No. 9556-2006

IN THE MATTER OF BRIAN CHARLES STUART, solicitor

\- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr D J Leverton (in the chair)
Mrs K Todner
Mr D E Marlow

Date of Hearing: 8th March & 16th April 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 29th August 2006 that Brian Charles Stuart of Heathlands, Leavens Heath, Colchester, might be required to answer the allegations set out in the statement which accompanied the allegation and that such order might be made as the Tribunal should think right.

The allegations against the Respondent were that he was guilty of conduct unbefitting a solicitor in each of the following particulars, namely that:-

(i) Contrary to Rule 6 of the Solicitors Accounts Rules 1998 (hereinafter referred to as “the 1998 Rules”) he failed to ensure compliance with the Rules;

(ii) Contrary to Rule 7 of the 1998 Rules he failed to remedy breaches promptly upon discovery;

(iii) He withdrew monies from client account other than as permitted by Rule 22(1) of the 1998 Rules;

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

(v) Contrary to Rule 32(7) of the 1998 Rules he failed to carry out the required reconciliations;

(vi) He misappropriated clients' funds, which for the avoidance of doubt is an allegation of dishonesty;

(vii) He failed and/or delayed in the delivery of his Accountant's Report for the year ending 31st March 2005.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London, EC4M 7NS on 8th March and 16th April 2007 when Jonathan Richard Goodwin appeared as the Applicant and the Respondent was represented on a pro bono basis by Mr Tucker of Counsel.

The evidence before the Tribunal included the admissions of the Respondent to allegations (i) to (v) and (vii). During the hearing the Applicant submitted a printout of payments made by the Compensation Fund and a letter to the Applicant from the Solicitors Regulation Authority dated 19th March 2007. The Respondent submitted the witness statement dated 18th November 2005 of Mr SG which had been used in High Court proceedings and documentation relating to the mortgage of a property in Ewell.

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

The Tribunal Orders that the Respondent Brian Charles Stuart of Heathlands, Leavens Heath, Colchester, solicitor, be struck off the Roll of Solicitors and they further Order that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £12,000.

The facts are set out in paragraphs 1 to 13 hereunder:-

1. The Respondent, born in 1955, was admitted as a solicitor in 1990 and his name remained on the Roll of Solicitors.

2. The Respondent carried on practice on his own account under the style of Stuart & Co from offices at Audley House, Berechurch Hall Road, Colchester, Essex, CO2 9NW.

3. On 16th November 2005 the Law Society resolved to intervene into the Respondent's practice and to refer his conduct to the Tribunal.

Accounts Rules Breaches

4. The Forensic Investigation Unit of the Law Society carried out an inspection of the Respondent's books of account commencing on 3rd October 2005 and produced a Report dated 10th November 2005. The Report noted the matters set out at paragraphs 5 to 10 below.

5. The Respondent's books of account did not comply with the Solicitors Accounts Rules 1998. Client account reconciliations had not been prepared at a date later than

31st March 2005, and the client account bank reconciliation as at that date included a large number of payments appearing in the bank statements but not recorded in the cash book and receipts recorded in the cash book not appearing in the bank statements.

6. In view of the inadequacy of the accounts it was not considered practicable for the Investigation Officers to calculate the Respondent's liabilities to clients. However, from documentation made available they calculated a minimum cash shortage of £171,111.11.

7. The Report stated that the Respondent agreed the existence of the minimum shortage which he said he was unable to replace, albeit he was attempting to arrange a remortgage of his firm's offices. The Respondent denied agreeing the existence of the minimum shortage.

8. The Report stated that the minimum cash shortage was in part caused by the following:-

(a)	Staff salaries paid out of client account	£98,550.85
(b)	Drawings of the Respondent paid out of client bank account	£65,000.00
(c)	Payments made to the Respondent's wife out of client bank account	£21,500.00
	TOTAL	£185,050.85

Staff salaries paid from client bank account - £98,550.85

9. It was ascertained that staff salaries had been paid from the client bank account in each month between February 2005 and September 2005. A total figure of £115,941.04 was paid from client bank account in respect of staff salaries for the above mentioned eight month period. The resulting shortage was reduced to £98,550.85 by allocating the August salaries of £15,662.25 and one of the September salaries of £1,727.94 to a client ledger account titled "Mr B C Stuart - remortgage of Church, Audley Chapel". The Report noted that the proceeds from this mortgage advance were utilised in full in respect of debts of the firm.

Drawings of the Respondent and payment to the Respondent's wife paid from client bank account £86,500

10. The Investigation Officers ascertained that in the period February 2005 to September 2005, drawings of the Respondent and payments to his wife were paid out of client bank account. The total paid out of client bank account for the eight month period was £104,500, representing £77,500 to the Respondent in respect of his drawings and £27,000 to his wife. From the total amount of £104,500, £18,000 was charged to the client ledger account in respect of the remortgage referred to in paragraph 9 above. The Report stated that the continuing shortage as at 27th October 2005 was therefore in the sum of £86,500.

11. The Respondent was made bankrupt on 17th January 2006.

Failure to file Accountant's Report

12. On 7th April 2006 an Adjudicator granted the Respondent an extension for the delivery of his Accountant's Report for the year ending 31st March 2005, to 28th October 2005.

13. By letter dated 24th April 2006 the Law Society wrote to the Respondent reminding him of the Adjudicator's decision granting the extension, and pointing out that no subsequent requests for extensions had been made prior to 28th October 2005. As a consequence, the Accountant's Report for the year ending 31st March 2005 remained undelivered. The Respondent was asked to provide his explanation. By email dated 8th May 2006 the Respondent replied indicating that he had been able to access certain information he required and hoped to be in a position to respond shortly thereafter. The Respondent provided no further representations or explanation, and the Report remained outstanding.

The Submissions of the Applicant

14. In his Rule 4 statement the Applicant had alleged that the Respondent had acted dishonestly in utilising clients' funds for his own purpose. The Respondent had dishonestly and improperly instigated withdrawals of monies from client bank account for the purpose of paying staff salaries, his own drawings and making payments to his wife. No reasonable, prudent and honest solicitor would have acted as the Respondent did. Allegation (vi) was an allegation of dishonesty.

15. By letter dated 11th October 2006 the Respondent had admitted allegations (i) and (v), the remainder being denied. The Applicant understood that the Respondent would today admit all allegations save allegation (vi).

16. The Applicant had served a Notice to Admit and Civil Evidence Act Notice in relation to his bundle of documents. He had also written to the Respondent on 20th November 2006 calling his attention to the Tribunal's Rules in relation to the service of documents upon which any party intended to rely and in relation to the service of witness statements. No material had been served by the Respondent.

17. The appropriate test to be applied in determining whether or not the Respondent had been dishonest was that set out in the case of Twinsectra Ltd -v- Yardley [2002] All ER 377. The Tribunal had to be satisfied so as to be sure that the allegation of dishonesty was made out and the Respondent was entitled to the benefit of any doubt that might exist.

18. If the Tribunal was not persuaded on the dishonesty allegation the Accounts Rules breaches fell into the most serious category, representing a systematic breach of the Solicitors Accounts Rules. The Rules existed to ensure the integrity of the accounts and to ensure that clients' funds did not become mixed with those of the solicitor and to ensure that at any time the solicitor was able to identify what clients' funds he held, and indeed be in a position to be responsible for repayment of those funds if called upon to do so.

