SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11436-2015

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

MARCUS PAUL NICKSON Respondent

Before:

Mr L. N. Gilford (in the chair)
Mr J. P. Davies
Lady Bonham Carter

Date of Hearing: 12-14 July 2016

Appearances

Mr James McClelland, Counsel of Fountain Court Chambers, Temple, London EC4Y 9DH instructed by Penningtons Manches LLP of Abacus House, 33 Gutter Lane, London, EC2V 8AR for the Applicant

Mr Timothy Nesbitt, Counsel of Outer Temple Chambers, The Outer Temple, 222 Strand, London WC2R 1BA instructed by Murdochs Solicitors, 45 High Street, Wanstead, London E11 2AA for the Respondent who was present

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JUDGMENT

Allegations

Note regarding allegations

The majority of the facts cited in support of the allegations took place or (in the case of ongoing conduct) started between 1 July 2007 and 6 October 2011, the former being the date upon which the Solicitors Code of Conduct 2007 ("the 2007 Code") came into effect, and the latter being the date upon which the SRA Code of Conduct 2011 ("2011 Code"), SRA Principles 2011 ("Principles") and SRA Accounts Rules 2011 ("AR 2011") took effect. However, some of the facts pre-dated 1 July 2007, and the conduct in question was therefore measured against the Solicitors Practice Rules 1990 ("the 1990 Rules"). Additionally, some of those facts/ circumstances continued after 6 October 2011, in that the relevant conduct was ongoing. The Applicant drafted the allegations primarily by reference to the provisions of the 2007 Code and the Solicitors Accounts Rules 1998 ("SAR 1998"). However, each such rule had an equivalent in the 1990 Rules, 2011 Code/ Principles, and the AR 2011 (albeit that the wording differed in some instances). These equivalents are given in brackets in the allegations, without exposition or being set out in full. Where the context or facts required, the relevant allegation was taken to include those provisions.

The allegations against the Respondent Marcus Paul Nickson set out in an amended Rule 5 Statement dated 17 May 2016, were:

1. Costs were taken by his firm from damages awarded to clients in legal aid funded cases, when the firm had no entitlement to those costs because they had not been subject to legal aid assessment. Those withdrawals resulted in significant shortfalls in client funds. He thereby:

1.1 breached sections 10 and 22 of the Access to Justice Act 1999 and regulations drawn up to give effect to those provisions;

1.2 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Rule 1(a) 1990 Rules/Principle 2);

1.3 failed to act in the best interests of his clients, contrary to Rule 1.04 of the 2007 Code (Rule 1(c) 1990 Rules/Principle 4);

1.4 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Rule 1(d) 1990 Rules/Principle 6); and

1.5 acted dishonestly, save that the allegation of dishonesty was not made in respect of the deduction made from client W's damages described at specified paragraphs of the Rule 5 Statement.

2. In the case of client C, in breach of a High Court order which required that the firm's costs either be subjected to a legal aid assessment, or otherwise waived, the firm neither submitted its costs to legal aid assessment nor waived them, but instead retained those costs, which it had already wrongly deducted from C's damages (as above), resulting in a shortfall in C's funds of at least £247,459.05. He thereby:

2.1 failed to comply with a court order requiring him and/or his firm to take a particular course of action, in breach of Rule 11.02 of the 2007 Code;

2.2 acted without integrity contrary to Rule 1.02 of the 2007 Code;

2.3 failed to act in the best interests of his clients, contrary to Rule 1.04 of the 2007 Code; and

2.4 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

3. In the case of client W, he breached a High Court Order requiring £496,529.75 to be paid into court on or before 10 March 2009, in that £419,133.01 was paid into court on 6 May 2009, but the balance was not paid in, either at that time or thereafter. He thereby:

3.1 failed to comply with a court order requiring him and/or his firm to take a particular course of action, in breach of Rule 11.02 of the 2007 Code;

3.2 acted without integrity contrary to Rule 1.02 of the 2007 Code; and

3.3 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

4. Having been advised by his in-house costs draftsman and three barristers that his firm had improperly taken costs from client W's damages, he took no steps at all to rectify the situation. He thereby:

4.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Principle 2); and

4.2 acted in such a way as to diminish the trust the public placed in him or the legal profession contrary to Rule 1.06 of the 2007 Code (Principle 6).

5. His firm took funds pursuant to interim invoices on client B's case, for sums which were significantly higher than the costs which had actually been incurred. He thereby:

5.1 failed to act in his client's best interests, contrary to Rule 1.04 of the 2007 Code; and

5.2 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

6. Notwithstanding that a member of staff prepared two written file notes expressing concern about the circumstances described at allegation 5 above, no steps were taken to rectify those circumstances. He thereby:

6.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Principle 2);

6.2 failed to act in his client's best interests contrary to Rule 1.04 of the 2007 Code (Principle 4); and

6.3 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Principle 6).

7. Following costs being settled and received on an inter partes basis in the case of DS, his firm applied those costs towards its own fees but failed to pay (i) disbursements and (ii) sums due to the Legal Services Commission ("LSC"), together totalling approximately £39,000. He thereby:

7.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Principle 2); and

7.2 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Principle 6).

8. He provided inadequate, confusing and/or unclear information to clients regarding costs. He thereby:

8.1 breached Rule 2.03 of the 2007 Code (Rule 15 of the 1990 Rules/Outcome 1.13 of the 2011 Code); and

8.2 failed to provide a good standard of service to clients, contrary to Rule 1.05 of the 2007 Code (Principle 5); and

8.3 (in respect of the facts and matters pleaded at a specified paragraph of the Rule 5 Statement only):

8.3.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Rule 1(a) 1990 Rules/Principle 2);

8.3.2 failed to act in the best interests of his clients, contrary to Rule 1.04 of the 2007 Code (Rule 1(c) 1990 Rules/Principle 4); and

8.3.3 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Rule 1(d) 1990 Rules/Principle 6).

9. He failed to provide adequate advice to clients about the benefits and/or detriments of switching from legal aid to private funding for their cases. He thereby:

9.1 failed to act in his clients' best interests, contrary to Rule 1.04 of the 2007 Code (Principle 4); and

9.2 failed to provide a good standard of service to his clients, contrary to Rule 1.05 of the 2007 Code (Principle 5).

10. He advised clients that they were no longer eligible for legal aid funding as a result of payments made to those clients by defendants in their cases, without first confirming the position with the LSC (and/or its successor, the Legal Aid Agency ("LAA")). He thereby:

10.1 failed to act in his clients' best interests, contrary to Rule 1.04 of the 2007 Code (Rule 1(c) of the 1990 Rules/Principle 4); and

10.2 failed to provide a good standard of service to his clients, contrary to Rule 1.05 of the 2007 Code (Rule 1(e) of the 1990 Rules / Principle 5).

11. He procured the withdrawal of £124,504.30 from trust funds belonging to client AB for the repayment of funds due to the LSC, when (i) only £35,396.30 was due to the LSC in respect of AB's matter, and (ii) those funds should in any event have been taken from funds set aside in client account for that purpose. He thereby:

11.1 acted without integrity contrary to Rule 1.02 of the 2007 Code (Principle 2);

11.2 failed to act in his client's best interests contrary to Rule 1.04 of the 2007 Code (Principle 4); and

11.3 failed to provide a good standard of service to his client contrary to Rule 1.05 of the 2007 Code (Principle 5).

12. He amended a Conditional Fee Agreement between his firm and client G on the advice of his costs draftsman for his and/or his firm's benefit, without informing client G of this. In doing so he:

12.1 acted without integrity contrary to Rule 1.02 of the 2007 Code; and

12.2 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

12A. He altered his assessment of risk in the Conditional Fee Agreement which is the subject of Allegation 12 above, not as a result of genuinely revising his assessment of the risks involved, but as a device to produce a more favourable funding arrangement. Specifically, the original CFA stated that no uplift was warranted because the Respondent was confident of success; the revised CFA stated that a 100% uplift was justified because of, amongst other things, there being "lively issues" between the parties. He thereby:

12A.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code; and

12A.2 failed to act in his client's best interests, contrary to Rule 1.04 of the 2007 Code; and

12A.3 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

13. Following receipt of costs payments from counterparties in legal aid funded cases on which he was acting, his firm failed to retain in client account sums sufficient to reimburse the LSC and/or LAA for payments which it had made in order to fund such cases. He thereby:

13.1 breached Rule 21(3) of SAR 1998 (Rule 19(3) AR 2011); and

13.2 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Rule 1(d) of the 1990 Rules/Principle 6).

14. It was alleged that the Respondent's conduct in respect of allegations 1, 2, 3, 5, 6, 9, 10 and 12A was reckless, although it was open [to the Tribunal] to find those allegations proved without making a finding of recklessness in relation to any or all of them. In the case of allegation 1, the allegation of recklessness was made as an alternative to the primary case of dishonesty.

