his employment, and in doing so breached Principles 2, 6 and 10 of the Principles and Rule 14.1 of the SARs).**

The Statement

18.1 The Statement submitted jointly by the parties included agreed facts and admissions in relation to allegation 1.2. Relevant extracts relating to this allegation, reflecting the Respondent's modified admissions, are set out below. The submissions made by the parties on the areas which remained in dispute are then summarised separately.

The Agreed Facts

18.2 During the course of his employment at M&P, the Respondent had the conduct of the client matter identified as the Client B matter, which involved the administration of the estate of Client B.

18.3 On or about 8 October 2018, M&P received a letter from HMRC recording that a repayment of tax was due to the Client B estate in the sum of £1,115. The letter was addressed to the Respondent by name, at M&P's office address.

18.4 On or about 27 September 2018, HMRC issued a cheque in the sum of £1,115. The cheque was payable to the Respondent by name. The Firm's records indicate that the Respondent was at work on 8 October 2018, when the letter and cheque were received, and, with the exception of a half day of leave, for each of the three subsequent days.

18.5 The Respondent left the employment of M&P on or about 22 March 2019.

18.6 Subsequently, during the handling of the Client B matter by another employee of M&P, it was identified that the repayment from HMRC referred to had not been received. M&P wrote to HMRC on 23 October 2019 requesting payment. On 18 November 2019, HMRC replied, initially indicating that they would cancel the original cheque and re-issue a payment. On 23 December 2019 M&P received a further letter from HMRC, dated 19 December 2019, confirming that the original cheque in the sum of £1,115 had been cashed on 7 January 2019.

18.7 On 29 February 2020, in response to requests for information from M&P, M&P received a letter from HMRC in which HMRC stated that they had been informed by HSBC Bank that the cheque had been paid into a bank account in the Respondent's name.

18.8 Documents subsequently produced to the [Applicant] by the Respondent showed that the Respondent held a bank account with the details provided by HMRC; this was also the bank account into which the Respondent's salary was paid by M&P.

18.9 On 3 March 2020, a partner in M&P wrote to the Respondent in connection with the Client B matter, stating that the cheque had been paid into an account which M&P believed to be the Respondent's personal bank account.

18.10 In a subsequent telephone call with [MT], the partner at M&P, the Respondent accepted paying in to his bank account three cheques including "the cheque from the Revenue". The Respondent denied that he had acted dishonestly, told [MT] that he had been expecting a tax rebate, and said that he had credited M&P's account with the entire amount which he had paid in (including sums from other sources in addition to the cheque from HMRC).

18.11 In a letter to the SRA of 18 June 2020 the Respondent accepted that he received the cheque from HMRC in the sum of £1,115, relating to the Client B matter, and that he paid it into his personal account. The Respondent has accepted that in so acting, he acted in a manner likely to undermine public confidence in him and in the delivery of legal services (in breach of Rule 6).

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

18.12 By reference to the Rule 14 Statement, Mr Mulchrone outlined the Applicant's case, focusing on those areas which were not admitted by the Respondent. Given the inclusion of the agreed facts from the Statement above, the full factual basis of the case

is not repeated. The Respondent had admitted that he paid the cheque received from HMRC which represented client monies into a personal bank account, the cheque having been received by the Respondent at his workplace and in the course of his employment. Such conduct was alleged to amount to misappropriation of client assets.

18.13 MT attended the hearing and affirmed the truth of his written statement. The Respondent did not question MT or challenge any aspect of his evidence.

18.14 A letter from HMRC dated 27 September 2018, stamped as received by M&P on 8 October 2018, confirmed that a tax rebate was due to Client B's estate and that a cheque would be sent within 14 days. The Respondent, as the solicitor with conduct of the case, was accordingly on notice that a rebate cheque would be received.

18.15 Mr Mulchrone submitted that it was inherently improbable that the Respondent had genuinely considered the cheque he had received at work shortly thereafter was intended for him personally. In a letter to the Applicant of 18 June 2020, the Respondent accepted that he received the cheque in an internal envelope, whilst at work, and that it was not under cover of any letter.

