SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12600-2024

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD Applicant

and

TEACHER STERN LLP First Respondent

CLAIRE ROLLO Second Respondent

SACHA IAN RIFKIN Third Respondent

Before:

Mr G Sydenham (in the Chair)
Mrs A Sprawson
Ms L Hawkins

Date of Hearing: 19-22 November 2024
And
27 January 2025

Appearances

Matthew Edwards, counsel in the employ of Capsticks, 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant.

James Counsell KC, counsel of The Outer Temple 222 Strand, London, WC2R 1BA,instructed by Capsticks, 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant. [Costs only]

Marianne Butler, counsel, of Fountain Court Chambers, instructed by Kinglsey Napley of 20 Bonhill St, London EC2A 4DN, for the First and Third Respondents.

Giles Wheeler KC, counsel, of Fountain Court Chambers instructed by Weightmans LLP, 105 Fenchurch Street, London, EC3M 5JG, for the Second Respondent.

JUDGMENT

Allegations

First Respondent

Allegation 1

1. The allegations made by the SRA against the First Respondent, Teacher Stern LLP ("the Firm"), are that, between 21 December 2014 and 14 April 2016, in respect of one or both of the matters identified in Appendix 1 to the Rule 12 statement, caused or allowed payments to be made from the Firm's client account in circumstances other than in respect of instructions relating to an underlying transaction being undertaken by the Firm and the funds arising therefrom or in respect of the delivery by the Firm of a service forming part of its normal regulated activities.

   AND THAT, in doing so, it breached

1.1 Rule 14.5 of the SRA Accounts Rules 2011 ("the SAR 2011");
1.2 Principle 6 of the SRA Principles 2011 ("the 2011 Principles"); and
1.3 Principle 8 of the 2011 Principles.

Respondent 2

Allegation 2

2. The allegations made by the SRA against the Second Respondent, Claire Rollo, are that, between 29 January 2014 and 14 April 2016, in respect of one or both of the matters identified in Appendix 1 to the Rule 12 statement, caused or allowed payments to be made from the Firm's client account in circumstances other than in respect of instructions relating to an underlying transaction being undertaken by the Firm and the funds arising therefrom or in respect of the delivery by the Firm of a service forming part of its normal regulated activities.

   AND THAT, in doing so, she breached

2.1 Rule 14.5 of the SAR 2011;
2.2 Principle 2 of the 2011 Principles;
2.3 Principle 6 of the 2011 Principles; and
2.4 Principle 8 of the 2011 Principles.

Recklessness

2.5 In addition, allegation 2 is advanced on the basis that the Second Respondent's conduct was reckless. Recklessness is alleged as an aggravating feature of the Second Respondent's misconduct but is not an essential ingredient in proving the allegations

Respondent 3

Allegation 3

3. The allegations made by the SRA against the Third Respondent, Sacha Ian Rifkin, are that, on or about 21 January 2014, in respect of one matter identified in Appendix 1 to the Rule 12 statement, caused or allowed payments to be made from the Firm's client account in circumstances other than in respect of instructions relating to an underlying transaction being undertaken by the Firm and the funds arising therefrom or in respect of the delivery by the Firm of a service forming part of its normal regulated activities.

AND THAT, in doing so, he breached:

3.1 Rule 14.5 of the SAR 2011;

3.2 Principle 6 of the 2011 Principles; and

3.3 Principle 8 of the 2011 Principles.

Executive Summary

4. On 15 October 2020, the Firm made a report to the SRA relating to payments made from its client bank account which may not have directly related to any underlying legal work.

5. The report concerned historical matters in respect of which the Firm acted for a company called Client B between 2014 and 2016.

6. The case before the Tribunal concerned a detailed and extensive exploration of Rule 14.5 SAR 2011, its origin, evolution and how it was understood by the profession upon introduction and at the time of the alleged misconduct.

7. The Tribunal found the evidence presented to it by the Applicant did not meet the requisite standard of proof, i.e. the balance of probabilities and it dismissed all the allegations against all Respondents.

8. The Tribunal adjourned the matter to 27 January 2025 and directed written submissions on costs.

The Facts can be found here
The Applicant's Case can be found here
The Respondents' Cases can be found here
The Tribunal's Findings can be found here.
The Tribunal's Decision on Costs can be found here

Documents

9. The Tribunal considered all the documents in the case, which were contained within an agreed electronic hearing bundle.

Preliminary Matters

10. Anonymity

10.1 The Tribunal granted an unopposed application made by Mr Edwards for the anonymisation of clients subject to Legal Professional Privilege (LPP) and other related persons and entities to prevent jigsaw identification of those protected by LPP.

11. Application to amend the Rule 12 Statement dated 10 May 2024

11.1 The Applicant applied to make amendments to the Rule 12 Statement 12 under Rule 24 Solicitors (Disciplinary Proceedings) Rules 2019 (SDPR).

11.2 This application was essentially in two parts.

11.3 Part 1 related to matters as to the Second Respondent's conduct and made in the light of the receipt of the Second Respondent's witness statement filed on 18 October 2024 in accordance with the Standard Directions.

11.4 Part 2 related to issues which the Applicant had set out in its Reply to the Respondents' Answers and which it now wished to 'consolidate' into its Rule 12 statement.

Part 1

11.5 The Second Respondent set out her understanding that all payments in relation to consideration for shares and shareholder loans were proper payments for a solicitor to make being sufficiently connected to the underlying provision of regulated legal services such that they were not made in breach of the rules, principles or code of conduct.

11.6 The Second Respondent averred that as to Client A all payments to the NS Trust Account were proper payments accounting to the client's nominated account; all payments of loans related to the pre completion running costs of Asset C and/or the Shareholder Receivable were proper payments in connection with the financial warranties and Disclosure Letter anticipated and indeed required by the share purchase agreement (SPA).

11.7 Mr Edwards said that evidence was first considered by the Forensic Investigation Officer in this matter on 7 November 2024, following her return from a career break/sabbatical. The completion of her review was delayed by the FIO's period of sick leave between 8 November and 13 November 2024. However, upon full consideration of this evidence the position taken by the Applicant was that it would not be appropriate to rely on several of the identified transactions that form part of the allegations.

11.8 The amendments to the Rule 12 statement were therefore largely made to align with the Second Respondent's version of events and additional amendments to the Rule 12 statement were to be made to clarify areas which were said to be unclear.

11.9 It was submitted that there could be no unfairness or prejudice to the Respondents in making these amendments because if the application was granted then the case as

pleaded in the Rule 12 statement would be reduced in seriousness and reduce the number of questionable transactions from 23 to 4 and bring the total figure regarding Client A from c.£9 million to c. £0.5 million.

11.10 It was said the amendments were based on the Second Respondent's own evidence made in open correspondence via her legal representatives.

11.11 The Applicant also wished to amend paragraph 72 of the Rule 12 Statement, describing how her conduct represented a lack of integrity to remove a reference that she *"was aware that she was in breach of the SAR 2011"* to simply that she was *"aware of the SAR 2011."*

11.12 This part of the application was not opposed by the Respondents.

The Tribunal's Decision

11.13 Notwithstanding the difficulties encountered by the FIO the Tribunal observed that the application was being made very late i.e. on the first day of the substantive hearing and set out in a written document served on 15 November 2024, i.e. the Friday before the hearing was due to commence.

11.14 However, as the Applicant had quite properly reviewed the scope of its case against the Second Respondent, based upon new material it accepted as being genuinely explanative, the Tribunal granted this part of the application. There was no obvious injustice to the Second Respondent or any other party. It was evident that by its own application the Applicant now conceded that the prospects of success on the relevant transactions was limited, and the Tribunal directed the Applicant to make the necessary amendments to the Rule 12 statement.

Part 2

11.15 Mr Edwards next applied to incorporate the contents of the Applicant's Reply dated 24 July 2024 into its Rule 12 Statement in order to 'consolidate' and 'streamline the case'.

11.16 In its Reply the Applicant advanced a case against First and Second Respondent as to a breach of Principle 6 based on (a) the significant time period over which the Rule 14.5 breach occurred; and (b) the scale of the transactions.

11.17 With respect to the Third Respondent the Applicant wished to put its case that he authorised the single transaction four days after he acknowledged an email from the Second Respondent which alerted him to the fact that transactions that were being authorised on behalf of the client was *"like being a bank for all our clients"*. In authorising the transaction four days later he did so in the ***knowledge*** (emphasis added), or at the very least he ought to have known, that the transaction was in breach of Rule 14.5 of the Solicitors Accounts Rules 2011 (SARs). To do so created a risk of the client account being used for fraud or insolvency which risked harming the reputation of the profession.

11.18 The Tribunal was referred to the decision in *Bittar v Financial Conduct Authority [2017] UKUT 82 (TCC)*, wherein it was decided that amendments to pleadings were permitted in circumstances where the amendment went to the Respondent's actual knowledge of the impropriety. Also, the case of *Nna v Health Care Professions Council [2018] EWHC 2967 (Admin)* where the Appellant appealed an allegation which had stipulated a figure (£9,200) in respect of which dishonesty was alleged, on the basis that the evidence in the case in fact related to a different figure (£12,000). It was said in that case that a professional disciplinary committee was entitled to allow necessary amendments to the allegations before it, even in some cases, after the evidence had been heard, provided that it is not unfair to make the amendment, and that there can be a finding adverse to the practitioner on the basis of such an amended allegation.

11.19 This part of the application to amend the Rule 12 statement, which applied to paragraph 77 onwards, was opposed by all the Respondents who adopted each other's submissions on the point without demur.

11.20 Collectively, it was their position that this application did not relate to fresh evidence but was a mere re-assessment of information known to the Applicant for over 4 years. Whilst this had formed some part of the Applicant's case earlier in the investigatory process it had long since been discarded and the Respondents, particularly the Third Respondent, had prepared their respective cases on the basis of the Applicant's case as put in its Rule 12 Statement dated 10 May 2024. Each Respondent had a legitimate expectation that this would be the case they would have to meet at the substantive hearing, and each had prepared their cases accordingly.

11.21 It was specifically unacceptable and unfair for the Applicant to apply at such a late stage to resurrect aspects of its case in relation to the Third Respondent via its Reply, with respect to allegations it had properly discounted as having no reasonable prospect of success.

11.22 The proposed amendments were flawed and wrong in law. The threshold test as approved in *Leigh-Day [2018] EWHC 2726 (Admin)* was whether the breach is sufficiently serious/reprehensible and culpable and concerns the nature of the solicitor or firm's conduct.