Documents

15. The Tribunal reviewed all the documents including:

Applicant

- Rule 5 Statement as amended at 17 May 2016 with exhibit KEW 1 in two volumes
- Skeleton argument for the Applicant drafted by Mr James McClelland dated 8 July 2016
- Applicant's authorities
- Applicant's Note in Response to the Respondent's application to adjourn drafted by Mr McClelland dated 8 July 2016
- Chronology drafted by Mr McClelland
- Statement of Applicant's costs as at 5 July 2016

Respondent

- Witness statement of the Respondent dated 6 July 2016
- Defence Case Statement drafted by Mr Timothy Nesbitt dated 14 January 2016
- Letter from Murdochs solicitors dated 7 July 2016
- Letter from Dr D Consultant Physician dated 27 June 2016
- Letter from Dr D dated 29 June 2016
- Letter from Dr S dated 29 June 2016
- Letter from Dr D dated 7 July 2016
- Letter from Dr T dated 7 July 2016
- Respondent's Skeleton argument drafted by Mr Nesbitt dated 11 July 2016
- Table identifying admission/denials drafted by Mr Nesbitt
- List of remaining issues drafted by Mr Nesbitt during the hearing (13 July 2016)
- Judgment in the case of R v SDT ex parte Gallagher heard on 30 September 1991 (unreported)
- Judgment in the case of R v BBC ex parte Lavelle (1983)1 WLR 23
- Bundle of testimonials
- Personal Financial Statement of the Respondent dated 15 June 2016

Preliminary Issues

16. In a letter dated 7 July 2016 for the Respondent Murdochs Solicitors applied for the substantive hearing to be adjourned based upon the prospect of criminal proceedings and grounds of ill-health. The Applicant opposed an adjournment in the Applicant's

Note in Response. Having regard to the proximity of the application to the scheduled hearing date, and since matters were not clear cut the Chairman felt it necessary to hear full argument from both parties.

17. For the Respondent, Mr Nesbitt referred to medical evidence from two GPs Dr T and Dr S and Dr D a consultant physician from a hospital neurovascular clinic. Dr T reported in his letter dated 7 July 2016 that the Respondent had been particularly unwell since around 2012. His medical problems included depression, cancer (which was thought to be in remission but in respect of which there was to be further investigation) and three transient ischemic attacks ("TIAs"). Dr T stated that the stress of the impending hearing was likely to have been the cause of these TIA events. Dr S in her letter dated 29 June 2016 detailed the Respondent's symptoms and stated that he was "finding it very difficult to face the impending Court Case around his fitness to practice (sic)". Mr Nesbitt accepted that Dr S did not feel that she could make a recommendation. In his letter of 7 July 2016, Dr D indicated that the risk of recurrence of TIA or stroke was highest in the first days and weeks following the index event. Dr D also indicated:

> "The risk does settle down after this period.
>
> In the first month I would normally advise my patients to avoid driving, patients frequently cancel holidays. In addition I usually advise patients to avoid digging, lifting, carrying heavy objects that might unduly raise their blood pressure.
>
> I was not aware that [the Respondent's] Tribunal was so soon. In the circumstances I think it would be reasonable to postpone it for one month.
>
> I am sure you realise that without a crystal ball I cannot be accurate and that this opinion may be challenged. However I do think it is reasonable advice."

18. Mr Nesbitt submitted that the index event referred to by Dr D occurred on 24 June 2016. Mr Nesbitt acknowledged as Mr Trevette of Murdochs had done in his letter to the Tribunal that the medical material did not include a doctor saying that the Respondent's ability to follow the proceedings had been adversely affected and the application to adjourn was not founded on evidence that the Respondent was not fit to face trial. However Mr Nesbitt submitted that as recently as late June 2016 the Respondent had suffered a mini stroke and in the aftermath of such an event one would expect as a matter of common sense that activities which put him under stress were likely to increase the risk of clinical incidents of that kind. The Respondent had been a clinical negligence practitioner for many years and was familiar with cases of this kind; one of the cases which was the subject of the allegations related to failure to react appropriately to TIAs and the Respondent did not want to put himself through the proceedings and giving evidence. Mr Nesbitt and his instructing solicitor shared his concern and Mr Nesbitt submitted that this was a proper basis for the Tribunal to adjourn for some weeks until the Respondent's condition had stabilised.

19. Mr Nesbitt submitted regarding the second limb of his application to adjourn that the Respondent had been interviewed by the police as long ago as 2013. His locally instructed solicitors had made enquiries with the police and the CPS as late as 27 June

2016 and the police eventually responded that the matter was still under investigation. Furthermore two police observers were present in the courtroom. Mr Nesbitt supposed they would report back to the CPS. The stress element was raised hugely in respect of that.

20. Mr Nesbitt referred to the authorities which Mr Trevette had lodged with his 7 July 2016 letter. The case of R v BBC ex parte Lavelle (1983) 1 WLR 23 which the then Mr Justice Woolf determined in 1982 involved disciplinary proceedings brought by the BBC in relation to suggestions of potential theft by Ms Lavelle. She was charged with theft and requested that disciplinary proceedings be adjourned until the outcome of the criminal proceedings was known. Those proceedings were more imminent than in the Respondent's case. Lord Justice Woolf said that in an application for judicial review regarding a refusal to adjourn, the decision had to fall outside the boundary of what a reasonable tribunal might do. Mr Nesbitt referred to the head note and the judgment which included:

> "If an employee makes an application to a domestic tribunal to adjourn its proceedings until after the conclusion of criminal proceedings on the basis that the continuation of the disciplinary proceedings would prejudice criminal proceedings, that application should be sympathetically considered by the tribunal. If it comes to the conclusion that the employee will suffer real prejudice if the domestic proceedings continue, then unless there is good reason for not doing so, the disciplinary proceedings should be adjourned. However, if the disciplinary tribunal does not adjourn in such circumstances, should the court intervene, and if so, in what circumstances?

21. Ultimately the Court concluded whilst the starting point should be that such an application should be looked at sympathetically it was not appropriate to intervene in the particular case. Mr Nesbitt accepted that the threshold for judicial review of a refusal to adjourn was higher than might be reached in this case. He also referred to the case of R v SDT ex parte Gallagher heard on 30 September 1991 (unreported) in which the application for judicial review was successful. It did not really depart from the propositions identified by Lord Justice Woolf in the Lavelle case. In Gallagher it was stated:

> "Each case will depend upon the facts and if it appears that to allow the proceedings to go forward would muddy the waters of justice, then it would be appropriate to adjourn them or take some other course to ensure that those waters were not muddied. But there is an infinite variety of facts and it must be left to the Solicitors Tribunal to proceed on the basis that I have suggested…"

22. Mr Nesbitt submitted that criminal defendants had procedural safeguards which were absent at the Tribunal and the ordinary rule against the admission of hearsay evidence did not apply. It was unusual for a person facing disciplinary proceedings to have to go through them before potential parallel criminal proceedings had run their course. The Respondent would be expected to give evidence in the Tribunal affording the police a complete preview of all he said while being tested in cross-examination by skilled counsel. It was unusual for a prosecuting authority to have such an opportunity to assess the strengths and weakness of the potential defendant's evidence.

Mr McClelland said in his Note that this argument was less forceful because witnesses at the Tribunal might not be the source of first-hand evidence in a criminal prosecution but the Respondent was already stressed and he now faced giving an account of himself in cross-examination by skilful counsel with a recording being made of all his evidence. Forcing him to defend himself before the police and CPS had nailed their colours to the mast would have disastrous effects on the Respondent's ability to do that. Although possibly any criminal proceedings were not as imminent as in the Lavelle case the rationale in respect of an adjournment was the same as Lord Justice Woolf had set out.

23. The Tribunal's Policy/Practice Note on Adjournments included:

> "4. The following reasons will NOT generally be regarded as providing justification for an adjournment;
>
> …
> c) Ill- health
>
> The claimed medical condition of the Applicant or Respondent unless this is supported by a reasoned opinion of an appropriate medical adviser. A doctor's certificate issued for social security and statutory sick pay purposes only or other certificate merely indicating that the person is unable to attend for work is unlikely to be sufficient."

24. For the Applicant, Mr McClelland submitted that the question of the Respondent feeling able to cope with the proceedings might elicit sympathy but did not reach the relevant standard for an adjournment. Dr T did not suggest that the Respondent was not fit to undergo the proceedings. He and Dr S were not specialists. Dr D's was the most relevant letter as he had greater insight into the neurology of the Respondent's condition. He had written three letters which individually and taken together did not provide a reasoned basis for the Respondent not to attend and give evidence. The first two letters appeared not to cover the issue of whether he should attend; what came out was that the Respondent had been advised not to drive. His condition affected vision in one eye so that advice followed but there was no recommendation that he should not work and Dr S said that he was still able to function as a solicitor. The Respondent had not been signed off from work and even that would not be sufficient for an adjournment under the Policy/Practice Note. Only Dr D's letter of 7 July 2016 directly addressed stress and whether the Respondent should continue. It pointed out the risk was of recurrent stress. It was unknown if appearing at the Tribunal could have a bearing or markedly increase the Respondent's risk of stroke and Mr McClelland submitted that the medical evidence was not therefore a basis not to proceed with the substantive hearing.

25. In respect of the second limb of the application to adjourn, Mr McClelland submitted that the Policy/Practice Note included among the reasons which would not generally be regarded as justification for an adjournment:

> "The existence or possibility of criminal proceedings unless the criminal proceedings relate to the same or substantially the same underlying facts as form the basis of the proceedings before the tribunal AND there is a genuine

> risk that the proceedings before the Tribunal may "muddy the waters of justice" so far as concerns the criminal proceedings. Proceedings which are not imminent will not usually meet this criterion …"

26. Mr McClelland submitted that there were no criminal proceedings less still were proceedings imminent. There was not even a charge just an indication that the Respondent was still under investigation, a situation which had lasted for some time. Any adjournment of these proceedings would be of indefinite duration until the long-standing criminal investigation was clarified. The Respondent was still working as a consultant in the same sort of matters as were in issue before the Tribunal so it was desirable that the allegations should be addressed now. Nothing was known about any future charge and whether it was founded on the same facts as the allegations. In Lavelle, Lord Justice Woolf said it was a matter for the Tribunal to conclude whether there was real prejudice to the criminal proceedings. In Gallagher it was stated:

> "It is perfectly plain, in my view, that the Disciplinary Tribunal, if faced with a situation where, for example, they were about to make a finding and order a day or two before the criminal proceedings began, might well consider that to do so would muddy the waters. They might then say that they would not reach a conclusion until after the criminal proceedings have been disposed of, or they might simply reserve judgment, which they are entitled to do under the rules, pending the hearing of the criminal proceedings."

