On 9 November 2023 the SRA's appeal against the Tribunal's decision in relation to costs was heard. On 24 November 2023 Judgment was handed down (Solicitors Regulation Authority Limited v Whittingham [2023] EWHC 2981 (Admin)). The Tribunal's Order dated 23 January 2023, insofar as it related to costs, was quashed. The Administrative Court substituted this decision with an Order that the Respondent pay costs fixed in the sum of £19,468.00.

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No.12383-2022

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD Applicant

and

DANIEL WHITTINGHAM Respondent

Before:

Mr A Ghosh (in the Chair)
Ms L Boyce
Ms L Hawkins

Date of Hearing: 23 January 2023

Appearances

Benjamin Tankel counsel of 39 Essex Chambers, 81 Chancery Lane, London WC2A 1DD instructed by Capsticks Solicitors LLP, 1 St Georges Road, Wimbledon, London, SW19 4DR for the Applicant.

The Respondent did not appear and was not represented.

JUDGMENT

Allegations

1. The allegations against Mr Whittingham, the Respondent were that, in the context of seeking investment for a venture by the Respondent:

1.1 On 7 September 2018, in response to a request by Mr Noodhir Sobun for "proof of employment", the Respondent wrote to Mr Sobun stating: *"I have attached two pictures of my business card for the law firm I work at. You will also see from my LinkedIn I have worked there since earlier this year"* and attaching two pictures of a business card from Blake Morgan LLP (the "Firm") bearing the Respondent's name, when he knew he was not, at the material time, in employment as a solicitor either at the Firm or at all. In doing so, he breached Principles 2 and 6 of the SRA Principles 2011, and Outcome 11.1 of the SRA Code of Conduct.

1.2 In September 2018, he misled Mr Luigi Mondini in a WhatsApp message when he stated that *"the return would be funded from a number of sources. Partly from my monthly salary as a lawyer"* when he knew he did not have a salary as a lawyer. He thereby breached Principles 2 and 6 of the SRA Principles 2011.

1.3 On 14 November 2018, he told the SRA that: "...*anyone would have my full name and would, in theory, be able to look me up on LinkedIn, which is what I assume happened. At this point, in theory, and in practice, it seems, it was viewed and interpreted that I worked at Blake Morgan. However, ... that is only because I do not use LinkedIn often and never have"* when he knew he had expressly drawn Mr Sobun's attention to his LinkedIn profile as per Allegation 1.1. In doing so, he breached Principles 2, 6 and 7 of the SRA Principles 2011.

2. In relation to any or all of the allegations above, the Respondent acted dishonestly. However, proof of dishonesty was not a requirement for any of the allegations of misconduct.

Executive Summary

3. Mr Whittingham, a solicitor who was admitted to the Roll in 2015, was found by the Tribunal to have made untrue and dishonest representations to two individuals to induce them to invest their money in a scheme set up by Mr Whittingham.

4. The two individuals were not his clients however Mr Whittingham used the fact that he was a solicitor to gain their trust and confidence and he misled them about his employment status as a solicitor to provide them with further assurance of his trustworthiness.

5. The events took place in 2018 and it remained unclear whether Mr Whittingham had repaid the two individuals in full . When questioned about his conduct he was found to have provided the Applicant, his regulator, with dissembling answers designed to hide his culpability.

6. The Tribunal judged Mr Whittingham to have been dishonest and he was struck off from the Roll and ordered to pay £5000.00.

The Facts can be found here.
The Applicant's Case can be found here.
The Respondent's Case can be found here.
The Tribunal's Findings can be found here.
The Tribunal's Decision on sanction and costs.

Documents

7. The Tribunal considered all the documents in the case which were contained in the electronic bundle.

Preliminary Matters

8. Adjournment and proceeding in absence

8.1 Mr Whittingham did not attend the hearing and was not represented. He had not applied to adjourn or vacate the hearing.

8.2 Mr Tankel submitted that there was evidence before the Tribunal that Mr Whittingham had been served correctly with the proceedings and notified of the date of the hearing. It was clear from the recent e-mail correspondence coming from Mr Whittingham that he was in fact aware of the date of the hearing and that his non-attendance at the substantive hearing was entirely voluntary.

8.3 Mr Tankel for the Applicant provided the Tribunal with a resume of the procedural background.

8.4 The Standard Directions were issued to the parties by the Tribunal on 3 October 2022 and the matter was listed for a substantive hearing on 23 - 24 January 2023 with a time estimate of two days.

8.5 The Standard Directions required Mr Whittingham to file and serve his Answer to the allegations together with any documents upon which he sought to rely at the substantive hearing by 31 October 2022.

8.6 Mr Whittingham had not complied with this direction and the matter was listed for a non-compliance hearing on 10 November 2022.

8.7 Mr Whittingham attended at the hearing and stated that he had not seen the Rule 12 Statement or the supporting material. He explained that he had received emails with large files attached but he had been unable to open them. He further received an email which contained a link to the proceeding papers on CaseLines *(the electronic document management system used by the Tribunal)* which displayed the message *"page cannot be found"* when he attempted to open it.

8.8 Mr Collis, acting on the Applicant's behalf at the Non-Compliance hearing, acknowledged Mr Whittingham's stated position and the fact that Mr Whittingham had not appeared to have accessed the Rule 12 Statement on CaseLines. Given the circumstances Mr Collis suggested that the Applicant should re-serve the proceedings papers by way of attachment to an email by the close of business that day. Mr Collis

further suggested that the Standard Directions be varied to provide Mr Whittingham an opportunity to file an Answer.

8.9 Mr Whittingham agreed with this approach, and he had made no objections either verbal or in writing that he had objected to being served electronically by e-mail or that he had required service by post. The Applicant duly re-served the proceedings papers on Mr Whittingham by an email sent at 4.30pm on 10 November 2022. The other Standard Directions were similarly recast to provide the parties with time to prepare for the substantive hearing, the date for which, remained 23-24 January 2023. The Tribunal sent Mr Whittingham and the Applicant a written memorandum setting out the matters discussed, agreed and all varied directions made in the hearing.

