SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12430-2023

BETWEEN:

SEAMUS ANDREW Appellant

and

SOLICITORS REGULATION AUTHORITY LTD Respondent

Before:

Mr P Lewis (in the chair)
Mr J Abramson
Dr A Richards

Date of Hearing: 22 May 2023

Appearances

Gregory Treverton-Jones KC, barrister of 39 Essex Street, instructed by Weightmans LLP for the Appellant.

Victoria Sheppard-Jones, barrister of Capsticks LLP for the Respondent.

JUDGMENT ON AN APPEAL UNDER S44E OF THE SOLICITORS ACT 1974

Background

1. Mr Andrew founded law firm "Andrews" in October 2004. Andrews merged with Madrid based law firm, Ontier, in January 2016 and became Ontier LLP ("the Firm").

2. Mr Andrew was Head of Legal Practice ("HOLP") and Head of Finance and Administration ("HOFA") at the Firm between 4 November 2012 and 31 December 2020, when he retired.

3. Mr Andrew undertook the book-keeping for the Firm's office account between May 2015 and December 2016. Thereafter, he engaged Moore Kingston Smith LLP ("Kingston Smith") to undertake the book-keeping for the Firm's office account between January 2017 and August 2018. Mr Andrew also undertook the book-keeping for the Firm's client account between May 2015 and August 2018.

4. From August 2018, Margaret Du Preez ("MDP") was employed as Practice Manager at the Firm and undertook the book-keeping for the Firm's client account and office account from that date. Kingston Smith produced qualified accountants reports for the years ending 30 April 2018, 2019 and 2020.

5. Pursuant to the qualified accountant's report ("QAR") for the year ending 30 April 2020, the SRA commenced a forensic investigation into the Firm on 5 March 2021, and produced a forensic investigation report ("FIR") on 28 May 2021.

6. On 24 March 2022, the SRA served a Notice and bundle on the Applicant alleging breaches of the SRA Principles, Accounts Rules and Authorisation Rules 2011 and recommending that the Appellant be rebuked.

7. On 6 May 2022, Mr Andrew, through his legal representative, provided representations to the Notice, admitting certain of the facts but disputing culpability for the alleged beaches and submitting that a rebuke was disproportionate in the circumstances. On 12 July 2022, the SRA served its Statement Following Representations, which confirmed the recommendation in the Notice.

8. On 28 July 2022, the Adjudicator found as follows:

> "Allegation one
>
> 2.1 I find that Mr Andrew caused or allowed the following shortages on the firm's client account:
> (a) £93,600 between May and July 2017
> (b) £13,969 between June and September 2018
> (c) £10,000 between April and August 2018
>
> 2.2 I find that his conduct breached principles 8 and 10 of the SRA Principles 2011 and rules 1.2 (e) and 6.1 of the SRA Accounts Rules 2011. I make no finding in relation to rule 8.5 (e)(i)(A) of the SRA Authorisation Rules 2011.
>
> 2.3 I do not find that he caused or allowed a shortage of £16,500 between August and September 2019."

9. On 30 September 2022, Mr Andrew applied for a Review of the decision and attached to his application a report of David Butterworth, a chartered accountant dated 29 September 2022. The report concluded that no serious regulatory breach of the Solicitors Accounts Rules 2011 had been identified.

10. On 21 December 2022, the Adjudication Panel upheld the decision of the Adjudicator and dismissed the application for Review.

11. On 18 January 2023, Mr Andrew served Notice and Grounds of Appeal seeking to appeal the SRA's Adjudication Panel decision to uphold the decision of the Adjudicator.

Grounds of Appeal

12. The heads of the grounds of appeal were as follows:

- Ground 1 – "The Adjudicator and Adjudication Panel erred in finding that there was a shortage of £93,600 on the Firm's client account".

- Ground 2 - "The Adjudicator and Adjudication Panel erred in finding that there was a shortage of £10,000 on the Firm's client account."