19. The Investigation Officer, Mr Clemo, had calculated a minimum liability to clients of £280,519.96 as at 27th October 2005 in respect of 12 clients listed in the Report.

20. The Applicant handed to the Tribunal a Compensation Fund statement which showed payments made by the Compensation Fund in excess of £1million and identified the names of the individuals and/or organisations who had made claims.

21. The Tribunal was referred to the relevant documents from which the Investigation Officer had identified a minimum liability in respect of the 12 clients, to the Investigation Officer's working notes and his calculation as to how he arrived at the minimum shortage referred to at paragraph 6 above.

22. The Report stated that the Respondent had agreed at the time the existence of the minimum shortage and that he was unable to replace the money but was trying to arrange a remortgage of his firm's offices, which he expected would take some four weeks to complete.

23. The Respondent had produced a copy of a client bank statement to the Investigation Officers from which it was noted that payment had been made from client account in respect of salaries for each month between February and September 2005. The resulting shortage had been reduced as set out in paragraph 9 above.

24. The Report noted that the Respondent had contended that amounts might have been transferred to client bank account in respect of staff salaries and in support of that contention it was noted that the firm's November 2004 salaries had been paid from client bank account and a transfer of like amount from office to client bank account had been made on the same day.

25. The Report noted that on 22nd August 2005 the client account was credited with a net mortgage advance of £289,112.33 but this was used for payment of other liabilities for the practice and was subsequent to the payments identified between February and July 2005 of staff salaries from client bank account.

26. The Report had also recorded that the Respondent's drawings were taken from client bank account between February and September 2005.

27. It was submitted that the public knowing the facts would conclude that what the Respondent did in taking monies from client accounts was dishonest and that the Tribunal could be satisfied that the Respondent knew that what he was doing would be regarded as dishonest by the standards of ordinary and honest people.

28. The Applicant had as indicated at paragraph 16 above written to the Respondent in November 2006 because there might be some suggestion from the interview with the Investigation Officer that certain of the monies in client bank account were monies due to the Respondent. There was reference within the papers to the 22nd August 2005 credit of the remortgage of the office premises and there was reference to the Respondent saying when the minimum shortage was drawn to his attention that he was trying to arrange a remortgage of the offices. There was also a suggestion that there might have been an earlier remortgage which would have accounted for why funds were taken from client bank accounts but the Respondent had not provided

details of any earlier remortgage nor any documentation. If the Respondent sought to demonstrate that funds had been placed into client account rightly or wrongly which belonged to the Respondent, the Tribunal might think that was relevant to the issue of dishonesty but no such documentation had been produced to the Investigation Officer during the course of his inspection nor to the Applicant following the issue of proceedings.

29. The position therefore was that the Investigation Officer had identified a large minimum shortage with monies being taken from client bank account for staff salaries and for the Respondent and his wife personally. In the absence of the most persuasive explanation from the Respondent it was submitted that the Tribunal could be satisfied that what the Respondent did was wrong, it was a breach of the Rules and at the time the Respondent knew that by the ordinary standards of honest people what he was doing was dishonest.

30. Whilst the Respondent did not have to prove his position, rather the Applicant had to prove that which he alleged, the Tribunal might think that if the Respondent had an explanation for why funds were paid from client bank account as they were, it would the easiest thing in the world to volunteer that information. The explanation might be sufficient to persuade the Tribunal or those instructing the Applicant that the Respondent had not acted in the way alleged. So far no such explanation had been provided.

31. The Respondent had not made a request to the Applicant for documentation. It would have been within the Respondent's power to seek disclosure of documents or indeed access to documents to obtain copies from the intervening agents.

32. The Investigation Officer had reported factually on what he had found. The Applicant disagreed with the submission of Counsel for the Respondent that the obligation was on the Law Society to carry out further enquiries of an explanation advanced by a solicitor. At the time of the inspection the Respondent was still at his practice. If he had an explanation then the obligation was on him at the time in terms of cooperation with his regulator to offer that explanation. An explanation might well have alleviated any concern that the Investigation Officer had as to the way in which the client account had been operated.

33. There was a requirement on solicitors to cooperate with their regulator who was investigating matters of a professional nature. These were not criminal proceedings and were not criminal allegations. The case of <u>Bultitude -v- The Law Society</u> [2004] EWCA Civ 1853 made clear that the taking of funds in circumstances where a solicitor knew or did not care that he was not entitled to the funds was sufficient to establish a dishonesty allegation. An intention permanently to deprive was not required as it would be on an allegation of theft.

34. The integrity of clients' funds was so important that different considerations from a professional regulation point of view came into play. Disclosure of documents and full explanation might have alleviated concern on the part of the Law Society as to what at face value from the facts seemed to be withdrawal from client accounts on a serious and systematic basis for the firm's benefit and the benefit of the Respondent and his wife.

Oral evidence of John Michael Clemo

35. Mr Clemo, an Investigation Officer with the Law Society, confirmed that his Report dated 10th November 2005 was true to the best of his knowledge and belief and that his notes of interview reflected an accurate representation of what was discussed. He further said that the notes of Mr M, the other Investigation Officer, were correct to the best of his recollection.

36. Mr Clemo recalled the Respondent's comments set out in the typed interview note of 27th October 2005 that:-

> "…the abortive costs had been financed through a property that he owned in York which had first been mortgaged and then disposed of some three to four months ago. This realised approximately £200,000 - this money was injected into the practice to alleviate the cashflow problems."

Mr Clemo accepted it was possible that the Respondent had said that the property was in Ewell, not in York.

37. The typed note of 27th October 2005 also mentioned the sale of a house from which the Respondent had injected £300,000. Mr Clemo was not sure whether this was a further sum. Mr Clemo had thought that this had been placed in office account given the fact that the funds had been injected into the business, but had not made a separate investigation to confirm that. The mortgage advance coming in on the office property in the sum of £289,112.33 was at the end of August.

38. Mr Clemo was referred to the typed notes of a meeting on 28th October 2005 in which it was said:-

> "What he has shown us which is a major concern is that your firm paid salaries on client account. That is our reason for asking about the payroll. That gives us great concern and we need to talk about it today. Why it happened? Was it put right? … We have precious little information."

There was also a reference in that interview to the remortgage of the firm's offices. Mr Clemo could not recall any additional explanation on 28th October by the Respondent as to why funds were taken from client bank accounts.

39. The books were very much in arrears and were in a poor state. The last reconciliation had been 31st March 2005.

40. Mr Clemo was referred to a client bank account statement for the period 21st December 2004 to 21st March 2005 which referred to receipts of £159,000 and £235,567 on 31st January 2005. Mr Clemo did not know to what those receipts related and said that the Respondent had not told him to what they related at the time of the inspection.

41. In relation to the meeting on 27th October 2005 Mr Clemo said that he believed that the sums of £200,000 and £300,000 related to the same property, i.e. the £200,000

was raised on a mortgage and £300,000 was the subsequent sale price. If Mr Clemo had noticed an inaccuracy at the time he would have put it in a note.