8.10 Mr Tankel explained that prior to and post the non-compliance hearing Mr Whittingham had contacted the Applicant in various e-mails asking for clarification about the proceedings and what was required of him. The procedure had been explained to him, and as late as 19 January 2023, the Applicant had been communicating with Mr Whittingham using an e-mail address which he had been using to send messages to the Applicant asking whether he was planning to attend the Tribunal and asking him to confirm whether he required the Applicant's witnesses to attend the hearing for cross-examination.

8.11 The Applicant had put Mr Whittingham on notice that if it did not hear from him by 16:30 on 19 January, it would proceed on the basis he did not require their witnesses to attend for cross-examination and the Tribunal would be asked that their evidence be taken as read.

8.12 The Applicant had also sign posted Mr Whittingham to sources of support available to him and ended the message urging him to contact the Applicant if he had any queries.

8.13 Mr Whittingham responded the same day as follows:

> *"Hello Rebekah,*
> *I do not think it is necessary for them to attend. Though I have to say, as I mentioned before, I do not know what I am supposed to be doing here, or what I need to prepare or submit.*
>
> *I also have work during the day so I wouldn't be able to attend a tribunal unless I miss work, which would come with negative consequences of course. In relation to the hearing, what will be done or decided at the hearing? As I say, I am quite lost as to what is going on here."*

8.14 Mr Tankel said that the e-mail showed clearly that Mr Whittingham had been aware of the proceedings (indeed there was evidence that he had accessed the CaseLines documents); that he did not require the witnesses to attend; that he was intending to prioritise his present employment over his responsibility to attend at the Tribunal and that he would not be making an application to adjourn and that his non-attendance before the Tribunal was voluntary.

8.15 Mr Tankel, said the response was all a piece with Mr Whittingham's conduct pre and post the issuing of the proceedings i.e., delay and obfuscation.

8.16 Mr Tankel submitted, on the information before the Tribunal, it could have little confidence that an adjournment would secure Mr Whittingham's attendance in the future. There had been no meaningful engagement from him and no application in good time from him or on his behalf to adjourn the substantive hearing.

8.17 Mr Tankel applied for the substantive hearing to proceed in Mr Whittingham's absence and he placed reliance upon the decisions in General Medical Council v Adeogba; General Medical Council v Visvardis [2016] EWCA Civ 16231 which in turn approved the principles set out in R v Hayward, R v Jones, R v Purvis QB 862 [2001], EWCA Crim 168 [2001] namely that proceeding in the absence of a respondent was a discretion which a Tribunal should exercise with the upmost care and caution bearing in mind the following factors:

- the nature and circumstances of Mr Whittingham's behaviour in absenting himself from the hearing;
- whether an adjournment would resolve Mr Whittingham's absence;
- the likely length of any such adjournment;
- whether Mr Whittingham had voluntarily absented himself from the proceedings and the disadvantage to Mr Whittingham in not being able to present their case.

8.18 It was held in Adeogba that in determining whether to continue with regulatory proceedings in the absence of the respondent, the following factors should be borne in mind by a disciplinary tribunal:-

- the Tribunal's decision must be guided by the context provided by the main statutory objective of the regulatory body, namely the protection of the public;
- the fair, economical, expeditious and efficient disposal of allegations was of very real importance;
- it would run entirely counter to the protection of the public if a respondent could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process; and
- there was a burden on all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession.

8.19 In Mr Tankel's submission the Tribunal had evidence that Mr Whittingham had been correctly served and that he was aware of the hearing date but that he had voluntarily absented himself.

The Tribunal's Decision

Adjournment

8.20 The Tribunal considered with care the submissions made by Mr Tankel and the material relating to the history of the matter and the communications passing between the Applicant and Mr Whittingham.

8.21 The Tribunal was satisfied that Mr Whittingham had been correctly served with the proceedings under Rule 13(5) Solicitors Disciplinary Procedure Rules 2019 ("SDPR 2019") and it was also satisfied that there was abundant evidence to demonstrate that he was well aware of the substantive hearing which was due to take place that day.

8.22 The Tribunal next considered whether the hearing should be adjourned. The Tribunal referred to its current Guidance Notes: Adjournments which sets out the principles to be applied in consideration of such applications under Rule 23 SDPR 2019.

8.23 The Tribunal noted that Rule 23 SDPR 2019 sets out, amongst other things, that an application for an adjournment of the hearing must be supported by documentary evidence of the need for the adjournment and that an application for an adjournment should be made in the prescribed form indicating the full reasons as to why an adjournment was being sought e.g. medical reports; and state whether the other party to the proceedings supported or opposed the application for an adjournment. The Tribunal would be reluctant to agree to an adjournment unless the request was supported by both parties or, if it was not, the reasons appeared to the Tribunal to be justifiable because not to grant an adjournment would result in injustice to the person seeking the adjournment.

8.24 In this case the Tribunal was satisfied that Mr Whittingham had been aware of the proceedings and the date of the substantive hearing since October 2022 and despite this knowledge, Mr Whittingham had chosen not to attend before the Tribunal to give an account of himself and/or be questioned. There was no application or any evidential material from Mr Whittingham to support adjourning the substantive hearing and in any event the Tribunal had no confidence that an adjournment of any length would ensure Mr Whittingham's participation and attendance.

8.25 The public expects cases to be dealt with expeditiously and the Tribunal decided not to adjourn the hearing as there was no evidence before it for it to reasonably do so.

Proceeding in absence

8.26 Having first decided on not adjourning the substantive hearing the Tribunal next considered, as a separate and distinct issue whether it should proceed in Mr Whittingham's absence.

8.27 With respect to proceeding in Mr Whittingham's absence the Tribunal was mindful that it should only decide to proceed in his absence having exercised the utmost care and caution.

8.28 The Tribunal considered the factors set out in Jones and Adeogba as to what should be considered when deciding whether to exercise the discretion to proceed in the absence of a respondent. The Tribunal noted that Mr Whittingham had been served with notice of the hearing under Rule 13(5) SDPR 2019 and the Tribunal had the power under Rule 36 SDPR 2019, if satisfied service had been affected, to hear and determine the application in his absence.