- Ground 3 – "Without prejudice to the above, the Adjudicator and Adjudication Panel erred in finding that the Appellant had "caused or allowed" all or any of the three alleged shortages on client account."

- Ground 4 – "Insofar as the Adjudicator and Adjudication Panel purported to impose strict liability upon the Appellant, they were wrong to do so in the light of the wording of the Allegation (the Appellant had "caused or allowed" three shortages on client account) and the assertion that the SRA Principles were engaged."

- Ground 5 – "The Adjudicator and Adjudication Panel erred in imposing a formal, public rebuke of the Appellant given, in particular:

    - The lack of culpability on the part of the Appellant;
    - The absence of recklessness;
    - The absence of any risk to the public;
    - The fact that the client shortages were caused by bookkeeping errors of third parties retained appropriately and in good faith by the Appellant, and had been rectified."

13. Ground 1 was accepted by the SRA. Grounds 2-5 were not accepted by the SRA.

Preliminary Point

<u>Application to adduce additional witness statement</u>

14. On 19 May 2023, the working day before the substantive hearing, the Respondent applied for leave to adduce a witness statement and exhibit from the SRA's Forensic Investigation Officer out of time. The Appellant was content for the material to go

before the Tribunal for the purposes of determining the application for leave, but opposed the admission of the material into evidence.

Respondent's Submissions

15. Ms Sheppard-Jones submitted that the witness statement was relevant to the part of the appeal relating to the £10,000 shortfall. Ms Sheppard-Jones told the Tribunal that in the course of preparing the case, it became apparent that there was a mistaken belief on the part of Mr Andrew that the Forensic Investigation Officer (FIO) had not had sight of a relevant bank statement during her investigation. Ms Sheppard-Jones understood this to be part of Mr Andrew's case. Ms Sheppard-Jones submitted that this was an error on Mr Andrew's part and that this was demonstrated by the evidence that had now been obtained, following enquiries having been made with the FIO.

16. Ms Sheppard-Jones submitted that this was source evidence and not 'fresh evidence' and so it did not offend the principle set out in SRA v Arslan [2016] EWHC 2862 (Admin).

17. Ms Sheppard-Jones further submitted that if the Tribunal was not with her on this point, the Tribunal had power to admit the evidence under Rule 19 of the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011 ("the 2011 Rules") where it would be just to do so. Ms Sheppard-Jones submitted that it would be just to correct a mistaken belief on the part of the Appellant.

Appellant's Submissions

18. Mr Treverton-Jones opposed the application. He told the Tribunal that Mr Andrew had informed the FIO during the interview that he was at a disadvantage due to a lack of access to documents. Mr Andrew had explained that he left the firm at the end of 2020 and was "frozen out" of the financial records thereafter.

19. Mr Treverton-Jones noted that the material had been produced at a very late stage. It was evidence that was in hands of the SRA and it was "extremely surprising" that is had emerged at this stage. Mr Treverton-Jones submitted that there had been no reference to this in the FIR and that it was unusual to allow new evidence to be admitted to allow a party to "plug a hole" in its case.

20. Mr Treverton-Jones further submitted that it was surprising that the FIO had only taken a copy of the April and not the August bank statements. There were no office account bank statements produced, which might have shown the £10,000 going to pay other bills on other matters. Mr Treverton-Jones submitted that it was unfair to permit two pages to be adduced from a single date, which gave an incomplete picture of the movement of monies.

The Tribunal's Decision

21. The Tribunal noted that this was a very late application. The appeal had been lodged five months ago and the Respondent had provided a Response on 20 February 2023. The Tribunal also acknowledged that Mr Andrew had not had access to the financial records, of which these documents were only a part.

22. There was no evidence that the Adjudication Panel had had sight of this material. If the material was admitted it would re-open the investigation element of the case, which was not under review. The Tribunal concluded that, in the context of a review, this did amount to fresh evidence.

23. Taking all those factors into account, the Tribunal did not consider that it would be just to admit the evidence. The Tribunal, therefore, refused the application.

