No. 9184-2005 (RH)

IN THE MATTER OF ADRIAN GERARD DONKIN, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr R J C Potter (in the chair)
Mr K Duncan
Mr M C Baughan

Date of Hearing: 31st July 2007

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of the Law Society by Jonathan Richard Goodwin of Jonathan Goodwin Solicitor Advocate, 17e Telford Court, Dunkirk Lea, Chester Gates, Chester, CH1 6LT on 31st January 2005 that Adrian Gerald Donkin of Bridge House, 94 High West Street, Gateshead, Tyne & Wear, NE8 1NA might be required to answer the allegations set out in the statement which accompanied the application and that such order might be made as the Tribunal should think right.

The allegations were that the Respondent had been guilty of conduct unbefitting a solicitor in each of the following particulars, namely that:

(i) He withdrew money from client account other than as permitted by Rule 22 of the Solicitors Accounts Rules 1998 (hereinafter referred to as "SAR");

(ii) Contrary to Rule 21 of the SAR he failed to ensure that money received from the Legal Services Commission in respect of disbursements was paid within 14 days of receipt or in the alternative, transferred to a client account;

(iii) He had utilised clients' funds for his own purpose;

(iv) He failed to remedy breaches of the SAR promptly upon discovery contrary to Rule 7 of the SAR;

(v) He had misappropriated clients' funds, which for the avoidance of doubt was an allegation of dishonesty;

(vi) He acted and/or continued to act in circumstances where his own interests conflicted with the interests of a client(s);

(vii) He acted for the buyer, seller and lender in a conveyancing transaction contrary to Rule 6(2) of the Solicitors Practice Rules 1990, or in the alternative, that he acted for two or more clients when there was a conflict or a significant risk of a conflict of interest between those clients, contrary to Principle 15.01;

(viii) He failed to ensure that each office of his firm was properly and adequately supervised and managed by a person qualified to supervise contrary to Rule 13 of the Solicitors Practice Rules 1990;

(ix) By reason of the matters set out in the Report, the Respondent had acted contrary to Rule 1 of the Solicitors Practice Rules 1990.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London, EC4M 7NS on 31st July 2007 when Jonathan Richard Goodwin appeared as the Applicant and the Respondent was represented by Andrew Lockley, solicitor of Irwin Mitchell Solicitors, Riverside East, 2 Millsands, Sheffield, S3 8DT.

The evidence before the Tribunal

The evidence before the Tribunal included the admissions of the Respondent as to the facts and the allegations, save that he denied that he had been dishonest. The Respondent gave oral evidence. A further bundle of written references in support of the Respondent was handed up at the hearing.

At the conclusion of the hearing the Tribunal made the following Order:

The Tribunal Orders that the Respondent, Adrian Gerard Donkin of Bridge House, 94 High West Street, Gateshead, Tyne & Wear, NE8 1NA, solicitor, be struck off the Roll of Solicitors and it further Orders that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £13,500 inclusive.

The facts

The background

1. The Respondent, born in 1949, was admitted as a solicitor in 1975.

2. At all material times the Respondent carried on practice on his own account under the style of John Donkin & Co from offices at Bridge House, 94 High West Street, Gateshead, Tyne & Wear, NE8 1NA.

Loans from clients/clients' estates

3. A Forensic Investigation Officer ("FIO") carried out an inspection of the books of account commencing on 23rd July 2003. A copy of the FIO's Report dated 18th March 2004 was before the Tribunal. It revealed that the Respondent's books of account did not comply with the SAR and that there was a shortage of clients' funds of £62,646.05 as at 30th June 2003.

4. The shortage arose in the following way:

(a)	Loans from estate of W deceased	£43,500.00
(b)	Funds due to third party not retained in client account	£9,248.79
(c)	Beneficiary underpaid in B Deceased	£4,859.41
(d)	Improper transfer in M Deceased	£2,702.18
(e)	Incorrect transfer in B Deceased	£1,727.40
(f)	Incorrect transfer in W Deceased	£608.27
	Total	£62,646.05

5. The cash shortage of £62,646.05 was partially rectified when the payment at (b) was made to the third party; the sum at (d) was paid to the beneficiary. Both payments were made from office account as was a transfer to client account of £11,390 in connection with (e) (incorrect transfer fees bookkeeper's charge).

Allegation (v), where it was alleged that the Respondent had been dishonest in that he misappropriated client funds in three client matters, (i) Mrs W (Deceased), (ii) Mr B (Deceased), and (iii) Miss B

(i) Mrs W Deceased

6. Mrs W died on 20th December 1991. By her will dated 26th March 1991, and a subsequent codicil dated 29th July 1991, the Respondent and Mr JD Williams were appointed executors. Probate was granted on 6th March 1992. Mr JD Williams left the partnership on 28th February 1993.

7. The Respondent took loans from Mrs W Deceased estate. The first of £30,000 on 26th March 2001, repaid on 8th June 2001 and loans of £12,500 on 30th July and 25th August 2001 and of £19,000 on 26th September 2001. The narrative in the clients' ledger read in respect of each transaction "JD & Co - loan". Interest on the first loan was included in the repayment. The loans were effected by client account cheques and the Respondent's position was that he had authority to effect the loan in the form of a letter written by the late Mrs W on 8th January 1991 in the following form:

"Dear John

I am about to instruct your Washington office to deal with my will. It will be a bit complicated because of a loan I am going to make to my son James. You can let me know who will deal with this in Washington, when I next see you.

I want you and Adrian to be my Executors and please deal with everything for me. Sometimes I don't feel so good these days. I know that my house will sell but I will want everything to go to my grandchildren. It might take a long time to finish off.