11.23 It was not accepted as a matter of principle that any unintentional and unwitting breaches of Rule 14.5 by the Respondents would in fact damage the trust that the public places in solicitors and in the provision of legal services. That point was reinforced by the circumstances in which any breaches took place. Here, in a context in which it was common ground between the Respondents that any breach was unintentional and unwitting (i.e. there was no awareness that the Firm was breaching Rule 14.5 and there are no aggravating features identified as to the context in which that conduct took place), the fact that the same unintentional and unwitting breach was repeated over a period of time could not as a matter of principle transform the conduct from an innocent (or negligent even) error into conduct that was sufficiently serious, reprehensible and culpable to constitute a breach of Principle 6.

11.24 Second, even if the Applicant could prove that significant sums of money were withdrawn from the client account, that could not as a matter of principle transform the conduct from an unintentional and unwitting one in the absence of any warning

signs/aggravating features into a breach that is capable of constituting a breach of Principle 6. It was an inherent feature of the Firm's business that the underlying transactions were high value, complex transactions with the result that, if the Firm did unintentionally and unwittingly breach Rule 14.5, it would necessarily follow that large sums of money would be involved. The value of the breaches could not have a bearing on the seriousness or culpability of the conduct concerned.

11.25 Regarding the amendments the Applicant had been permitted to make, its case on lack of integrity in relation to the Second Respondent could now not be supported as mere knowledge of the SAR was not sufficient to form the basis of a breach of this or any of the SRA Principles.

11.26 To permit the further amendments would be contrary to natural justice and fair play in action. The Applicant had known its own case for nearly four years and to change it overnight before the first day of the substantive hearing was unacceptable and should not be allowed by the Tribunal.

The Tribunal's Decision

11.27 The Tribunal refused this part of the application as it was made without a proper basis and too late.

11.28 The Respondents had conducted themselves reasonably in meeting the Applicant's case as it had been pleaded until the day of trial and it would be unfair to permit the Applicant to change how it was to put its case at this very late stage.

11.29 This was not a minor drafting change to the allegations representing a 'streamlining' of the Applicant's case as suggested by Mr Edwards but the re-introduction of allegations relating to conscious knowledge of the breaches on the Respondents' part.

11.30 In the case of the Second Respondent this aspect of the case had been removed upon the Applicant's own application (Part1) and in the case of the Third Respondent this was an attempt to resurrect a more serious allegation which had been discarded by the Applicant at an earlier stage, no doubt following a review of the evidence.

11.31 Given that there had been no change in the account given by the Third Respondent since that time and no further evidence against him, the proposed amendment lacked any real basis. The Tribunal had been urged by Mr Edwards to permit the amendment by viewing matters *'through the scope of the Principle 2 and Principle 6 breaches'* and by placing a particular interpretation on the e-mails passing between the Second and Third Respondent. The Tribunal did not follow this line of reasoning as an argument to authorise the amendment sought by the Applicant given that these were issues upon which the Applicant's case was already founded absent amendment. It did not advance the Applicant's application.

11.32 The Tribunal saw no contradiction in its decisions made on Parts 1 and 2 of the Applicant's application to amend the Rule 12 statement. In Part 1 the application raised no issues of undue prejudice to any party whereas the Part 2 application represented 'a dialling up' of the seriousness of the allegations to be met by the Respondents absent any new or additional evidence to justify this step in the interests of justice. If permitted,

this would have been unfairly prejudicial to the Respondents who had had no opportunity to address the points raised in the depth required or within their skeleton arguments.

11.33 Having made its decisions, the Tribunal gave the parties time to review their respective positions to consider whether any agreement could be reached. In the event, no agreement was reached and the substantive hearing resumed.

Factual Background

First Respondent

12 The Firm is a limited liability partnership (LLP) and a recognised body authorised for all legal services. It has circa 68 regulated people in the organisation. The Firm practises in the following areas: Immigration; Property Commercial and Residential; Commercial/Corporate Work for Non-Listed Companies and Other; Employment; Litigation; Probate and Estate Administration; Landlord and Tenant (Commercial and Domestic); Wills, Trusts and Tax Planning.

13. The total UK turnover from its last complete accounting period was approximately £14,896,968.41.

Second Respondent

14. She was admitted as a solicitor on 1 February 1993. She holds a current Practising Certificate, free from conditions. At all material times she was a partner in the Firm's Corporate and Commercial Team.

Third Respondent

15. He was admitted as a solicitor on 2 November 1998. He holds a current Practising Certificate, free from conditions. At all material times he was a partner in the Firm's Property Team.

16. On 15 October 2020, the Firm made a report to the SRA relating to payments made from its client bank account which were not directly related to any underlying legal work. The concerns were brought to the attention of the Firm by Jones Day Solicitors.

17. The report concerned a historical matter in respect of which the Firm acted for a company, Client B between 2014 and 2016. The Firm advised Client B on the issue of loan notes by Client B under a subscription agreement. Client B was the borrower in the transaction; the Lender was represented by Jones Day. The Firm's Euro client account was the designated account for receipt of payments made by the Lender to Client B. Payments were credited to the Firm's Euro client account and then paid out by the Firm, as instructed by Client B, to the Firm for fees invoiced relating to the transaction, Client B and third parties during the period June 2014 to August 2016.

18. Following the Firm's report, the SRA commissioned its own forensic investigation. This commenced on 18 January 2021 and ultimately resulted in a detailed report dated 22 December 2021 together with supporting appendices. During the investigation, the

SRA's Forensic Investigation Officer, ("the FIO"), discovered a further client matter in which payments were made from the Firm's client bank account which were not directly related to any underlying legal work. The Firm's client in this matter was Client A, a company incorporated in the British Virgin Islands.

19. The total value of transfers identified as not directly relating to underlying legal work on each client matter was as follows:

- Client A - £591,507.28 and
- Client B - €23,563,782.53

Tribunal's use of evidence in this judgment

20. The written and oral evidence of witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the oral evidence of all witnesses. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

Findings of Fact and Law

21. 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 the Respondent's right to a fair trial and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Applicant's Case

22. As set out in its amended Rule 12 Statement dated 22 November 2024.

23. Mr Edwards called Ms Rachel Gibson (FIO) to give evidence who stated that following notice being given to the firm, the investigation started on 18 January 2021. Due to the Covid-19 national lockdown, the investigation was conducted both at the firm's offices and remotely.

24. Ms Gibson explained how she had conducted her investigation and that she had reviewed the firm's electronic files together with other relevant information including other client files. On 14 September 2021, Ms Gibson held a recorded interview with the Second Respondent. A meeting was also held with the firm's COLP, Mr Colin Richman. Ms Gibson did not interview the Third Respondent.

25. Ms Gibson confirmed that having seen further information from the Second Respondent she had revised her opinion on a number of the transactions which she accepted were linked legal services provided by the Respondents.

26. However, it was her view that for the remaining 4 transactions if the Respondents believed there was a proper connection due to work being conducted on other matters,

this should have been brought to her attention and specific reasons given for each transfer.

27. Both the Second Respondent and the Firm were aware of the issues under investigation, and she had requested explanations for how the payments were in connection to the specific work being undertaken. The response from the Second Respondent was that the payments were linked to connected companies and individuals. However, with respect to these transactions Ms Gibson could not see how this answered her question. Ms Gibson held the view that as each company was a separate legal entity the Respondents had had no reason to pay funds to them on their clients' instructions without proper legal reason and documentary evidence to justify the payments, which on their face appeared to be in breach of Rule 14.5.

28. At interview Ms Gibson commented to the Second Respondent that she could not see a retainer letter for Client B on file. The retainer letter dated 18 October 2013 for Client A was seen during Ms Gibson's review and she made no specific comment upon it other than several tasks/items were listed on the letter and it was not certain if any of these were fulfilled or how this could alter the distribution of funds.

29. Whilst the Second Respondent's Answer had provided a compliant explanation for 19 of the 24 impugned transactions the 'Shareholder Receivable' section set out within the Answer had also set out the following:

> *"the Buyer will, on the Completion Date, pay to the Seller a consideration amounting to €10,799,999 for the acquisition of the Shareholder Receivable.'*
>
> *"The parties acknowledge that the Directors Loans will be the only indebtedness of any kind owing on Completion by any Group Company to an entity connected with any such director."*

30. Ms Gibson could not see anything within this section as having a bearing on the distribution of funds post completion and did not bring any of the remaining identified transactions within the scope of the underlying legal transaction. However, if the matter had been raised by the Second Respondent as being relevant during the ongoing forensic investigation Ms Gibson confirmed that it would have been likely she would have sought the assistance of the SRA's Legal team to help consider the agreement.

31. Ms Gibson said that a review of the retainer letters did not reveal any information in them that would have informed her decision making on whether the Firm had potentially breached Rule 14.5 SAR. She could see no specific points in the Answer to evidence that the payments were in connection to the sale or the loan and if the Second Respondent believed there was a proper connection due to the scoping documents, then this should have been provided in relation to each transaction.

32. With regards to Client B, the letter referred to the broad nature of the instruction and stated: *'review of the proposed Loan Notes and intercompany financing,'* but the correspondence attached to Ms Gibson's investigation report referred only to the loan, the receipt of that money and its payment out. Even if the retainer letter was broad, this did not mean payments can be made to other parties, whether connected companies or not, at the direction of the client, unless there was a proper connection to that matter.

There was nothing in the material to suggest there was any such connection to this matter.

33. Ms Gibson also noted from the Answer and review of the FIR and appendices the following: At interview the Second Respondent could not state how the payments were connected to the underlying legal transaction.

34. The Firm's self-report could not identify any 'links' and it was not apparent from the files that payments were connected to underlying legal transactions. During the interview with her, the Second Respondent said that she had helped draft the self-report.