42. Mr Clemo was aware that documents had gone missing following the Respondent's car accident. A statement of Mr SG, the Respondent's accountant, was produced to the Tribunal on behalf of the Respondent, the statement having been used in the High Court proceedings relating to the intervention. The statement said that the books were reconciled correctly up until March 2005.

43. Mr Clemo confirmed that the Respondent had told him that the house in Ewell was owned by a company called Venus Investments. He had not mentioned this in his note. His notes had originally been handwritten, although not in a formal notebook. He was not sure that he had retained the original note.

44. Mr Clemo had not made enquiries to try to trace the funds that had come from Venus. Asked if he had a duty to investigate defences put up by solicitors, Mr Clemo replied "Yes".

45. Mr Clemo did not recall a figure of £337,000. Mr Clemo said that he did not recall the Respondent giving him a copy of the accounts ledger with regard to Venus Investments. On further questioning he said that the Respondent had not given the ledger to him. He accepted that he had changed his story a little under pressure.

46. Mr Clemo said that the exercise he had carried out was the difference between the liabilities to clients and the cash in the client account. He accepted that it was dependent on the accuracy of the figures.

47. Mr Clemo was shown the Compensation Fund statement but said that he did not know what the "£459,000 emergency funding" referred to on that document was for.

48. Mr Clemo said that his Report showed minimum liabilities as shown on the Respondent's computer and as supported by the documentation on the relevant matter files. It was a snapshot of the position on a given date.

49. Mr Clemo accepted that if a payment had been made out of the client account but not yet posted on the computer at the time the snapshot was taken, there would show a shortfall. The exercise was however carried out in conjunction with looking through the individual client matter files. The Investigation Officers had also looked at bank statements, cheque stubs and ledger accounts. Mr Clemo had not traced from the bank account to the ledger account on a one-for-one basis. He did not carry out investigations to see whether or not any monies had left the client account but not been posted on the computer.

50. Mr Clemo was referred to the accounts ledger of Mr B and Ms B and an annotation stating that the matter was completing on 28th October. He accepted that as that matter had not been paid out by the Compensation Fund Mr B and Ms B were not losers. He said that the money would have gone on completion on 28th October, i.e. the day after the comparison of client cash and liabilities had been done. He could not throw any further light on the matter.

51. Asked about the matter of Mr K and the sum of £13,720 due for stamp duty, Mr Clemo said that as the Inland Revenue did not appear on the Compensation Fund list

he did not specifically know what had happened but assumed that the stamp duty was paid after 27th October and before the intervention. He accepted that another possible explanation was that the sum had been paid on the date of completion, i.e. 7th October, but had not been posted on the computer. He pointed out however that the matters were discussed with the Respondent on a matter-by-matter basis and the Respondent had agreed the figures that the Investigation Officers had produced. Mr Clemo said that his notes of the meeting on 31st October 2005 showed the Respondent agreeing the liability in particular matters. The agreements were listed under the heading 'Mr Stuart's comments'. Mr Clemo accepted that at the same meeting he had told the Respondent that he had bent over backwards to help the Investigation Officers. Mr Clemo believed that the handwritten notes of the meeting on 31st October 2005 were written contemporaneously. Mr Clemo had not checked with the Inland Revenue or any of the other people shown as having liabilities whether they had been paid.

52. It was put to Mr Clemo that the figures listed in his handwritten note of the meeting on 31st October 2005 could not be relied on. Mr Clemo said that he was doing the exercise on a matter-by-matter basis not ascertaining the total liability for each client.

53. It was put to Mr Clemo that he had said in his Report that the Respondent agreed to the existence of the minimum shortage which he said he was currently unable to replace. Mr Clemo was asked where that statement was in his notes. Mr Clemo said that this had been said on 31st October 2005 but it was not actually put in his notes in so many words. The Respondent had however then gone on to talk about the remortgage of the offices. The Respondent had agreed the existence of the minimum shortage or the liabilities. Although the comment referred to above did not appear in the note he thought the Respondent had said this. He accepted that it was an important part of the interview and that he had not recorded it at the time. His interview notes were so far as he could recall contemporaneous.

54. The comments under the heading of 'Mr Stuart's comments' in relation to the 12 matters identified were recorded at the time of the interview. When Mr Clemo had put to the Respondent the total liabilities of £280,519 he had not disagreed.

55. Mr Clemo said that the payments to the Respondent and his wife were drawings which he assumed remained unposted. Mr Clemo had been through the bank statements to gather these figures and in the case of salaried payments he had gone through the payroll. The salaries paid to staff were debited through the client account.

Submission on behalf of the Respondent of no case to answer

<u>Submissions on behalf of the Respondent</u>

56. The allegation the Tribunal was considering was that the Respondent had misappropriated clients' funds. The issue to be decided upon was very narrow, namely whether the Respondent had acted dishonestly.

57. The test in tribunals and the criminal courts at the close of applicant's or prosecution's case was the Galbraith test.

58. Where there was evidence of a tenuous character, weak, vague or inconsistent evidence or where the Applicant's case taken at its highest was such that the

Respondent could not properly be convicted on it, the Tribunal should rule that the case had not been made out.

59. With regard to misappropriation, what was shown by the snapshot which had been referred to was that the computer showed one figure but the client account had another in it.

60. There were a number of reasons why this could happen, one of them being simply that the figures on the computer could have been wildly inaccurate because matters had not been posted on the computer. While that might be covered by other matters, and might be a matter for which the Respondent would face disciplinary proceedings, the Applicant had not proved to the criminal standard that the Tribunal could rely upon the postings on the computer. Individual enquiries had not been made as to what had happened to the various funds of the various clients.

61. There was therefore a problem of inconsistency in that taken at its highest there was still an explanation that could be given for the shortfall because of posting problems on the computer.

62. The Applicant had said, and it was accepted, that he did not have to show an intention permanently to deprive. In an allegation of misappropriation however the Applicant did have to show whose property it was and what the Respondent had done with it. The Applicant had not done this. The only evidence before the Tribunal regarding honesty was what the Respondent did or did not say.

63. The subjective part of the test could only be described as intent. The Respondent's intent at the time was what he did and what he said. What he said would be the way of proving his intent at the time.

64. The Report alleged that the Respondent had agreed the existence of a minimum shortage and was currently unable to replace it. That was a particularly damning piece of evidence which Mr Clemo had not recorded. That evidence was therefore of a tenuous nature.

65. If that evidence was tenuous there was no evidence before the Tribunal about how to judge the allegation of dishonesty unless it was said that paying money out of the client account under the circumstances in which it was paid was res ipsa loquitur dishonest.

66. That would be a misdirection as neither the Rules nor the allegations said that a breach of rules of itself equalled dishonesty.

67. The Tribunal was asked to take into account that the alleged statement was not recorded, the inaccuracies in the figures which were shown as the minimum liability figures and the submission that if this huge amount of money was a shortfall at the time of the snapshot that would be significantly represented in the Compensation Fund payments to people who would be short of their funds.

68. The Compensation Fund payments meant nothing to anyone, even to the Applicant. It would be dangerous to take the serious step of branding a solicitor dishonest on the basis of such tenuous evidence.

69. The Respondent had admitted to very serious breaches of other matters. Virtually all the sanctions which were available to the Tribunal would be available on the basis of his admissions so far. In relation to dishonesty, at this particular stage the Applicant had not come up to the standard which was required.