24. The Tribunal proceeded to hear the appeal.

Appellant's Submissions

25. Mr Treverton-Jones set out the chronology of events, including the history of Mr Andrew's decision to move some of the bookkeeping functions to MDP. In November 2020, a resolution to remove Mr Andrew as managing partner of the Firm was passed. This had the effect of removing his authority to operate the accounts.

26. Mr Treverton-Jones submitted that in circumstances where the shortfall of £93,600 was no longer part of the case against Mr Andrew, the matters that the Tribunal were considering were much smaller case than those before Adjudicator or the Adjudication Panel. The shortage was now just under £24,000, based on two shortages rather than the three found by the panel.

27. Mr Treverton-Jones submitted that the rebuke was imposed due to the amount and the number of the shortages. The Adjudicator had referred to the "most substantial" transfer being the £93,600 and had described the total shortage as exceeding £100,000.

28. Mr Treverton-Jones submitted that the Adjudication Panel decision was "plainly wrong" as it took into account the £93,600 when it should not have done. Mr Treverton-Jones submitted that this was "fatal" to the SRA's case and invited the Tribunal to allow the appeal on this basis and revoke the decision.

29. In respect of the £13,969 shortage, Mr Andrew had not been the fee earner on the matter. Mr Treverton-Jones submitted that due to a bookkeeping error by Kingston Smith (KS), the system recorded that the £13,969 was still in the client account. When he made the transfer of £215,600 from client account to office account in May 2018, Mr Andrew, acting in accordance with the ledger, thereby inadvertently transferred £13,969 too much. On the face of the ledger, he was entitled to transfer the £215,600 as at that stage the client owed £312,276.03, and KS had told him that the bookkeeping problem had been fixed. Mr Treverton-Jones submitted that the matter was not brought to Mr Andrew's attention until October 2020, shortly before he left the Firm. Mr Treverton-Jones referred the Tribunal to the Management Reports.

30. In KS' 2017-18 Management Report, the issue had been described as a bookkeeping issue, with the balance being overstated, rather than being described as a cash shortage. The accountants expressly stated that it had been rectified.

31. In the 2018-19 Report, the matter was described as a bookkeeping/posting issue and a non-material breach. The Report stated that "This posting has not been corrected as at 29 October 2019". As a result, Mr Andrew had told MDP to fix it if not already done.

32. In the 2019-20 Report the issue was described as follows:

> "This was reported as a trivial breach on the Post SRA Accounts Rules Review Management Report for the years ended 30 April 2018 and 2019. On 31 May 2018 all remaining funds shown on this client matter ledger were transferred to the office account in respect of fees. Therefore as at this date, if the client ledger was corrected, a shortfall on the client ledger would be shown. By taking these funds there was a shortfall on the client account amounting to £13,969.73 between 15 May 2018 and 10 September 2019 when this was rectified."

33. Mr Treverton-Jones submitted that Mr Andrew was not culpable for the shortage and that the Tribunal should not impose too high a duty in circumstances where the breaches of the Solicitors Accounts Rules were caused by an error by someone else.

34. Mr Treverton-Jones submitted that the Adjudication Panel had in effect, wrongly, held Mr Andrew to be vicariously liable for the shortage as there was insufficient evidence that he had been personally culpable.

35. The same submission was made in respect of the £10,000 shortage, also a case in which Mr Andrew had not been the fee earner. The £10,000 court fee should have been listed under 'Anticipated Disbursements' instead of 'Not yet paid disbursements'.

36. Mr Treverton-Jones submitted that the SRA had failed to obtain the relevant bank statements and had not, therefore, verified whether there was an actual shortage. There was no suggestion in the accountants' reports that this shortage had occurred and it had not been put to Mr Andrew during his interview on 29 April 2021. Mr Treverton-Jones submitted that it appeared to have been a conclusion drawn subsequently by the FIO based on the ledgers and without reference to the bank statements.