35. Ms Gibson said the earliest SRA Warning Notice which could be found find regarding Rule 14.5 SAR was dated December 2014. It included the following passage:

> *'The fact that you have a retainer with a client does not give you licence to process funds freely through client account on the client's behalf. Throughout a retainer, you should question why you are being asked to receive funds and for what purpose. You should only hold funds where necessary for the purpose of carrying out your client's instructions in connection with an underlying legal transaction or a service forming part of your normal regulated activities. You should always ask why the client cannot make the payment him or herself. The client's convenience is not the paramount concern and, if the client does not have a bank account in the UK, this considerably increases the risks. You should be prepared to justify any decision to hold or move client money to us where necessary.'*

36. This section of the Warning Notice related to the concluding sentence of paragraph 11 in the Answer - *"it is respectfully submitted that clients could legitimately expect their convenience to be accommodated insofar as their requests were legal and proper"*. Ms Gibson was not provided with evidence to show that the payments highlighted in her report were in connection with the underlying legal transaction. Payments made which did not have a proper connection to the underlying transactions would therefore constitute a breach of the Accounts Rules.

37. Ms Gibson was cross-examined by Mr Wheeler and Ms Butler. She confirmed that the Second Respondent had co-operated fully and that she had not found any other client files to have been in breach, though it had not been a wide-ranging investigation as it was a self -report.

38. She had not interviewed the Third Respondent.

39. Ms Gibson accepted that the Second Respondent had not had a lot of time to review the questioned transactions before start of the interview and that these were matters that had taken place nearly a decade prior.

40. It was put to her that her investigation had been in essence a shallow and paper based one which had not gone into the depth required, and she had relied primarily on the responses from the Second Respondent in drawing the conclusions she made in her report.

41. It was also put to Ms Gibson that she had had no factual or legal basis for treating the payments made within the transactions as not being part of a legitimate legal service provided to clients under a retainer. Ms Gibson denied that she had been wrong to consider that payments had been made impermissibly to entities not related to proper underlying transactions and that the Respondents had been operating a banking facility for their clients' convenience. It remained her view that drawdowns where properly received from the lender should have been paid to the client and not out other entities.

42. Ms Gibson did not accept that she had mis-understood the e-mails passing between the Second and Third Respondent e.g. the one on 17 January 2014 referring to *"like being a bank for all our clients"* as being a mere expression of frustration at the Firm's administrative processes and not a literal admission and acceptance of a breach of Rule 14.5 SAR.

Respondents' Cases

Withdrawal of admissions

43. At the commencement of their respective cases the First and Third Respondents were granted permission by the Tribunal to withdraw an acceptance of some facts which may have been viewed as admissions to a breach of Rule 14.5 SAR. These had been putative admissions made on the basis of matters understood by them when responding to the Rule 12 statement and subject to certain reservations regarding the underlying evidence.

44. The Applicant did not object to the application.

45. The Tribunal allowed the application. Due to the particular circumstances in which the case against the Respondents had been revised by the Applicant on the first day of the hearing, it was in the interests of justice to permit withdrawal of the admissions, which in some respects had been equivocal.

46. As part of its reasoning the Tribunal noted that having granted the Applicant permission to amend its Rule 12 statement the Applicant had then gone on to present a case stalked by uncertainty, for example, up to the point when it closed its case the Applicant had uploaded to the trial bundle **five** separate versions of the Rule 12 statement, each one of which had contained noted inaccuracies. In such circumstances, and as a matter of fairness, the Respondents should be entitled to meet the case on the evidence presented by the Applicant and not be bound by vague and contingent admissions.

47. The First Respondent

47.1 It denied the allegations. Reliance was placed upon the statement produced by the Mr Colin Richman, the First Respondent's COLP, dated 15 October 2024. In the statement the background circumstances were set out as to how matters came to light leading to the self-report to the Applicant. Mr Richman set out the ways in which the First Respondent's control systems, training and procedures had been modified to reduce risk of recurrence. There was no cross-examination.

48. The Second Respondent

48.1 She denied all the allegations. In her evidence before the Tribunal, the Second Respondent said that the payments out of client account had been connected to underlying transactions and related to legitimate legal services. She accepted that there were 3 or 4 transactions where she could not at this remove in time identify whether they had been connected to underlying transactions, but the likelihood was that they had been.

48.2 The Second Respondent denied that her e-mail to the Third Respondent on 17 January 2014 had been any sort of acknowledgement of the SAR or a breach thereof. She denied that she had made payments in deliberate breach of the SAR or in defiance of the pertaining guidance and warnings. Her e-mail had been sent at a time when she had been frustrated by the administrative burden placed upon the Firm by the transactions and nothing more.

48.3 Whilst accepting the proposition that the payments had been made for the convenience of the clients and that it would have been possible for the clients to have made the payments themselves, she had believed that she had been entitled to carry out the instructions of her clients in making payments. She had acted under the terms of the retainers and the payments were to other entities clearly within the clients' direct corporate structure and in order to further the clients' business interests, for which reason the loans had been given.

48.4 She would not have carried out any work in knowing breach of the rules and she pointed to her previous unblemished career history before and since the date of the alleged breaches as relevant evidence to support this assertion. Further, her actions were based on her experience and knowledge of the clients, one of whom was a director who had also been an experienced solicitor. There was nothing within the transactions which presented any obvious concerns or red flags other than the administrative difficulties and her repeated requests to Client B to open a non-French account.

49. The Third Respondent

49.1 He denied all the allegations. In his evidence before the Tribunal the Third Respondent explained that he was the relationship partner at the Firm for Clients A and B who had been very longstanding clients of a predecessor the Firm of which he was also a partner, and who transferred to the Firm along with the Second Respondent and other colleagues when the predecessor firm ceased business. Clients A and B were very active, experienced and skilled investors. Their transactions were often inherently very complicated and involved large sums of money.

49.2 He had little to no direct recollection of the transactions which had taken place many years earlier and in which he had played next to no part other than limited interaction with the Second Respondent.

49.3 He had no issue with the Second Respondent's evidence. He trusted her and he had seen no obvious red flags with the transactions, nothing unusual which would have given him cause for concern at that time and required him to investigate further.

Closing

50. Second Respondent

50.1 Mr Wheeler for the Second Respondent was first to provide closing submissions.

Factual Context

50.2 The allegations arose from two transactions in which the Firm (the First Respondent) was engaged on behalf of two clients which completed in 2013 and 2014 respectively. Both transactions involved funds being paid through the client account: in one as the proceeds of the sale of shares in which the Firm acted for the seller, and in the other as funds drawn down under a loan note subscription agreement in which the Firm acted for the borrower. In both cases the Second Respondent handled aspects of the work.

50.3 Most of the payments were made to the Firm's clients (or nominees of its clients) or were made to discharge obligations assumed by the clients under the terms of the transactions. There was no dispute that the client account was properly used to receive the funds paid into it. However, it was alleged that many of the payments out of the client account breached Rule14.5 SAR 2011 and that the Second Respondent acted in breach of principles 2, 6 and 8 of the 2011 Code of Conduct in authorising the payments out of the client account.

50.4 Apart from a small number of payments where the Second Respondent could not now explain their connection with underlying transactions on which the Firm was instructed, she disputed she acted in breach of Rule 14.5 or any of the cited Principles. The payments were sufficiently connected with the underlying transactions on which the Firm was instructed to be permitted by Rule 14.5. To the extent that they were not in breach of Rule 14.5 and if they had been, then they were minor technical breaches that did not approach the level of seriousness required to find a breach of the Principles.

50.5 In significant part, the relevant facts were derived from the documentary records and from the evidence of the Second Respondent. The SRA relied only on the evidence of its FIO, and it had not advanced any factual case or evidence contesting the Second Respondent's account of events. It was accepted by the SRA that there were no red flags regarding any of the transactions regarding fraud, money laundering or other serious wrongdoing by the clients or the Respondents. This was nothing other than lawful, albeit very complicated, business.

50.6 The Applicant's case in very large measure rested on an email exchange, the context of which was crucial to understand. On 17 January 2014, a client sent an email to the Second Respondent (copying in the Third Respondent amongst others) asking for a breakdown of Firm's fees for its work on the sale of Company B. The Third Respondent responded to that email by way of an email to the Second Respondent asking to *"see and agree this email* [i.e. the email giving the breakdown of fees] *before it goes."*

50.7 The Second Respondent responded to shortly afterwards, writing, *"Yes but I can't do it right now - the amount of work we have to do like this is getting painful! it's like being a bank for all our clients"*. The Third Respondent responded with the comment, *"I know it is annoying as and when."* Her email was not sent in response to a request

from Client A to make a payment from the Firm's client account. The reference to *"work we have to do like this"* was therefore not a reference to the work involved in arranging payments from client account but rather the administrative work in meeting a request for a breakdown of fees.

50.8 The Second Respondent did not refer to being a bank for Client A in breach of Rule 14.5 but said that it was "*like being a bank for <u>all our clients</u>*" [underlining added] and her evidence on this exchange was that she was complaining about having to carry out administrative tasks for clients relating to accounting or financial information, rather than focusing on chargeable legal work.

50.9 Mr Wheeler said that it had not occurred to the Second Respondent that there could be any suggestion that Firm was providing banking facilities in breach of Rule 14.5. The email was sent at a time when the profession did not focus closely on issues arising out of Rule 14.5 and it did not cross her mind that her email could be read as a reference to that rule. The Third Respondent's response consistent with that understanding. Had he really thought that the Second Respondent was highlighting a conscious breach of Rule 14.5 he would not have responded with the 'banal acquiescence' with which he met what he (correctly) understood to be an off-hand complaint about the tedium of an administrative task.

50.10 The SRA placed similar reliance on a file note of a discussion between the Second Respondent and a client by telephone on 7 February 2014. The telephone discussion followed a change in instructions as to the identity of a payee after a payment sought on behalf of Client A had been rejected by the bank. The Second Respondent sought clarification of her instructions and to explain that his change of instructions had created administrative burdens, that she *"needed more info re payment. We were being put in position of acting as a Bank and confirmed that it wasn't really fair for them to put us in this position."* As with the email exchange on 17 January 2014, the Second Respondent was raising a complaint about the administrative tasks being imposed on her by Client A. It did not reflect any consciousness of a risk that the payments being made gave rise to a breach of Rule 14.5 (or any rule).

<u>Genesis and evolution of Rule 14.5 SAR</u>

50.11 Mr Wheeler considered this in depth along with relevant caselaw and how guidance with respect to it had evolved in the intervening years.

50.12 Rule 14.5 provides that: "*You must not provide banking facilities through a client account. Payments into, and transfers or withdrawals from, a client account must be in respect of instructions relating to an underlying transaction (and the funds arising therefore) or to a service forming part of your normal regulated activities."* Although the prohibition of the rule is aimed at providing *"banking facilities through a client account,"* the rule itself does not explain what is meant by the provision of "*banking facilities*" To understand that term, it was necessary to consider how Rule 14.5 evolved.