Later the judgment included:

> "In my judgment, the criminal trial not being estimated to come on for hearing for at least a year, these matters are very remote."

So this was a case where the criminal proceedings were contemplated in immediate proximity to civil proceedings. The Respondent's position was more remote than that.

27. The Tribunal noted that the Respondent was given notice of the hearing date on 26 January 2016. The Tribunal also wished to know what had prompted the police enquiries to resurface around 27 June 2016 when the events subject of the allegations were referred to in the chronology as dating from 2004 and at the latest took place in 2012 when the Respondent left the firm. Mr Nesbitt explained that the Respondent had been interviewed in 2013 and 2014 but not told what the status of the investigation was. He was represented by criminal solicitors not those instructing Mr Nesbitt and the latter had asked that firm throughout 2016 about the status of the police investigations but it was not until 27 June that a police officer had contacted Murdochs to inform them that the file had been received back from the CPS who were looking for additional information. There had been no further interview. It was understood that the investigation would not be completed before the Tribunal proceedings concluded. The police response triggered the application to adjourn.

28. The Tribunal also wished to know why medical evidence had only been obtained in the last couple of weeks. Mr Nesbitt submitted that the Respondent's solicitors had reviewed the position and did not see on the basis of the medical information which they had, that there was a formal basis for submitting that he was not fit to stand trial

but the position had become more worrying because the Respondent had suffered a mini stroke in the last month.

29. The Tribunal had regard to the submissions for the Respondent and for the Applicant and to its Policy/Practice Note. The Policy/Practice Note specified that if the application was late, that is within 21 days of the commencement of the hearing the Tribunal would expect there to be a statement from the Respondent with a statement of truth but there was nothing from the Respondent; the Tribunal only had the letter from his solicitors and the medical evidence. The Tribunal considered it likely that if it allowed an adjournment the matter would go off for six months.

30. The Tribunal also noted particularly in the context of the medical evidence that Dr S stated that the Respondent could still function as a solicitor. The medical evidence did not suggest that the Respondent was medically unfit to attend but rather that there was an unquantifiable risk that his attendance would increase the risk of stroke. The Respondent had been instructed not to drive, dig and the like but no doctor had been asked to address the question was he fit to give evidence? The Tribunal considered the only persuasive evidence was that of the consultant Dr D. It noted that the so-called "index" event had taken place three weeks previously. It also considered that for the matter to continue to hang over the Respondent would increase his stress. The Tribunal did not find the medical evidence was sufficient to form an opinion that the Respondent's medical condition was such that he could not cope with the proceedings. The Tribunal could make reasonable adjustments particularly if the Respondent decided to give evidence. The Tribunal considered that the Respondent's circumstances did not meet the Policy/Practice Note requirements for an adjournment on ill-health grounds.

31. As to the second limb of the application to adjourn there were no criminal proceedings on foot and no charges had been brought but the matter was under investigation by the Police. It was not known if the same facts might form the basis of any future criminal proceedings as were the subject of the allegations before the Tribunal. If there were publicity about the Tribunal proceedings the judge at any criminal proceedings could deal with it. The Tribunal considered that any criminal proceedings were somewhere in the remote future. If the authorities said that a criminal trial a year off was very remote, one could not say in this particular case that the waters of justice would be muddied by refusal to give an adjournment. The Tribunal also noted in the case of Gallagher in a phrase not quoted by the advocates, it was said:

> "In another case there might be a completely remote chance of the criminal proceedings being in any way prejudiced."

32. Furthermore the Tribunal considered that it was not in the interests of justice for this matter to be adjourned indefinitely which was what would have to happen in order to allow the criminal investigation to be concluded and any consequent proceedings which might be embarked upon to conclude also. The Tribunal did not therefore consider it appropriate to adjourn the substantive hearing on grounds of potential criminal proceedings. The application to adjourn was refused on both grounds of the application.

Admissions and Denials

33. In advance of the hearing, the Respondent had made a considerable number of admissions in response to a request by the Tribunal for a schedule of admissions and denials. Before Mr McClelland opened his case for the Applicant, Mr Nesbitt informed the Tribunal that the Respondent would make additional admissions. The Respondent's admissions are recorded under the relevant allegation. The Respondent made admissions including recklessness but it became apparent that the admissions of recklessness were based on a misunderstanding of the way in which recklessness was alleged and the Tribunal therefore agreed to those admissions being withdrawn.

Factual Background

34. The Respondent was born in 1952 and was admitted to the Roll of Solicitors on 1 November 1977.

35. From 2002, the Respondent was one of two partners of KJ Commons & Co. In October 2010, following the death of his co-partner in June 2010, the Respondent became one of five directors of KJ Commons & Co Ltd. References to those two entities either individually or jointly during the hearing and in the pleadings were to "the firm".

36. On 17 December 2012, the Respondent resigned from the firm. He then worked as a consultant elsewhere until 12 November 2014.

37. On 5 March 2013, an inspection of the books of account and other documents of the firm was commenced by Ms Liz Bond, a Forensic Investigation Officer ("IO") of the Applicant. Ms Bond's investigation culminated in a report dated 24 June 2013 ("the first FI Report").

38. On 19 September 2013, a further inspection of the books of account and other documents of the firm was commenced by Ms Lesley Horton, an IO. An interim report resulted from Ms Horton's investigation dated 28 November 2013 ("the second FI Report"). Ms Bond and Ms Horton together produced a further interim report regarding the Respondent, dated 11 September 2014 ("the third FI Report"). Ms Bond and Ms Horton together produced a final report dated 21 November 2014 regarding the firm ("the fourth FI Report").

39. In this judgment there are references to the agencies responsible for administering legal aid funding, namely the Legal Services Commission ("LSC") and its successor body (from April 2013), the Legal Aid Agency ("LAA"). The terms LSC and LAA are used interchangeably and a reference to one should be taken to include a reference to the other, should the context require.

40. It was set out in the Rule 5 Statement that personal injury/clinical negligence cases of the kind discussed in the Statement were typically conducted in two stages. Initially, the liability of the defendant for the harm suffered by the claimant had to be established (whether by agreement or trial). This part of the relevant cases was referred to as the "liability stage". Once liability was established, the quantum of

damages awarded to the claimant had to be established (again, by trial or agreement). This part was referred to as the "quantum stage".

41. The facts of the case of client E were the subject of detailed analysis in the submissions relating to allegations 1 and 8.3 and are not therefore rehearsed in this section of the judgment.

Client DS

42. The Respondent was instructed in relation to client DS's clinical negligence claim in March 2007. The matter was funded by way of legal aid certificate, the limit of which was £22,500.

43. The claim was successful and the defendant agreed to pay £287,000 in respect of damages, with an interim contribution of £50,000 towards the DS's costs. The sum of £337,000 (comprising damages and interim costs payment) was received into the firm's client account on 28 January 2011.

44. The firm raised four bills for profit costs (that is not including any disbursements) of £106,250 (inclusive of VAT) between 27 January and 12 May 2011, as follows:

Date	Amount
27.01.11	£47,000.00
14.02.11	£23,500.00
22.02.11	£11,750.00
12.05.11	£24,000.00

45. In July 2011 the parties agreed costs of £110,000, and the defendant paid £60,000 to the firm on 24 August 2011, £50,000 already having been paid in relation to costs on 28 January 2011.

46. By 21 November 2011, after various payments out of DS's client ledger, including payments to DS, a balance of £889.58 remained credited to DS's client ledger.

47. On 25 January 2012 an administrative member of the firm's staff identified, following a review of the file, that £40,006.62 was still due to be paid to third parties in relation to the matter, as follows:

- £7,949.69 was owed to Dr PE, a barrister
- £9,912.86 was due to a medical expert, Dr W (an email from the firm to W on 19 April 2011 suggested that his invoice had been lost); and
- £22,144.13 was due to the LAA as shown by a letter dated 13 August 2013 from the LAA to the firm.

48. On 20 September 2013, the balance on the client ledger (£941.69 at that date) was transferred to the LAA as part recoupment of the money due to it. Following that payment, the balance on the ledger was nil.

Client W

49. The Respondent had conduct of the personal injury matter of client W from 1999. The matter was funded throughout by legal aid (no private retainer of any kind was put in place between W and the firm).

50. On or around 19 January 2009, a settlement was agreed between the parties pursuant to which W would recover a global sum of £550,000, to include damages, legal costs, disbursements and VAT.

51. A court order recording the agreement between the parties was sealed on 3 March 2009 ("the W Order"), pursuant to which, W was to receive £496,529.75 in respect of damages (£500,000 less £3,470.25 due to the Compensation Recovery Unit ("CRU")).

52. Additionally, the W Order provided that the sum of £496,529.75 was to be paid to the firm "for subsequent payment into the Court Funds Office on or before 10th March 2009…. to be invested and accumulated in the Special Investment Account pending further order".