In view of your many past kindnesses to me, you can be generous with your charges. You can do what you like with the money until it needs to be shared out. Write soon.

Yours
[signed]"

8. It was the Respondent's belief that the letter had been addressed to his father as senior partner of the practice. The Respondent did not whether the late Mrs W had taken independent advice before writing this letter.

9. The late Mrs W's will and codicil, which post-dated her letter to John Donkin, did not authorise the Respondent to utilise the estate monies for his own benefit.

10. Mrs W (Deceased)'s will created a trust as she left the residue of her estate equally amongst her ten grandchildren, all of whom were minors as at the date of her death, when they reached 21 years of age. The Respondent had not notified the parents or guardians of the minor beneficiaries that he had utilised the residuary estate monies by way of loan to himself. The Respondent did not see a need to do so. The eldest grandchild attained the age of 21 on 15th January 2004. The next grandchild attained the age of 21 on 29th May 2004. The Respondent was provided with evidence of identity and age of the first qualifying beneficiary some time later.

11. The Respondent accepted that as at 12th March 2004 he owed the estate the sum of £43,500 plus interest. He had always intended to repay that money and had expected to receive funds from the sale of a property.

12. The Respondent was not in a position to pay the first grandchild of the late Mrs W his share of the residuary estate when he reached the age of 21.

13. The Respondent did not discuss the loans from the estate with his co-executor Mr Williams, a former partner.

(ii) – Mr B Deceased

14. Mr B died on 19th May 2001. His will dated 15th March 2000 appointed the Respondent sole executor. Probate was granted on 31st July 2002.

15. The main asset of the estate was Mr B (Deceased)'s property. The Respondent's firm acted in the sale of the property for £42,000. Completion took place on 30th August 2002. The net proceeds of sale of £40,590 were credited to the relevant account in the clients' ledger in September 2002.

16. The ledger account recorded the following two payments:

(i)	17th September 2002 - "TT - Lyons Davidson"	£8,113.37
(ii)	6th November 2002 - "client to office, loan to office account"	£32,249.46
	Total	£40,362.83

17. Payment (i) was by way of CHAPS transfer debited to client bank account on 17th September 2002. The Respondent explained that this was a repayment of cash paid against his pension policy. The Respondent's cash book recorded a payment to HM Customs & Excise of £32,249.46 on 6th November 2002 in respect of a banker's draft issued on office account. On 22nd July 2003, £40,686.42 was credited to the client ledger of Mr B (Deceased) described as "AG Donkin - loan repayment". The Respondent explained that this represented the sum to discharge the loan plus interest of £323.59.

18. It was the Respondent's position that he had the late Mr B's authority for the loan given by letter dated 14th February 2001 in the following terms:

> "Dear Mr Donkin
>
> Following our recent meeting, and bearing in mind all your kindnesses to me over the years, I confirm that, in view of all the difficulties caused to you by your ex-partner, Mr Williams, when you are dealing with the administration of my Estate after my death, you may use the funds for your own purposes so long as you need to, as long as you pay all of the legacies eventually.
>
> Yours very sincerely
> [signed]"

19. The Respondent said in evidence that the letter from Mr B had been unsolicited and had been left at his office.

20. Mr B's will did not contain an express clause authorising the Respondent to utilise the estate monies for his own personal benefit, but the will did enable trustees to "invest money and to vary and transpose investments from time to time with the same full and unrestricted freedom to choose investments as if they were a sole absolute beneficial owner".

21. The Respondent regarded the loan to him as an investment as it would be repaid and interest would be paid.

22. A letter on the client matter file dated 7th March 2001 from Mr W, the brother-in-law of the late Mr B, addressed "To Whom It May Concern" indicated, "Please be

informed that Mr B is now resident in a 24 hour care nursing home suffering from a severe form of dementia. As a result of this illness he is no longer capable of conducting his affairs nor will he ever return to the above domicile".

23. The Respondent said that he frequently saw Mr B and although Mr B was in a home he enjoyed long periods of lucidity. He had no reason to doubt his mental capacity.

24. The Respondent conceded that he had not ensured that Mr B had obtained independent legal advice in connection with his letter of 14th February 2001. Mr B was a friend of the Respondent. He had not thought that he would make use of the offer, but following Mr B's death he did so because he needed money with a degree of urgency.

25. The Respondent's repayment of his loan from Mr B Deceased was the day before the commencement of the inspection by the FIO. The Respondent indicated that it had always been his intention to repay the loan from the proceeds of an endowment policy that was to mature. It had taken longer than expected for the money to come through. He had repaid the loan when he was in funds, coincidentally just before the FIO's inspection.

26. The Respondent confirmed that he had not informed the beneficiaries or the parents or guardians of minor beneficiaries of the loans to himself. He did not feel it necessary to do so.

27. Members of the late Mr B's family and the mother of three residuary beneficiaries who were minors had pressed the Respondent for information about the progress of the administration of the estate in March 2001, January and July 2003.

Miss B

28. The Respondent's firm acted in the estate of Mr MNB who died on 21st August 1992. He left his residuary estate to his sister, Miss B. The firm had held estate monies on behalf of Miss B since 1992. Miss B had resisted the payment of monies to her.

29. An attendance note on the file made by a member of the Respondent's staff dated 26th March 2001 recorded that having discussed the investment money held by the firm, Mrs P (the member of staff employed as a conveyancing clerk and office manager) noted that instructions had been received from Miss B to dispose of the entire sum of money as she no longer wanted to be bothered with the finance. The note went on, "I advised her that my express wish to visit the office was with a view to requesting a short term loan of her funds for office purposes. She immediately confirmed her agreement to this and said that long term she had no plans for the funding. However, I did inform her that the loan would be for a limited period of time and of course interest would be paid on the funding whilst in our possession. She was extremely pleased to be lending the funds and was happy to sign the confirmation … a copy of the agreement was given to her".