50.13 The rule's origin was in the decision of the Tribunal in *Wood and Burdett* (No 8669/2002) on 23 December 2003. In that case, Mr Burdett had sought to broaden his practice by offering a cheque deposit service to clients, by which clients could deposit cheques into the firm's client account and would in return receive an immediate cleared

payment in the form of cash or a bank transfer (including, if wished, a bank transfer to a third party). At the time, there was no specific rule prohibiting the operation of a client account in that way. A guidance note to Rule 15 of the Solicitors' Accounts Rules 1998 stated only that *"Solicitors may need to exercise caution if asked to provide banking facilities through a client account. There are criminal sanctions against assisting money launderers"* The provision of banking services through a client account therefore appeared to be implicitly permitted provided that caution was exercised.

50.14 Given the scope for Mr Burdett's scheme to be used as a vehicle for money laundering, the Tribunal held that, although there was no breach of any specific rule, Mr Burdett had acted in breach of his own and the profession's good reputation and that *"The proper use of a solicitor's client account was to hold money and disburse it as required in connection with a client matter of which the solicitor has conduct on behalf of that client"*. The Tribunal also stated that *"a solicitor should not hold money simply because he has been asked to do so without his taking charge of that money and disbursing it in accordance with a client's instructions in connection with professional work undertaken on behalf of that client."*

50.15 The note to Rule 15 of the 1998 Accounts Rules was subsequently revised to reflect the Tribunal's decision in *Wood and Burdett*. The revised note recorded that it was not a proper part of a solicitors' everyday practice to operate a banking facility for third parties, even if they were clients. The note continued by stating expressly that *"Solicitors should not, therefore, provide banking facilities through a client account."*

50.16 When the Accounts Rules were rewritten in 2011, what had been a note to rule 15 of the 1998 Accounts Rules became in substance the new Rule 14.5. The Divisional Court in *Patel v SRA [2012] EWHC 3373* confirmed that Rule 14.5 should be understood as a crystallization of the principle established in *Wood and Burdett*. Moore-Bick LJ said (at para. 43) that, *"The primary purpose of maintaining a client account is to segregate funds held for the client from the solicitor's own funds in order to provide the client with a measure of protection. One would therefore expect it to be used to hold funds which have come into the solicitor's hands in relation to services carried out for the client, to be paid out in due course to the client or <u>in accordance with his instructions</u>"* (underlining added).

50.17 *Wood and Burdett* was an example of a client account being used wholly in isolation from any regulated professional work of a solicitor at all. Subsequent authority has made clear that a broad retainer cannot be relied on as a justification for any use of a client account, even where that use is wholly unconnected with any legal work undertaken pursuant to the retainer.

50.18 In *Fuglers v SRA [2014] EWHC 179*, Popplewell J identified three strands as the rationale for the rule:

> *"(1) It is objectionable in itself for a solicitor to be carrying out or facilitating banking activities because he is to that extent not acting as a solicitor. If a solicitor is providing banking activities which are not linked to an underlying transaction, he is engaged in carrying out or facilitating day to day commercial trading in the same way as a banker:* para 39.

(2) Allowing a client account to be used as a banking facility, unrelated to any underlying transaction which the solicitor is carrying out, carries with it the risk that the account may be used by the client for money laundering: para 41.

(3) In the context of insolvency or a risk of insolvency, the use of a client account as a banking facility will allow the client to avoid the withdrawal of banking facilities by banks and favour one creditor over another when making payments: para. 42.

50.19 By contrast, nothing in the authorities (or the wording of the rule) suggested that there could be any breach of Rule 14.5 where a client account was operated in the context of normal professional work and payments into and out of the account were properly made in accordance with the other requirements of the SARs.

50.20 In that context, the SARs expressly permitted:

(1) The payment of client money into an account at a bank, building society or other financial institution opened in the name of the client or of a person designated by the client, where the client gives written instructions to that effect for the client's own convenience: SAR 2011, Rule 15.1(b) and Rule 20.1(f).

(2) The withdrawal of client money when it is properly required for a payment to the client: SAR 2011, Rule 20.1(a).

(3) The withdrawal of client money when it is properly required for a payment made on behalf of the client: SAR 2011, Rule 20.1(a).

(4) A payment by way of loan from one client to another out of funds held in a client account on behalf of the lender, where both clients authorise such a loan: SAR 2011, Rule 27.2.

50.21 Where funds have been properly paid into a client account in connection with a client matter, where those funds are not held for an excessive period in breach of SAR Rule14.3, and where a withdrawal from the client account is made in accordance with the requirements of SAR Rule 20, there is little or no room for a breach of Rule 14.5 to occur. Even if a breach of Rule 14.5 can technically occur in such circumstances, there is little room for serious criticism of a solicitor who has authorised in accordance with Rule 20 withdrawals from funds properly held within the client account, and who has authorised the withdrawals in accordance with client instructions consistently with the primary purpose of the client account as stated by Moore-Bick LJ in *Patel v SRA*.

50.22 The Tribunal's decision in *Walker and Nathan* (No 10640/2010) June 2011 was consistent with that interpretation of the rules. The decision concerned a solicitor who had acted for himself in undertaking various property purchases and who used his firm's client account for that purpose. Three "personal" payments were made from the client account on behalf of the solicitor where those payments did not relate to the underlying transaction. The Tribunal noted that some clarification of the rules as regards the provision of a banking facility might be required but did not think it appropriate to provide it in its decision. However, the Tribunal dismissed the allegations. The Tribunal noted that "*it was acceptable, in appropriate circumstances and with proper*

safeguards, to make a payment to a third party from a client's ledger, on the direction of that client. For example, a solicitor holding the proceeds of sale of a property may be directed by the client to send a payment to a member of the client's family. Rule 22 appears to envisage such a situation". However, "*frequent payments (or receipts) involving third parties which were not related to the underlying transaction should not normally take place*." In this case, there were only three payments, which were not found to be *"frequent"* payments, and no breach of the rules was found to have occurred.

50.23 Even if a breach of Rule 14.5 can occur where the client account is otherwise utilised in accordance with the SARs, there can certainly be no breach of the rule where the funds paid out of the client account are paid out for a purpose reasonably connected with an underlying transaction on which the solicitor is instructed.

50.24 While it was accepted that the client account has to be used in connection with professional work, where there is *"a reasonable nexus"* between the use of the account and the underlying transaction the authorities demonstrated that only a limited degree of connection is required for such *"reasonable nexus"* to exist.

50.25 The Guidance on Rule 14.5 issued by the SRA in December 2014 (after most of the payments subject to the allegations before the Tribunal) provides that *"there must be a reasonable connection between the underlying legal transaction and the payments"* but only states that *"whether there is a reasonable connection is likely to depend on the facts of each case"*. The Guidance also emphasises that it "*is not intended to affect your ability to make reasonable and proper payments on your client's instructions when related to an underlying legal transaction on which you have been instructed, for example, upon completion of a house purchase on your client's instructions under Accounts Rule 20.1(f)."*

50.26 Mr Wheeler submitted that the very need for guidance issued by the SRA in December 2014 demonstrated that the scope of Rule14.5 was far from clear at the time of the transactions giving rise to the instant proceedings.

50.27 Even after the SRA's December 2014 guidance was issued, the scope of Rule 14.5 remained uncertain: an article by the Lawyers Defence Group dated 31 May 2016 highlighted many of the uncertainties, giving examples similar to the instant case as situations where the requirements of Rule14.5 were not clear cut.

50.28 Mr Wheeler noted that the SRA exhibited to its Rule 12 statement the 1 March 2023 version of its guidance on the improper use of client account as a banking facility. The revised version of the guidance post-dated the conduct before the Tribunal by many years and concerned the differently worded Rule 3.3 of the 2019 Accounts Rules. It could therefore have no application to the allegations against the Second Respondent.

50.29 Applying the above to the circumstances of the Second Respondent's case, Mr Wheeler made the following points:

- There was no suggestion in this case that Firm's client account ought not to have been utilised at all. It was entirely commonplace for a client account to be

utilised to receive the funds paid into it, all of which arose directly from the transactions on which the Firm was instructed. The contrary was not alleged.

- There was no allegation that the Firm held the funds for excessive period in breach of SAR 2011 Rule 14.3.

- There was no allegation that any of the withdrawals from the client account were made in breach of SAR 2011 Rule 20 and no suggestion of an illegitimacy or impropriety in either the underlying transactions or any of the uses to which funds paid out from the client account were put.

- The First Respondent was accordingly not providing a banking facility to Clients A and B but rather operating its client account in accordance with the SARs as it was then understood. Even if those matters alone did not suffice to demonstrate that there was no breach of Rule 14.5, the payments made on the instructions of Client A and Client B had a reasonable nexus to the underlying transactions with which those clients were involved. In determining whether on the particular facts relevant to the allegations before the Tribunal there is a reasonable nexus to the underlying transactions, it was important to resolve any doubt against the imposition of a penalty for a breach of Rule 14.5 on the basis of the application of the established principle against doubtful penalisation: *Rakusen v Jepsen [2023] 1 WLR 1028.*

50.30 Looking at the payments Mr Wheeler set out the following:

Client A

50.30.1 The transfers from the First Respondent's client account which were authorised by the Second Respondent and alleged to give rise to a breach of Rule 14.5 could be grouped as follows:

(1) The payments to Anatolia Enterprises Ltd, Staisse Bay, Blue Star, Cranbourne Star Pension Scheme, Darius Khakshouri, Murmansk Overseas Ltd and Atpledge Ltd were all made to discharge liabilities to third parties as required by clause 4.7 of the SPA. These payments had a reasonable nexus to the underlying transaction because they were contractually required by the terms of that transaction. The payments were no different in principle from a conveyancing solicitor paying an estate agent's fees or discharging a mortgage from proceeds of sale paid into its client account.

(2) The payments to Client B were loans to a company under related ownership to Client A (with the CT and the RT having an interest in both companies) pending completion of the refinancing of Client B (on which the First Respondent was instructed). These payments could legitimately be made pursuant to SAR 2011, Rule 15.1(b) and Rule 20.1(f), as well as reflecting an inter-client loan which was also permitted under the SAR.

(3) The payments to Wallace LLP and Metis Law were both payments of legal costs incurred by related companies. These payments could similarly legitimately be

made pursuant to SAR 2011, Rule 15.1(b) and Rule 20.1(f), as well as reflecting an inter-client loan which is also permitted under the SAR.