53. On 4 March 2009, £496,529.75 was received from the Defendant and credited to W's client account ledger. However, in breach of the W Order, it was not until more than two months later, on 6 May 2009, that any funds were paid into Court.

54. Additionally, only £419,133.01 was paid into Court. This was £77,396.74 less than the sum required to have been paid in pursuant to the W Order.

55. Pursuant to the W Order, there was to be no order as to costs, save that the Defendant was to make a contribution to W's costs of £50,000. The W Order went on to state that W's costs were to be assessed in accordance with Regulation 107 of the Civil Legal Aid (General) Regulations 1989, i.e. those costs were to be subject to legal aid assessment. The effect of this provision was that if the firm wished to recover any difference between its actual costs and the costs recovered inter-partes (£50,000), it was required to apply to recover that shortfall via legal aid assessment. This order reflected the statutory/regulatory "default" position which applied to the matter, as it was funded by legal aid. However, no legal aid assessment was undertaken, either at the time or subsequently.

56. On 3 March 2009, the firm raised an invoice for £115,000 (£100,000 plus VAT) in respect of profit costs. On 4 March 2009, the firm received the damages payment of £496,529.75 from the Defendant and credited it to client account. The firm also received the £50,000 costs contribution and credited it to office account in part settlement of the firm's invoice of 3 March 2009. The balance of the invoice (£65,000) was paid by means of a client to office account transfer. This transfer was made from W's damages.

57. On or around 29 April 2009, a further £12,918.87 was paid out of client account in order to settle an invoice from costs draftsmen C Costs Consultants Ltd ("C") instructed by the firm. Again, this payment was made from W's damages. This

payment and the costs contribution of £50,000 were not subject to the allegation of dishonesty attached to allegation 1.

58. Subsequently the Respondent consulted three barristers in succession about how the order might be amended but this did not occur. On 2 June 2009, the Respondent had a conversation with a third barrister, NB, who advised that the £50,000 which had been taken in respect of costs should, strictly speaking, be paid back and transferred to the Court, and that the firm's bill (presumed to be the bill for £115,000 dated 3 March 2009) should be withdrawn. Notwithstanding NB's advice, the firm's invoice for £115,000 was not reversed, and no further payment was made into Court.

59. As at 11 September 2014 (i.e. the date of the third FI Report), there was a shortfall of at least £127,918.87 on W's matter, comprising:

- £50,000 – the contribution towards W's costs which should have been retained on client account pursuant to SAR Rule 21(3); plus
- £65,000 - the balance of the firm's invoice dated 3 March 2009 which was taken from W's damages on 4 March 2009, in breach of the W Order and/or Regulation 107; plus
- £12,918.87 – the sum paid to C from W's damages on 29 April 2009.

60. In a letter to the IOs dated 4 June 2013, the Respondent stated that because leading counsel had previously advised that the case should be discontinued, he considered that the settlement of £500,000 "for the claimant's benefit" was a "considerable success"; an error had been made in the W Order by counsel, in that the order provided for legal aid taxation "when the agreement that had been reached with the Defendants was that they would pay £500,000 which included Solicitor/Client costs. They did, as a matter of fact, make a contribution to those costs of £50,000". Before leaving the firm, he had instructed his costs draftsman to make an application under the Slip Rule so that the W Order would reflect the agreement between the parties, that the costs were to be paid on a standard basis and there would be solicitor/client assessment, although he now understood that an application could not now be made and that any shortfall would be met by the firm's insurers.

61. In his attendance note dated 2 June 2009 the Respondent noted that there were dates in the W Order;

> "of which I was blissfully unaware because the Order has been put straight on the file, and I was not present in Court… when the Order was actually being finalised by Counsel".

<u>Client B</u>

62. The Respondent acted for B, who was pursuing a claim relating to the death of her husband. The matter commenced in August 2006.

63. On 30 August 2006, the Respondent sent a letter to B in which he gave a costs estimate of between £2,500 and £5,000. The matter was therefore privately funded from the outset. In respect of costs, the letter stated:

> "Regarding our discussion about costs being awarded to you, should you be successful, you will recover the vast majority of the monies you have paid to the firm. Unfortunately, the firm cannot guarantee that every penny paid on account will be refunded, but it is likely that the vast majority of fees expended will be recovered."

64. On 2 May 2007, the Respondent signed terms of appointment from NatWest Legal Insurance in respect of a before the event ("BTE") insurance policy, following which the matter was funded pursuant to that policy. There was no evidence that a revised client care letter was sent to reflect these terms taking effect.

65. B's claim was settled in September 2010, with B awarded £180,000 in damages. On 24 September 2010, £195,000 was received from the Defendant, comprising £180,000 in damages plus an interim costs payment of £15,000. On the same day the firm raised a bill for "interim profit costs" of £35,250 (£30,000 plus VAT); and paid the invoice by way of a transfer from client to office account. On 28 September 2010, the firm raised a further bill for "profit costs" of £11,750 (£10,000 plus VAT). This was paid the following day by way of client to office account transfer.

66. Accordingly, by 29 September 2010, the firm had billed and been paid £47,000 (inclusive of VAT) in respect of profit costs only. However, a "billing guide" (a printout from the firm's time recording system, usually obtained as a prelude to raising an invoice) for the matter showed that, to 6 September 2010, the firm's time costs (profit costs) were only £34,069.13.

67. A bill later prepared by a costs draftsman for assessment amounted to £48,275.03, inclusive of disbursements and VAT, with the profit costs element amounting to £38,016.18 (inclusive of VAT).

68. On or around 20 October 2011, the firm's costs draftsman settled costs at a global figure of £37,000, i.e. inclusive of disbursements and VAT. After deductions for disbursements and the costs draftsman's fee, this settlement resulted in a net recovery of profit costs for the firm of £22,574.59 (£19,212.42 plus VAT).

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69. As stated above, the client care letter which the Respondent sent to client B on 30 August 2006 provided a cost estimate of between £2,500 and £5,000. However, the firm's costs as contained in a bill drawn up by its costs draftsman for assessment, were £48,275.03. The client care letter also stated:

> "Should it become apparent that we are spending more than anticipated, we will advise you and explain the reasons why".

70. The IOs were unable to locate any evidence that client B had been provided with a revised estimate of her costs, or regular updates in respect of the level of costs incurred.

71. In respect of client B's potential liability for the firm's costs, the client care letter stated:

> "Regarding our discussion about costs being awarded to you, should you be successful, you will recover the vast majority of the monies you have paid to the firm. Unfortunately, the firm cannot guarantee that every penny paid on account will be refunded, but it is likely that the vast majority of fees expended will be recovered."

72. On 8 September 2010, shortly after damages had been agreed at £180,000, the Respondent wrote to B saying:

> "I will, if I may, deduct the base costs from the damages when they come in and then recover them from the Defendants. This will still leave you with a very substantial interim payment. The costs recovery procedure may take up to about three months but my Costs Draftsman will see to that for you".

73. On 28 September 2010, the Respondent had a telephone conversation with B. His note of the conversation states the following:

> "[B] rang and asked if I could send her some money; I said that I would retain the costs for the time being (something about which she was perfectly happy) and send £100k as soon as the monies were cleared".

74. On 19 August 2011, the Respondent wrote to B, saying that he had changed his cost recovery solicitor and that he hoped that costs, other than £8,000, would be recovered.

75. On 2 September 2011, B stated in a letter to the Respondent:

> "My view is that if by changing the recovery firm they can claim more of your costs than the previous recovery firm then I am happy with this so long as it does not cost me the £8,000 shortfall and perhaps you can enquire if my insurance company would cover the £8,000 considered to be unreasonable. I believe this would be a good outcome".

76. In a letter to B on 11 October 2011, the Respondent stated that a costs award had been agreed at £38,000, as against a bill of "just over £48,000". In fact, costs were agreed at £37,000. In his letter of 11 October 2011 the Respondent went on to state:

> "As you will see from my client care letter, we can never recover all of the costs involved. The recovery comes in at about 75% which is what you would expect".

77. In a letter to B on 4 November 2011, the Respondent stated:

> "I have managed to recover costs and disbursements of £37,000 against a bill of £47,000; we discussed this and I did not advise, as you know, going to detailed assessment for the balance because of the difference in contractual rebates and rates allowed by the Court, and so on."

78. There were further communications between B and the Respondent, which made clear that B was unhappy about the shortfall in damages paid to her. This culminated in B instructing other solicitors to provide professional advice in or around November 2012. On 7 March 2013, M (who had been instructed by B) wrote to the firm to express her dissatisfaction with the costs position.

79. There was no evidence that the Respondent provided client B with an updated client care letter when he signed the NatWest terms of appointment on 2 May 2007, notwithstanding that those terms fundamentally changed the costs position insofar as client B was concerned. For example:

- clause 5 stated that the firm's charges would be based on those prescribed by the nearest County Court;

- clause 6 stated:

> "Where your costs are assessed by the Court on the standard basis, such costs awarded and recovered will be in full and final settlement of your bill of costs, and no further sum will be payable by the insured person or NatWest Insurance";

- clause 8 stipulated that the maximum cover for costs, disbursements and VAT pursuant to the policy was £50,000.

Client H

80. The Respondent had conduct of a clinical negligence claim on behalf of client H, which commenced in 2000. Because H was a minor, the Respondent took instructions from her parents. The matter was initially funded by legal aid.