18.16 In support of his contention that he believed the cheque related to a tax rebate due to him personally the Respondent provided a letter from HMRC showing that a different sum was due to him in respect of an earlier tax year (2015/16). It was said to be clear from that letter that HMRC had corresponded with the Respondent about his personal tax affairs at a different, and the Applicant presumed personal, address. The letter sent to the Respondent personally about his own tax rebate contained his national insurance number. It also stated that if the refund was not claimed online within 45 days a payable order would be sent. Mr Mulchrone submitted that it was improbable that HMRC would have sent a personal rebate to his work address having previously corresponded with the Respondent elsewhere.

18.17 Mr Mulchrone stated that the Respondent had never provided copies of his personal bank statements for the relevant period to assist with the Applicant's investigations into whether he had received the personal rebate separately (and in addition) to Client B's cheque. The Respondent maintained that he had not. The documents obtained from HMRC did not resolve the issue.

18.18 Prior to the hearing, the Respondent had consistently stated that the correspondence about his personal tax rebate dated from January 2017. He stated that he received the Client B cheque at work in January 2019 (despite it having been issued by HMRC on 27 September 2018). Mr Mulchrone submitted that it was not credible that a cheque, in a different sum, received at work at some point between October 2018 and January 2019 (when the cheque was cashed) could genuinely have been mistaken by the Respondent for money due to him personally for the tax year 2015/16.

18.19 Mr Mulchrone invited the Tribunal to take into account the admissions, which had at one point included admissions to conduct lacking integrity and dishonesty. He submitted that in any event these allegations were proved to the requisite standard.

18.20 It was submitted that the public, including clients entrusting solicitors with their assets and, in probate instructions, relying on solicitors to collect in their assets, were entitled to trust solicitors with those assets and are entitled to assume that solicitors will take great care to ensure that client monies are treated properly and prudently and are not mixed with solicitors' own personal affairs. It was alleged that the Respondent failed to act in a manner which maintained the trust placed by the public in him and the provision of legal services in breach of Principle 6.

18.21 The Respondent's actions were further alleged to amount to a failure to act with integrity in breach of Principle 2 and by reference to the test set out in Wingate. It was submitted that a solicitor acting with integrity would not pay into a personal account a cheque received, at his workplace, and from HMRC, in circumstances strongly indicating that such sums were client money. It was alleged that that in doing so the Respondent fell short of the ethical standards of the profession and so breached Principle 2.

18.22 It was further submitted that the misappropriation of client monies was the clearest possible breach of the Respondent's obligation to protect client monies, and so amounted to a breach of Principle 10 of the Principles.

18.23 The SARs required that client monies must be paid into a client account. By paying client monies into his own account the Respondent was alleged to have breached Rule 14.1 of the SARs.

Dishonesty alleged

18.24 The Applicant relied upon the test for dishonesty set out in Ivey v Genting Casinos [2017] UKSC 67:

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

18.25 As an experienced solicitor of, at the time of the matters alleged, some 18 years' standing, it was alleged that the Respondent must have known that it was wholly unacceptable to pay into a personal account a cheque received in circumstances in which it was alleged to be clear to the Respondent that the payment represented client monies, including:

- The monies were received from HMRC, in circumstances where the Respondent was aware that such payments were often so received in the course of the administration of estates;

- The cheque was received at the workplace;

- The cheque was in a sum previously identified as being due to a client from HMRC in a matter being handled by the Respondent (and a sum different to that which the Respondent claimed to be owed by HMRC).

18.26 It was submitted that ordinary, decent people would consider this behaviour dishonest.

The Respondent's Case (including dishonesty)

18.27 The underlying facts as set out in the Statement were admitted. The Respondent admitted that he paid the cheque for £1,115 representing client monies into his personal bank account. The alleged breaches of Principles 6 and 10 of the Principles and Rule 14.1 of the SARs were admitted.

18.28 The allegations that his conduct also lacked integrity and was dishonest were denied. His case was that the payment of the cheque into his personal account was the result of an error.

18.29 The Respondent gave evidence under oath. He stated that the HMRC cheque he received whilst at work had no correspondence or any covering note attached. He stated that it was simply left on his desk without any explanation. He stated that this happened in January 2019.

18.30 The Respondent's evidence was that he believed this was a tax rebate cheque intended for him personally. He stated that he had received correspondence from HMRC in relation to a personal tax rebate, and had no record of having received this rebate separately. The disclosure made by HMRC to the Applicant similarly revealed no record of any such separate payment. The Respondent stated that as he paid tax via his employer he had thought that the refund had been made via his employer.