50.30.2 There were three payments for which the Second Respondent was unable, now to identify a connection with the legal work undertaken for Client A. Those payments, which may have been made in breach of Rule 14.5, were:

(1) A payment of £15,332.28 to Mr G on 29 January 2014 (which is thought to be consultancy fees in connection with the management of the transaction for Client A).

(2) A payment of £10,000 to B Norrington on 14 May 2014.

(3) A payment of £500,000 to United West Ltd on 15 May 2014.

Client B

50.30.3 The terms of the Subscription Agreement required that the proceeds of subscription requests should be paid into the "Note Proceeds Account" (which was the First Respondent's client account) and was accompanied by a statement as to how the proceeds would be applied: clause 4.2 of the Subscription Agreement.

50.30.4 Clause 14.14 of the Loan Notes issued pursuant to the terms of the Subscription Agreement required that the proceeds of the Notes was to be applied towards: (1) the "*Budgeted Costs"* including the cost of carrying out the Development being funded by the Subscription Agreement; or (2) repayment of existing *"Financial Indebtedness"* in broad terms to include any form of borrowing) owed by Client B to Client B's parent company in an amount of €5 million. As such the making of payments into First Respondent's client account and the utilisation of those payments in accordance with the requirements of the Subscription Agreement was necessarily closely and directly connected with the underlying transaction on which the First and Second Respondents were engaged.

50.30.5 It was not understood by the Second Respondent how a payment out to a client or its nominee of a sum properly received into a client account could give rise to a breach of Rule14.5 and Mr Wheeler said that the SRA had not explained the basis for this aspect of its allegations at all.

The alleged breaches

50.31 Mr Wheeler urged the Tribunal to dismiss all the allegations of breach of the Principles.

50.32 As to the breaches of the Principles, Mr Wheeler said that to establish a breach, the Applicant had first to establish that the Second Respondent breached Rule 14.5 and if she had, whether the breach was sufficiently serious and culpable to give rise to a breach of one or more of the Principles: *SRA v Day [2018] EWHC 2726* at para. 156-158, as endorsed in *SRA v Beckwith [2020] EWHC 3231*.

50.33 If and to the extent that SAR R14.5 was breached at all, it was neither a serious breach nor was it in any way deliberate or culpable:

50.34 The Second Respondent did not appreciate at the time that the rules might prohibit the payments that were being made and her understanding reflected a degree of uncertainty amongst the profession generally as to the impact of R14.5 (and the ambiguity created by the interaction of Rule 14.5 and R20). Any breach was far removed from the conduct criticised by the Tribunal in *Wood and Burdett*, *Patel* and *Fuglers*. Each of those was a case in which the client account ought not to have been utilised at all. By contrast, there is no suggestion in the instant case that the First Respondent's client account ought not to have been utilised to receive the funds arising from the transactions on which the Second Respondent was instructed. The criticism was more limited, that certain payments out ought not to have been permitted. However, none of the payments gave rise to any of the risks which R14.5 is intended to guard against.

50.35 The Second Respondent was making payments of client funds in the way directed by the client and for the convenience of the client. A solicitor could reasonably be expected to accept and follow client instructions as to the handling of client money insofar as it was lawful and proper to do so. No one suffered loss or harm or was otherwise prejudiced by the making of those payments. Before the events giving rise to the First Respondent's report to the SRA, no one had complained about the making of any of those payments.

Principle 2 (integrity)

50.36 It had been alleged that the Second Respondent acted without integrity on the basis that she was aware that she was in breach of Rule 14.5, however, on the Applicant's application this aspect of the pleadings was amended with the Tribunal's permission that *'she was aware of the SAR.'* Her conduct it was said created a clear risk that the First Respondent was facilitating money laundering or circumventing the rules on insolvency. However, there was no awareness on the Second's part of any risk of a breach of Rule.14.5 (or any other rule). Nor was there any risk in the circumstances of this case that the First or Second Respondent were facilitating money laundering or the circumvention of the rules on insolvency. A mere, technical, breach of the SAR could not in the circumstances, be a basis for a finding that the Second Respondent acted in breach of Principle 2.

Principle 6 (maintaining trust and confidence in yourself and the profession)

50.37 On the generalised basis that *"funds tainted by insolvency, fraud or other wrongdoing that pass through client account risk damaging public confidence in the profession"* the Applicant alleged breach of principle 6. However, there was no evidential basis at all for suggesting that the funds which passed through First Respondent's client account were in any way tainted by insolvency, fraud or other wrongdoing. It was not part of the allegation that the funds were, or could have been thought to be, tainted in such a way and no proper basis for such a finding.

Principle 8 (proper governance and sound financial and risk management principles)

50.38 The Rule 12 statement implied that a breach of Rule 14.5 necessarily gave rise to a breach of principle 8. No other basis for alleging a breach of principle 8 was set out in the Rule 12 statement. There was no basis for such an approach, which again was

inconsistent with the approach laid down in *Leigh Day* and *Beckwith*. Instead, the Tribunal was required to consider whether the Second Respondent's conduct was sufficiently serious and culpable to establish a breach of Principle 8. In the circumstances outlined above, particularly having regard to the uncertainty surrounding the scope of Rule 14.5 at the relevant time, Mr Wheeler submitted that there was no basis for such a finding that she had been in breach of Principle 8.

Recklessness

50.39 In order to establish that the Second Respondent had acted recklessly the Applicant was obliged to establish that (a) she was aware of a risk that she was acting in breach of Rule 14.5, and (b) knowingly ran that risk when it was unreasonable to do so. The basis for the allegation of recklessness was the terms of the Second Respondent's email of 17 January 2014. Mr Wheeler submitted that the Applicant's case was premised on an entirely false interpretation of her email. Contrary to the allegation, the email did not demonstrate that she had had any knowledge that she was, or might have been, acting in breach of Rule 14.5. On that basis, the allegation of recklessness could not succeed.

50.40 In conclusion Mr Wheeler said that depending on the view taken by the Tribunal as to the effect of Rule 14.5, there was at most a minor breach of this rule by the Second Respondent and that the allegations that she had acted in breach of the Principles and acted recklessly ought to be dismissed whatever conclusion the Tribunal reached on Rule 14.5.

51. First and Third Respondents

51.1 Ms Butler said she endorsed and adopted matters set out by Mr Wheeler regarding the facts, case law and the evolution of Rule14.5 SAR 2011 in so far as relevant to the First Respondent and Third Respondents.

51.2 Ms Butler reminded the Tribunal that the burden of proving its case, on the balance of probabilities, rested solely upon the Applicant. The Applicant had presented a legally flawed case and if there had been any breach of Rule 14.5 by the First and Third Respondents then this was at the lowest end of any scale of seriousness and not sufficient to justify sanction.

51.3 The facts of this matter were leagues away from any of the cases in which a breach of the banking facility rule had been proven by the time of even the conclusion of the relevant period, which was approaching a decade ago. It was doubtful that the SRA should have brought the case against the First Respondent to the Tribunal and certainly not the case against the Third Respondent.

51.4 With respect to the Third Respondent the Allegation did not contend that he knew that the January 2014 payment would (or even might) breach Rule 14.5 or that he ought to have known that it would or might do so, or that he acted recklessly, without integrity or otherwise in relation thereto.

51.5 As such, what was in issue was, at worst, a single inadvertent misunderstanding of the meaning and effect of Rule 14.5 by the Third Respondent that was made nearly 11 years ago in the absence of the partner with the day-to-day conduct of the matter

from the office (the Second Respondent) and where the client and individual providing the payment instructions to the Third Respondent were well known to him and trusted by him (as was the Second Respondent).

51.6 With respect to both the First and Third Respondent the conduct in issue needed to be kept into perspective. There was, in particular, no allegation that the funds from which the impugned payments were made should not have been received by the Firm into the client account and it was common ground that there were legitimate underlying commercial transactions in relation to which the Firm was providing a significant amount of legal services to Clients A and B.

51.7 The breach, if indeed there was any, was nothing but unintentional and unwitting, there being no warning signs or evidence of financial impropriety, AML or CDD issues. These were long-standing trusted clients who were well known to the Firm where, as set out by Mr Wheeler, the case related to events a long time ago when Rule 14.5 was understood very differently. No harm was caused to any client or to any third party. Neither the Firm, nor the partners concerned made any financial gain from the matters covered by the allegation.

51.8 In determining whether, properly construed, Rule 14.5 was breached on even a technical basis, one of the cardinal precepts of statutory interpretation is the principle (or presumption) against doubtful penalisation (Bennion on Statutory Interpretation, 8th edition, at [26.4]):22 "*It is a principle of legal policy that a person should not be penalised except under clear law and, when interpreting legislation, a court should take into account"*.

51.9 This principle means that if there is any doubt as to whether a payment breached Rule 14.5, it should be resolved against the party relying upon the wording of the rule (here, the SRA). Rule 14.5 can only properly be applied to cases clearly falling within its scope.

51.10 In the context of what was well recognised to be a vaguely worded rule, none of the cases that had been decided prior to January 2014 in which a breach of Rule 14.5 had been found were remotely analogous to the facts here. What was not nearly as clearly established as it is now, in 2024, was how close the connection between the use of the client account and legal services being provided by the Firm needed to be.

52. <u>The Tribunal's Findings</u>

52.1 The Tribunal had due regard to the Respondents' rights to a fair trial and to respect for their private and family life under, respectively, Articles 6 and 8 of the ECHR.

52.2 The Tribunal applied the civil standard of proof, as it was required to do. The burden of proof lay entirely with the Applicant. The Tribunal carefully considered the evidence it had heard and read. The Tribunal also noted there is no 'sliding scale' with respect to the standard of proof and the balance of probabilities always meant '*more likely than not*."

52.3 The Respondents were not bound to prove that they did not commit the alleged acts, and that great care was to be taken by the Tribunal to avoid an assumption (without sufficient evidence) of any deliberate failure or act on their part.

52.4 The Tribunal found no part of the Applicant's case against the First, Second and Third Respondent had been proved to the requisite standard, and it dismissed all allegations, including recklessness alleged against the Second Respondent because the factual basis had not been made out by the Applicant.

52.5 The Tribunal therefore did not need to consider whether any breach of Rule 14.5 was sufficiently serious and culpable to give rise to a breach of one or more of the Principles. Put simply, the facts presented by the Applicant did not support the pleaded allegations.