30. That agreement was in the following form:

> "I [Miss B] of [address] Tyne and Wear in the County of Tyne and Wear Hereby agree to the loan of £25,000.00 to John Donkin & Co of 94 High West Street, Gateshead, Tyne and Wear for a period of 3 months from the date of this letter such sum to be repaid to me with interest thereon at the standard rate payable by Barclays Bank plc."

31. The Respondent's firm did not ensure that Miss B received independent legal advice in respect of the loan to the firm. The Respondent had not met with Miss B.

32. On 26th March 2001 the relevant account in the clients' ledger was charged with a payment of £25,000 annotated "JD & Co loan". The cash book recorded the loan as a receipt.

33. The ledger account showed that on 8th June 2001 £25,000 was repaid and a further amount of £95.72 in respect of interest was credited on the same date.

34. Miss B subsequently made a gift of the monies to which she was entitled under the late brother's will to the Tynemouth Voluntary Life Boat Brigade.

(i) Mrs W Deceased and (iii) Miss B

35. The Respondent agreed that the loan of £30,000 from Mrs W Deceased and the loan of £25,000 from Miss B were paid in to office account to fund the firm's VAT liability of £54,225.49 in March 2001.

36. The Respondent's partnership with Mr Williams had proved unhappy. There were disputes about staffing and Mr Williams's large drawings left the firm short of money to pay tax and VAT. Mr Williams and an assistant solicitor had diverted funds belonging to the firm to a fraudulently opened bank account. In February 1993 Mr Williams served notice of dissolution and seized control of the firm's Washington office. The Respondent had been jointly and severally liable for the firm's debts, which ran into six figures. He had cleared them, save for some outstanding tax.

37. The Respondent incurred further liabilities as he remained joint lessee at the Washington Office after the Law Society intervened into Mr Williams's practice. The Respondent obtained judgment against Mr Williams but it remained undischarged.

38. A valued member of staff who had generated costs had suffered a heart attack in 1997, been off work for a year and had returned to work only part-time, leading to further financial difficulties.

39. The Legal Services Commission changed the way that it funded legal aid cases which also had an adverse financial effect upon the firm.

40. The Respondent had increased the mortgage on his home substantially and had taken a loan from his pension. He was not in a position to seek assistance from the firm's bankers. He owned his own home, three flats and one of the office premises. All were security for loans, but he retained a substantial equity. Two endowment policies taken out in the 1970s were to mature after twenty five years.

41. The Respondent was in no doubt about his ability to repay the loans. The loans had been openly and transparently recorded in the firm's books of account. The Respondent had repaid the loans with interest, at first at the rate earned on his client account, but he had subsequently increased this to a commercial rate of interest upon advice.

42. The Respondent had drawn the attention of the FIO to his borrowing from Mrs W Deceased, Mr B Deceased and Miss B.

The submissions of the Applicant on the question of dishonesty

43. The appropriate test for the Tribunal to apply when considering whether or not the Respondent had been dishonest was that set out in Twinsectra -v- Yardley and others [2002] UKHL 12, and the Tribunal was reminded of the Judgment of Lord Hutton when he said:

> "… there is a purely objective standard whereby a person acts dishonestly if his conduct is dishonest by the ordinary standards of reasonable and honest people, even if he does not realise this. Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this "the combined test."

He went on to quote Lord Chief Justice Lane in Ghosh [1982] QB1053:

> "Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."

44. The Applicant accepted that dishonesty must be proved to the highest standard.

45. The Applicant relied also on the case of Bultitude -v- The Law Society [2004] EWCA Civ 1853 on appeal from a decision of the Tribunal which confirmed that in order to establish dishonesty on the part of a solicitor it was not necessary to prove that he had an intention permanently to deprive a person of his money.

46. It was the Applicant's case that the utilisation of funds which the Respondent was holding in his capacity as a solicitor and/or as executor and trustee, was the utilisation of money to which the Respondent knew he was not entitled and that did amount to conscious impropriety. That amounted to dishonesty even if the Respondent had every intention of making repayment.

47. It was open to the Tribunal to find that the Respondent had acted dishonestly in the cases of Mr W Deceased, Mr B Deceased and Miss B, or in any one of them alone.

48. The Respondent had taken money by way of loans from funds held in client account in order to pay his firm's Value Added Tax and meet office expenses. It was dishonest of a solicitor/executor to make use of money in the way that the Respondent did.

49. It was the Respondent's case that he had authority to utilise the money in the cases of Mrs W Deceased and Mr B Deceased.

50. In the case of Mrs W Deceased it was the Applicant's case that the Respondent did not have authority and he knew that to have been the case. The letter upon which the Respondent relied was addressed to his father and was some ten years old at the time when he sought to rely upon it. Ms W had drawn a will and a codicil subsequent to that letter, neither of which gave authority for the use of the monies in her estate by the Respondent.

51. In the case of Mr B Deceased the letter of authority upon which the Respondent sought to rely had been signed only some three weeks before the Respondent was put on notice by a letter from Mr B's brother-in-law of Mr B's impaired mental capacity. At that stage Mr B apparently was not capable of giving such authority.

52. In the case of Miss B she did provide authority for the Respondent to take a loan from funds he held on her behalf, but in that case the Respondent's failing was that he had not advised Miss B to seek independent advice.