8.29 The Tribunal considered that, given the information it had been provided regarding his knowledge of that day's hearing and the indication he had given in relation to prioritising his work over attendance before the Tribunal and by implication his decision not to attend, an adjournment would not resolve his absence and there was nothing to suggest that he would attend a hearing on a future date. It was clear that Mr Whittingham had absented himself voluntarily

8.30 The Tribunal had regard to the observations of Leveson P. in Adeogba, that, whilst the principles outlined in Hayward and Jones were the starting point, it was important that the analogy between a criminal prosecution and regulatory proceedings should not be taken too far. In a criminal prosecution steps could be taken to enforce attendance by a defendant; they could be arrested and brought to court. No such remedy was available to a regulator. In determining whether to continue with regulatory proceedings in the absence of the accused, the following factors should be borne in mind by a disciplinary tribunal:- (i) the tribunal's decision must be guided by the context provided by the main statutory objective of the regulatory body, namely the protection of the public; (ii) the fair, economical, expeditious and efficient disposal of allegations was of very real importance; (iii) it would run entirely counter to the protection of the public if a respondent could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process; and (iv) there was a burden on all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That was part of the responsibility to which they signed up when being admitted to the profession.

8.31 In the light of the above, the Tribunal was satisfied that it was appropriate and in the public interest for the hearing to proceed in Mr Whittingham's absence and the Tribunal decided that it should exercise its power under Rule 36 SDPR to hear and determine the application in Mr Whittingham's absence. The Tribunal also gave due weight to the dictum of Lord Hoffmann in his judgment in Hayward and Jones that "the question is not whether the defendant has waived the right to a fair trial but whether in all the circumstances he got one"

Findings of Fact and Law

9. The Applicant was required to prove the allegations on the balance of probabilities. The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with Mr Whittingham's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 respectively of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Witnesses

10. No witnesses were called to give evidence.

Factual Background

11. Mr Whittingham was a solicitor, having been admitted to the Roll, on 15 September 2015, and he was not currently practising.

12. On 9 April 2018, he commenced employment with the Firm in their Banking and Finance team. On 20 June 2018, he was dismissed from his role during his probationary period, for reasons which are unrelated to the allegations in the Applicant's Rule 12 Statement.

The Applicant's Case

13. In or around September 2018, Mr Whittingham posted an advertisement on a website *"angelinvestorsnetwork.co.uk"* seeking investors in an investment opportunity (the Applicant did not have details of the advertisement). From the context, Mr Whittingham seemed to have been seeking to raise money in order to purchase shares in a bar or nightclub in Manchester. In or around September 2018, Mr Sobun contacted Mr Whittingham with respect to the advertisement.

14. Mr Sobun was a member of the public, who was a postgraduate student at the time of the events in question.

15. On 7 September 2018, in an exchange of WhatsApp messages, Mr Sobun asked for *"proof of employment please."*

16. Mr Whittingham replied the same day stating: "*In relation to proof of employment, I have attached two pictures of my business card for the law firm I work at. You will also see from my LinkedIn I have worked there since earlier this year."*

17. The business cards photographed and attached to the email were from his former period of employment at the Firm. They referred to Mr Whittingham as a *"solicitor"*.

18. The email and attachments of 7 September 2018 created the impression that Mr Whittingham was currently employed as a solicitor by the Firm. However, at the time of sending this email in September 2018, Mr Whittingham no longer worked at the Firm as a solicitor and had not done so since his earlier dismissal on 20 June 2018.

19. By email dated 7 September 2018 from an email address dan@w-investments.co.uk, Mr Whittingham also provided a draft loan agreement to Mr Sobun which provided as follows:

    a) Loan sum of £3,000
    b) Term: 6 months (until March 2019)
    c) Fixed sum of interest: £6,000
    d) Monthly repayments: Instalments of £1,500 from 8 October 2018 through to 8 March 2019

e) Purpose of loan:
"3.1 The Borrower shall use all money borrowed under this Agreement for purchasing shares in a limited company of his choosing.
3.2 The Lender is not obliged to monitor or verify how any amount advanced under this Agreement is used."
f) Additional interest for late payment: 5% monthly."

20. Accordingly, the investment opportunity appeared to have been for Mr Whittingham to invest £3,000 in an unspecified company entirely of his own choosing. Presumably, in agreeing to advance a loan in such circumstances, Mr Sobun was at least in part relying upon Mr Whittingham's assumed credibility as a then-employed banking and finance solicitor.

21. By bank transfer dated 8 September 2018, Mr Sobun duly provided Mr Whittingham with funds to invest.

22. Between 9 September 2018 and around 21 September 2018, Mr Whittingham sought additional investment from Mr Sobun, representing via further WhatsApp messages as follows:

a) That he had an opportunity to purchase additional shares for which he would require an additional £3,000 of investment, or less if that was not possible;

b) That he would be able to provide a 4x return on the same;

c) That there was an urgent deadline for said investment, which was then pushed back several times whilst Mr Whittingham sought additional investors.

23. By a WhatsApp message dated 11 September 2018, Mr Whittingham asked Mr Sobun if he knew of anyone else who may wish to invest, and Mr Sobun provided Mr Whittingham with contact details for Mr Luigi Mondini . By an agreement dated 19 September 2018, Mr Whittingham entered into a facility agreement with Mr Mondini which provided as follows:

"a. Loan sum of £5,000
b. Term: 6 months (until 19 March 2019)
c. Fixed sum of interest: £10,000
d. Monthly repayments: Instalments of £2,500 from 19 October 2018 through to 19 March 2019
e. Purpose of loan: *"3.1 The Borrower shall use all money borrowed under this Agreement for purchasing shares in a limited company of his choosing. 3.2 The Lender is not obliged to monitor or verify how any amount advanced under this Agreement is used."*
f. Additional interest for late payment: 5% monthly."