81. On 2 February 2005, the Respondent sent a client care letter to client H's parents, in which he reported that the Defendants had admitted liability and the legal aid certificate had been discharged. Accordingly, the matter ceased to be publicly funded at around that time.

82. In relation to costs, the letter gave the Respondent's hourly rate as £163 and stated that letters and telephone calls would be charged at 10% of that rate. The letter did not give a costs estimate, but stated:

> "Regarding our discussion about costs being awarded to you, should you be successful, you will recover the vast majority of the monies you have paid to the firm. Unfortunately, the firm cannot guarantee that every penny paid on account will be refunded, but it is likely that the vast majority of the fees expended will be recovered"

83. The letter made no mention of a conditional fee agreement ("CFA"), and no copy of such an agreement was located on the file. Nevertheless as recorded in the FI Report dated 11 September 2014, both H's father and the Respondent appeared to consider that a CFA was put in place as evidenced by a telephone attendance note dated 12 February 2014.

84. On 7 November 2005, an offer of £3.5 million in damages was accepted by H's parents.

85. Costs (to include profit costs, disbursements and VAT) in respect of the liability stage (taken to cover the period to 18 January 2005) were agreed at £97,500 and the firm received a payment in that sum on 21 November 2005. In around September 2006, costs in respect of the quantum stage were agreed at £155,000 (again to include profit costs, disbursements and VAT) and the firm received payment in that sum on 7 September 2006. The firm therefore received a total of £252,500 in agreed costs.

86. Between 29 October 2003 and 16 January 2007, the firm was paid a total of £212,464.49 in respect of profit costs only, as follows:

Date	Sum
29.10.03	£2,440.90
13.01.05	£147.89
02.02.05	£98,631.23
09.12.05	£105,419.53
07.09.16	£4,179.94
16.01.07	£1,645.00

87. Additionally, throughout the conduct of the matter, the firm paid out at least £123,608.17 in respect of counsel's fees and disbursements.

88. Accordingly, the profit costs and disbursements (including counsel's fees) on the matter amounted to at least £336,072.66, which was £83,572.66 more than the sum received from the Defendant in respect of costs (£252,500). This difference was taken out of client H's damages, which would have been permissible provided there was a CFA in place containing appropriate terms (which the Applicant accepted was the case).

89. After being publicly funded initially, on or around 2 February 2005, a private retainer was put in place. For as long as the legal aid certificate was in place the Respondent/firm would not be entitled to recover any shortfall in the costs recovered inter-partes from H, except by means of legal aid assessment undertaken via the LSC; any such assessment would have been based on legal aid rates; and the costs limit on the legal aid certificate (which was not known in this case) would have placed an absolute cap on the sum which the firm would have been entitled to recover by means of legal aid assessment.

90. There was no evidence on the file of costs advice given to H's parents other than that provided in the client care letter to H's parents dated 2 February 2005.

<u>Client C</u>

91. The Respondent had conduct of a clinical negligence claim on behalf of C. As C was a minor, his father acted as his litigation friend. The Respondent was instructed in February 2000, and in June 2000 a public funding certificate was issued. In August 2004 proceedings were issued on behalf of C.

92. In around May 2005, CFAs were signed by C's parents. On 10 May 2005 a client care letter was sent to C's father regarding the CFAs. On 30 June 2005, the firm received an interim payment of £100,000 in respect of damages suggesting that the CFAs might have been prompted by an agreement between the parties with respect to liability.

93. On 9 December 2005, £55,000 was received from the Defendant in respect of costs.

94. On 24 October 2007 an order was made by consent ("the C Order"). Amongst other matters, it provided that C would be awarded £1.15 million in damages, with further periodical payments in the future. The C Order also contained provisions as to costs.

95. In around September 2007, a separate client ledger was set up for a Trust Fund for C. On 7 December 2007, £156,899.76 was transferred from the litigation ledger to the trust ledger.

96. In February 2008, the Defendant agreed to pay a further £170,000 in respect of costs, meaning that a total of £225,000 was received from the Defendant in respect of global costs (i.e. for both the liability and quantum phases of the case, and to include profit costs, disbursements and VAT). On 19 March 2008, £170,000 was paid to the firm.

97. The C Order contained the following provisions regarding costs. At paragraph 7:

> "the Defendant do pay the Claimant's costs of this action to be the subject of detailed assessment on the standard basis if not agreed"

and at paragraph 8:

> "There to be a detailed assessment of the Claimant's costs incurred up to and including 4 October 2007 [i.e. the date of the hearing at which the C Order was approved by the Court] in accordance with Regulation 107 of the Civil Legal Aid (General) Regulations 1989… except that the Claimant's solicitors shall be at liberty to waive any claim for further costs beyond those referred to in paragraph 7 above in which circumstances legal aid assessment shall be dispensed with"

98. C's ledger shows that up to 1 October 2007, the firm had raised four bills for profit costs, totalling £357,438.41:

Date of bill	Amount of bill
17.06.05	£59,908.92
22.05.06	£12,337.50
28.02.07	£17,660.00
01.10.07	£267,531.99

99. The bills were paid by way of transfers from client to office account. Additionally, fees of counsel SE were paid out of client account, totalling £31,939.38.

100. In April 2008, a recoupment payment of £25,638.49 was made to the LSC from the firm's office account, the sum having been paid to the firm by the LSC in the course of the matter on account of profit costs and disbursements. These funds had, however, been transferred to office account on 9 April 2008 from C's trust fund ledger (it had been paid from C's damages).

101. On 2 April 2008, £16,052.77 was paid to C from the trust fund client ledger, and on 11 March 2009, £31,402.50 was paid from the trust fund client ledger to counsel (WB) who had worked on the litigation.

102. In around May 2005, the Respondent entered into a CFA with C's parents. There were two signed CFAs on the file (one for each parent). The first, signed by Ms KS (client C's mother) and the Respondent ("the mother's CFA") was not dated and did not provide details of the Respondent's hourly rate, but stated that a 100% success fee would be applied. (Whilst the reference to a 100% success fee at paragraph 6 of the CFA appeared to be struck through, paragraph 7 continued to refer to a success fee.) The CFA justified the success fee on the basis that this was an "exceptionally complicated cerebral palsy case".

103. A file note prepared by the Respondent appeared to contain an instruction to prepare a CFA based on an hourly rate of £200 with a 100% uplift. This was consistent with the mother's CFA. Additionally, on 13 September 2007, C (who had been instructed to prepare a detailed final bill of costs) wrote to the firm, noting that although the firm had expected costs to be assessed at an hourly rate of £200 with a 100% uplift, they (C) had used a rate of £300 with no uplift, in accordance with the terms of the CFA provided.

104. The second CFA, was signed by the Respondent and C's father, and was dated 10 May 2005 ("the father's CFA"). It stated that an hourly rate of £300 would be applied, and that there would be no success fee, because the firm was confident that the case would succeed.

105. On 10 May 2005, a client care letter was sent to C's father regarding the CFA. The letter was signed by both C's parents. The letter enclosed a copy of the Law Society's CFA explanation brochure, which stated in respect of costs:

> "If we and your opponent cannot agree the amount, the court will decide how much you can recover. If the amount agreed or allowed by the court does not cover all our basic charges and our disbursements, then you pay the difference."

106. However, this was inconsistent with the father's CFA, which stated in relation to costs:

> "If you and your opponent cannot agree the amount, the Court will decide how much you can recover. If the amount agreed or allowed by the Court does not cover all our basic charges and disbursements, we will not seek the balance from you."

107. The mother's CFA, on the other hand, stated that a shortfall in the firm's fees recovered from the Defendant would be recovered from her.

108. On 30 July 2014, the IOs asked the Respondent about the two CFAs on the file. He was unable to explain why the two CFAs were in such different terms. He added that the CFA signed by C's father was "wrong", as such agreements normally allowed solicitors to look to clients to make up any shortfall in costs.

Client AB

109. The Respondent had conduct of client AB's clinical negligence matter, which commenced in August 2000. A public funding certificate was granted on 9 September 2000.

110. On 18 February 2005, following a trial, the Defendant was found liable for AB's injuries.

111. An order sealed by the Court on 18 February 2005 ("the AB Order") which was drawn up by the Respondent, provided:

> "…the Defendant do pay the Claimant's costs of and incidental to the second trial of liability and causation on the standard basis to be subject to a detailed assessment forthwith if not otherwise agreed."

112. On 22 February 2005, the Respondent sent a memorandum to the firm's costs draftsman, in which he asked for a bill of costs to be prepared. He noted that there would be 700 to 750 hours of work, which would be charged at a 100% uplift, due to various factors, including the value and difficulty of the claim, and the fact that "I am not insured and have done this entirely at my own risk". However, the claim was being publicly funded at that stage.

113. On 9 March 2005, the firm received £575,000 from the Defendant, comprising interim payments of £500,000 in respect of damages and £75,000 in respect of costs. The £575,000 was credited to AB's client ledger on 9 March 2005.

114. On 10 March 2005, an interim bill for £352,500 (£300,000 plus VAT) was sent to AB, and under cover of a letter from the Respondent in which he referred to having received a cheque of £575,000; presented the interim bill of costs, and referred to remitting "the balance of the cheque" (i.e. the £575,000 minus the costs). That same day, the interim bill was paid by way of client to office account transfers, as follows: £141,000 on 14 March 2005; and £211,500 on 24 March 2005.