53. The Applicant did not seek to suggest that the Respondent was "rotten to the core". The Applicant accepted that the Respondent was highly regarded and highly thought of by other solicitors, members of other professions, the Police and the public in general, whether clients or otherwise. It was also recognised that the Respondent had suffered financial difficulties.

54. It was the Applicant's case that in the light of those financial difficulties the Respondent had "come off the rails" and took loans from monies held by him without proper authority or notification to interested parties and in doing so he had acted dishonestly. In the matter of the loans from Mrs W Deceased, the Respondent had not discussed them at the time or subsequently with his co-executor, nor had he discussed the matter with the parents or guardians of the minor beneficiaries of the residuary estate.

55. The Applicant adopted the list of reasons why it was considered that the Respondent acted with conscious impropriety prepared by the FIO in his Report, namely:

> "when asked if there was a shortage of clients' funds of £43,500 in respect of this matter [W Deceased] which has been in existence since 2001 as (a) the loans were without the knowledge and authority of the Respondent's co-executor; (b) the letter of authority was to the Respondent's father not himself; (c) the letter of authority was superseded by the will in which there was no clause referring to loans; (d) the parents or guardians of the beneficiaries had not been informed of the loans; (e) one of the beneficiaries had reached 21 and there was no money on client account with which to payment".

56. It was accepted that the Respondent and his former partner did not get on, but all the Respondent had to do was to write to his partner about his proposal.

57. At the time when the Respondent took monies from the account of Mrs W Deceased and Mr B Deceased, he was under considerable financial pressure and needed to pay VAT and he had used client funds in order to do so. At that time the Respondent knew that what he was doing was wrong.

58. At first when making repayment the Respondent calculated interest on the basis of interest that he would receive on client account a low rate, but subsequently had calculated and paid interest at a commercial rate. In the submission of the Applicant it was a further indication of the Respondent's dishonesty that he sought to utilise client's funds for his own purposes at a rate of interest advantageous to him.

59. The Applicant noted that the Respondent would rely upon an earlier inspection by an FIO (Mr H) whom he had told of his borrowing which he had repaid prior to Mr H's inspection. It was the Respondent's case that if the Law Society's FIO had seen anything wrong with what he had done he would have said so. It was further the Respondent's case that the Law Society had thereby condoned or indicated that the Respondent's actions were acceptable.

60. The certificate provided by the FIO (Mr H) upon which the Respondent sought to rely stated, "This was not a full audit, absence of comment in any area cannot be taken as signifying that compliance was satisfactory."

61. The Applicant accepted that the Respondent had volunteered information about his borrowing from Mrs W Deceased and Mr B Deceased, but that did not alter the Applicant's view that the Respondent's behaviour had been dishonest.

The submissions of the Respondent on the question of dishonesty

62. The Respondent admitted the facts and, indeed, had come to admit that he had misappropriated clients' funds. However he strenuously denied that he had been dishonest.

63. The Respondent had initiated the loans from Mrs W Deceased and Mr B Deceased believing that he had full authority to use the monies in the way that he did. He certainly had no intention of depriving the estates from such money and he did have every intention to effect repayment and believed that he would have the resources to do so. He had indeed effected such repayment together with a payment of interest,

initially at a low rate but subsequently he made that up to a commercial rate of interest.

64. The Respondent had given detailed explanation as to why he required to take such loans on a short term basis. He knew that he would be receiving sufficient monies either from endowment policies or the sale of property to make repayment. It was his case that repayment had never been in doubt. In the matter of Miss B the loan had been arranged with Miss B by a member of the Respondent's staff. He accepted that Miss B should have been required to take independent advice before the completion of the loan. The circumstances were a little out of the ordinary as the money held by the Respondent had been money due to Miss B under the terms of her late brother's will, which she had not wanted to accept. The Respondent had in those circumstances continued to hold it on her behalf. The fact that Miss B did not want that money was evidenced further by the fact that she eventually gave it to a charitable organisation.

65. The Tribunal was invited to take into account the large number of written testimonials, all of which attested to the Respondents' competence and integrity. It was clear from those testimonials that the Respondent was regarded by his fellow solicitors, clients, members of other professions, some at a senior level, and many others as a man of impeccable good character. He was not a man who would act dishonestly.

66. With regard to Mr B, he had become a client of John Donkin & Co when he returned from New Zealand but his brother had been a client for some years. The Respondent and Mr B became friends because they shared a common interest in cricket. Mr B had learned from his brother about the problems in the practice and when he made his will in March 2000 he told the Respondent that he could have a loan if he wanted one. At that stage the Respondent declined but the offer was repeated. The Respondent had no reason to believe that Mr B was not in full possession of his faculties when he wrote the letter dated 14th March. The loan was taken in September of the following year after probate had been granted to Mr B's estate. The Respondent overlooked the professional requirement to advise Mr B to take independent advice. He regretted that he was not aware that in the absence of such advice he should have refused the offer of the loan. The Respondent did not see his behaviour as dishonest because it was always his intention to repay these funds with interest, as indeed he did.

67. On 26th March 2001 the Respondent faced a VAT bill of approximately £55,000. He thought it essential to save the practice from insolvency. He recalled that Mrs W had written to his father on 8th January 1991 indicating that until her estate needed to be shared out between her grandchildren he "can do what he likes with the money". The Respondent had been aware that even the eldest grandchild had not yet reached the stipulated age and he decided that the firm would borrow £30,000 from W Deceased's estate.

68. As with other loans referred to in the proceedings, they were scrupulously recorded in the clients' ledger as loans to the Respondent's firm.