24. On 19 September 2018, Mr Mondini remitted £5,000 to Mr Whittingham. In WhatsApp messages between Mr Whittingham and Mr Mondini on or around 21 September 2018, Mr Whittingham said *"The return would be funding from a number of sources. Partly from my monthly salary as a lawyer, partly from the business I am investing in, partly from another business I operate in my spare time which is a luxury watch dealership."*

25. By referring to his monthly salary as a lawyer, Mr Tankel said that Mr Whittingham created the impression that he was employed as a lawyer at that time. However, at the time of sending this message, that was not the case. By referring to himself as a solicitor, Mr Whittingham intended to lend a veneer of respectability and creditworthiness to the investment opportunity.

26. The first instalment due to Mr Sobun was for the sum of £1,500 due on 8 October 2018. Mr Whittingham did not pay on that date. Instead, between 8 and 10 October 2018 he provided a number of excuses for failing to do so, including that he was taken to hospital on the repayment date and put under sedation; and that he did not have his card reader with him in hospital to be able to access his bank account.

27. On 10 October 2018, Mr Sobun started to express doubts to Mr Whittingham via WhatsApp about the veracity of the transaction.

28. By WhatsApp messages on the same date, Mr Whittingham sought to allay Mr Sobun's concerns, by amongst other things drawing attention to his LinkedIn profile once again, saying, *"we are also connected on LinkedIn, so I don't follow how you have got to that conclusion"*.

29. The first instalment due to Mr Mondini was for the sum of £2,500 due on 19 October 2018. Mr Mondini said that, around that time, Mr Whittingham started to make excuses as to why he could not pay. Mr Mondini said that, as at the date of drafting this Rule 12 Statement, he has never been paid anything by Mr Whittingham.

30. On 6 December 2018, Mr Whittingham wrote to Mr Sobun that he still had *"three sources of income, one being a salary"*.

31. In the event, on 10 and 11 October 2018 Mr Whittingham made a number of delayed payments amounting to £1,250.

32. The Applicant invited the Tribunal to consider the copy of the WhatsApp conversation between Mr Sobun and Mr Whittingham between 7 September 2018 and 14 February 2019. In the course of his conversations with Mr Sobun, when repayments fell due, Mr Whittingham made a number of excuses as to why such repayment would be delayed:

    a) That he had not received Mr Sobun's bank details;

    b) He had to make the transfer by telephone as Mr Sobun was a new payee, but the bank was closed at the time he tried to make the payment;

    c) That on 9 October 2018 he was taken to hospital overnight because he dislocated his shoulder and trapped an artery and was put under sedation; he was not allowed to use his phone from his hospital bed; he did not have his card reader with him in hospital;

    d) Various issues at the bank that meant he was unable to make the transfers. The timescale for resolving these issues was continuously pushed back;

e) He was unable to obtain bank statements from his bank to show to Mr Sobun that there was money available for repayment once the banking issues were resolved;

f) Various other means of repayment none of which came to fruition.

33. The above appear to be excuses provided by Mr Whittingham to avoid repayment. Whenever Mr Sobun asked for proof of the above, Mr Whittingham was unable to provide satisfactory evidence of the same. It is not even clear whether the investment proposed by Mr Whittingham was a genuine one.

34. On or around 22 February 2019, Persons S and M instructed a debt collection agency to collect the debt Mr Whittingham owed to them. Mr Whittingham continued to provide excuses for late payment to that agency. There is reference in the notes from the debt collection agency to Mr Whittingham purporting to make a payment of £2,500 to the debt collectors, but it is unclear on the evidence whether such payment was in fact made. In any event, even if it was paid it was much less than the amount that Mr Whittingham owed.

35. In October 2021, Mr Sobun contacted Mr Whittingham to seek further payments. He says that Mr Whittingham made seven ad hoc payments in sums of between £100 and £500 per month, adding up to £1,750 in total. Other than this, Mr Sobun and Mr Mondini say that Mr Whittingham has made no other payments. On 14 November 2018, the Applicant contacted Mr Whittingham and asked why he had advised Mr Sobun that he worked at the Firm and why his LinkedIn profile also stated that he remained employed as a solicitor at the Firm when this was not the case. Mr Whittingham answered the same day explaining that personal details only start to be shared once an investor indicates an interest and that:

> "*At this point, when details are shared, anyone would have my full name and would, in theory, be able to look me up on LinkedIn, which is what I assume happened.*
>
> *At this point, in theory, and in practice, it seems, it was viewed and interpreted that I worked at Blake Morgan. However, as I say above, that is only because I do not use LinkedIn often and never have"*

36. Later, when the Applicant asked Mr Whittingham to explain the contradiction, Mr Whittingham answered on 15 September 2020 that:

> "*It was done to give an indication of my background and my experience to show I have qualified into a professional industry and that I have experience in business, and transaction. It wasn't about overstating anything, but to give a picture that I have worked in business-, and business-related fields."*

However, this explanation does not account for the words used in the email of 7 September 2018, and was different from the explanation that Mr Whittingham had provided to the SRA on 14 November 2018.

> *"At the time you state, September 2018, I was still looking for a job as a lawyer and had a number of second round interviews. I believed these would come to*

> *fruition and even if those specific interviews didn't pan out, I would find others and get a job as a lawyer either way, at one firm or another."*

However, despite the Applicant requesting evidence of this, Mr Whittingham was unable to provide evidence of this to the Applicant, claiming that the relevant emails were contained in an old defunct email account to which it was impossible to gain access. Nor has he provided any evidence from the recruitment company through which he said he was working.

> "*In relation to the salary in December, yes I can provide information to support this."*

However, despite a request from the Applicant to provide evidence on 16 December 2020, Mr Whittingham failed to provide any bank statements to show the receipt of this payment.

The Allegations

37. The Applicant acknowledged that the four allegations relate to matters outside the course of Mr Whittingham's ordinary practice as a solicitor. In Beckwith v Solicitors Regulation Authority [2020] EWHC 3231 (Admin), the Court held (at [54]):

> *"There can be no hard and fast rule that either regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny. But Principle 2 or Principle 6 may reach into private life only when conduct that is part of a person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6). Any such conduct must be qualitatively relevant."*.