115. The amount of £277,500 of the £352,500 bill (that is £352,500 less the £75,000 interim payment) was therefore paid out of AB's damages. However, as the case was publicly funded during the liability stage (the stage to which the 10 March 2005 bill related), the Respondent was not entitled to be paid by AB, and should have sought to recover any difference between the firm's costs and the sum recovered inter-partes via legal aid assessment. A resulting shortfall of £277,500 in client funds arose. On 6 March 2006, the parties reached agreement with respect to damages. The consent order recorded that the Defendant would pay AB's costs, to be assessed on the

standard basis if not agreed. On 22 March 2006, the firm raised a bill for a further £243,460 (inclusive of VAT) in respect of its profit costs, taking the total billed in respect of profit costs only to £595,960 (including VAT). The detailed bill drawn up by the costs draftsman assessed its overall costs (i.e. including profit costs and disbursements) at £485,601.91. On 15 December 2006, global costs (for the liability and quantum stages) were agreed between the parties at £330,000 inclusive of profit costs, disbursements and VAT.

116. The firm's bill for £352,500 dated 10 March 2005 appeared to be that which was drawn up by the firm's costs draftsman as a result of the Respondent's memorandum on 22 February 2005. The bill appeared to have been based on 750 hours of work at an hourly rate of £400 (750 hours x £400 = £300,000). However, as the case was publicly funded at that stage, the Respondent was not entitled to charge an uplift. When the costs draftsman drew up a final, detailed bill for assessment following the conclusion of the quantum stage in 2006 ("the detailed bill") hourly rates of between £267 and £316 were applied to the publicly funded stage.

117. The detailed bill gave the firm's profit costs for the liability stage as £177,926.81 (inclusive of VAT). This was £174,573.19 less than the sum billed on an interim basis on 10 March 2005 (and subsequently paid). However, there was no evidence on the file to suggest the reason for the difference between the profit costs on the interim bill of 10 March 2005 and the profit costs assessed by the firm's costs draftsman in 2006; that the Respondent had brought this difference to AB's attention and/or explained the reason for it; and/or that this difference was refunded to AB, or that the Respondent had considered making such a refund.

118. On 10 March 2005, the Respondent sent AB a letter saying that, following receipt of the interim payment of £575,000, AB's certificate of public funding had been discharged, as public funding was no longer appropriate. In fact, the legal aid certificate was not discharged until 20 October 2009.

119. Enclosed with the Respondent's letter of 10 March 2005 was a new client care letter, also dated 10 March 2005, which provided a costs estimate of £600,000 to £700,000, and mentioned the Respondent's hourly rate of £400. There was no reference to a CFA, and no CFA was found on the file.

120. There was no evidence that the Respondent advised AB in respect of the reasons for the switch, or about the merits (or otherwise) of doing so. There was also no evidence that the Respondent made enquiries of the LSC as to whether AB would no longer be eligible for legal aid funding, following receipt of the interim payment on 10 March 2005.

121. Between 25 September 2000 and 5 July 2005, a total of £35,396.30 was received from the LSC on account of costs (£18,094.10) and disbursements (£17,302.20). However, once the firm had received the £75,000 interim costs payment on 9 March 2005, it did not retain a sum in client account equivalent to the payments received from the LSC. Rather, that sum was applied towards the payment of the firm's invoice of 10 March 2005.

122. On 7 July 2007, £196,458.15 of the damages won by AB was transferred to a trust set up for the benefit of AB, of which the Respondent was a trustee. A separate file and ledger were created for the trust. The trust funds were administered by BL.

123. On 17 March 2008, the Respondent signed a CLS CLAIM2 form to the LSC.

124. On 20 May 2009, the Respondent sent a letter to BL stating:

> "I find that, having recovered [AB's] costs, I have inadvertently paid the Legal Aid funds payment on account for the time when [AB] was legally aided into the Trust rather than the Legal Aid funds.
>
> They have just woken up to it this morning and are seeing [sic] to recoup the sum of £112,039.76.
>
> I know we have a substantial cash holding; would you be good enough to forward that directly to my clients account so that I can satisfy them.
>
> I will explain the position to [AB]".

It was unclear how the sum of £112,039.76 was calculated, and no further explanation or breakdown for this sum was located. However the LSC paid only £35,396.30 to the firm.

125. On 27 May 2009, the sum of £112,039.76 was received into client account from BD (the parent company of BL) and was credited to the litigation client ledger. Prior to the receipt of those funds, the balance on that ledger had been nil.

126. On 28 July 2009, AB's mother, PB, who was a trustee of AB's trust along with the Respondent, telephoned the Respondent, apparently to query the fact that "£112,000" had been taken from the trust. The Respondent told PB that the money was to go back to the "legal aid board" and should not have been paid into the trust in the first place. He also apologised for not letting her know about this sooner, and said he would explain all to her at the trustees' meeting in October 2009.

127. In a letter to PB on the same date (28 July 2009), the Respondent again apologised to PB about the firm's failure to inform her about the withdrawal earlier, and repeated that the funds were to be sent back to the "legal aid board", and should not have been paid into the trust in the first place.

128. On 5 November 2009, a payment of £16,650.78 was made to the LSC.

129. A note of the trustees' meeting on 17 December 2009 stated:

> "[The Respondent] started the meeting by explaining the reason for the withdrawal of £112,000 from the Trust; a Claim Form "Claim 2" had been submitted to the Legal Services Commission some time ago and they were due to recoup the money paid out under the Legal Aid Certificate, which covered the proceedings up to the Trial on Liability (but not thereafter) and the LSC would be clawing sums back shortly. They had taken some, but not the rest".

130. A letter from the firm to the LSC dated 22 February 2010 enclosed a breakdown of payments made by the LSC to the firm in respect of AB's claim, which totalled £35,396.30; noted that the LSC had "recouped" £16,650.78 on 5 November 2009; and asked that the balance of £18,745.52 be recouped as well.

131. On 26 February 2010, £34,579.88 was paid to barrister SE from the litigation client ledger. This payment was made out of the balance of the funds received from BD on 27 May 2009.

132. On 4 August 2010, in an email to BD signed by the Respondent but sent by a secretary, the Respondent stated that the LSC had advised that it was going to recoup legally aided costs in the case, and that the recoupment amounted to £13,486.79. He asked for that sum to be sent by BACS. A letter from the firm to PB (AB's mother) stated that "after all these years" the LSC was going to recoup a further £13,486.79, and went on to say "I am perfectly happy with that…". On 6 August 2010, £13,486.79 was received into client account from BD, and credited to AB's litigation ledger.

133. On 4 November 2010, a further payment of £73,273.64 was made to the LSC from AB's litigation ledger, (that is from AB's damages).

Respondent's Submissions in relation to AB's matter

134. The Respondent was interviewed about AB's matter on 14 October 2014 and a transcript of the interview made. The Respondent was unable to recall details and could not therefore comment in relation to various matters raised with him. However, he stated that responsibility for the costs aspect of the case would have rested with the firm's management and that he was not directly involved.

135. In a letter dated 6 August 2014 to D Solicitors, which was enclosed with his letter to the Applicant of 26 November 2014, the Respondent stated that the firm had instructed an inappropriate costs draftsman, who had:

> "made a very poor effort and produced a bill totally [sic] £485,000, or indeed just under half what it should have been. I became aware of this last Monday"

and suggested that the firm had been wrong to accept an offer of £330,000 in respect of costs from the Defendant, and that this had been negligent, resulting in the client being "about £600,000 out of pocket".

136. In his letter to the Applicant on 26 November 2014, the Respondent stated:

> "I authorised this removal [i.e. the withdrawal of circa £112,000] because I had been told that it was to be repaid to the [LSC] and I could readily accept that the sum in that amount could be repayable to the [LSC] having regard to the size and complexity of this case, and I gave instructions to the Fund Managers to withdraw the money…"

Client G

137. The Respondent acted for client G in respect of a clinical negligence case. The client's mother, WG, acted as his litigation friend. The case was transferred to the firm in 2004, and the firm obtained a certificate of public funding.

138. A separate but related road traffic accident ("RTA") claim was pursued by the Respondent under a private retainer, the LSC having declined to fund it. The RTA claim was successful, with G recovering a net total of £46,213.69 in damages.

139. On 15 February 2007, the Respondent wrote to WG in relation to the damages in the RTA claim, stating:

> "I know this money is required for [G's] immediate needs, and I have not, therefore, disclosed it as capital to the Legal Services Commission"

140. No further reference was made to the RTA claim.

141. In around October 2008, in the clinical negligence case the parties agreed that the Defendant would accept liability on an 85% basis, and on 17 November 2008 the Court approved that agreement and made an order requiring the Defendant to make an interim payment to G of £220,295.68 in respect of damages (£250,000 less £29,704.32 due to the CRU) by 2 December 2008; and to pay G's costs on the standard basis, to be assessed if not agreed.

142. Following the settlement of the liability stage, the funding for the case switched from legal aid to a private retainer (CFA). On 7 November 2008, the Respondent sent a letter to WG which enclosed a CFA. The CFA, which was signed by the Respondent and WG (although not dated) provided that if the claim was successful: the firm would expect to recover 80% of its fees from the Defendant, but would look to G for any shortfall; and if the parties could not agree on costs, the court would assess costs, and again the firm would look to G for any shortfall.

143. The CFA provided for an hourly rate for the Respondent of £450, with a 0% success fee, on that basis that the firm was "confident that [the] case will succeed". By that stage, the issue of liability had been settled in favour of G, so it was uncertain how "success" in the context of the case would have been judged.