18.31 The Respondent stated that he had not lived at the address to which the correspondence from HMRC about his personal tax rebate had been sent for six years. He also stated that he had previously received personal HMRC correspondence at his place of work. The arrival at the cheque at work had thus not struck him as strange.

18.32 In one answer during cross-examination the Respondent indicated that he had collected the letter relating to his personal tax rebate from a former address around Christmas of 2018. As set out above, his account to the Applicant had been that the personal HMRC letter dated from January 2017.

18.33 The Respondent's evidence was that he had thought at the time that the cheque being for a higher amount than he stated he was due as a personal tax rebate (£1,115 rather than £1,103.65) was due to interest having been added by HMRC.

18.34 The Respondent's evidence was that his personal tax rebate had not been at the forefront of his mind since he learned about it and he had genuinely considered when the Client B cheque arrived in the circumstances set out above that it was his personal rebate. He stated that whilst he had conduct of the Client B matter he was not the executor of the estate (this had to be a Partner) and he was not the personal representative. In these

circumstances the Respondent stated that he thought the cheque payable to him was for him and it was not in his mind that it may relate to a client. The Respondent stated that this was the only cheque for, as it turned out, client monies that he had ever received at work that was payable to him personally.

18.35 The Respondent stated that at the time he had conduct of around 200 files and did not remember every figure used in correspondence. His evidence was that he did not marry the figure on the face of cheque with that in the previous correspondence from HMRC relating to the Client B rebate.

18.36 The Respondent stated that as soon as he was advised of the true position he refunded the money. He described his action as an "horrific error".

18.37 During cross-examination about his earlier seemingly full admissions, the Respondent stated that he had not understood that he was being accused, effectively, of theft. He had admitted that he had paid the cheque into the wrong account. In response to a direct question the Respondent acknowledged that he had admitted that he had acted dishonestly but stated that this was with a view to seeking to reach an agreement with the Applicant to avoid the necessity for a hearing. He stated that was not the true position.

18.38 The Respondent emphatically rejected and was indignant at the suggestion made during cross-examination that he was lying in his oral evidence to the Tribunal.

The Tribunal's Decision

18.39 The underlying facts as set out above in the extracts taken from the Statement were admitted. The alleged breaches of Principles 6 and 10 of the Principles and Rule 14.1 of the SARs were admitted. The Tribunal found that these admissions were properly made and that the alleged breaches were proved to the requisite standard.

18.40 The allegation that the admitted conduct had lacked integrity, in breach of Principle 2, was denied.

18.41 The cheque from HMRC plainly should have been linked to the Client B matter. The cheque was in precisely the sum that HMRC had advised would be forthcoming in relation to the Client B matter in their letter of 27 September 2018. However, beyond a description of the arrangements for dealing with incoming post at M&P, the Applicant adduced no direct evidence about when the cheque was received at M&P and when it was placed on the Respondent's desk.

18.42 The cheque raised by HMRC on 27 September 2018 was not cashed until 7 January 2019 (when it was paid into the Respondent's personal account). The Respondent's sworn evidence was that it was left on his desk in January 2019 and that there was no accompanying cover letter. The burden of proof was on the Applicant; the Respondent was not required to prove anything. Whilst MT's evidence about M&P's systems for distributing post and cheques was not challenged by the Respondent, the Tribunal did not consider that evidence had been adduced which outweighed the Respondent's account on the balance of probabilities.

18.43 The Tribunal ultimately found the Respondent to be a credible and truthful witness. The Tribunal noted that he had made and withdrawn admissions to serious allegations. He had also given evidence during the hearing where he stated, for the first time and contrary to his consistent previous account, that he had only received the letter from HMRC about his own personal tax rebate around Christmas of 2018. However, the core of his account about the paying in of the cheque had remained consistent from his first conversation with MT in March 2020.

18.44 MT's contemporaneous file note of their conversation recorded that the Respondent said he was "horrified" to have received the letter about the matter (sent one week earlier) and had already credited the sum of £1,490.29 to M&P's account. The Respondent explained to MT during that call about the personal tax rebate he said was expecting. The Respondent had the opportunity to cross-examine MT but did not do so. The Tribunal accepted Mr Trenerry's evidence. The Respondent's responses to the Applicant during the investigation, and his ultimate position during the hearing, were consistent with the initial account provided in this conversation.