38. The conduct in question touched upon Mr Whittingham's practise of the profession and the standing of the profession in that:

a) The conduct in question involved fraudulent misrepresentations in the context of financial transactions with members of the public. A solicitor who acts in that way outside the profession would pose a significant risk of similar misconduct within the profession.

b) Conduct of this kind is a taint upon the character of Mr Whittingham, in areas (dishonesty; fraudulent financial transactions; dealing unfairly with third parties) which touch upon the course of ordinary practice as a solicitor. Because of this, and because of the risks that Mr Whittingham poses, ignoring this conduct would rightly undermine the high esteem in which the profession is held by the public.

c) The conduct also touches upon Mr Whittingham's practise as a solicitor because, on the particular facts of this case, he expressly invoked his profession as a solicitor in order to induce the financial transactions and as a way of reassuring investors when repayments were delayed.

39. **Allegations 1.1 and 1.2**

39.1 Mr Sobun asked Mr Whittingham for proof of employment. In response, Mr Whittingham sent a photograph of his Blake Morgan business card identifying himself as a solicitor, referred Mr Sobun to his LinkedIn profile which stated that he worked at the Firm, and referred in terms to the Firm as being the place *"I work at"*. He also reminded Mr Sobun of his LinkedIn profile on 10 October 2018. Mr Whittingham knew that all of this this would create the impression that he was currently employed as a solicitor by Blake Morgan, when he was not. By referring to himself as a solicitor, Mr Whittingham intended to lend a veneer of respectability and creditworthiness to the investment opportunity.

39.2 Mr Whittingham told Mr Mondini that the return on his investment would be funded in part by his monthly salary as a lawyer. This created the misleading impression that Mr Whittingham was currently employed as a lawyer. This was not the case. Mr Whittingham's intention was to induce Mr Mondini into making an investment that he might not otherwise have made.

39.3 In doing either or both of these, Mr Tankel submitted that Mr Whittingham had breached:

Principle 2

39.3.1 Mr Whittingham's actions amounted to a failure to act with integrity (i.e., with moral soundness, rectitude and steady adherence to an ethical code) in breach of Principle 2 of the SRA Principles. In Wingate v Solicitors Regulation Authority v Malins [2018] EWCA Civ 366, it was said that integrity connotes adherence to the ethical standards of one's own profession. Mr Whittingham demonstrated a lack of integrity in making representations which he knew created a misleading impression that he continued to work for the Firm when he did not. He sought to rely upon his own purported employment status, and the credibility of the solicitors' profession generally, to induce members of the public into making an investment with him.

Principle 6

39.3.2 The public would be alarmed by a person who misled members of the public into believing that he held a privileged position as a solicitor, in order to induce members of the public into making investments with him.

Outcome 11.1 (you do not take unfair advantage of third parties in either your professional or personal capacity)

39.3.3 Mr Whittingham used his status as a solicitor employed as such to obtain investments that he might not otherwise have obtained. The investors were third parties. In seeking to induce them to make investments in reliance upon false representations, Mr Whittingham took unfair advantage of these third parties.

40. **Allegation 1.3**

40.1 Mr Whittingham knew that, in response to a request for proof of employment, he had directed Mr Sobun to his LinkedIn profile, and that his LinkedIn profile showed that he was currently employed by the Firm. When asked by the Applicant, he said that he assumed that Mr Sobun must have looked up the LinkedIn profile for himself, and that the profile was unintentionally out of date because he did not use it often. This was approximately one month after the events in question, when the matter will have still been fresh in Mr Whittingham's mind. Mr Whittingham intended to create the impression that this had happened outside of his control, and without him knowing, when in fact he had brought it about himself. In so doing, he breached:

Principle 2

40.1.1 Anyone with integrity would respond as accurately as they were able to investigations by their regulator. By contrast, Mr Whittingham had sought deliberately to mislead his regulator.

Principle 6

40.1.2 The public would find it reprehensible that a solicitor should have misled his regulator deliberately.

Principle 7

40.1.3 Mr Whittingham was required to deal with his regulator in an open and co-operative manner. By withholding from the Applicant that it was he who had directed Mr Sobun to his LinkedIn profile, and indeed by creating the impression that Mr Sobun accessed it on his own, when he knew otherwise, Mr Whittingham had failed to be open or co-operative.

41. **Allegation 2: Dishonesty**

41.1 The Applicant relied upon the test for dishonesty set out by Lord Hughes in the Supreme Court in Ivey v Genting Casinos [2017] UKSC 67, which is:

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

41.2 Mr Tankel submitted that on any or all of the three occasions identified in each of the Allegations, Mr Whittingham made representations which he knew to be false. He did so with the intention of inducing a member of the public into making an investment

with him (in relation to Allegations 1.1 and 1.2) and seeking to escape blame for the same from his regulator (in relation to Allegation 1.3).

41.3 Ordinary decent people would regard lying in order to obtain an investment, or in order to avoid blame, to be dishonest.

42. The Respondent's Case

Note: The Tribunal approached this, and all the other allegations on the basis that they were denied by Mr Whittingham.

42.1 Mr Whittingham had not served an Answer to the allegations. His precise position, therefore, with respect to the allegations was unknown and the Tribunal could only determine what his case may have been from the available information contained within the bundle.

42.2 In an e-mail from Mr Whittingham dated 19 August 2020 at 09:06 to the Applicant he set out:

> *"Good morning, Thank you for your email. I would like to reiterate; I still regret and profusely apologise to [Mr Sobun] for the way this transaction unfortunately unfolded. I am still working to pay him his interest in full, after already make several payments.*
>
> *There was never an intention from me to be dishonest and I am trying to remember more details about dates to see where things could have overlapped. As I say though, there was never a dishonest intention. I only wanted to engage in a professional business transaction, which benefitted the investor. As was hopefully demonstrated by from the facility agreement and its thoroughness, I always set out to conduct a professional and proper business transaction. Despite the difficulties I later encountered I always set out to conduct a professional transaction which would benefit [Mr Sobun] and I am still working to do that so that, overall, despite the delay, he still makes a financial gain. In large part because of this experience, I took the decision to not seek further employment in the legal profession, and I will not do so for the rest of my career. Essentially because this transaction did not go according to plan and it has caused such inconvenience for [Mr Sobun].*
>
> *To sum up, I am full of regret that this transaction became complicated and didn't go to plan - though I still fully intend to rectify that and, indeed, that is what I continue to work towards now. I have experienced considerable financial difficulty in the past few years since, and that is why I haven't been able to conclude this matter yet in a manner [Mr Sobun] is content with. But I will still make that happen so he is content. My aim was always, simply, to take on a relatively small amount of investment and repay it on fixed upon dates at a profit to the investor. That was always my intention and I feel very badly that this didn't go to plan and has inconvenienced the inventory."*