37. Mr Treverton-Jones submitted that once the £93,600 was taken out of the equation, what was left was bookkeeping errors made by professional bookkeepers. Neither error was brought to Mr Andrew's attention at the time. The £10,000 was not brought to his attention at all and the £13,969 only just before he left the firm. They were not Mr Andrew's cases and he was not the fee earner. The Adjudication Panel had fallen into error by treating it as a vicarious liability case.

Respondent's Submissions

38. Ms Sheppard-Jones submitted that the SRA did not agree that once £93,600 issue was conceded, the remainder of the case fell away. The SRA remained of the view that the Adjudication Panel was right in relation to the other elements of its decision, including the decision to rebuke and publish.

39. Ms Sheppard-Jones referred the Tribunal to Arslan at [40] in relation to the approach she invited the Tribunal to take when considering the matter:

> "40. More guidance on the proper approach to a review is given in the judgment of Clarke LJ in Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577, which Mr Arslan cited in his skeleton argument. The passage at paras 14-17 of the judgment was approved by the House of Lords in Datec Electronics

> Holdings Ltd v UPS Ltd [2007] 1 WLR 1325 at para 46 (Lord Mance). In that passage the point is made that the approach to any particular case will depend upon the nature of the issues under review. Where a challenge is made to conclusions of primary fact, the weight to be attached to the findings of the original decision-maker will depend upon the extent to which that decision-maker had an advantage over the reviewing body; the greater that advantage, the more reluctant the reviewing body should be to interfere. Another important factor is the extent to which the original decision involved an evaluation of the facts on which there is room for reasonable disagreement. In such a case the reviewing body ought not generally to interfere unless it is satisfied that the conclusion reached lay outside the bounds within which reasonable disagreement is possible."

40. Ms Sheppard-Jones submitted that the case against Mr Andrew had not been advanced purely on the basis of vicarious liability but on the basis that he had some personal involvement.

41. Ms Sheppard-Jones submitted that the finding in relation to the £13,969 shortfall in and of itself justified a finding of a breach of Principle 8 and Rule 1.2(e). The overall £23,969 shortfall was not contested by Mr Andrew and so Ms Sheppard-Jones posed the rhetorical question as to whether a shortfall of £23,969 would amount to a breach of Principle 10 and result in a rebuke. Ms Sheppard-Jones submitted that the answer would be 'yes'. Ms Sheppard-Jones submitted that the Tribunal should therefore consider all the proved allegations and not allow the appeal simply on the basis that the £93,600 figure had gone.

42. In relation to the £10,000 shortfall, Ms Sheppard-Jones submitted that the Tribunal could be sure, on the balance of probabilities, that the shortfall existed. She referred the Tribunal to the ledger and to an email sent from MDP to the FIO in May 2021.

43. Ms Sheppard-Jones submitted that this had not been a strict liability case because Mr Andrew's position was different due to his direct involvement in the financial management in the firm as he was HOLP and HOFA. This put him in a different position to other principals in the firm. Ms Sheppard-Jones submitted that, in circumstances where Mr Andrew had been unhappy with KS, there was a question as to why he had continued to retain their services at all. This was an example of his direct responsibility. The Adjudication Panel were aware of these roles when they made their decision. Ms Sheppard-Jones noted that that the Adjudication Panel had stated that Mr Andrew could not abrogate his responsibilities.

44. Ms Sheppard-Jones further submitted that Mr Andrew physically made the transfers and was the bookkeeper for the client account when the transfers were made. He was involved in the transfers and that was key.

45. In relation to the £13,969 shortfall, Ms Sheppard-Jones submitted that Mr Andrew was on notice of an issue because he had transferred the £93,600 back to the client account.

46. Ms Sheppard-Jones submitted that Mr Andrew had referenced his inability to interrogate the LEAP system that he had permitted MDP to implement in May 2019. Ms Sheppard-Jones submitted that this was not an attractive position as it made him vulnerable to mistakes that he could not check.