69. With regard to the loan from Miss B, the attendance note made by a member of staff recorded that Miss B "was extremely pleased to be lending the funds and was happy to sign the confirmation". Because of the Respondent's own lack of awareness of the

rules, he readily acknowledged that he did not tell his member of staff that Miss B should be advised first to take independent advice. The suggestion for the short term borrowing had come from the member of staff.

70. The loans from Mr B Deceased and Miss B were repaid 2½ months later on 8th June 2001 with interest when an endowment policy of the Respondent matured.

71. Because the firm was not "out of the woods" financially in July, August and September 2001, the Respondent took advantage of the offer which Mrs W had made to his father in 1991 and borrowed a further £43,500 for the use of the practice. Most of that went to pay VAT and PAYE. At the time of the FIO's inspection in 2004 those sums had not been repaid to the estate as they should have been.

72. The eldest of Mrs W's grandchildren became entitled to his share of the estate on 15th January 2004. The Respondent requested him to provide his birth certificate and ID but at the time of the inspection in March 2004 he had not received that. As soon as he did receive it, the Respondent paid the amount due out of office account. He had planned to repay the balance of the money owing to Mrs W Deceased's estate on the sale of a property which he owned and indeed he did so, with interest, in May 2004. The property had been on the market for two years. There were no other assets which the Respondent could have sold, except the small flat in which he lived.

73. In 2002 the Respondent took a further loan from the Mr B Deceased's estate on 7th November and that, together with a sum wrongly paid out of Mr B Deceased's estate on 17th September of £8,113.37, was repaid on 22nd July 2003 with interest. Again, the loans had been had been taken in order to meet mainly an urgent liability for VAT. However, and the Respondent was particularly ashamed of this, he also used £8,113.37 to pay Lyons Davidson by telegraphic transfer the arrears of his pension cashback.

74. The Respondent accepted that he should have known the Rules and ignorance was no excuse. He maintained that his fault in relation to the matters of Mr B Deceased, Mrs W Deceased and Miss B was that he committed a breach of the Rules. He did not have any dishonest intent and the evidence was that others who knew about those events did not regard the Respondent's behaviour as dishonest either.

75. The Respondent relied on the fact that the FIO (Mr H) who had visited his firm to conduct a monitoring unit had been told that the Respondent had borrowed money from clients but had repaid it by the time of the visit. Mr H had made no adverse comment despite the fact that he stayed in the office for several days. He had "ticked" the "no breaches" box on the form he had prepared.

76. Somewhat unusually, the Tribunal had been invited to read the decision of the High Court in the Respondent's appeal from an earlier decision of the Tribunal relating to the same allegations, this being a rehearing directed by the Court. In that decision, guidance had been given as to how the Tribunal should approach the unusual situation which had been described to them.

77. Mr B had made an unsolicited offer of a loan. Mrs W had given authority ten years previously. Neither the Respondent nor his father had deliberately set out to acquire an unfair advantage over their clients.

78. Whilst the Respondent accepted the decision in Bultitude that an intention permanently to deprive was not a necessary element in order to establish dishonesty, it was a factor that the Tribunal should take into account.

79. In applying the Twinsectra test the Tribunal had to be sure that by the ordinary standards of reasonable, honest people the Respondent's actions were dishonest. The Tribunal was invited to take into account that the wealth of testimonials placed before it had been written by reasonable and honest people and over 100 people had said that they had no reason to doubt the integrity of the Respondent even knowing the details of the allegations that he was facing.

80. With regard to the subjective part of the Twinsectra test the Respondent did not regard his conduct as dishonest. He had maintained that position consistently. The Respondent placed reliance on the fact that no objection had been raised by the FIO, Mr H, when he conducted a monitoring visit at the firm. The Respondent recognised that Mr H had at the time been relatively inexperienced but he was not aware of that at the time.

81. The Tribunal in particular was invited to draw a distinction between the loans from Mrs W Deceased and Mr B Deceased and the loan from Miss B, who was alive and did consent to the loan when it was taken up.

The Tribunal's Decision on allegation (v) and the question of dishonesty

82. The Tribunal found that in taking money from a deceased's estate to bolster his office account and to enable office outgoings to be met without informing the beneficiaries of that estate that he was doing so, the Respondent's conduct was dishonest by the standards of reasonable and honest people. Having heard and seen the Respondent give evidence and heard his explanation of the borrowings and his assertions that he had authority to act as he did in the cases of Mrs W Deceased and Mr B Deceased, the Tribunal was satisfied so that it was sure that the Respondent did not have an honest belief that he had such authority and therefore that he knew that what he was doing was dishonest by those same standards.

83. Put in the bluntest of terms, the Respondent identified a pool of client money upon which no immediate call was to be made and he took it to pay his own debts. The fact that there was no intention permanently to deprive the estates of those monies might serve to mitigate the seriousness of the offence but it did not have a bearing on the question of dishonesty in the circumstances of this case.

84. The Tribunal is able to distinguish the case of Miss B from the cases of Mrs W Deceased and Mr B Deceased because she was alive at the time of the loan and had given her formal consent to it. The Tribunal was able to conclude in the case of Miss B that the Respondent's behaviour had fallen very far short of what was required of him in accepting a loan from a client, namely ensuring that she first had independent advice, but accepted his explanation, however surprising it might be, that he was not aware of that requirement and as a result the Tribunal found that the Respondent was not dishonest in connection with the loan to him from Miss B.

The agreed facts in allegations (i) to (iv) and (vi) to (ix) - those allegations admitted by the Respondent

Incorrect transfer - W Deceased

85. The FIO's Report listed transfers made from the clients' account to the office account in respect of the Respondent's firm's fees between 4th August 1997 and 1st July 2002 in the total sum of £6,727.57.