The Submissions of the Applicant

70. The Applicant disagreed that the only evidence upon which he relied was what the Respondent might or might not have said.

71. The Tribunal had Mr Clemo's Report identifying in addition to the minimum shortage that one of the contributing factors to the shortage was payment out of client account for staff salaries, drawings of the Respondent and payments to his wife from client bank account.

72. Other than a suggestion from the Respondent recorded within the notes that he put money into the business the Tribunal was provided with no further evidence of this at this stage as to when that was done, in respect of which property and no explanation had been advanced as to why the money was paid from client bank accounts.

73. At this stage there was a clear case to answer.

74. The Tribunal was referred to Twinsectra and to Bultitude -v- The Law Society [2004] EWCA Civ 1853. On the face of it there had been significant amounts of money coming out of client account and other than a brief mention during the interview as to funds going into the firm without reference as to whether they went into direct or office account, no explanation had been given as to why that occurred.

75. The Tribunal was entitled to conclude that not only had there been breaches of the Accounts Rules, which the Respondent accepted, but also that the Respondent had acted in a way which could be described as conscious impropriety.

76. It was submitted that the Respondent had utilised clients' funds improperly and knowingly. In those circumstances there was a case to answer and it was open to the Respondent to call evidence.

Decision of the Tribunal in relation to the submission of no case to answer

77. The Tribunal had been invited to dismiss the allegation of dishonesty, the Respondent having admitted all the other allegations.

78. Those admitted matters included allegation (iii), namely that the Respondent withdrew monies from client account other than as permitted and allegation (iv), namely that he utilised clients' funds for his own purposes.

79. Mr Clemo had given evidence relating to the payment of salaries, drawings and payments to the Respondent's wife being made out of client account. The Tribunal did not regard the evidence in this case as tenuous. The Tribunal did not think that the failure of Mr Clemo to make a note of the Respondent's agreement relating to the

minimum shortage as set out in the Report was fatal to the whole case. There was very much a case to be answered.

Oral evidence of the Respondent

80. The Respondent started his firm in February 1995 and took over a conveyancing firm in 1998. His practice was then 60% conveyancing and 40% commercial.

81. In 2002 the Respondent considered that the market was ready for a quantum leap in the legal services offered by way of conveyancing, namely mass conveyancing. The only way that this could operate would be to have a computer system to take the drudgery out of conveyancing. None was available at the time so the Respondent had written the software himself. He also prepared a precise action plan, project plan and spreadsheets, which he took to a number of people for comment including KPMG the accountants.

82. The firm required refinancing and the Respondent did this by utilising a property called Aberfoil in Ewell which had previously been the Respondent's mother's dental surgery. The surgery was owned by a company called Venus Investments Ltd which the Respondent's mother and then subsequently the Respondent fully controlled.

83. The Respondent raised just over £335,000 from the mortgaging of the property. Documentation relating to the remortgage was produced to the Tribunal.

84. Although described in the documents as a bridging loan it was in fact an open-ended loan where the Respondent paid a certain amount of interest per month and could then pay the full amount off.

85. The £335,000 was sent by telegraphic transfer into the Respondent's client account by Sherrington Solicitors as shown by the ledger card for Venus Investments on 18th March 2004. There was a separate client ledger for Venus Investments.

86. The Respondent had told Mr Clemo about this and was almost sure that he had mentioned Venus Investments Ltd. He could not be certain that he had shown Mr Clemo the Venus Investments ledger.

87. The whole sum was then paid out to the Venus Investments Ltd account at NatWest. The money was then transferred back by the Respondent's bookkeepers as loans to the firm to make payments out of client account for expenses. The money came across as and when required.

88. The tranches had come into client account and the Respondent agreed that that was incorrect. He did not believe he had told the cashier to pay it into client account but was aware that this was happening.

89. The Respondent did not have a schedule of tranches paid. The property had been repossessed and sold and the bank account frozen and closed so the Respondent was unable to obtain any documentation.

90. In addition to being unable to obtain documentation from the bank the Respondent could not access his accounts. He had had tremendous problems answering client

inadequate professional service enquiries from the Law Society as the intervention agents had taken a complete copy of the whole system. The Respondent had not deleted a single file from the server since 1995. Only important papers had been held on file. All paper coming into the firm was scanned and then posted internally by email to the database.

91. The intervention agents had been unable to access the database and could not for instance supply the Respondent with a list within the database of every single client account entry, which would have allowed the Respondent to go through and reconcile from day one.

92. The Respondent had replied to all Law Society letters but could not access the accounting package. The Respondent at the time was bankrupt and could not pay for work to be done on the database. A friend who was a software expert tried to take the information off the server for the Respondent but said files were missing because of careless copying by the intervention agents. The Respondent had informed the intervention agents. The Respondent had only one side of the file and had told the Law Society that because of that he could not answer the accusations.

93. The Respondent could therefore not say how much was owed. He was staggered by the Compensation Fund list of over £1million.

94. The Respondent referred the Tribunal to the example of Mr W as a matter where the intervention agents had been unable to show the Respondent a complete file. The correspondence had all been scanned. The firm had checked with the Law Society that as long as the documents which had to be kept were kept, other scanned documents could be boxed up and destroyed quickly. They were therefore not on the paper files.

95. The Respondent had therefore known that there could not be discovery in this case as no-one could access the files. The information the Respondent had received from his software friend was that the activities of the intervention agents had crashed the system.

96. The firm had made all the necessary preparations to start the mass conveyancing project in April or May 2004 and had carried out a huge amount of work in preparation. A television advertising campaign had been undertaken but it was a complete catastrophe and there was hardly any increase in sales at all. Some of the £335,000 from the mortgage of the Ewell property was used to fund the advertising and some of the furniture and equipment.

97. The Respondent knew that he had substantial funds. He tried to reduce his overheads by reducing staff, renegotiating loans and increasing conveyancing work. The Respondent returned to 2001 staff levels while doing three times as much work. The software worked well and after discussion with his accountant the Respondent decided that he was in a position to continue trading. Everyone worked very hard. The Respondent's staff had continued to show support even though they were all creditors of the Respondent.

98. The Respondent's bookkeeper Mr M had been taken on in 2002. He was well-qualified and the Respondent had relied on him, in retrospect far too much, to post all

the office and client postings and to ensure that the accounts were kept up-to-date. The Respondent also trained Ms B, another bookkeeper. Mr M left in June 2004 together with a licensed conveyancer and set up a company, F Conveyancing Limited. The Respondent had been told by someone whose identity he wished to protect that Mr M had written to the Law Society immediately on leaving the Respondent's firm and said that the Respondent was paying office expenses out of client account, which they were not.

99. The Respondent had continually asked Mr M how things were going in the accounts and had not been told of any problems. If matters had been posted completely wrongly, that would eventually have come to the Respondent's notice as the client whose money had been used would have had insufficient money for their own matter. No such circumstance had come to the Respondent's notice.

100. The Respondent had told Mr M that he could use the funds from Venus or the funds from the later remortgage of the office to pay office expenses. The Respondent accepted that it would be better if these finances had not gone into the client account.

101. The Respondent had referred the matter to Mr SG, whose statement was before the Tribunal. SG reconciled every payment from November through to March 2005.