18.45 The Tribunal sought to assess credibility primarily through reference to supporting documents and consistency over time. However, the Tribunal found the Respondent's indignation when it was put to him that his account was false to be genuine and compelling. It was a strange feature of the case that the Respondent had in fact repaid *more* than the client monies he had paid into his personal account. Even during the hearing the reasons for this were not clearly explained. The Tribunal did not consider that it was the action of someone seeking personal advantage.

18.46 The Respondent was categorical in his evidence during cross-examination that the position he outlined during the hearing was true and that he had previously admitted acting without integrity and dishonestly in order to seek to avoid the need for a hearing. Again, the tentative and somewhat muddled way in which the Respondent put forward his case was consistent with this being a plausible motivation from which the Respondent ultimately resiled.

18.47 The Respondent's unchallenged evidence was that at the relevant time he had conduct of around 200 files. His assertion that he had never received a client-related cheque at work made out to him personally was also not challenged. The Tribunal accepted this evidence. As set out above, on the balance of the available evidence the Tribunal accepted that the Respondent had received the unaccompanied cheque in January 2019, around three months after the HMRC letter which stated that a rebate would be forthcoming. The Tribunal did not consider that it was implausible that in those circumstances the Respondent might not link the cheque with the specific client as the cheque arrived with no identifying cover note.

18.48 The Tribunal noted that the sum that the Respondent was due for a personal tax rebate (£1,103.65) was similar to the tax rebate in the Client B matter (£1,115). Again, the Tribunal did not consider the Respondent's evidence that he had assumed the difference was due to interest was unreasonable or implausible. Whilst the Respondent had not provided copies of his bank statements, there was no evidence from HMRC before the Tribunal that the 2015/16 personal tax rebate had been paid to him and his consistent evidence had been that it had not been.

18.49 For the reasons set out above, the Tribunal found that the Applicant had not discharged the burden of proof upon it to establish that the Respondent had knowingly paid client monies into his personal bank account. The Tribunal accepted the Respondent's evidence that his action had been the result of a mistake and that he genuinely, if somewhat surprisingly, believed that the cheque was a personal tax rebate from HMRC that was due to him.

18.50 However, The Tribunal considered that the Applicant's contention that the arrival of the cheque at work was a strong indication that it was work related had force. Whilst the Respondent's evidence that he had received personal HMRC correspondence addressed to his place of work was not challenged, the previous correspondence about the specific 2015/16 rebate in question had been sent to a residential address.

18.51 The Respondent was an experienced probate solicitor. He knew that tax rebates were not unusual features of administering an estate.

18.52 The Tribunal applied the test for conduct lacking integrity from Wingate. As stated by Jackson LJ, acting with integrity involved more than mere honesty. It was described as "*a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members*." In short, it was said "*Integrity connotes adherence to the ethical standards of one's own profession.*" The Tribunal was mindful that he also stated that "*The duty of integrity does not require professional people to be paragons of virtue.*"

18.53 As set out above, the Tribunal had found that the Respondent's stated belief was genuine and that his actions were the result of a mistake. However, the Tribunal considered the clear and obvious factors, the cheque being sent to his place of work when the previous personal correspondence had not and the fact that tax rebates were not uncommon in the probate work undertaken by the Respondent, should have prompted him to take steps to investigate the position. The Tribunal considered that a solicitor receiving a cheque in the circumstances described by the Respondent, even on his own case, was duty bound to take steps to establish the provenance of the cheque with absolute certainty before paying it into his personal account. The Tribunal found that the ethical standards of the profession, to which the safeguarding of client money was paramount, required this. By failing to take such steps the Tribunal found proved on the balance of probabilities that the Respondent had failed to adhere to the ethical standards of the profession and his conduct had lacked integrity in breach of Principle 2.

Dishonesty

18.54 When considering the allegation of dishonesty, the Tribunal applied the test in Ivey. Accordingly, the Tribunal adopted the following approach:

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

- secondly, once that was established, the Tribunal then considered whether this conduct would be thought to have been dishonest by the standards of ordinary decent people.