52.6 These were no doubt complicated and complex transactions carried out by Respondents who were well practised and skilled in their work. They knew their clients, having built up a working relationship with them over many years. The Respondents trusted each other's abilities. Within this context it was common ground that the disputed transactions, now substantially reduced in number from that originally alleged by the Applicant, raised no obvious red flags regarding fraud and money laundering, and no immediate cause for concern. The transactions were treated as nothing more than routine, albeit they were administratively demanding.

52.7 The Tribunal observed that the Applicant is charged with the difficult and demanding responsibility of ensuring that allegations of potential misconduct and wrongdoing are investigated fully and subject to rigorous review before and after the decision to refer to the Tribunal is made.

52.8 However, on her own account Ms Gibson stated that she had not conducted an in-depth investigation because it had been a self-report. These were complex matters going back many years, yet the Second Respondent was given very little time to review the material before being asked questions in interview. The Third Respondent was never interviewed or asked to give an account by the FIO.

52.9 It appeared that having formulated an initial view Ms Gibson built her case on what she perceived to be the law. Yet, the Applicant did not provide the Tribunal with any rule, statute or decided case which supported Ms Gibson's view that the Second Respondent had been wrong to make payments to connected entities which had been within the scope of the retainer/agreements and made for legitimate purposes.

52.10 The payments were evidently connected to underlying legal transactions and the Respondents were undertaking normal regulated legal activities. In such circumstances, the question asked of the Respondents by Mr Edwards, for the Applicant, as to why the clients themselves had not paid out monies to the various entities was otiose. The Applicant had instead been obliged to produce persuasive evidence to the required standard that the payments made by the Respondents had been out with the scope of the retainer/agreements and not connected to underlying transactions. It had failed to do so.

52.11 It was notable that when the Second Respondent had had the opportunity to thoroughly review documents relating to the transactions and she served her Answer, the Applicant

had rightly withdrawn the majority of the impugned transactions from the allegations. This decision was based predominantly on the investigative work and analysis carried out by the Second Respondent and not upon its own investigation. This appeared to be the hallmark of the Applicant's case: accusation without evidence. In the case of the Second Respondent, and perhaps all the Respondents, it had had the effect of effectively reversing the burden of proof when as a matter of law, neither she nor the other Respondents had been required to prove anything.

52.12 The Applicant had successfully applied to amend its Rule 12 statement by removing from the allegation that the Second Respondent had been aware that she had been in breach of the SAR 2011 to merely that she had been aware of the SAR 2011.

52.13 The Respondents had set out a detailed and extensive analysis of the relevant case law, the operation of Rule 14.5 and the evolution of the understanding of it by the profession and the SRA. Further, the Respondents had then gone to great lengths to apply this analysis to the facts in each of their cases. They had needed to do this as such analysis had been absent from the Applicant's case.

52.14 Neither the Second Respondent nor the First and Third Respondents ever denied that they had been aware of the SAR. Their case in terms, was that they considered the payments were properly made and in accordance with the rules as they, and the profession at the time, understood them to be. They had not considered themselves to be in breach, but, if breach there had been it was unwitting and inadvertent.

52.15 The Tribunal agreed that the Respondents' action had to be seen through the lens of how the profession understood Rule 14.5 at the relevant time and not to overlay a decade's worth of development in the guidance which had since been given. The Tribunal accepted that at the relevant time of the allegations the scope of Rule 14.5 had not been clear, guidance was limited and rudimentary and even the SRA Handbook 2015 had set out that this was a grey area.

52.16 With respect to the matters which the Second Respondent could now not account for the Tribunal did not find that the Applicant had proved its case to the requisite standard and the most that could be said about them was that it could not be said one way or another whether there had been a breach, given the lack of documentary evidence, which itself may not have been surprising given the gap of nearly 10 years and fading of memories. Further, the Tribunal agreed with the Respondents' assertion of the presumption against doubtful penalization and that any doubt as to whether a payment breached Rule 14.5, should be resolved against the party relying upon the wording of the rule, i.e. the Applicant.

52.17 Finally, having made its findings, set out above, the Tribunal saw no probative value in the Second Respondent's e-mail of 17 January 2014 which was nothing more than a venting of her frustration at the administrative burden of complying with many requests to make payments.

52.18 The Applicant had taken her words far too literally, magnified it out of proportion and had then placed an overly simplistic and sinister interpretation upon them. Having taken the decision to remove the bulk of the impugned transactions from the allegations the Applicant should have returned to this aspect of its case and critically reviewed it again,

this time viewed against the backdrop of the decision it had just made to excise a large portion of transactions from the allegations and the Second Respondent's explanation upon which the Applicant had based its decision to do so.

52.19 If one was to examine the minutiae of the short e-mail then in fairness the words *like being a bank for <u>all our clients</u>* [underlining added] should have also been viewed as having equal significance. No breach of the rules was found in relation to any other clients, of which the First Respondent had no doubt many.

52.20 The Tribunal agreed with the Second Respondent that the Applicant had failed to appreciate the context which was as Mr Wheeler had set out

> *"the email pre-dated both the Fuglers decision relied upon by the SRA and the SRA warning notice issued some 11 months later. The Second Respondent was not and could not have been aware at the time that there was any risk of breaching the SRA Accounts Rules – indeed, it remains far from clear that these issues would have been considered to have been a breach of Rule 14.5 at the time given the interpretation which had been applied by the SDT at that time."*

52.21 For all the above reasons the Tribunal did not find the Applicant's case against the First, Second and Third Respondent proved to the requisite standard, namely the balance of probabilities.

Costs

<u>Legal Principles</u>

53. The Tribunal has the power to order the "the payment by any party of costs or a contribution towards costs of such amount as the Tribunal may consider reasonable" (Solicitors Act 1974, S.47(2)(i)).

54. Rule 43 of the Solicitors (Disciplinary Proceedings) Rules 2019 (SDPR 2019)) also grants the Tribunal broad discretion to make cost orders "as it thinks fit," including wasted costs orders. Rule 43(4) outlines the factors to consider when making cost orders, including the parties' conduct and whether allegations were pursued or defended reasonably.

55. While the Tribunal has broad discretion, it is not the case that "costs follow the event" and the starting point when an allegation is dismissed is that there should be "no order as to costs made against the SRA" (*Baxendale-Walker v The Law Society* [2007] EWCA Civ 233). To depart from this starting position, there must be a "good reason" to award costs against the SRA. These reasons are not limited to cases of completely improper proceedings and include instances of 'fundamentally flawed' bases of proceedings, or failures in conduct, which can be independent of any increase in costs incurred by the other party (*SRA Ltd v Tsang* [2024] EWHC 1150). Eyre J in *Tsang* stated, *"Procedural failings on the part of the SRA, including delay, are capable of being a good reason for that purpose regardless of whether or not they increased the amount of costs incurred by the other party."* Such reasons should be of some gravity.

First Respondent

56. The Firm sought its costs after successfully defending itself, along with two other respondents. Ms Butler explained that it did not seek pre-issue costs and requested that if the Tribunal ordered the Applicant to pay its costs, then it should also direct the Applicant to make an interim payment of 50% of total costs, to be subject to detailed assessment.

57. Ms Butler argued that there were compelling "good reasons" for the Applicant to bear the costs, based on the following:

Improper Basis for Proceedings:

58. The Tribunal criticised the Applicant's case as being based on "accusation without evidence," effectively "reversing the burden of proof."

59. The SRA investigation was not in-depth and failed to interview all relevant parties (e.g., the Third Respondent) or give them sufficient time to review all documents.

60. The SRA failed to provide legal support for their allegations and were found to be applying 'overly simplistic and sinister interpretations' of correspondence.

61. Overall, the Tribunal's judgment was unusually, though justifiably, critical of the Applicant. These were errors that, in the context of proceedings where there was no substantive dispute between the parties as to the facts, went to the root of the basis of the proceedings against the Firm.

Unreasonable Persistence:

62. The Firm cooperated fully and self-reported the matter to the Applicant in October 2020. It attempted to bring the matter to a close on sensible terms, but the Applicant rejected its offers to admit a breach and pay a fine which was within the Applicant's power to impose, instead taking the matter to the Tribunal.

63. The Firm made a 'Without Prejudice Save as to Costs' offer to admit to all allegations and pay £20,000, but this was rejected. The Firm argued that there was no public interest in the Applicant refusing this and taking the matter to the Tribunal.

64. The decision to refer was made on the misconceived basis that there was "a wilful disregard by the Firm of its regulatory obligations as the conduct alleged involves deliberate or reckless breaches of its regulatory obligations." There was, however, no evidence for that.

65. By going to the Tribunal, the Applicant created unnecessary costs when it could have resolved the matter through a Regulatory Settlement Agreement.

Inordinate Delay:

66. There was inordinate delay in this case of the kind envisaged by Eyre J in *Tsang* at [73] as being both attributable to the actions of the Applicant and going "substantially

beyond the delay inherent in the proper investigation and determination of allegations of misconduct"." A period of over 3 years elapsed between the Firm's self-report and the Applicant's referral to the Tribunal, despite the Firm's cooperation. The Applicant could not justify this length of time. This delay exacerbated the stress caused to those at the Firm involved in the case.

Other Procedural Failings:

67. The allegations of breaches of the Principles were advanced by the Applicant in the Rule 12 Statement without any attempt to address why the alleged breaches of Rule 14.5 were of sufficient seriousness or culpability.

68. The SRA amended its case very late and then sought to change the basis of its claim in closing submissions. The SRA presented five versions of the Rule 12 Statement, which added to confusion and expense.

The Firm's Admissions

69. The Firm acknowledged having admitted to a breach of Rule 14.5 and Principle 8 of the SRA's principles but argued they were made:

- in the context of historical circumstances where the understanding of Rule 14.5 differed.
- after the Applicant had already recommended referral to the Tribunal.
- to try to resolve the matter quickly and limited in scope, and subject to express reservations.
- in circumstances of considerable stress and pressure, and did not relieve the Applicant of the need to prove its case properly.
- The Firm cites *SRA v Austin and Sanders (11167-2013)* as an example of a case in which a costs order was made against the SRA even where admissions had initially been made by the respondent(s).