102. The Respondent considered that the payments to himself, his staff and his wife during that period were posted on the electronic accounts. If not this would have been obvious to the Respondent. The Respondent's drawings were openly shown. At no time did he suspect that funds were being drawn off client account which were not his.

103. Telegraphic transfers made it easier to use the client account as they were instant. On the office account there was a BACS payment which took four days.

104. The salaries were telegraphic transfers and the Respondent's drawings and his wife's payments went from the CHAPS terminal. The Respondent knew what was happening, although not initially, and had already admitted that it was wrong. He did not stop it.

105. The money from the NatWest account was telegraphically transferred. He could draw on the accounts separately if he wished outside of the firm.

106. He expected the funds from the Ewell property to last about 18 months, maybe a little longer, and the first office remortgage, there was to be a second, to last another year. If the advertising had worked the £335,000 would have lasted considerably longer than 18 months. The television advertisements cost £20,000 per month. The Respondent had taken a loan of £70,000 to cover the indemnity insurance, which was a normal procedure.

107. None of the £337,000 was left. The Respondent had put something like £440,000 of his own money into the firm.

108. The Respondent knew that if he had been drawing on client account and those sums could not be covered by his input into client account, that would be misappropriation. He did not think that this was happening. He was not dishonest. It was never his

intention to steal money from clients. He had made no attempt to hide where the money was going.

109. The money paid to his wife was a notional amount to take advantage of tax allowances. She was paid £27,000 over eight months, being an element of rent and an element of salary. The rent was paid to her in respect of the firm's offices the equitable title of which was vested in the Respondent and his wife. The Respondent understood that that payment to his wife to obtain the best tax advantage was entirely legitimate.

110. The Respondent was drawing approximately £120,000 per annum gross from the firm. The payments were there for all the world to see.

111. When Mr Clemo first came to the firm the documentation he required was at the accountant's, Mr SG. There was then a delay because of an accident with a 40 ton lorry which hit the Respondent head on. The Respondent was not badly hurt but was airlifted to hospital. He was not capable of working for at least a week.

112. When he returned to the car with Mr Clemo to collect the papers they were not there. The Respondent was told by the police that they might be in police storage but they were not.

113. There was however nothing in those documents which could not be found elsewhere, except the post-March 2005 Reconciliations. It was not true to say that reconciliations had not been prepared later than 31st March 2005. There had been bank reconciliations but there were "spikes" in the system caused by an adjacent military facility. This sometimes caused the computers to crash. Mr Clemo had accepted this.

114. The Respondent considered that the figures for liabilities to clients were inaccurate. There might have been entries which had not been posted on the electronic accounts which would vastly change the situation.

115. SG was happy to say that everything had been posted up to March 2005. From that date the Respondent had no reason to believe that everything had not been posted. It would still be possible if the Respondent could access the accounts to reconcile them to the bank accounts the whole way through.

116. The Respondent had not misappropriated anybody's funds.

117. The Respondent had accepted the minimum cash shortage of £171,111.11 in the course of the investigation by Mr Clemo on the documents that he was shown. He confirmed that he had agreed the individual balances set out in the note of the meeting of 31st October 2005 on the basis of the printouts except that in the matter of K the Respondent knew that £70,000 had gone out on the Friday. Figures did not have to be correct on a daily basis. There were five weeks in which to get the figures correct. The Respondent had accepted the figures on the basis of what his client ledger said but no investigation had been made of the figures and he did not accept that there was a shortage.

118. The Respondent confirmed that Stuart & Co had acted for Venus Investments and for the lender which was why the money had come into the client account at Stuart & Co. The £337,000 had come in in one go to the client account but the Respondent could not produce the ledger to show the receipt as he did not have his accounts package. He had discussed the matter with Mr Clemo. If Mr Clemo had asked for a printout of the ledger he would have been given one.

119. The Respondent was referred to the notes of the interview on 27th October 2005 which referred to the property (in York which should be Ewell) having first been mortgaged and then disposed of some three to four months ago, i.e. Summer 2005. The Respondent was asked about the apparent discrepancy in dates as he had said that he injected the £335,000 in March 2004. The Respondent was unable to recall the dates.

120. The Respondent reiterated that as far as he had been concerned there had not been a cash shortage. He had accepted that the figures put down by the Investigators tallied with what was recorded on the computer but it had already been shown that £70,000 of that was incorrect.

121. The Respondent had cooperated with the Investigators as shown by Mr M's comment that he had "bent over backwards".

122. The Respondent confirmed the nature of the various payments out of client account for expenses and to his wife. The payments to his wife included cash of £5,000 on 5th September 2005 for the purchase of a horse which he had promised her.

123. The funds introduced in August 2005 were primarily to assist in the financial viability of the practice although some payments were paid elsewhere. Without his accounts package he could not identify every payment.

124. There was a loan agreement in relation to the loan between Stuart & Co and Venus but the Respondent did not have a copy as it would have been taken by the Law Society. The Respondent agreed that it would have been available at the time of the inspection.

125. The Respondent confirmed that the CHAPS terminal on the client account was instantaneous. He was the only signatory to the accounts. Salaries would be transferred by the bookkeeper without a need for a signature by the Respondent. The figures for the salary would come from the accountants who did the payroll. For drawings the Respondent would simply tell the bookkeeper how much he wanted. Again as he was talking directly to the bookkeeper there would be no need to sign anything to authorise the payment and the same applied to payments to the Respondent's wife.

126. The Respondent knew indirectly which account the money for salaries, drawings and payments to his wife were coming from. He knew it was coming from Venus and from the client account. It was his money. He had admitted allegation (iv) because he was utilising his own funds which happened to be clients' funds for his own purpose. He accepted that the money should have gone into office account. He knew at all times that the money had gone into client account. He had never questioned

whether that was a correct procedure as it was a loan to Stuart & Co from a client and as far as the Respondent was concerned it was his money anyway.

127. He had not checked that there were sufficient funds available to meet the payments being made on clients' account as he relied on his bookkeeper. The Respondent would have made checks at some stage when he did the reconciliations.

128. He accepted that he would by way of example have been prepared to tell his bookkeeper to arrange for drawings of £10,000 in a particular month without knowing whether there were funds available to cover that, but he denied that he would have done it without caring. He would have done the reconciliations within two or three weeks of the funds being transferred out of the client account. That was a way of checking as if payments were posted it was not possible to overdraw on client account.

129. Between February to September 2005 the Respondent had an overdraft facility with the bank of £30,000. The overdraft was up and down.

130. The Respondent understood the importance of the Solicitors Accounts Rules to ensure the integrity of clients' funds and to ensure that they did not become mixed with the funds of the solicitor. He accepted that solicitors should never take money from client account unless they were certain that they were entitled to those funds.

131. Asked if he had utilised funds in client account to keep the practice going, he asserted that he had utilised his own funds.

132. Asked to confirm that there would not have been sufficient money in office account to repay the salaries in the period February to September 2005, the Respondent said that the bank was very supportive but he chose to do it the other way.