18.55 As set out above, the Tribunal had found that that the Respondent genuinely believed that the cheque he received at work was a tax rebate due to him personally. The Tribunal had regard to the dicta of Lord Hughes at paragraph 74 of his judgment in Ivey that "when dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held". The Tribunal accepted that the Respondent had genuinely believed that he was due a personal tax rebate and that he had not received it prior to the unaccompanied cheque arriving on his desk in January 2019. Whether the surrounding circumstances undermined the reasonableness of the Respondent's beliefs was irrelevant The test for dishonesty in Ivey was not satisfied and the allegation of dishonesty was not proved; there was nothing objectively dishonest about his conduct.

Previous Disciplinary Matters

19. There were no previous Tribunal findings.

Mitigation

20. The Respondent requested and was given additional time in which to prepare his submissions on mitigation.

21. The Respondent stated that he had spent the majority of his career in the charitable sector where he had not recorded his time. When he joined the Firm this was the first time he had done so.

22. The Respondent stated that around 8% of his caseload at the Firm was wills and probate. He was extremely busy and considered the time targets for handling these cases to be unrealistic. He stated that he had no secretary whilst at the Firm.

23. The Respondent stated he had had what he referred to as a breakdown in 2012, before he joined the Firm. He provided further details but these are not repeated in this judgment. The Respondent went on to say that he did not consider he was well suited to the culture at the Firm. He stated that he felt personally compromised by what he regarded as unachievable time recording targets and costs limits for types of files. As a consequence, he contacted a recruitment consultant to explore alternative options but said the consultant provided details of his approach to a partner of the Firm. The Respondent stated that it was as a result of the conversations which followed that he began recording time inaccurately. He described his actions as "stupid" and said he had naively thought that whilst this would affect internal performance calculations there would be no substantive harm. The Respondent stated he had only ever had any issues with time recording at the Firm.

24. With regard to the cheque from the Client B matter, the Respondent's mitigation was as set out above in his defence to the allegation; he had genuinely believed the cheque was for him and the money his. The Respondent stated that he took responsibility for his "terrible error" and had repaid the money immediately.

25. The Respondent stated that the investigation and proceedings had taken a heavy toll on him personally and that this was exacerbated by periods of delay.

26. The Respondent stated that he had been invited to an interview in November 2019 after which he was told that the "door would be open" to him if he successfully cleared his name at the Tribunal. He invited the Tribunal to consider a sanction other than strike off.

27. He stated that he had been unemployed for 18 months and lived very frugally, taking casual gardening work from time to time. He stated that he was dependent on others financially, had relied on foodbanks and feared insolvency if he was ordered to pay a fine or the Applicant's costs.

Sanction

28. The Tribunal referred to its Guidance Note on Sanctions (8th edition) when considering sanction. The Tribunal assessed the seriousness of the misconduct by considering the level of the Respondent's culpability and the harm caused, together with any aggravating or mitigating factors.

29. In assessing culpability, the Tribunal found that the motivation for the Respondent's time recording conduct was to avoid adverse scrutiny whilst, in his eyes, causing little if any harm. The conduct with the cheque was the result of an error and of insufficient investigation rather than any positive motivation. The time recording conduct was plainly planned. He had recorded over 500 hundred hours to the Client A matter and he had not suggested this was inadvertent. The mistake over the cheque was spontaneous and could not be described as planned. In both cases, the Respondent as an experienced solicitor, albeit one whose experience was mainly in a non-commercial setting, was trusted by his employer and had direct control over the circumstances of the misconduct. The Respondent had not misled his regulator. The Tribunal assessed his culpability as high.

30. The Tribunal then turned to assess the harm caused by the misconduct. The direct harm was minimal. However, the Tribunal considered that the Respondent's actions created the risk of more significant harm. His time recording practices created a risk, albeit a remote one, that the fees for the Client A matter may be inflated by the time recorded to the file by the Respondent for work he had not undertaken. In the Client B matter, had another solicitor not noticed that the £1,115 tax rebate was missing from the file the estate may have been deprived this money, or M&P may have been put to the expense of remedying the shortfall. The primary harm, however, was to the reputation of the profession. Wildly inaccurate time recording and the payment of client monies into a personal bank account without undertaking appropriate checks was conduct which may seriously harm the reputation of the profession. The Tribunal considered such harm was entirely foreseeable.