47. The Chair asked Ms Sheppard-Jones what her submission would be should the Tribunal find that the Adjudication Panel had failed to give sufficient reasons. Ms Sheppard-Jones submitted that the Tribunal would still need to consider if the overall conclusions were wrong.

The Tribunal's Decision

48. The Tribunal's powers under s44E(4) are as follows:

> "(4)
> On an appeal under this section, the Tribunal has power to make such order as it thinks fit, and such an order may in particular—
>
> (a) affirm the decision of the Society;
> (b) revoke the decision of the Society;
> (c) in the case of a penalty imposed under section 44D(2)(b), vary the amount of the penalty;
> (d) in the case of a solicitor, contain provision for any of the matters mentioned in paragraphs (a) to (d) of section 47(2);
> (e) in the case of an employee of a solicitor, contain provision for any of the matters mentioned in section 47(2E);
> (f) make such provision as the Tribunal thinks fit as to payment of costs.

49. The test that the Tribunal was required to apply was set out in Arslan at [38]:

> "38. I turn to the nature of the Tribunal's task in conducting a review under section 43(3) and an appeal under section 44E. It is not in dispute that the Tribunal was correct to hold that, in both cases, the proper approach was to proceed by way of a review and not a re-hearing. As for what such a review involves, the Tribunal accepted submissions made to it by Ms Emmerson that its function was analogous to that of a court dealing with an appeal from another court or from a tribunal and that it should apply by analogy the standard of review applicable to such appeals which is set out in rule 52.11 of the Civil Procedure Rules. Rule 52.11 makes it clear that a court or tribunal conducting a review should not generally receive new evidence that was not before the original decision-maker, although it may do so if justice requires it; and it should interfere with a decision under review only if satisfied that the decision was wrong or that the decision was unjust because of a serious procedural or other irregularity in the proceedings."

50. The approach was set out at [40] as quoted above.

51. The applicable standard of proof is the civil standard.

52. The majority of the monies that made up the shortfall had been the £93,600 figure, which the SRA no longer relied on. This had clearly been found in error. The Tribunal did not accept Mr Treverton-Jones' submission that the matter ended there. The Tribunal still had to determine if the remaining decisions of the Adjudication Panel were wrong or unjust due to a serious procedural error or other irregularity.

53. The Tribunal reviewed the reasons given by the Adjudication Panel in relation to the £13,969 and the £10,000. The reasons given in relation to the £13,969 figure were as follows:

> "The Shortage of £13,969
> 5.13 We do not accept that Mr Andrew can avoid responsibility for this shortage on the client account which lasted for about three months between June and September 2018. This is because, in his view and Mr Butterworth's view, it was caused by Kingston Smith's bookkeeping errors. Kingston Smith acted as Mr Andrew's firm's agent, and in the last analysis, Mr Andrew is responsible for the way he and his firm handle client money, even through agents.
>
> 5.14 Even if the original transfer in June 2018 was the result of an error, the continuance of that error for three months or so ought to have been picked up by Mr Andrew. He did cause and allow the shortage, and he caused and allowed it to obtain for an extended period. For a senior solicitor, and a HOLP and HOFA to 'blame the bookkeepers' (which is in effect Mr Andrew's position) is unattractive and we do not accept it."

54. The Adjudication Panel did not explain why Mr Andrew was not entitled to rely on professional bookkeepers or why he was not entitled to blame them when they had made a mistake. The Adjudication Panel did not give a reason as to why they did not accept Mr Andrew's explanation. They described it as "unattractive" but did not explain why. There was reference to his HOLP and HOFA roles but the reasoning does not make clear why that meant that, effectively, Mr Andrew was vicariously liable for all actions undertaken by professionals whom he had engaged to do this work.

55. The Adjudication Panel asserted that the error "ought to have been picked up by Mr Andrew" but does not explain how he ought to have picked it up.

56. The Adjudication Panel did not address, in relation to either shortfall, the fact that Mr Andrew had brought MDP on board in order to address concerns that had arisen with KS.