133. In relation to the Compensation Fund printout where an issue had arisen as to the accuracy of the printout and in relation to a payment described as "emergency funding" of £459,000, the Respondent accepted that a letter dated 19th March 2007 from the Solicitors Regulation Authority which the Applicant produced to the Tribunal confirmed that the total sum paid out up to 19th March 2007 was in excess of £1million. He also accepted from the letter that the £459,000 referred to the matter of Mr and Mrs G. The Respondent said he would have been able to explain it if the printout had contained the client name rather than the description "emergency funding".

134. The Respondent accepted that he had had correspondence with the Compensation Fund relating to the matter of Mr and Mrs G, but asserted that despite the emergency payment to complete the purchase the money had been there. Following intervention solicitors' funds were frozen and were thereafter under the control of the intervention agents. The Compensation Fund would be repaid if there was money available in the client account. This was the Respondent's understanding of why the Compensation Fund printout was misleading. The intervention agents were not allowed to operate the Stuart & Co account, rather they had a fresh account. If the debit balance in that account equalled the credit balance in the Respondent's client account there would be no shortfall.

135. The Respondent also said that from the documents it appeared that the Compensation Fund had paid out more money to Mr and Mrs G than the clients were entitled to for the conveyance, such additional payment being by way of compensation. This necessarily meant that his client account would be overdrawn. The Respondent said that he had felt very cross with the implication introduced by the Applicant in his opening of the Compensation Fund making a payment of £1million. The Tribunal clarified that there was no suggestion in this case that £1million had disappeared and certified that the allegations in relation to dishonesty related only to matters set out in the Investigation Report.

136. The Respondent denied that having introduced an expensive advertising campaign that did not produce the work he anticipated, he had needed to keep the practice going by payments of expenses and drawings by simply using the client account. The money used had been his money. He had never been shown any information which indicated that it was someone else's money.

The submissions on behalf of the Respondent

137. The Tribunal would have to determine whether there had been a misappropriation of client funds and secondly whether the misappropriation was dishonest, although "misappropriation" was by definition a dishonest appropriation.

138. In relation to dishonesty the Tribunal would have to determine whether with regard to Twinsectra the Respondent was dishonest on the basis of his own subjective view. There was a strong subjective test in Twinsectra.

139. The Tribunal in order to determine these matters would have to look at the evidence put forward by the Applicant. The burden of proof was on the Applicant.

140. The Applicant had asked the Respondent in cross-examination whether he had told Mr Clemo about a matter or found documentation to support it or assisted Mr Clemo. The Respondent had assisted Mr Clemo by telling him about the remortgages. There was no burden imposed on a respondent under investigation to assist the Law Society to prosecute or indeed to assist them in any way. There was a rule against self-incrimination and there was no burden on any defendant to produce evidence to defend himself.

141. The Tribunal would have to be sure that the Respondent had taken other people's money. To be sure that there was other people's money, at least a group of people whose money was taken must be identified.

142. The central issue was simple. The Applicant was bringing the case on the basis that at the time of the snapshot on 27th October 2005 there was a shortfall and the Applicant had produced a list of clients and a list of their liabilities.

143. If the Tribunal accepted what the Applicant said then the Tribunal would have to accept that the liabilities listed were correct. It was known that there was an error on one of them but generally the Applicant must show that the figures were correct in order to make out his case. The Applicant claimed a total minimum liability of £289,515 and cash available in the bank of £109,408 giving the minimum cash shortage. The Applicant had to prove that to prove his case.

144. In order to rely on the Applicant's conclusion the computer entries showing the liabilities would have to be checked and found to be correct and all the credits and debits in the bank account reconciled with the computer. The Investigation Officer could have asked for a client account ledger and ticked off all the items against the bank account. He could have done a reconciliation to check whether the computer married with the bank account. He had not done so.

145. Another way of checking would be if the various people listed had made claims on the Compensation Fund because the money was not in the bank account when matters were resolved. In fact the Compensation Fund had not made payments to the listed individuals.

146. The Applicant had failed to show the Tribunal any victim or to show any sum of money that was misappropriated. They had to do that for the Tribunal to find the Respondent guilty of this allegation of dishonesty.

147. In his evidence Mr Clemo admitted that he had changed his story under pressure from the Respondent's Counsel during cross-examination over the figure of £200,000 or £300,000 being injected. The name of the premises was wrong. Mr Clemo had said York instead of Ewell. He had not investigated the matters of which the Respondent had told him.

148. The Applicant also relied on the Respondent admitting to Mr Clemo that there was a minimum shortage. However Mr Clemo had been unable to point out where the Respondent had said that in his interview despite the fact that this was a contemporaneous interview in which Mr Clemo asked a question and wrote down the answer. The most damning comment which appeared to be a confession did not appear in the interview. It was not safe to rely on this. This was a résumé of what Mr Clemo had thought without properly investigating it.

149. The Respondent had said that he had agreed the figures of the client liabilities that he was being shown. He was agreeing the piece of paper put in front of him. He had said that he had no intention of losing the books and that the Investigation Officers should be able to reconstitute them. He did not say what he was alleged to have said as the basis of the allegations. Mr M had said:-

> "I know you bent over backwards, including the remortgage. It's been tough on you."

150. There was no statement from any of the people on the list claiming that they had lost any money.

151. The £1million paid out from the Compensation Fund was unreliable. The printout merely gave a list of the payments made out but all might be reconciled at the end of the day.

152. It was respectfully submitted that the Applicant had not proved misappropriation. It would not be possible to write down who had lost money, where it had gone and where the problem was.

153. It was accepted that the Applicant did not have to prove intention permanently to deprive. It would be sufficient to show that the Respondent simply treated other people's property as if it was his own.

154. The Tribunal was referred to the case of Michael Ambrose Conlin & Roger Harris -v- Paul Francis Simms. In this case an Order of the Tribunal was held as evidence. A finding of dishonesty by the Tribunal could therefore be held in other courts as evidence of dishonesty. This raised the authority of the Tribunal to the level of a judicial body. This meant that the rules governing investigations in criminal cases must therefore govern the investigators of the Law Society when they concerned themselves with matters of dishonesty.

155. If the Tribunal's finding could be used for example in the criminal courts the same safeguards must be present. To do otherwise would be to make solicitors a special species of people who could be found dishonest in other courts when the evidence that had been provided to make that assumption was substandard.

156. The rules governing the Law Society investigators should include the rules that govern every other type of investigator into criminal activity or into dishonesty. To do otherwise would be in contravention of the Human Rights Act, particularly with regards to self-incrimination and fair trials.

157. An example was that the Respondent should have been cautioned that any answers he gave could be or would be used at a Tribunal.

158. Like the Law Society investigators, police make initial enquiries and may interview people, but as soon as they reach the point where they suspect dishonesty they have to abide by various rules. It was submitted that the Law Society should do the same. They had not in this case and perhaps did not other cases, but perhaps it was time that this was changed.

159. The Respondent had told Mr Clemo that he had remortgaged a property in Ewell and that there was a possibility that there were other issues that needed investigating with regard to the computer and reconciliations. Mr Clemo did not carry out some investigations although in evidence he said that he thought he had a duty.

160. The Tribunal had indicated that they did not regard Mr Clemo as having that duty but the Tribunal was referred to the Attorney General's guidelines for prosecutors:-

> "When prosecutors or disclosure officers believe that material might reasonably be considered capable of undermining the prosecution case or assisting the case of the accused, prosecutors must always inspect, view or listen to the material and satisfy themselves that the prosecution can properly continue."