144. However, on 5 January 2009, a further client care letter was sent to WG. The letter contained a table which set out the hourly rates of various grades of fee earners. 'Grade A' was defined as solicitors with 8+ post qualification experience (which would include the Respondent), and the hourly rate for Grade A fee earners was given as £250. The letter also warned that the firm might look to G for any shortfall in costs recovered, and provided a cost estimate of £800,000, which was said to include an enhancement at 100%.

145. On 27 August 2009, the Respondent had a telephone conversation with his internal costs draftsman, GH and made a note of that conversation. It referred to amending the CFA. On 4 September 2009 the Respondent made a file note again referring to

amending it. An unsigned and undated CFA in different terms from the earlier documents was found on the file.

146. In the 14 October 2014 interview, the Respondent stated that he had provided WG with the updated CFA. However, there was no evidence on the client file to suggest that WG had been sent the amended CFA or that its terms were explained to her.

147. Following the parties' agreement with respect to liability in November 2008, on 2 December 2008 the Respondent raised a bill for profit costs of £195,500 (£170,000 plus VAT); that bill was sent under the cover of a letter from the Respondent in which he referred to the fact that the costs would be taken from the client's damages. On 5 December 2008 an interim damages payment of £220,295.68 was received and the firm's invoice was paid by way of a client to office account transfer.

148. On 27 February 2009, the firm received an interim payment of £75,000 from the Defendant on account of costs.

149. C prepared a detailed bill of costs for assessment. Costs for this stage were settled in or around September 2009 at £110,514.95 (the FI Report incorrectly cited this figure as £110,214.95) (£107,000 plus interest) as set out in a letter from C to the firm dated 3 September 2009. The terms of the settlement were set out in the letter but C's detailed bill of costs was not located on the file.

150. On 9 October 2009, the firm received £35,514.95 from the Defendant, being £110,514.95 in agreed costs less £75,000 already paid on an interim basis on 27 February 2009.

151. Also on 9 October 2009, an invoice of the firm dated 7 October 2009 in the sum of £35,500 was paid by way of client to office account transfer. Additionally, the following disbursements totalling £28,073.43 were paid out of client account in respect of the liability stage:

Date	Purpose	Amount paid
12.12.08	Counsel's fees (SE)	£ 5,000.00
10.03.09	Counsel's fees (SE)	£ 9,982.13
11.03.09	Costs draftsman's fee (C)	£ 575.00
16.03.09	Counsel's fees (SE)	£ 1,844.53
16.03.09	Costs draftsman's fees (C)	£10,384.27
18.03.09	Costs draftsman's fees (C)	£ 287.50

152. In summary, at least £223,573.43 was taken/paid by the firm in respect of costs and disbursements for the liability stage, consisting of: £195,500 pursuant to the firm's invoice dated 2 December 2008; and £28,073.43 in respect of counsel's fees and costs draftsman's fees. However, the firm had only recovered £110,514.95 (inclusive of interest) from the Defendant on an inter-partes basis for the liability stage.

153. As the liability stage of the case had been funded by way of a legal aid certificate, the firm was not entitled to deduct from G's damages any costs in excess of those recovered inter-partes, without legal aid assessment being undertaken. As such an

assessment was not undertaken, a shortfall of at least £113,058.48 arose (i.e. £223,573.43 less £110,514.95).

154. G's ledger recorded that various payments had been received from the LSC throughout the conduct of the liability stage of the case. On 5 November 2009, a recoupment payment to the LSC of £17,965.34 was made from client account. In effect, this payment was made from client G's damages. However, following receipt of the £75,000 interim costs payment from the defendant on 27 February 2009, funds sufficient to repay those payments to the LSC (i.e. to "recoup" them) were not set aside for that purpose.

The Respondent's Representations Generally

155. The Respondent represented to the IOs on a number of occasions that, once the "substantive" aspects of cases had been concluded, the responsibility for recovering costs passed to others. He produced a copy of a board resolution of the firm dated 12 February 2012 which, in effect, absolved him of any responsibility for dealing with costs, "save for initial discussions with clients about proposed cost".

156. On 12 August 2014, the Respondent provided the IOs with a statement/set of notes providing background information regarding his time at the firm in which he stated:

> *"*I would be in sole charge of the cases, running them with Counsel and Expert and Non-Expert Witnesses, through to trial. Once the case had reached trial, and had concluded (usually successfully) my involvement came to an end"

The Respondent stated that during the time that he (the Respondent) was in partnership with Mr KC, the Practice Manager, HM and Mr KC would then deal with the administration and financial management of the firm; the "collection of costs etc. was down to his secretary, [CA] and [HM], and I had no involvement in it save when things went wrong". He also described his approach to legally aided cases and costs and the pressure on him to "produce costs quickly". The Respondent referred to difficulties he experienced after the firm was incorporated:

> "And the pressure with regard to costs started up again. I could not stand it, and took steps to get out of the Practice quite literally at any cost".

In his letter to the Applicant of 26 November 2015, the Respondent said that the practice had been very much run by his former partner, Mr KC.

Witnesses

157. **Ms Lesley Horton** an IO gave evidence. The witness had not looked at legally aided work before this investigation. She had seen sizeable firms which hived off costs work to a finance or practice management department. The witness did not dispute that in interview JD a solicitor in the firm stated that "the three or four people in the Accounts Department and the Office Manager" dealt with the monthly statements that came in from the legal aid authorities or that the Respondent stated in interview:

> "… What is extraordinary about this is that every single year since this case (client H) settled, we have had Trustees meetings with the Investment Manager, myself and the Accountants present and this has never come to light, you know if it had come to light it might have been helpful."

The witness agreed that the Respondent had told her that the internal costs draftsman GH was frequently consulted.

158. The witness agreed that she knew by the time of the interview with the Respondent that there had been a "huge" falling out at the firm and that the Respondent had limited access to files.

159. In respect of the matter of client DS and failure to retain sums for recoupment by the LSC, the witness agreed that there was no evidence that the Respondent had seen the e-mail from SJ of the firm to LT dated 25 January 2012 saying that the case should be raised in the next directors' meeting. The witness was referred to the second FI report dated 28 November 2013 which recorded that on 28 October 2013 she asked various individuals at the firm why, if they were aware of the shortfall in this matter in 2012, action was not taken to deal with it until mid-2013. LT had explained that following the incorporation of the firm the managers began to hold regular management meetings and issues were raised at meetings with the Respondent but they complained about failure to engage with fellow managers and explain his decision/actions. The witness agreed that there was no assertion that the shortfall was something which the Respondent had created. What they said about the Respondent only indicated lack of engagement. The only reference to him was what was said in that e-mail. The comments about his failure to explain decisions and actions related to his conduct of clinical negligence files generally and the costs relating to them.

160. **Ms Liz Bond** an IO gave evidence. The witness stated that the accountants' role was only to prepare the annual accountants report and a report on the solicitor's accounts rules. The witness agreed Mr GH was heavily involved in matters.

161. The witness was referred to the case of W where the ledger showed a cheque requisition for the payment of funds into court in April 2010 in the amount of £77,396.74. The witness stated that it was an attempt to repay the shortfall but the money never made its way into court funds and the Applicant did not know the explanation. The witness agreed there was no evidence that the Respondent was responsible for the cancellation of that cheque and her recollection was that no one knew why it was cancelled and by that time another firm had taken over the matter.

162. As to whether others in the firm could see and scrutinise the transfers, the witness stated they would be evident from the ledgers and the files if someone needed to look at them and provided they were told that the matter was legally aided in the first place. She expected that they would have understood the rules. The same applied to the accountants provided they had the correct information at the outset about how the matter was being charged; otherwise it would not be obvious from the accounts.

Findings of Fact and Law

163. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(Paragraph numbers in quotations have been omitted unless they aid comprehension. Submissions include those in the documents and those made orally at the hearing.) Allegation 14 recklessness is dealt with under the allegations in respect of which it was alleged.

General Submissions for the Applicant

164. The allegations fell into three types: misconduct in relation to legal aid retainers, misconduct when moving clients from legal aid to private retainers and other failures of costs advice and misconduct in relation to private retainers. The defence rested on two linked propositions. First that notwithstanding many years of specialist practice in heavy clinical negligence cases conducted under legal aid the Respondent remained ignorant of some of the most fundamental principles governing that regime including that clients were not liable to their solicitors for costs. Second, he was so focused on fighting for clients that he had little or no involvement in the financial aspects of their cases and acted under the direction and guidance of the firm's administrative staff.

165. Mr McClelland submitted that the Respondent's admissions in respect of integrity were put on the basis of a form of culpable mistake and arose out of a failure to get to grips with the legal aid scheme so that he should not have been taking on work of this sort and was pointing his ethical compass in the wrong direction. (Mr Nesbitt submitted that it was more that the Respondent should have taken greater care.) The Applicant's case went beyond that; it asserted that the deductions which the Respondent had made were improper; he took unsecured loans from clients in respect of the recovery of fees. The integrity admissions were offered on the basis that the Respondent had little real involvement in the costs arrangements in the firm. The Respondent could not by making admissions tailor the allegations made against him or their seriousness. The admissions seemed to be made on the basis of gross error or gross negligence but the Applicant's case was that what the Respondent had done was inherently improper and he realised that and thus was dishonest. Mr McClelland submitted that recklessness was put on the basis that the Respondent had not got to grips with the rules, that he knew it and so should not have undertaken work of the sort.