57. The reasons given in relation to the £10,000 figure were as follows:

> "The Shortage of £10,000
>
> 5.15 This amount comprised part of a larger sum of £26,500. It represented an amount to pay court fees which, in the end, were not paid. When a solicitor authorises a transfer of money from a client account to an office account to pay a disbursement that has not yet been paid (as opposed to reimbursing the firm that has already paid it), the firm must pay that disbursement very promptly or issue a credit note and return the money to the client account.

> 5.16 The credit note was not issued, and the money was not returned, not for days but for months. It was a serious breach of the Accounts Rules. Mr Andrew was responsible for this delay for the reasons already explained. Either he should have personally attended to the matter or, if not, put in place arrangements that did. But he did not. Either way, he either caused or allowed it to happen."

58. The Adjudication Panel found that Mr Andrew was responsible for this delay "for the reasons already explained". the reasons, however, had not been adequately explained and were not further elaborated. Paragraph 5.16 asserts that Mr Andrew did not put arrangements in place, without explaining what arrangements he ought to have put in place but did not, and then states that he caused or allowed the breach to occur, without properly explaining why failure to put some (unspecified) measures in place meant that Mr Andrew was personally culpable.

59. The Tribunal found that the reasons given were inadequate which represented a serious procedural irregularity. As such, the decision of the Adjudication Panel was overturned and the appeal was allowed.

Costs

60. Mr Treverton-Jones sought costs against the SRA in the sum of £61,767.72. Mr Treverton-Jones told the Tribunal that Mr Andrew had taken the view that the allegations made and found proved by the Adjudicator and the Adjudication Panel suggested that he could not be trusted with client monies, in the context of an unblemished career. Mr Treverton-Jones raised this in justification of his own fee.

61. Ms Sheppard-Jones did not object to the principle of costs following the event, but invited the Tribunal to scrutinise the costs claimed in the usual way. Ms Sheppard-Jones reminded the Tribunal of the solicitors guideline hourly rates, noting that the firm instructed by Mr Andrew was based in Manchester. Ms Sheppard-Jones noted that the hearing had not taken seven hours as anticipated in the costs schedule. Further, Ms Sheppard-Jones submitted that the time spent on reviewing the standard directions, preparing the bundle and the preparation of the schedule was disproportionate.

62. Ms Sheppard-Jones queried whether it was necessary to instruct leading counsel on a relatively straightforward matter. Ms Sheppard-Jones did not have an alternative figure in mind. Mr Treverton-Jones reminded the Tribunal of the usual rule that a senior junior's fee would be two-thirds of that of leading counsel.

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

63. The Tribunal decided that the SRA should pay costs to Mr Andrew, having been successful in his appeal.

64. In assessing those costs, the Tribunal applied the solicitors guideline hourly rates. It noted that the length of the hearing was reduced by four hours. It reduced the review of standard directions by 0.6 hours and preparing the hearing bundle by 4.5 hours at Grade A rates. It reduced the preparation of the cost schedule by 1.3 hours at Grade B rates and removed 'drafting long emails to client' as it appeared to be a duplication of 'letters

and emails' to the Applicant claimed elsewhere in the schedule. This reduced the profit costs to £10,532.44 inclusive of VAT.

65. The Tribunal allowed the travel costs in full.

66. In relation to Counsel's fees, the Tribunal accepted the submission that the matter could have been dealt with by a senior junior. Mr Andrew's was entitled to instruct whomever he wished, but the profession should not necessarily be expected to fund that choice without limit. The Tribunal therefore assessed Counsel's fee at £27,000, a reduction of a third.

67. The Tribunal awarded costs to Mr Andrew in the total sum of £37,869.77.

Statement of Full Order

68. The Tribunal Ordered that the appeal under S.44E of Seamus Andrew be ALLOWED.

And it further Ordered that the Respondent to the appeal do pay the costs of and incidental to the appeal fixed in the sum of £37,869.77.

Dated this 14th day of June 2023
On behalf of the Tribunal

P Lewis
Chair