42.3 In an e-mail to the Applicant from Mr Whittingham sent on 14 December 2020 at 15:00 Mr Whittingham stated the following:

"Thank you for your email. Naturally, I would like to proceed with an internal sanction rather going further, so I endeavour to provide information to do that. At the time you state, September 2018, I was still looking for a job as a lawyer and had a number of second round interviews. I believed these would come to fruition and even if those specific interviews didn't pan out, I would find others and get a job as a lawyer either way, at one firm or another.

Since you sent your last email, I have been trying to retrieve the emails with a legal recruiter to demonstrate as much. The email address I was using at the time is no longer in service and I have encountered delays with LCN (the provider) in trying to retrieve them. I am told it is possible, so those emails will be available to you soon, it is just a delay in hearing back from LCN with the required information.

I will get the information to demonstrate I was in touch with recruiters to get a job as a lawyer because they statement, I made which you refer to was made because I would be getting a job as a lawyer and then indeed pay him that way. In relation to the salary in December, yes I can provide information to support this.

In regard to what is acceptable to you, I have an invoice for this, though I would point out it is a simple invoice which I generate myself, with my name, address, amount and the company who paid it. Is this sufficient or do you also require me to provide evidence of the transaction going into my bank account I can also provide this, I am just checking what is required, I have spoken to [Mr Sobun] a couple of times every 2-4 months or so, when I have asked if he would like me to pay him directly or pay the collection agency he is using and he has informed me he would like me to continue paying the collection agency.
My next payment to them will be in two days' time, from now. Please let me know if there is anything else I can provide in addition to the above so we can hopefully close this matter with an internal sanction. I look forward to your response on what you would like me to provide in relation to the payments I was receiving, and I will send the recruiter emails as soon as I have access to them in my old (now deleted from my laptop and phone) email account.

Thank you and kind regards, Daniel."

42.4 An e-mail to the Applicant sent at 15:16 on 17 February 2021:

"*Thank you for your agreement to this. I have attached some screenshots of payments into my account over a number of months. This was not work from a law firm, this was a different industry.*

The interviews I had with two law firms (via the recruiter I mentioned in my last email) went to third interview stage, and at this point everything looked very promising. Then, essentially in both cases, I learned that they had another final candidate who had essentially the same experience as me but they had been working in the industry continuously (whereas I had around an 18 month break from law whilst working on another venture, which many firms valued because of the variety of experience it gave me, however in the end they decided to go

with the other candidate because they hadn't had a break and, therefore, and more recent legal experience (i.e. hadn't had a break from the industry).

So, the emails I refer to were going to show I was pursuing legal employment and was making serious headway in this regard, giving me plausibility to say I would have a legal salary, because it was at the same time I was talking me [Mr Sobun]. After the firms went with the other candidates for the above listed reasons, this is when I included looking in other industries in my search, again to ensure that I would receive an income to pay [Mr Sobun], even if it wasn't my first choice of industry.

In order to do this, I initially worked with no pay for the business, basically because they didn't actually have a position open, so I wanted to try to demonstrate my worth so they would create a position which, after a couple of months of me working for them, they then did. I took up the alternative employment (which the screenshots of payments show) to ensure I had income coming in.

Kind regards, Daniel."

42.5 In an e-mail from Mr Whittingham sent on 1 April 2022 at 15:20 to the Applicant Mr Whittingham set out what appeared to be his core submission of denial:

"… I would like to submit that this was always an honest transaction, in that the investment was taken with honest purposes, and with an honest intention to repay both the investment and the interest as was agreed by both parties at the outset. I think where the issue came from is that I said that I would be repaying the monies from a legal salary, which I absolutely believed to be the case at the time, because I believed I would be working as a lawyer for the foreseeable future. This was because my intention at the time was to remain in the legal industry working as a solicitor, and I took steps to do this.

Therefore, I was expressing to the other party that there would be a reliable salary used to repay his monies, and that salary would come from working as a solicitor. I was attending interviews at the time to look for roles in the legal industry and attended many second and third stage interviews at the time of our discussions, so I was fully expecting to have a legal salary there to be used to repay the monies, whether it was with one of the firms I was at the time attending final stage interviews for or elsewhere. Shortly after this my personal circumstances changed rather drastically, which meant pursuing the legal route didn't happen, however, this absolutely was not known at the time of discussions with [Mr Sobun].

At the time of those discussions, I fully and completely expected to have a legal salary to use to repay him. Which is why I said to him that is where the repayments would come from. I have expressed many times since to [Mr Sobun] that I sincerely regret causing not just a delayed repayment but the inconvenience which surrounds that. I have reiterated many times my remorse and that I will make it right with him to the extent that he is content with the outcome. I remained in contact with him throughout the time which followed to

ensure he knew I would repay everything and to ensure he knew I was full of regret for how this inconvenienced him and caused him trouble. That is still how I feel about that of course. And I remain of the view that I will stay in contact with him until I have given enough value back to him that he is in a position where he is, perhaps not 'happy', but content with how things are left because I will have gone over and above to rectify things with him. I realise now I should have communicated much better and much clearer with him at the time.

I am thankful for his patience and understanding at what was a very difficult time for me, personally and financially, and I think he is open to working with me until I can indeed put him in a position where he is content with the outcome and we can part ways on good terms. I believe that outcome - putting him in a position where he is content and happy with how we leave things so we can part on good terms - is the best I can do now for him, and therefore that is what I will do. I will make sure I go over and above to make him happy with the final outcome, despite the drawn-out process."
Kind regards, Daniel."