86. A review of the bills of costs on the W Deceased client matter file in respect of the transfers subsequent to 1998 was made as it was not apparent what work had been undertaken to justify the costs transfers after a meeting between the Respondent and beneficiaries in 1997. These were dated 8th and 10th May 2000 and 1st July 2002. The narrative on the July 2000 bill for £608.27 was "To professional charges", "Reviews of file 2001/2002". The last transfer of £608.27 had the effect of reducing the balance on the client ledger to nil. By letter to the Law Society dated 27th February 2004 the Respondent said "I am also agreeable to refunding the July 2002 costs".

Allegation (ii) - Funds due to third party not retained in client bank account

87. Mr W, solicitor, joined the Respondent's firm in or about July 2000. He had previously had conduct of a matter on behalf of Mr and Mrs C in connection with care proceedings brought by a local authority, in respect of their four children, at his previous firm. The matter was legally aided and was transferred to the Respondent's practice. In or about December 2001 the file was costed and by letter dated 3rd January 2001 to Mr W's previous firm it was suggested that the Respondent's firm would submit the accounts for both firms as the Certificate was in the name of John Donkin & Co and they would then account to McKeags, the previous firm, for the proportion of assessed costs due to them.

88. On 11th December 2001 the firm received £9,713.41 into office account from the Legal Services Commission. Following deduction of the firm's own costs and disbursements, the sum of £9,248.79 remained and was shown as being paid to Mr W's previous firm by office bank account cheque dated 21st December 2001. That cheque remained outstanding on the office bank reconciliation until 30th June 2003. The firm cancelled the unpresented office account cheque and sent a new office account cheque to the previous firm. The new cheque cleared the office bank account on 8th August 2003. The Respondent had the benefit of those monies from 11th December 2001 to 8th August 2003.

89. The Respondent had agreed with the FIO this represented a shortage on clients' funds for a 19 month period but he had been unaware of this.

Beneficiary underpaid - Bg Deceased

90. Bg Deceased died on 26th June 1994. The Respondent and Mr R were appointed executors. Probate was granted on 17th December 1985. Mr R left the firm in June 1987.

91. A trust had been created for Mr Bg's two minor children and policies had been acquired to generate income and retain capital. The trust was to remain in place until the children attained the age of 18, which they both had by 22nd April 1999.

92. Bonds with Royal & Sun Alliance were cashed in or about May 1999 and the proceeds were distributed to the two beneficiaries. A Universal Building Society account held a balance of £26,209.09 at 1st July 1996. On 5th August 1997, £18,574.08 was paid into the Respondent's client account and was then paid into a Halifax deposit account. Payments were made to the beneficiaries of £1,000 to Miss EB on 25th November 1997 and £8,590.59 on 31st July 1998 and to Mr RB in the sum of £9,450 on 3rd April 1998. On 7th May 1997 a cheque had been drawn from the Universal Building Society account in favour of Mr RB in the sum of £5,000 which when added to the monies paid from the Halifax account, gave a total of £14,450 paid to Mr RB, whilst Miss EB's "half share" amounted to £9,590.59, creating an underpayment of £4,859.41. The Respondent indicated that he had made a mistake as he had failed to take into account the £5,000 paid to Mr RB when making the further payments from client account.

93. The Respondent indicated to the FIO that he had investigated the underpayment of £4,859.41 and had written to the children's mother suggesting a proposal which would rectify the position in approximately 12 months' time. The Respondent conceded that there had been a shortage since 1998, but he had not thought of it in those terms. He agreed it was not for the beneficiaries to put things right.

Incorrect transfer - £1,727.40 - Bg Deceased

94. The Respondent indicated that there had been an "over deduction", in that he transferred funds when he should not have done so, and that the costs charged from 2000 to 2002 totalling £7,014.90, should in fact have been £5,287.50, thereby producing an overtransfer and shortfall of £1,727.40. On 18th November 2003 the Respondent transferred £1,139.90 back to client account as he did not think it unreasonable to charge a nominal sum £100 per year plus VAT for bookkeeping services provided for 5 years totalling £587.50.

Improper transfers - M Deceased - £2,702.18

95. M Deceased died on 24th April 1992. By her will dated 13th April 1992 the Respondent and Mr W were appointed executors. Probate was granted on 29th July 1992. Following Mr W's departure from the firm, the matter remained with him until early 1996 when the Respondent took over conduct of the file with a view to completing the administration of the deceased's estate.

96. In July 1996 final estate accounts were drawn up and delivered to the beneficiaries showing a sum of £43,459.97 available for distribution. The only legal costs shown in the estate accounts were those due to JD Williams & Co in the sum of £2,487.74. By letter dated 4th September 1996 to Elsbury & Co, solicitors instructed by the beneficiaries, the Respondent said, "I concur with the view that the fees charged were grossly excessive and were based upon incorrect figures for the estate". The will provided that the residuary estate was to be divided into one-fifth shares to

beneficiaries. The distribution account identified that each beneficiary was entitled to a one-fifth share of £2,692, after having received interim distributions of £6,000 each.

97. The client ledger card showed that only four of the final distributions were made to the beneficiaries in or about September 1996. The distribution due to the All Saints Parish Church was not recorded on the ledger card as having been made. Following the four distributions that were made, a residual balance remained on the ledger card in the sum of £2,558.31.

98. The balance of £2,558.31 was carried forward to the firm's computerised bookkeeping system on 28th February 1997 entitled "M (Deceased)". The money was placed on deposit at the Halifax Building Society Account and earned interest of £143.87. On 8th May 1998 and 28th April 2000 client to office transfers in respect of costs in the sums of £1,175 and £1,527.18 (totalling £2,702.18) respectively were made, reducing the balance on the ledger account and building society account to nil.