Second Respondent

70. The Second Respondent applied for a costs order against the Applicant, arguing that the Applicant's actions were wholly unsatisfactory throughout. The Applicant's application was not only unsuccessful but also fundamentally flawed in its investigation and presentation. Mr Wheeler requested that the Tribunal order the Applicant to pay the Second Respondent's costs, subject to a detailed assessment if agreement could not be reached.

71. The claimed costs were in the sum of £189,141 (inclusive of VAT) from the service of the Rule 12 Statement to the conclusion of proceedings, but did not seek costs incurred prior to this. The Second Respondent sought an interim payment of £95,000 (50% of her total costs) as a payment on account, reflecting an estimate of likely recovery.

72. Mr Wheeler submitted that in the Second Respondent's case there were five good reasons justifying a departure from the usual approach to costs:

Failure to Identify a Proper Basis for Allegations:

73. The Applicant's case was built upon an inadequate investigation which failed to properly consider underlying documentation. The Second Respondent was given documents on the morning of her interview and there was no further investigation of documentation provided by her after her interview.

74. The Applicant asserted breaches of Rule 14.5 were not rationalised or properly explained beyond assertions that payments were not related to underlying legal work. The Applicant did not address inconsistencies between its report and statements made during the Second Respondent's interview and eventually withdrew certain allegations without any explanation.

75. The Applicant did not provide any legal or factual support for the FIO's interpretation of Rule 14.5 and instead the hallmark of its case was "accusation without evidence," which had the effect of shifting the burden of proof onto the Second Respondent.

76. The Applicant's case concerning an email exchange was based upon a literal reading of words and not grounded in any evidence.

Failure to Review Allegations as Proceedings Progressed

77. The Applicant failed to clarify which payments were improper, despite being asked to do so by the Second Respondent's solicitors. The Applicant failed to review the sustainability of its application after the Second Respondent's response to the Rule 12 statement and after the exchange of evidence. Its explanation for this failure was allegedly due to the FIO's career break and sick leave, but the Second Respondent contended that this was insufficient because others could have conducted the review.

78. The Applicant only began serious reconsideration after the Second Respondent's skeleton argument was lodged and did not undertake a proper review even then. It attempted to amend the claim, but this failed, and the Applicant still pursued a hopeless allegation.

Procedural Failings in the Applicant's Conduct of the Case

79. The Applicant's lack of analysis meant that the Second Respondent had to conduct her own analysis of the relevant case law, and she was forced to respond to hopeless allegations, which were later abandoned. The Applicant's pursuit of breaches of the Principles was without sufficient explanation as to how alleged breaches of Rule 14.5 were serious enough to constitute a breach of the Principles. The Applicant's late amendment application caused significant delays at the beginning of the hearing and wasted time. This could have been avoided by submitting an application in good time.

80. Even after having some amendments refused, the Applicant continued to try to advance those arguments, requiring further rulings from the Tribunal.

Delay in Bringing Allegations

81. There was a considerable delay between the First Respondent's self-report in 2020, the Second Respondent's interview in 2021, the FIO report in 2021, and the commencement of Tribunal proceedings in 2024. The length of the delay was especially unjustifiable given the Applicant's lack of in-depth investigation.

Failure to Respond to R2's Without Prejudice Position

82. The Second Respondent made without prejudice offers to resolve the matter both before and after proceedings had commenced. In April 2024, the Second Respondent offered to admit a breach of Rule 14.5, pay a reduced fine, and to admit to breaches of the Principles. During the hearing, the Second Respondent offered to admit to a breach of Rule 14.5 and to accept a reprimand with no order as to costs. The Applicant's failed to resolve the matter and acted unrealistically in continuing with the proceedings. While it was not suggested by the Second Respondent that the without prejudice offers should be treated in the same way as a Part 36 offer might be treated in civil litigation, the offers made by her were relevant to the question of costs and ought therefore to be taken into consideration by the Tribunal.

Third Respondent

83. Ms Butler applied for the Applicant to pay the Third Respondent's costs for defending the proceedings. He did not seek pre-issue costs, recognising that the Applicant was initially entitled to investigate after his self-report. Ms Butler argued that a costs order against the Applicant was justified due to its improper conduct, which was also criticised by the Tribunal. This would not have a "chilling effect" on the regulator but encourage fair and responsible behaviour.

84. The Third Respondent adopted the Firm's submissions on legal principles and argued the following factors equally applied to him as a reason for the Applicant to pay costs in principle:

The proceedings were advanced on an improper or fundamentally flawed basis.

85. It was submitted that the Third Respondent was referred to the Tribunal for a single alleged *inadvertent* breach of an accounts rule that resulted in no harm. The Applicant's decision to prosecute him was extraordinary because the payment was authorised 11 years ago for clients he knew well, and the matter partner approved the payment. The scope of Rule 14.5 was unclear before the High Court decision in *Fuglers.*

86. The Applicant did not allege any warning signs or context that would make the breach serious. Even if a breach of Rule 14.5 had been found, it was submitted that there was no realistic chance of the Tribunal making an order against him nor any basis for it being in the public interest for this matter to be determined by the Tribunal.

87. The prosecution of him appeared to be driven by the Applicant's interpretation of a 2014 email exchange. According to the Applicant's Authorised Decision Maker,

> *"the prohibition against solicitors providing a banking facility through their firm's client account was well established and, it seems from the correspondence, understood by Mr Rifkin and other managers at the Firm...[and] there is a realistic prospect of the Tribunal concluding that Mr Rifkin understood and was on notice that the payment which he authorised risked putting him and the Firm in breach of their regulatory obligations."*

88. However, the Tribunal found no probative value in the email exchange. The Applicant did not even interview the Third Respondent to understand the context of the payment and it failed to properly assess the case after abandoning its interpretation of the email, which left it with only the argument that it was a single inadvertent breach. Pursuing the case, given all the above, was an error that went to the very root of the basis of the proceedings.

<u>The Applicant unreasonably persisted despite being given opportunities to close the matter</u>

89. The Third Respondent cooperated with the Applicant's investigation, self-reported the issue, and attempted to resolve the matter constructively. The Firm's self-report on 15 October 2020 was made with his involvement and consent. The Third Respondent (along with other partners) confirmed their awareness of the issues, provided context, and explained improvements to the firm's systems in a letter dated 5 October 2021.

90. In September 2023, the Applicant issued a notice recommending the Third Respondent be referred to the Tribunal based on the assertion he was "aware of the issue" and therefore "failed to act with integrity". His solicitors responded (30 November 2023), stating that "It is, in my experience, usual for the FI Officer to interview those partners in a firm who may have some personal responsibility for the breaches alleged and therefore it is notable that he was not interviewed and consequently the Notice was drafted without any explanation from him" (paragraph 7), and detailed why, the Applicant's position in the Notice was misplaced. Despite this, and without any evidence of deliberate or reckless breach, the Third Respondent was referred to the Tribunal in December 2023.

91. He made a "Without Prejudice Save as to Costs" (WPSATC) offer in April 2024 (along with the other respondents), offering to admit to a breach of Rule 14.5, accept the Principle breaches and pay a fine of £1,000. The WPSATC letter included the following in respect of Second Respondent (Ms Rollo):

> *"Ms Rollo had received no training on Rule 14.5 at that time and gave insufficient thought to enquiring into the specific purposes of each payment. She had no suspicions that any of the transfers were in any way improper and believed that there was no reason at the time to refuse instructions from the relevant clients."*

92. The Applicant WPSATC offer was rejected by the SRA, who proceeded with a flawed case. This behaviour is relevant to a costs order against the Applicant as it was a "manifestly reasonable and constructive offer seeking to draw matters to a close on appropriate terms in the public interest."

Inordinate Delay

93. There was inordinate delay that went "substantially beyond the delay inherent in the proper investigation and determination of allegations of misconduct." The delay caused significant stress to the Third Respondent.

Other Procedural Failings

94. The Applicant attempted to resurrect a more serious case against the Respondent at the last minute, after abandoning the idea in the Rule 12 statement, which was based on the email exchange. The Applicant waited until the Friday before the start of the Tribunal hearing to apply to amend to incorporate a case they had previously abandoned. After being refused permission to amend (as the application was too late and made without a proper basis), the Applicant persisted in pursuing the flawed allegations and continued to try to advance their case based on the Reply rather than the Rule 12 Statement. The Tribunal had to rule the Applicant was limited to the Rule 12 Statement.

95. The Applicant's case, as pleaded in the Rule 12 Statement, was "stalked by uncertainty," with multiple versions uploaded to the trial bundle including those containing inaccuracies. The issues as pleaded were so opaque that it was not clear whether the Third Respondent was being accused of a breach of Principle 6.

96. The Third Respondent adopted the submissions made by the Firm on his admissions. His admission was "limited and highly contextualized" and caveated in his letter of 30 November 2023 and paragraph 3 of his Answer. His approach was driven by the stress of the ongoing process.

Approach to Assessment and Quantum

97. The Third Respondent agreed that costs should be subject to detailed assessment. He sought 50% of the combined costs of the Firm and himself (as they were dealt with as one retainer), which totals £119,173.80 and an interim payment of £59,500, which is 50% of his claimed costs.

98. Based on the arguments presented (individually or cumulatively), the Third Respondent submitted that the Tribunal should make a costs order against the Applicant for his costs as this is one of the "rare cases" where such an order was appropriate.

Applicant

99. Mr Counsell confirmed that the Applicant would not be claiming its costs, which had been in the sum of £67,718.20. However, despite the Respondents being successful in contesting the allegations and the Tribunal being critical of the Applicant's conduct of the case, he argued on the Applicant's behalf that no adverse costs order should be made against it because the Respondents had not established that there were sufficient grounds for such an order to be made. To justify an adverse costs order, the Respondents must demonstrate that the Applicant's conduct "fell so seriously into error that it reached the level which justifies an adverse costs order against a regulator, acting in good faith, in the exercise of its regulatory function."

100. The Applicant was in a "wholly different position to that of a party to ordinary civil litigation" (citing *Baxendale-Walker*). The normal civil principle that "costs should follow the event" does not automatically apply in regulatory proceedings. Regulatory proceedings require wider considerations than ordinary litigation (as seen in *City of Bradford MBC v Booth*). The court must take into account the need to encourage public authorities to make decisions in the public interest without undue fear of financial prejudice.