43. The Tribunal's Findings

43.1 The burden of proof was on the Applicant, which was required to prove its case on the balance of probabilities.

43.2 Mr Whittingham had not engaged in the proceedings and had not made himself available to be cross-examined.

43.3 Under rule 33 of the SDPR 2019 where, as in this case, a Respondent had failed to send or serve an Answer in accordance with a direction under rule 20(2)(b) or failed to give evidence at a substantive hearing or submit himself to cross-examination the Tribunal was entitled to take into account the position that the Respondent had chosen to adopt and to draw such adverse inferences from his failure as the Tribunal considered appropriate and the Tribunal considered it appropriate to draw an adverse inference from such failure.

43.4 The Tribunal relied on the extensive documentary evidence which had been presented for its consideration, in particular contemporaneous evidence in the form of e-mails and WhatsApp messages between Mr Whittingham and Mr Sobun and Mr Mondini and the later explanations given by Mr Whittingham to the Applicant.

43.5 The Tribunal found that Mr Whittingham had abused his status as a solicitor in order to gain the trust of Mr Mondini and Sobun, so that he could dupe and take advantage of them.

43.6 Findings re: Allegation 1.1 & Allegation 1.2

43.6.1 The Tribunal found that, notwithstanding Mr Whittingham's later explanations of his conduct to the Applicant, the issue was a straightforward one of fact. At the time Mr Whittingham had been engaging Mr Sobun in his putative investment opportunity Mr Whittingham had already been dismissed by the Firm and he no longer worked for it.

43.6.2 The words set out in his response to Mr S for proof of employment were unambiguous in asserting the status of his employment: *"I have attached two pictures of my business card for the law firm I work at. You will also see from my LinkedIn I have worked there since earlier this year"*

43.6.3 The proffering of the old business cards and the subsequent words written to Mr Sobun, in the present tense and within the context of the discussions between Mr Whittingham and Mr Sobun could only be read one way i.e., that Mr Whittingham was asserting that he was a solicitor at the Firm when he knew full well that he was not.

43.6.4 This was no mere '*advertising puff',* it was a representation of fact designed to deceive.

43.6.5 With respect to Allegation 1.2, Mr Whittingham had given Mr Mondini an unequivocal assurance that the repayments would be funded in part from his monthly salary as a solicitor. There was nothing in his statement to suggest the payments were contingent upon future employment as a solicitor and the implication was that Mr Whittingham was saying that Mr Mondini could take assurance from the fact that he was a solicitor at the Firm and in receipt of a regular salary from the Firm.

43.6.6 The obvious inference to be drawn was that Mr Whittingham pretended that he was still a solicitor at the Firm in order to bolster his credibility and to garner the confidence of Mr Sobun and Mr Mondini to persuade them to part with their money and invest in Mr Whittingham's scheme.

43.6.7 The Tribunal then considered whether on the basis of its factual findings the Respondent had breached any, or all, of Principles 2, 6 and Outcome 11.1 of the SRA Code of Conduct.

43.6.8 The Tribunal considered that by misleading Mr Sobun and Mr Mondini, Mr Whittingham had clearly demonstrated a lack of integrity and breach of Principle 2 of the Principles 2011.

43.6.9 As defined in Wingate and Malins integrity '*connotes adherence to the ethical standards of one's own profession'* and whilst Mr Sobun and Mr Mondini had not been clients, they had trusted in Mr Whittingham because he was a solicitor and had, therefore, believed that he would be open and transparent in his dealings with them. Mr Whittingham had abused that trust and damaged public confidence in the profession.

43.6.10 Mr Whittingham's conduct amounted to an egregious breach of Principle 6 of the Principles 2011 and Outcome 11.1 *(you do not take unfair advantage of third parties in either your professional or personal capacity)* as it was clear that deliberately presenting a misleading version of the facts to obtain money from another person would diminish the trust the public placed in him and in the provision of legal services.

43.6.11 The Tribunal found Allegations 1.1 and 1.2 proved to the requisite standard of proof, namely on the balance of probabilities and that Mr Whittingham had breached Principles 2 and 6 of the Principles 2011 and had failed to attain Outcome 11.1.

43.7 Findings re: Allegation 1.3

43.7.1 Mr Whittingham directed Mr Sobun to his LinkedIn profile, in order to dupe Mr Sobun into believing that Mr Whittingham was still a solicitor at the Firm, since his LinkedIn profile showed that he was currently employed by the Firm.

43.7.2 The Tribunal did not find credible Mr Whittingham's explanation, given to the Applicant that he assumed that Mr Sobun must have looked up the LinkedIn profile for himself, and that the profile was unintentionally out of date because he did not use it often.

43.7.3 Mr Whittingham had breached Principle 2, as a solicitor of integrity would respond as accurately as they were able to investigations by their regulator. Mr Whittingham had, instead, deliberately attempted to mislead his regulator.

43.7.4 The Tribunal also found that Mr Whittingham had breached Principles 6 and 7 and that the public's trust in him and the profession would be damaged by a solicitor who misled their regulator and one who did not deal with their Regulator in an open and co-operative manner. By withholding from the Applicant that it was he who directed Mr Sobun to his LinkedIn profile, and by creating the impression that Mr Sobun accessed it on his own, when he knew otherwise, Mr Whittingham had, clearly, failed to be open or co-operative.

43.7.5 The Tribunal found Allegation 1.3 proved to the requisite standard of proof, namely on the balance of probabilities and that Mr Whittingham had breached Principles 2, 6 and 7 of the Principles 2011.

43.8 Tribunal's Findings re: Allegation 2: Dishonesty

43.8.1 Having found the factual matrix in Allegations 1.1, 1.2 and 1.3 proved to the requisite standard, namely on the balance of probabilities, the Tribunal considered whether Mr Whittingham had acted dishonestly in each of those allegations.

43.8.2 When considering the allegations of dishonesty, the Tribunal applied the test in Ivey, set out at paragraph 41.1 above.

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

- secondly, once the actual state of Mr Whittingham's knowledge or belief as to the facts had been established, the Tribunal considered whether his conduct would be thought to have been dishonest by the (objective) standards of ordinary decent people.