99. The Respondent agreed that the residual payment due to All Saints Parish Church appeared not to have been paid from the estate monies and he did not know why that was so. He agreed that the balance on the ledger card of £2,558.31 plus interest was money due to the Church and there was a shortage on client account of £2,702.18. When asked if the same represented improper use of client money he said it was not the correct way to use clients' funds. The Respondent said that he had been notified by a member of staff that there was a balance on the ledger and no transfer of costs had been made. He had assumed the balance related to costs, but he had not checked. The Respondent had paid the sum of £2,692 to the Church on 5th March 2004.

Allegation (vii) - Breach of Rule 6 and/or Principle 15.01 in the Guide to the Professional Conduct of Solicitors 1999

(a) Mr and Mrs S and Mr and Mrs G

100. The Respondent's firm was instructed by Mr and Mrs S in the purchase of a property. The clients were assisted by a mortgage advance from the Bank of Scotland of £39,950 and the Respondent's firm was instructed also to act on behalf of the lender. The firm also acted for the sellers of the property, Mr and Mrs RG. The sale price was £39,950.

101. The Respondent confirmed to the FIO that Mr and Mrs G were the parents of Mrs S. In a letter dated 16th March 2004 the Respondent suggested that this was an arm's length transaction at full market value and that both vendors and purchasers were existing clients. He also confirmed that there was no written consent on the client matter files from the sellers or purchasers for the firm to act. The Respondent indicated that the Bank of Scotland had been advised by both clients and brokers that the firm was acting in the sale on behalf of Mrs S's parents, but the Respondent accepted that there was no evidence on the client matter file to demonstrate that the bank was notified in writing that the firm acted for all parties.

(b) Mr T and E Deceased, Ms CT

102. The Respondent's firm was instructed by Mr T in the purchase of a property. The client was assisted by a mortgage advance from Abbey National plc of £27,075. The firm was also instructed by the lender. The firm also acted for the seller of the property Ms CT as executor of the estate of Mr T's late grandfather, E Deceased. The sale price was £32,000 less a cashback of £5,000.

103. The Respondent confirmed to the FIO that Mr T was the son of Ms CT. The Respondent indicated by letter dated 16th March 2004 that this was an arm's length transaction, the property being correctly valued and the seller and the deceased being existing clients. He confirmed that there was no written consent on the client matter files for him so to act. The Respondent indicated that the Abbey National was aware that the firm was acting for all parties because Mr T was an employee of Abbey National. He did concede that the firm had not notified the Abbey National of this. Subsequently the Respondent conceded that the transaction was not at arm's length.

(c) Mr and Mrs H and Mr N

104. The Respondent's firm was instructed by Mr and Mrs H in their purchase of a property. They were assisted by a mortgage advance from Standard Life Bank of £84,000. The firm was also instructed by the lender. The firm also acted for the vendor of Mr N. The sale price was £88,500 less £1,000 allowance for repairs. In his letter of 16th March 2004 the Respondent asserted that this was an arm's length transaction and that both seller and buyer were existing clients. He conceded that there was no written consent on the client matter files from the seller or buyer for the firm to act and the firm had not notified the lender that it was acting for all parties. The firm had not notified the lender of the repairs allowance.

Allegation (viii) - Breach of Rule 13 of the Solicitors Practice Rules

105. The Respondent's practice comprised two branches, one at Gateshead and one at Washington. The Respondent was the only person "qualified to supervise" for the purpose of Rule 13 of the Solicitors Practice Rules 1990. It was not possible for the Respondent properly to supervise and manage each office for the purpose of Rule 13. The Respondent had confirmed that he worked principally at the Gateshead office. The two offices of the firm were approximately six miles apart. Mr W had supervised the Washington office until he left the practice on 31st August 2003, and from that date on the Respondent had been attempting to find a suitably qualified solicitor as a replacement.

106. The Respondent said that he supervised both offices and had been in daily attendance at both offices since 1st September 2003. He perused the post at both offices and the control of client and office bank accounts was centralised at the Gateshead office. The Respondent worked at Gateshead for approximately six hours per day and he spent approximately three hours per day in the Washington office.

The submissions of the Applicant

107. The Respondent had admitted allegations (i) to (iv) and (vi) to (ix). Although the Respondent had denied dishonesty in connection with allegation (v) he admitted that he had misappropriated client funds. He admitted all of the underlying facts.

108. Even if the Tribunal had not made a finding of dishonesty in respect of the Respondent's conduct in the matters of Mrs W Deceased, Mr B Deceased and Miss B, the Respondent had been guilty of a catalogue of failures and breaches which were at a serious level and amounted to conduct unbefitting a solicitor of a serious nature.

The submissions of the Respondent

109. The Respondent had admitted the allegations and accepted that the Tribunal would make a finding that the allegations had been substantiated. In the light of the Tribunal's finding in connection with dishonesty it was recognised that the Respondent should make submissions in mitigation.

The Findings of the Tribunal

110. The Tribunal found all of the allegations to have been substantiated.

Previous Findings of the Tribunal

111. At a hearing on 15th May 1997 the following allegation was found substantiated against the Respondent, namely that he had failed, alternatively failed with reasonable expedition, to make any adequate or sufficient response to correspondence and enquiry addressed to him by the Solicitors Complaints Bureau and consequently had been guilty of conduct unbefitting a solicitor.