In any investigation other than this into dishonesty the investigator as soon as he is told something that he might be able to further investigate has a duty to do so.

161. It appeared that an adverse inference was being drawn in this case because the Respondent had not managed to persuade Mr Clemo or to produce documents with regard to the mortgaging of properties. Effectively it was being said that the Respondent had not proved he was innocent. With regard to the Codes of Practice for

any other prosecuting authority, adverse inferences could not be drawn from failure to assist the prosecution or failing to answer questions when not put under caution.

162. No legal advice was offered at the time of interviews, nor were significant statements recorded and offered to the Respondent for signing. In any other court with judicial authority over matters of dishonesty the evidence of Mr Clemo's interview would have been excluded because it had failed those safeguards.

163. For dishonesty to be established there had to be consciousness that one was transgressing the ordinary standards, in other words that what one was doing was wrong. The Tribunal had heard from the Respondent that he believed when he was withdrawing funds from client account that he was using his own funds. The Applicant had not put before the Tribunal a single piece of evidence to contradict this. There was no evidence to show that it was actually clients' funds being used. The Respondent had said he believed all along that the money he was using was his money. The burden was on the Applicant to prove otherwise and he had not done so.

164. The Respondent had entered guilty pleas to a number of allegations and accepted the fact that withdrawing monies from the client account was in breach of a Rule. He had admitted utilising clients' funds for his own purposes and in evidence he had said that by that he meant that he had used the funds of Venus Investments which was actually his own money but should not have been in the client account.

165. The Respondent had accepted that he failed to carry out reconciliations and failed to deliver his accounts. These were serious matters in any event.

166. Dishonest misappropriation however was a very serious matter. The Tribunal would have to be sure that funds were misappropriated. Suspicion or virtual certainty was not enough. The Tribunal had to be sure, and it was submitted that the Tribunal had not been given evidence that could make it sure. The evidence as to what funds were misappropriated was simply not there.

Submissions in mitigation

167. After the Tribunal's decision in relation to liability the following submissions were made in mitigation.

168. Punishment imposed by the Tribunal had three aspects. These were the deterrent to the Respondent, the deterrent to others and the punishment for the Respondent.

169. The Respondent knew that he would be punished but the Tribunal was asked to note the cost to the Respondent so far. Because of his stupidity he had destroyed his own business into which he had paid £1.395million to try to support it. He had also lost half his home. His loss of earnings and future earnings for himself and his family was massive. He lost in the region of £300,000 of work in progress. He lost his reputation, his good name and his pensions. He had been made bankrupt and had been forced to sell his house. A nine year condition had been placed on his bankruptcy that he could not have any position of running a company or become a company director. That had effectively destroyed any possibility of the Respondent moving into other areas of business.

170. There had been enormous health repercussions on him including depression.

171. His children had been taken out of private education. There had been repercussions on his marriage and family life generally. The matter had broken and devastated the Respondent. Any further punishment would only keep him at the bottom level for longer than he was likely to be at the moment.

172. The Tribunal was asked not to strike the Respondent off the Roll. Striking him off would prevent him from earning any money for his family in the future and would remove any hope of attempting to work in the profession in the future.

173. The Tribunal was asked to consider whether it could mark its disapproval in these matters and a give deterrent to the Respondent and others by suspending his Practising Certificate for a number of years. The Tribunal could add to it conditions in relation to the Respondent's future employment. It would however be an act of mercy to allow the Respondent the possibility of getting his Practising Certificate back at some stage. This would be a balanced but firm way of dealing with the matter.

174. A fine would have a limited impact on the Respondent as it would flow into the bankruptcy proceedings. The Respondent accepted and expected a punishment but the Tribunal was asked to consider that dishonesty had not been proved against the Respondent. He had entered guilty pleas for the other matters and the Tribunal was asked to give him credit for that and to show mercy.

Submissions as to costs

175. On behalf of the Respondent it was said that the costs sought by the Applicant were a fairly large sum of about £13,000. The allegation of dishonesty had not been proved against the Respondent. While there was authority to say that if the Tribunal felt the allegation was properly brought the Respondent might still be liable for the costs of it, the Tribunal was asked to consider that this investigation was perhaps not properly carried out and that in all the circumstances it would be unfair for the Respondent to bear the full cost of all the investigations. The Respondent was not seeking his own costs as Mr Tucker defended him on a pro bono basis. The Respondent had written to the Law Society in October 2006 admitting a number of the disciplinary matters. Counsel for the Respondent had told the Applicant that he believed there was insufficiency of evidence in relation to dishonesty. Costs would have been very much reduced if the Law Society had taken a pragmatic view of the evidence. The Tribunal was asked to consider whether the investigation itself was a shambles from beginning to end. There was no evidence to support the allegation of dishonesty which was all based on presumptions. It would be grossly unfair for the Respondent to be forced to pay for the whole thing.

176. The Applicant confirmed that he sought an order for costs in favour of the Law Society and submitted a schedule to the Tribunal. The proceedings had been properly brought notwithstanding the fact that the allegation of dishonesty had not been proved. Whilst certain allegations were admitted prior to the start of the hearing it was only on the morning of the hearing that all the allegations were conceded save the dishonesty allegation. Further, Counsel for the Respondent had only contacted the Applicant a few days before the hearing.

177. The Applicant referred the Tribunal to the Court of Appeal decision of Baxendale Walker [2006] EWHC 643 (Admin).

178. The Applicant further said that it was wholly unfair to describe the investigation of Mr Clemo as a shambles from start to finish. It had been suggested on behalf of the Respondent that Mr Clemo should effectively have done the work the Respondent himself should have done. The Tribunal was reminded with respect that no reconciliations had been prepared since later than 31st March 2005, a matter of importance in this case which of course was one of the admitted allegations.

The Findings of the Tribunal

179. Allegations (i) to (v) and (vii) were admitted by the Respondent and the Tribunal found them to have been substantiated. The contested allegation (vi) was an allegation of dishonesty. The other allegations having been admitted, the evidence which the Tribunal had heard and the submissions which had been made related only to that allegation of dishonesty. The Tribunal had listened very carefully to what had been said and had looked very carefully at the evidence which was necessary to support a serious allegation of this nature.

180. The Investigation Officer's Report dated 10th November 2005 attached to the Rule 4 statement set out details of the matters upon which the allegation of alleged dishonest misappropriation was made. A Civil Evidence Act Notice was served by the Applicant who also sent a letter to the Respondent pointing out the procedure to be followed.

181. Although at the time of the Investigating Officer's initial visit there were records and documentation at the offices of the firm's accountant, subsequently not only were the accounting records books stolen from the boot of the Respondent's car following a serious road accident but also it became impossible to retrieve the computer-based records of the practice. No material at all had been served by the Respondent as an explanation of his conduct. The Tribunal had therefore been faced in this case with a complete and utter lack of written evidence or of accounts or records which might have clarified quite a large number of issues in this case.

182. The Tribunal had seen the Report of Mr Clemo and had had the advantage of seeing him give evidence and be cross-examined. The Tribunal had also had the advantage of seeing the Respondent give evidence and be cross-examined. The Tribunal had found Mr Clemo's evidence in certain respects somewhat unsatisfactory. It was equally right that the Tribunal make the comment that it found certain aspects of the Respondent's evidence unsatisfactory.