43.8.3 The Tribunal considered Mr Whittingham's state of knowledge at the material times. This exercise was undertaken in the absence of any significant input from Mr Whittingham which may have assisted the Tribunal in determining any rationale or context not immediately obvious with respect to Mr Whittingham's state of knowledge.

43.8.4 The Tribunal found that Mr Whittingham would have known that the representations he had made in each of the Allegations, 1.1, 1.2 and 1.3 were precise and that he had left no room for misinterpretation. Mr Whittingham knew when he made the statements that he was not employed by the Firm or in receipt of a monthly salary from his employment as a solicitor with the Firm. He would have known therefore that the statements he made were untrue and misleading. With respect to Allegations 1.1 and 1.2 he made the misrepresentations with the intention of inducing members of the public into making an investment with him and seeking to escape blame for the same from his regulator in relation to Allegation 1.3.

43.8.5 The Tribunal found that ordinary decent people would regard lying in order to obtain an investment, or in order to avoid blame, to be dishonest.

43.8.6 The Tribunal noted that there were no character references, or any other material put forward by Mr Whittingham as evidence of his good character and/or lack of propensity to be dishonest which could be weighed in the balance before reaching a decision on dishonesty. Therefore, in the light of its factual findings and its conclusions in relation to Mr Whittingham's knowledge the Tribunal was satisfied on the balance of probabilities that Mr Whittingham had been dishonest.

43.8.7 Dishonesty in relation to Allegations 1.1, 1.2 and 1.3. were proved on the balance of probabilities.

Previous Disciplinary Matters

44. There were no previous findings.

Mitigation

45. No mitigation was advanced by Mr Whittingham.

Sanction

46. The Tribunal first had regard to the observation of Sir Thomas Bingham MR (as he then was) in Bolton v Law Society [1993] EWCA Civ 32 that the fundamental purpose of sanctions against solicitors was:

> *"to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth".*

47. The Tribunal next considered the Guidance Note on Sanction (10th Edition, June 2022) ("the Sanctions Guidance"). In doing so the Tribunal assessed the culpability and harm identified together with the aggravating and mitigating factors that existed.

48. In assessing culpability, the Tribunal found that the motivation for Mr Whittingham was avarice. In the pursuit of money and financial gain he had knowingly made false representations to dupe two members of the public.

49. Mr Whittingham's actions were not spontaneous, on the contrary, he had pursued a considered and calculated path of conduct and he had had direct control and responsibility for the circumstances giving rise to his misconduct.

50. The Tribunal considered that the Respondent had misled the Regulator in that he had not been open with the Regulator and had given obfuscating answers to the questions it had asked of him.

51. Overall, the Tribunal assessed the Respondent's culpability as very high.

52. The Tribunal next considered the issue of harm. There was evidence of direct harm to Mr Sobun and Mr Mondini. Neither had been sophisticated investors and both had trusted Mr Whittingham at his word. Both had experienced financial loss and personal stress as a result of their interactions with Mr Whittingham.

53. The consequential damage to the reputation of the profession by Mr Whittingham's misconduct was significant. His conduct had fallen very far short of the standard required of a solicitor, as expressed by Sir Thomas Bingham MR (as he then was) in Bolton, which required a solicitor to be capable of being "*trusted to the ends of the earth".*

54. Mr Whittingham's conduct was a significant departure from the complete integrity, probity and trustworthiness expected of a solicitor.

55. The extent the harm was reasonably and entirely foreseeable by Mr Whittingham who had had a clear knowledge of his actions.

56. The Tribunal assessed the harm caused as very high.

57. The Tribunal then considered aggravating factors. The Tribunal, in its finding of fact, had found that the Respondent had acted dishonestly and that he had given deliberately evasive answers to the Regulator.

58. Mr Whittingham's actions had been deliberate and calculated and it had involved two separate individuals. These events occurred in 2018 and it was still unclear how much of the monies advanced by Mr Mondini and Mr Sobun had been repaid to them by Mr Whittingham.

59. He had grossly abused his position as a solicitor.

60. The Tribunal considered there were very few mitigating factors but noted that the Respondent had no previous disciplinary findings recorded against him and that he had had a hitherto unblemished career.

61. There was no evidence of any genuine insight, no open or frank admissions and no meaningful co-operation with his regulator – quite the converse as Mr Whittingham had sought to mislead his regulator.

62. In the Judgment of the Divisional Court in SRA v Sharma [2010] EWHC 2022 (Admin) it had been held that:

> *"save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll….that is the normal and necessary penalty in cases of dishonesty... There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances… In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary… or over a lengthy period of time …whether it was a benefit to the solicitor, and whether it had an adverse effect on others."*

63. It was clear that there were no exceptional circumstances within the meaning of Sharma in this case.

64. The only appropriate sanction was for Mr Whittingham to be Struck Off the Roll

65. The profession has no place for dishonest solicitors.

Costs

66. Mr Tankel said the quantum of costs claimed by the Applicant was in the sum of £22,800.00.

67. He submitted that the proceedings had been correctly brought by Applicant and it was right that it should recover its costs in doing so. The hours claimed by the Applicant were not excessive and were reasonable and proportionate in the circumstances of the case and that the Applicant was entitled to its costs.

The Tribunal's Decision on Costs

68. Having listened with care to the submissions made by Mr Tankel with respect to costs the Tribunal considered that it was able to assess costs summarily.

69. The Tribunal noted the following factors:

- the facts were straightforward and there were no complex legal issues;
- the substantive hearing had taken less time than anticipated: less than a day instead of two days;
- Mr Whittingham had not attended the hearing;
- there had been no witnesses;
- it did not require counsel of Mr Tankel's call to draft the Rule 12 Statement.

70. The Tribunal assessed the costs payable by the Respondent in the sum of £5,000.00.

Statement of Full Order

71. The Tribunal Ordered that the Respondent, DANIEL WHITTINGHAM, solicitor, 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 £5,000.00.

Dated this 20th day of February 2023
On behalf of the Tribunal

A Ghosh
Chair