112. On that occasion the Tribunal said:

> "The Tribunal found the allegation to have been substantiated, indeed it was not contested.
>
> The Tribunal took note of the fact that the Respondent had enjoyed a blameless career hitherto. It appeared that he was a good lawyer and his failure to respond to letters had not perhaps been as prolonged or deliberate as some cases which came before the Tribunal. The Tribunal have on many occasions made it plain that it considers a non response by a solicitor to letters addressed to him by his own professional body to be a very serious matter and in this matter they do not resile from that view. However they do consider that the Respondent although at fault had erred at the lower end of the scale and they felt able to avoid the imposition of a financial penalty upon him and ordered that he be reprimanded and pay the costs of the application and enquiry in a fixed sum."

The Respondent's mitigation

113. In the case where a client's previous firm had not been paid legal aid costs a cheque had been issued within the stipulated time but it was not presented. The Respondent's firm failed to pick it up as an unpresented cheque. As soon as the error was pointed out a duplicate cheque was provided which was cashed in due course.

114. There were problems with the estate of Mr Bg where the firm delayed taking costs for acting in litigation brought against the estate by the brother of Mr Bg. The firm did not take those costs of about £4,000 for 15 years. An error was made in the distribution which as soon as it became clear the firm proposed to rectify.

115. The Respondent's firm failed to pay out a beneficiary, a church. As soon as the error was drawn to the Respondent's attention he authorised the payment of £2,692. That was before the 2004 FIO's inspection.

116. With regard to the breach of Practice Rule 6, in each of the conveyancing transactions the vendor and purchaser were established clients of the firm and/or related to each other. There was no specific evidence on the files to show that the parties had been advised in writing that the firm was acting for both parties nor had it advised the lenders of that situation. On writing to the lenders subsequently two said that they were not too concerned as long as the firm was happy that there was no conflict of interest. The third did not reply.

117. The Rule 13 breach arose when Mr W left the firm on 31st August 2003. He had been the only solicitor apart from the Respondent who was more than three years qualified. The Respondent should have applied to the Law Society for a waiver which he anticipated would have been granted. He continued to supervise both offices on a day-to-day basis in breach of the Rules up until after the inspection in March 2004, when he had been able to employ an assistant solicitor who had the requisite qualifications.

118. At the original hearing before the Tribunal in November 2005 the Respondent had been struck off the Roll. As a result his personal life collapsed. He had separated from his wife and they had sold the matrimonial home. The Respondent lived in a small flat in Gateshead. The Law Society had given permission for the Respondent to be employed as a conveyancing clerk by a firm of solicitors so that he was still able to put his legal experience to good use. He had not applied for a Practising Certificate and had de facto been suspended from practice for a period of twenty months. The Tribunal was invited to take that into account.

119. The Tribunal was also invited to take into account that from the start the Respondent had been open and transparent about what he had done. He had volunteered the information to Mr H and had upon the second FIO's visit admitted all of the breaches of which he had been guilty immediately.

120. The breaches occurred in the context of serious professional and financial difficulties under which the Respondent had laboured for some eight years. The Respondent had paid some £200,000 from his own resources to meet debts which in many cases had been incurred by others.

121. As a result of the loans taken by the Respondent and the other breaches there had been no loss to anyone. The Respondent's borrowings had eventually been fully repaid with interest calculated at a commercial rate.

122. The character evidence before the Tribunal was exceptional by any standards. One hundred and eight letters had all been written in remarkably positive terms. He was seen as a man to be trusted who maintained a high level of commitment to his clients. He was described as a man of great decency whose hard work had sometimes been a danger both to himself and his family.

123. The Respondent's unfortunate personal circumstances included the fact that he faced a bankruptcy hearing on the day following the disciplinary hearing.

124. At the age of the Respondent he had to give consideration to retirement. There was no question of any repetition of the Respondent's former conduct. The Respondent fully accepted that should he be granted a Practising Certificate it would be subject to conditions. The Respondent hoped that he might be permitted to continue to make a contribution to his profession and to serve the public.

125. This was not a case where there had been any complaint by clients, or indeed, the beneficiaries in the estates from which loans had been taken accepted.

The Tribunal's Decision and its Reasons

126. The Respondent had taken funds from client account that he was holding, in his capacity as a solicitor and in two cases as an executor, in three different client matters. He had done so at a time when he was under severe financial pressure. The Tribunal recognised that the sums of money taken were considered by the Respondent to be loans and were repaid sometimes within months, although in one case after a period of some three years.

127. It was the Respondent's position that he had been authorised to take such money as loans. The Tribunal has already indicated that it accepts that in the case of Miss B she did enter a formal agreement to lend him some money that he was holding on her behalf. The Tribunal did not consider that the Respondent was dishonest in accepting this loan, but he failed seriously in his duty as a solicitor to look after the best interests of his client in not ensuring that Miss B had taken independent advice before finalising the loan. However, in relation to the other loans, the Tribunal, for the reasons set out above, did find that the Respondent had been dishonest.

128. The Tribunal had read carefully and had taken into account the wealth of glowing testimonials written in support of the Respondent attesting to his integrity and competence.

129. Even if the Tribunal had not found the Respondent to have been dishonest in connection with the loans, these and the other admitted breaches demonstrated such a serious disregard for the rules of professional practice covering a wide area that the Tribunal would, without a finding of dishonesty, have considered the imposition of the ultimate sanction upon the Respondent. However having made a finding that the

Respondent had been dishonest, the Tribunal found itself in no doubt that the appropriate and proportionate sanction, in order to protect the public and maintain the good reputation of the solicitors' profession, to impose upon the Respondent was that of a striking off order.

130. The Tribunal ordered that the Respondent be struck off the Roll of Solicitors and it further ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £13,500 inclusive, a figure agreed between the parties.

DATED this 18th day of December 2007
on behalf of the Tribunal

K Duncan
on behalf of the Chairman