183. The background of the events leading up to the intervention in the Respondent's practice in November 2005 was explained by the Respondent in evidence. In or about 2002 the Respondent for reasons which he thought good at the time decided to make what he described as a quantum leap to increase his practice and to generate a huge inflow of conveyancing work. This involved a national advertising campaign on television and the installation of new computer systems together with the hiring of additional staff to cope with the anticipated flow of work. The Respondent prepared an action plan and decided to refinance the firm to pay for all aspects of the plan.

184. Unfortunately the flow of work did not materialise and it was clear from the Respondent's evidence that as this gradually dawned upon him he had to make decisions to lay off staff, to renegotiate loans and generally to try to stop a haemorrhaging of money going out of the firm.

185. Two properties of which details had been mentioned in this case were remortgaged. The first one was a property owned by Venus Investments Ltd, a company owned by the Respondent. The remortgage monies were paid into the client account and then into the bank account of Venus Investments Ltd. The Respondent authorised his cashier to draw down tranches of money into the firm as and when needed. There were no records about this and the Respondent was unable to say how much was drawn down or at what intervals and in what separate amounts. It was however absolutely clear that the Respondent knew that these amounts of money were being drawn from the bank account of Venus Investments Ltd straight into the client account of his practice.

186. Although there was no direct evidence it seemed clear to the Tribunal that as the Respondent's practice was continuing there must have been other client monies coming into that client account and so there would in all probability have been a mixing-up of client money and money which should have been paid into office account but which was improperly paid into client account. The Respondent did nothing to prevent this situation with the result that staff salaries, the Respondent's own drawings and payments to the Respondent's wife continued to be made out of client account for a period of some eight months. It appeared from the Respondent's evidence that all the payments were posted on the electronic accounts and that the CHAPS terminal was used for making the payments out of client account. No postings for ledger accounts were made for these tranches of money taken out of client account.

187. The Respondent's case was that the monies should have been paid into office account but that it was his money, that the money was financing the office, and that to his knowledge there was no shortfall.

188. The difficulty was that no bank reconciliations had been carried out by the Respondent or his staff since March 2005 and it was therefore not possible accurately to compute the true position, particularly since as referred to above when the Law Society's Investigation Officers arrived to conduct the examination of the practice books in October 2005 the books were not available and subsequently the Respondent said they had been stolen. Further, according to the evidence of the Respondent it was not now possible to gain entry to the computer system containing the practice records and therefore he could not say how much had been owed to clients. He also confirmed that the intervention agents were unable to gain access to the system.

189. There had been something of a side-issue in this matter regarding a list of payments from the Compensation Fund. This was not part of the allegations made against the Respondent. There was a complete lack of cogent evidence either way as to whether the Compensation Fund list was right or wrong or whether there were other funds which should be taken into account in order to investigate that aspect fully. It was not part of the Tribunal's remit to carry out that exercise.

190. The Respondent had also given evidence that he had arranged to remortgage his property known as Church, Audley Chapel, the funds from which were used for the practice.

191. Mr Clemo confirmed the truth of his Report dated 10th November 2005 when giving evidence. He was cross-examined about the figures used at the time to compute the minimum shortage on 27th October 2005 and it was suggested that his figures could not be relied on. Mr Clemo's evidence was that he looked at the practice bank statements, ledger accounts, cheque stubs and files and produced what has been referred to as a "snapshot" of the position at that date showing a minimum shortage. It was not possible to compute the total liabilities to clients because of the lack of documentation.

192. Mr Clemo was criticised on behalf of the Respondent for not going further and doing other checks in arriving at his minimum liability figures but the Tribunal were of the view that what Mr Clemo did was entirely reasonable in the circumstances. His evidence, which the Tribunal accepted, was that he discussed each matter separately with the Respondent at the time and that the Respondent agreed with Mr Clemo.

193. Mr Clemo did not make a written note of the Respondent's admission of a minimum shortage. While this was unsatisfactory, Mr Clemo's evidence was that the Respondent did agree at the time and indeed told Mr Clemo that he was trying to arrange a remortgage of his firm's offices to raise money. The implication was that the money was to be used towards rectifying the shortfall.

194. The Respondent's evidence was that he was agreeing the individual figures rather than the shortfall. The Tribunal preferred the evidence of Mr Clemo in this regard to that of the Respondent.

195. The allegation of dishonesty was specifically pleaded in this case on the basis of paragraphs 17 to 23 of the Accountant's Report. After carefully considering all the evidence the Tribunal had reached the conclusion that they were not satisfied on the high standard required that dishonesty had been substantiated. This was partly because of the lack of cogent evidence of a written nature and partly because the Tribunal had heard from only two witnesses and no other information was available. The tests set out in Twinsectra could not be satisfied.

196. The Tribunal had considered carefully the submissions in mitigation on behalf of the Respondent. It was clear however from the Respondent's own evidence that he knew that his firm was beginning to get into financial trouble following his plan vastly to increase the size of his conveyancing practice. Despite this knowledge and despite the fact that no reconciliations had been carried out in his practice since March 2005, he continued to draw money from the client account, money which he knew should never have been in the client account, and although he referred to it on several occasions as "my money" it was in the Tribunal's view money in the client account which was in all probability mixed up with other client monies.

197. Despite knowing that the money should not have been in client account and he was in breach of the Solicitors Accounts Rules, the Respondent allowed the situation to continue unchecked for some eight months. In his evidence he had said that he had not checked whether there was sufficient of his own funds in client account to meet

each payment made but had relied on his bookkeeper. There had therefore in the view of the Tribunal been a real risk that clients' money might be used for office expenses or for payment to the Respondent or his wife. This was totally unacceptable behaviour on the part of a solicitor. The Respondent had fallen well below the expected standards of probity required as a member of the profession. He had shown a wholesale disregard for the Solicitors Accounts Rules.

198. This was a serious case. Despite the mitigation put forward on behalf of the Respondent the Tribunal had a duty to protect the public. Clients' funds had been put at risk by the Respondent's actions and it was right that the Respondent's name be struck off the Roll.

199. In relation to costs the Tribunal considered that the application was properly brought before the Tribunal including the overarching allegation of dishonesty. The application followed a prima facie finding by a High Court Judge on the intervention appeal of dishonesty. Such findings often led to subsequent applications because matters needed to be investigated more thoroughly. The Respondent had not put forward any defence or written explanation. It was only on the morning of the first day of the hearing that it became known that the Respondent would be admitting all the Accounts Rules breaches. Further, the Tribunal did not regard the inspection by the Investigation Officers as "a shambles from start to finish". The Tribunal had considered the Applicant's schedule of costs. It did not appear to the Tribunal, with experience in these matters, that the costs could be said to be excessive. The Tribunal would give a discount on the amount sought to reflect the fact that dishonesty had not been substantiated at the end of the day and would order that the Respondent pay costs fixed in the sum of £12,000.

200. The Tribunal therefore ordered that the Respondent Brian Charles Stuart of Heathlands, Leavens Heath, Colchester, solicitor, be struck off the Roll of Solicitors and they further Order that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £12,000.

DATED this 29th day of August 2007
on behalf of the Tribunal

D J Leverton
Chairman