101. A costs order should not be made simply because the charge was dismissed unless "there are particular circumstances which justify it" (*Baxendale-Walker*). In *Competition and Markets Authority v Flynn Pharma Limited* the starting point was no order for costs against a regulator acting in their regulatory capacity. This default position could be departed from for "good reason," not just because the regulator was unsuccessful. "Good reason" includes unreasonable conduct by the regulator or substantial financial hardship for the successful party. Additional case-specific factors may also permit a departure from the default position.

102. The current state of the law (post *Solicitors Regulation Authority v. Tsang*) indicates that costs orders against a regulator are not limited to situations that are a "shambles from start to finish," but the conduct needs to be of "comparable gravity."

103. The Applicant set out the following relevant matters: Initial Referral: The Firm self-referred itself for potential breaches of Rule 14.5, admitting to making payments for unknown purposes.

104. Admissions: The Respondents made admissions to breaches of Rule 14.5 at various stages of the proceedings.

105. Substantial Sums: The sums of money involved in the payments were substantial, with 45 payments totalling over £19.1 million, spanning 28 months.

106. No Early Challenge: The Respondents did not initially challenge the proceedings, apply for a stay or submit a "no case" argument at the close of the Applicant's case.

107. Information from Respondents: The Applicant argued it was dependent on the Respondents to fully explain the connections between payments and the underlying transactions. The Applicant submitted that the Respondents "kept their cards close to their chests" (as they were perfectly entitled to do) in terms of explanations until the witness statement stage which made the withdrawal of some charges possible shortly before the hearing.

108. Withdrawal of Charges: Although the Tribunal criticised the Applicant for relying on the Second Respondent's investigation, the Applicant considered it was reasonable to reassess the charges once it received a full explanation.

109. Interview with the Second Respondent: The Applicant accepted that the Second Respondent was not given the materials for her interview far enough in advance but argued that she had many opportunities to provide more detailed information afterwards.

110. Investigation: The Applicant denied the investigation was not in depth, explaining it was triggered by a self-report.

111. Delay: The Applicant submitted that most of the time that elapsed was because the Firm did not identify the breaches until pointed out by another firm.

Response to Criticisms of Case Conduct

112. *"Stalked by Uncertainty"*: The Tribunal was critical of the multiple versions of the Rule 12 statement that were uploaded, which the Applicant acknowledged this was unfortunate it submitted that it did not impact the Respondents' understanding of the allegations. The reason for the five versions of the Rule 12 statement being uploaded were due to anonymisation of details, corrections and updating the transaction amounts.

Rejection of "Calderbank" Offers

113. The Respondents made two "Calderbank" offers which the Applicant rejected. The first involved fines and admissions, the second involved a breach of Rule 14.5, a reprimand and no costs order. Mr Counsell argued that the principles of "Calderbank" offers in normal civil litigation do not apply in disciplinary proceedings against a regulator. A regulator's decision to proceed is based on its regulatory function and public interest obligations, not just litigation outcome and a cost outcome. A regulated party should not be able to buy their way out of disciplinary proceedings.

114. A 2016 decision of a disciplinary tribunal confirmed that a Regulator should not be penalised for not accepting a settlement offer where the case was properly brought, even if they lost (Attwells Solicitors LLP).

Quantification of Costs

115. Mr Counsell requested that if a costs order was made, it should only cover the period from when the proceedings became unreasonably conducted and argued if a costs order was made, the cut-off date for the cost calculation should be no earlier than a reasonable time after the service of the Respondents' witness statements.

116. The Applicant submitted that summary assessment was not appropriate in the circumstances of this case given the level of costs and lack of detail provided by the Second Respondent. The Applicant requested the Tribunal to refer the issue of reasonableness of costs to a Taxing Master of the Senior Courts.

117. In conclusion the Applicant argued that despite the Tribunal's criticisms, this case was not comparable to those that are "improperly brought" or a "shambles from start to finish." Therefore, no costs order should be made against the regulator. An adverse costs order against a regulator should be rare and reserved for serious errors in conduct, akin to a prosecution that was a "shambles."

118. The Applicant believed it acted reasonably in bringing and conducting the proceedings, given its regulatory function and the information available to it, especially in light of the self-referral and the respondents' acknowledgements of breaches.

Tribunal's Decision on Costs

119. The Tribunal noted that it has a broad discretion to make orders regarding costs (Rule 43(1)SDPR 2019) and that the amount of costs to be paid could be determined in two ways (Rule 43(2) 2019):

- Summary Assessment: in which the Tribunal could decide and fix the costs itself.

- Detailed Assessment: in which the Tribunal can direct a "taxing Master of the Senior Courts" to conduct a detailed assessment.

120. The three Respondents, successful in defending allegations of misconduct before the Tribunal sought costs orders from the Applicant. The Applicant, argued against a costs order, citing its regulatory role and the Respondents' admissions.

121. The Respondents, contended that the Applicant's conduct was unreasonable, including flawed investigations and unreasonable persistence, justifying a costs award. The Tribunal therefore had to determine whether to award costs in principle and whether to order a detailed assessment, a course urged upon by all parties, if it decided that the Applicant should pay some or all of the Respondents' costs.

122. The central issue was whether the Applicant's actions in conducting its prosecution of the Respondents represented a 'good reason' to depart from the usual principle against awarding costs against a regulator. Mr Counsell had argued that there was no such good reason.

123. The Tribunal examined the core issues:

<u>Inadequate Investigation:</u>

124. There had been some criticism of Financial Investigator (FIO) for not adequately investigating the case and not seeking further clarification when faced with confusing or incomplete information. The Tribunal considered that, irrespective of the fact that this had been a self-referral it had not been without complexity and the FIO should have sought legal advice and /or advice from a forensic accounting expert regarding payments within the corporate structure and the implications of such transactions.

<u>Failure to Review Case Strength:</u>

125. The Applicant's failure to reassess the validity of its case, particularly after receiving further information from the Second Respondent. The Tribunal considered this to have been a significant failing, and the Applicant should have recognised the weakness of its position and taken corrective action, including potentially settling or withdrawing the case.

<u>The Rule 12 Statement and Conduct of the Applicant at the Substantive Hearing:</u>

126. Time had been wasted during the substantive hearing by the Applicant's amendments and revisions to the Rule 12 Statement. The fact that these were being attended to past

the eleventh hour was particularly unimpressive and they were an unwarranted distraction for the Tribunal and the Respondents at a crucial time. Whilst a prosecutor is expected to be in command of their case at the commencement of a substantive hearing things may happen which necessitate fine tuning and minor amendment, this sometimes happens, and the Tribunal does not expect infallibility.

127. However, in this case the Rule 12 Statement was amended multiple times, sometimes confusingly so. This went beyond errors relating to anonymisation and problems with the listed payment amounts and extended to what was being alleged and the case which the Respondents had to meet. This was particularly egregious as the Tribunal had, on day one of the hearing and following its initial permission to amend the Rule 12 Statement, given the parties an opportunity to reflect, review and settle. The Respondent chose to pursue its case despite obvious weaknesses with it. This had been a serious error of judgment which served to increase costs unnecessarily.

128. During the evidence stage of the proceedings, it was not clear to the Tribunal whether certain allegations and breaches of the Principles were still being pursued by the Applicant even at the stage where counsel for the Third Respondent was making her final address. This was somewhat unprecedented in the Tribunal's experience and could rightly be characterised as a 'shambles' and/or a matter of comparable gravity which persisted throughout the course of the substantive hearing to the point where it retired to deliberate.

129. There had been a significant risk that the Tribunal could have veered off course in its deliberations had not the various mistakes and oversights been addressed by the Respondents.

130. In this regard the Respondents were fortunate to have able counsel to protect their position. The Tribunal noted with concern what injustice may have resulted in a similar situation where Respondents were not represented.

131. The Tribunal found that the above factors, in combination, were good reason to depart from the usual position as to costs and in such circumstances, this was one of those rare instances where it was right for an award of costs to be made against the Applicant.

132. Whilst the Tribunal had heard arguments from the Respondents regarding alleged failures at earlier stages of the case it considered that the case had been properly brought but that it had gone severely off track at the substantive hearing. Therefore, it would be proportionate to limit the extent of the costs order to the failings which it, the Tribunal, had observed directly. This related to events which took place when the Applicant was given time to review its case on the first day of the substantive hearing. This had been a strong signal to the Applicant, yet it persisted with the prosecution despite clear indications that its case was weak, if not fatally flawed. It failed to take a realistic view of the evidence and ignored an opportunity given to it by the Tribunal to reach a resolution: from this point to when the Tribunal retired to deliberate the Applicant had not been acting reasonably.

133. The argument that the Respondents made no applications to dismiss the case, nor half time submissions were not sufficient to dislodge the Applicant's core failure as identified by the Tribunal itself.

134. The award of costs would be limited to 11:30 am on 20 November the, time when the case was adjourned for the Applicant to review to 2:30pm on November 22, 2024 [the time when the Tribunal retired to deliberate on the facts.]

135. The Tribunal considered that a summary assessment of costs was clearly not appropriate and that it would order a detailed assessment. As to ordering an interim payment, the Tribunal declined to do so noting that its Rules did not give it such a specific power and, even if it had such a power, the Tribunal had not been presented with the detailed information it required to calculate the amount of an interim payment and to make a fair order in that regard.

The Statement of Full Order

First Respondent

136. The Tribunal ORDERED that the allegations against of TEACHER STERN LLP, Recognised Body, be DISMISSED.

137. The Tribunal further ORDERED the Applicant do pay the Respondent's costs of these proceedings for the period commencing 11:30 am on 20 November to 2:30pm on November 22, 2024, such costs to be subject to detailed assessment unless otherwise agreed.

Second Respondent

138. The Tribunal ORDERED that the allegations against CLAIRE ROLLO, Solicitor, be DISMISSED.

139. The Tribunal further ORDERED the Applicant do pay the Respondent's costs of these proceedings for the period commencing 11:30 am on 20 November to 2:30pm on November 22, 2024, such costs to be subject to detailed assessment unless otherwise agreed.

Third Respondent

140. The Tribunal ORDERED that the allegations against SACHA IAN RIFKIN, Solicitor, be DISMISSED.

141. The Tribunal further ORDERED the Applicant do pay the Respondent's costs of these proceedings for the period commencing 11:30 am on 20 November to 2:30pm on November 22, 2024, such costs to be subject to detailed assessment unless otherwise agreed.

Dated this 10th day of February 2025
On behalf of the Tribunal

G. Sydenham

JUDGMENT FILED WITH THE LAW SOCIETY
10 JANUARY 2025

G Sydenham
Chair