31. The Respondent's conduct, in relation to time recording, was aggravated by the fact it was deliberate, repeated and calculated. The conduct extended over several months. The Tribunal considered that the conduct was aggravated by the fact that when acting for an estate the client could be regarded as vulnerable as the usual level of client scrutiny may be reduced. The Tribunal considered that there was some degree of

concealment involved in the 'dumping' of time on the Client A file to give the impression that the Respondent was meeting his targets. The seriousness of the conduct was also aggravated by the fact that, as a solicitor with several years' experience, the Respondent knew, or ought to have known, that recording his time inaccurately to mislead his employer was potentially harmful to the reputation of the legal profession.

32. Turning to mitigating factors, the Respondent had paid the cheque into his personal account as a result of a mistake. He had repaid the money promptly when notified of his mistake. The Respondent had made open and frank admissions to a significant extent. The Tribunal accepted that he had displayed genuine insight into his behaviour which he had described as "stupid" and "horrific".

33. The Tribunal assessed the misconduct as very serious. The Tribunal had found that the Respondent's actions had lacked integrity in relation to both allegations. The misconduct involved inaccurate time recording and a failure to take appropriate steps with a view to protecting client monies. Whilst the Tribunal had not found the Respondent had acted dishonestly, the conduct fell well below the minimum standards expected of solicitors. In view of this seriousness and the potential for damage to the reputation of the profession, the Tribunal did not consider that No Order or a Reprimand were adequate sanctions.

34. The Tribunal also rejected the imposition of a fine. The two findings of conduct lacking integrity, and the fact that the conduct in both cases was a very straightforward and basic failure to take appropriate and necessary steps, led the Tribunal to determine that a fine would not be a sufficient sanction in all the circumstances. Despite the insight demonstrated by the Respondent, the Tribunal did not consider that a fine would adequately reflect the seriousness of the misconduct or protect the reputation of the profession.

35. The Tribunal determined that a fixed-term period of suspension followed by indefinite restrictions on practice was the appropriate combination of sanctions in all of the circumstances. Public confidence in the legal profession demanded no lesser sanction for the serious misconduct which had been found proved. On the basis of the insight displayed by the Respondent, and the fact that the direct harm had been limited, the Tribunal considered that a fixed-term suspension of 9 months, coupled with restrictions on his practise, was sufficient to punish and deter whilst being proportionate to the seriousness of the misconduct.

36. The Tribunal considered that in order to protect the public the Respondent should be subject to restrictions ensuring he did not have unsupervised control over client monies. The Tribunal imposed the conditions set out below which it considered were targeted at the specific risks resulting from the conduct found proved and which were necessary for public protection.

Costs

37. On behalf of the Applicant Mr Mulchrone applied for costs of £35,156.50 as set out in the Applicant's schedule of costs dated 14 September 2021. He reminded the Tribunal that the hearing had lasted for two rather than the three anticipated days and submitted that a reduction to reflect this was accordingly appropriate. He submitted that the time

and costs set out in the schedule were properly incurred and submitted that the Applicant's investigation and supervision costs of £12,956.50 were modest. Mr Mulchrone stated that Capsticks had been instructed on a fixed-fee basis and the fee of £18,500 had been determined at the outset. Whilst there was no hourly rate in a fixed-fee arrangement a notional rate based on the work completed was £130 which he submitted was reasonable. He acknowledged that the Tribunal had not found the allegation of dishonesty proved but noted that this was an aggravating allegation and that all other matters had been found proved.

38. In reply, the Respondent did not make detailed submissions but stated that the Applicant's costs were huge and that he feared insolvency if he was required to pay them. As stated above, he informed the Tribunal that he had been unemployed for 18 months and had no income or significant assets. The Respondent submitted a detailed and signed statement of means in support of his statements. He did not submit supporting documentation such as bank statements. He had stated in mitigation that subject to resolving the Tribunal proceedings he had been told that he would be able to take up a job for which he had interviewed.

39. The Tribunal assessed the costs for the hearing. The Tribunal had heard the case and considered all of the evidence. The Tribunal accepted that it was appropriate to reduce the figure claimed to reflect the fact that the anticipated third day had not been required.

40. The Tribunal carefully reviewed the investigation costs claimed of £10,105. The Tribunal noted that 48 hours had been included for 'information review' and a further 26 hours for report preparation. The Tribunal did not consider that the case was particularly document heavy or complex. Further categories for 'other' and 'travel' included 8 and 11 hours respectively. Without any supporting material, other than the report which had been produced, the Tribunal considered the claimed time, and the corresponding fees, to be excessive and disproportionate. The Tribunal considered that the £10,105 should be reduced to £8,000.

41. The Tribunal also reviewed the schedule of Capsticks' fees and time incurred. 54.3 hours had been incurred in relation to "investigation and preparation of Rule 12 and Rule 14 and documents for issue". The Tribunal considered that following the Applicant's investigations the matter was relatively straightforward and that 54.3 hours was excessive. Based on a review of the documentation, having heard the case and based on experience of comparable cases, the Tribunal determined that the time for the activities listed should be reduced to 40 hours (a reduction of 14.3 hours). The Tribunal determined that this represented a reasonable time for the necessary and proportionate investigation and preparation tasks to be completed.

42. 17.5 hours had been included for "directions, answer and case management". The Tribunal considered that the schedule indicated there had been duplication between the solicitors involved. The Respondent's Answers had been very brief and the additional tasks required were limited. The Tribunal determined that a reasonable and proportionate amount of time for the activities listed was 9.5 hours (a reduction of 6 hours).

43. The Tribunal considered that the preparation and attendance times included for the substantive hearing were reasonable and proportionate in all the circumstances. Save for the reduction of one day (a reduction of 7 hours) to reflect the hearing only requiring two days, the time incurred was reasonable. Whilst the aggravating allegation of dishonesty had not been proved, the Tribunal considered that it was entirely appropriate for the Applicant to have pursued this serious allegation in all the circumstances, not least in circumstances where the Respondent had initially admitted it.

44. The Capsticks schedule was based on a fixed fee rather than an hourly rate and so the deductions identified by the Tribunal (amounting to 27.3 hours) did not automatically translate into a specific deduction to be applied to the overall costs claimed. The hours identified by the Tribunal amounted to just under 20% of those expended by Capsticks. As set out above, the Tribunal had also determined that a reduction of £2,105 should be applied to the investigation costs claimed by the Applicant. The Tribunal determined that taken together, and informed by the complexity of the case and the work and time which was reasonable, necessary and proportionate, the costs claimed on behalf of the Applicant should be reduced by 20%. This gave a total of £28,000.

45. The Tribunal then made a reduction to that figure to reflect the Respondent's financial means. This was based on the stark oral evidence he had given about his current means and the supporting written schedule which contained a signed statement of truth. The Tribunal noted that the Respondent had not provided supporting documentation along with his written schedule, but the Tribunal had assessed the Respondent as credible and truthful generally and accepted the evidence as to his means. The Tribunal considered that applying around a 30% reduction struck the appropriate balance between the Respondent's means and the costs properly incurred by the Applicant in the proceedings brought in the public interest (which would otherwise be met by the profession). The Tribunal ordered the Respondent to pay the Applicant's costs of and incidental to this application fixed in the sum of £20,000.

Statement of Full Order

46. The Tribunal ORDERED that the Respondent, CLIVE MATTHEW AUSTIN, solicitor, be suspended from practice for the period of 9 months to commence on the 22nd day of September 2021 and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £20,000.

47. Upon the expiry of the fixed term of suspension referred to above, the Respondent shall be subject to conditions indefinitely imposed by the Tribunal as follows:

47.1 The Respondent may not:

47.1.1 practise as a sole practitioner or sole manager or sole owner of an authorised or recognised body; or as a freelance solicitor; or as a solicitor in an unregulated organisation;

47.1.2 be a partner or member of a Limited Liability Partnership (LLP), Legal Disciplinary Practice (LDP) or Alternative Business Structure (ABS) or other authorised or recognised body;

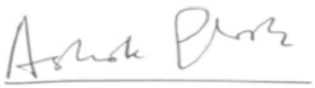
47.1.3 be a Head of Legal Practice/Compliance Officer for Legal Practice or a Head of Finance and Administration/Compliance Officer for Finance and Administration;

47.1.4 hold client money;

47.1.5 be a signatory on any client account;

47.2 There be liberty to either party to apply to the Tribunal to vary the conditions set out at paragraph 47.1 above.

Dated this 5th day of November 2021
On behalf of the Tribunal



A Ghosh
Chair