166. Mr McClelland adopted the definition of integrity used in the financial services context as "moral soundness, rectitude and steady adherence to an ethical code" in the case of Hoodless v Financial Services Authority [2003] UKFSM FSM 007. A solicitor might act without integrity even if he did not act dishonestly, an example being where he did not appreciate that his conduct was dishonest by the ordinary standards of reasonable and honest people. In a case in the Upper Tribunal First Financial Advisers Ltd v Financial Services Authority [2012] UKUT B16 (TCC) it was said:

> "Even though a person might not have been dishonest if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity."

In Scott v SRA [2016] EWHC 1256 (Admin) it was said that want of integrity was capable of being identified as present or not, as the case might be, by an informed tribunal or court by reference to the facts of a particular case.

167. As to the authorities for recklessness, in R v G [2004] 1 AC 1034 Lord Bingham said:

> "A person acts recklessly… With respect to – (i) a circumstance when he is aware of the risk that it exists or will exist; (ii) a result when he is aware of the risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk."

In the present case the word "fact" could stand for the word "circumstance" in the quotation above. Reckless conduct might also be dishonest. As Lord Nicholls said in Royal Brunei Airlines v Tan [1995] 2 AC 378:

> "Nor does an honest person in such a case deliberately close his eyes and ears or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless."

In the case of Bryant v Law Society [2009] 1 WLR 163, the Court said:

> "In our view the tribunal has to be satisfied, to the proper standard of proof, that the relevant appellant knew that one or more of the transactions was "dubious" in the sense set out above. That entails finding that the particular appellant actually knew the transaction was dubious, not simply that he ought to have done so. But the tribunal would be entitled to reach this conclusion of knowledge on evidence that the appellant had deliberately shut his eyes to the obvious or refrained from enquiry because he suspected the truth but did not wish to have his suspicions confirmed…"

Recklessness required advertence to the risk and in terms of R v G that the relevant circumstance existed. In respect of reckless dishonesty a person was reckless of knowledge that something was improper in the way that reasonable and honest people would consider dishonest and was not asking the questions. Mr McClelland asked what was the Respondent aware of in terms of risk?

168. The Applicant accepted that there was no vicarious or strict liability in respect of the conduct rules relating to public trust, integrity and in respect of the allegation of dishonesty. The Applicant asserted that the Respondent's conduct included failure to ensure others carried out work regarding costs and any finding about that would be based on the Respondent's conduct.

169. Mr McClelland submitted that in Bolton v Law Society [1994] 1 WLR 512, Lord Bingham identified the "most fundamental" purpose of disciplining a solicitor as being;

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

That was amplified in Weston v Law Society (unreported, 29 June 1998). Lord Bingham (as the Lord Chief Justice) added:

> "It is important to appreciate that in speaking of "trustworthiness" in that passage the court had in mind, of course, honesty, but also had in mind the duty of anyone holding anyone else's money to exercise a proper stewardship in relation to it. That is violated if one solicitor with a duty to see that the rules are observed fails to do so. The tribunal was in my judgment entitled to take the view that the situation in this Firm was one which called for the close personal attention of Mr Weston as senior partner. It was entitled to conclude that it was not in all the circumstances enough for him to say that the Firm's finances were managed by Mr North and could therefore be left to him."

There was a minimum standard of good stewardship of client money. This was expanded on by Sir John Thomas MR in the case of Iqbal v Solicitors Regulation Authority [2012] EWHC 3251 (Admin):

> "It seems to me that trustworthiness also extends to those standards which the public are entitled to expect of a solicitor, including competence. If a solicitor exhibits manifest incompetence, as, in my judgment, the appellant did, then it is impossible to see how the public can have confidence in a person who has exhibited such incompetence. .."

It was not just a matter of negligence but of conduct exhibiting lack of competence; not a moment of madness but professional failure to understand the duties of a solicitor.

General Submissions for the Respondent

170. Mr Nesbitt divided the allegations into those which were serious but did not involve dishonesty and the residual allegation of dishonesty. His submissions regarding the latter are recorded under allegation 1. Mr Nesbitt agreed that it was accepted that acts and omissions were covered by the allegations.

171. Mr Nesbitt suggested that following the additional admissions made after the Respondent had heard the density and weight of the material in Mr McClelland's opening around 80% of the allegations were now admitted including widespread admissions of breach of the integrity principle. The Respondent recognised that the outcome of the proceedings even if the Tribunal found in his favour in respect of all the residual allegations, was likely to prevent him ever practising in future as a solicitor. Mr Nesbitt asked the Tribunal to be vigilant that in thinking about the outstanding issues it was not influenced by a general negative assessment of the Respondent derived from his admissions.

172. In the case of Re a Solicitor 1 WLR 869 Lord Denning set out that negligence might amount to professional misconduct if it was unconscionable and such as to be regarded as deplorable by other solicitors in the profession but negligence per se was not professional misconduct. In the case of Preiss v General Dental Council [2001] UKPC 36 it was confirmed that gross negligence could amount to serious professional misconduct.

173. Mr Nesbitt submitted that an ordinary analysis of recklessness involved distinguishing some sort of state of mind and some sort of risk; in the case cited as authority R v G it had been arson and some sort of recklessness regarding the results which in that case was a fire. That was not the case here and Mr Nesbitt had not appreciated that recklessness was pleaded in the sense of recklessness to the running of some sort of risk. He invited the Applicant to identify what the risk was in respect of which the Respondent was reckless. If the proper technical analysis of recklessness was to the risk of a particular event then the Respondent was not at fault.

174. In respect of the Tribunal's Practice Direction No. 5 of 4 February 2013 following on from the case of Iqbal v SRA [2012] EWHC 351 where it was said that "ordinarily the public would expect a professional man to give an account of his actions" the Tribunal directed for the avoidance of doubt that, in appropriate cases where a respondent denied some or all of the allegations against him (regardless of whether it was alleged that he had been dishonest), and/or disputed material facts and did not give evidence or submit himself for cross-examination the Tribunal should be entitled to take into account the position that the Respondent had chosen to adopt as regards the giving of evidence when reaching its decision in respect of its findings. This direction applied regardless of the fact that the Respondent might have provided a signed statement to the Tribunal. Mr Nesbitt placed emphasis on the words "in appropriate cases". A cogent and coherent explanation had been provided to the Tribunal for the Respondent's decision not to give evidence. Mr Nesbitt therefore submitted that this was not a case in which it was appropriate to attach weight to his failure to do so. It was also difficult to see evidence that would have a bearing on what the Tribunal had to determine. In respect of inconsistency between documents and the Respondent's witness statement, Mr Nesbitt acknowledged that the Tribunal did not have the benefit of explanations from the Respondent to resolve the tensions in evidence if they counted against him. He accepted that of course it would be better for the Respondent if his position were clear.

175. Mr Nesbitt did not take issue with the case law relating to integrity but admitted that in respect of it the Tribunal was looking for conduct beyond ordinary professional misconduct; something that was unethical or for loss of direction which was indicated by moral compass. He submitted that the Tribunal must be satisfied that the underlying facts were proved to the criminal standard but should also be sure that the characterisation which the Applicant sought to attach to the conduct was made out. Mr McClelland disputed this approach.

176. Mr Nesbitt did not challenge the authorities offered by Mr McClelland regarding recklessness but submitted that the law on recklessness largely arose from events that might have been foreseen which was not the best way to characterise the conduct in question in this matter. It was for the Applicant to establish direct evidence of an act or omission beyond mere negligence which had the pejorative adjective

"recklessness" attached to it by the allegation. For example in respect of the first of the issues proposed by Mr Nesbitt: (arising under allegation 7) had the Applicant proved the applicable standard (so that the Tribunal was sure) that the payments made in breach of the Court order in relation to C involved the Respondent in acts which amounted to or involved a breach of the integrity principle and recklessness? Mr Nesbitt invited the Tribunal to review this and submitted that there was no evidence of the Respondent executing the payments, triggering them, signing or authorising them. He accepted professional fault in some of the misconduct allegations in respect of failure to ensure a result. There was no evidence that it was his act or omission. It was not clear how it would work to attach breach of integrity if there was a failure to act and Mr Nesbitt suggested that something clear was needed for the allegation to be made out. He suggested that this principle applied in a similar way to all the allegations.

177. Mr Nesbitt submitted that the case had been brought and wide-ranging admissions had followed but the evidence of the Respondent's direct involvement was of a limited kind; it was more a matter of inferences or omission. The Tribunal had to ask did the evidence go far enough to tie the Respondent to what went wrong and even if it did, did the evidence rather than inference of personal fault go far enough to prove lack of integrity, recklessness or whatever misconduct was alleged. Mr Nesbitt suggested that it was a bridge too far.

178. **Allegation 1 - Costs were taken by his [the Respondent's] firm from damages awarded to clients in legal aid funded cases, when the firm had no entitlement to those costs because they had not been subject to legal aid assessment. Those withdrawals resulted in significant shortfalls in client funds. He thereby:**

1.1 breached sections 10 and 22 of the Access to Justice Act 1999 and regulations drawn up to give effect to those provisions;

1.2 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Rule 1(a) 1990 Rules/Principle 2);

1.3 failed to act in the best interests of his clients, contrary to Rule 1.04 of the 2007 Code (Rule 1(c) 1990 Rules / Principle 4); and

1.4 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Rule 1(d) 1990 Rules/Principle 6); and

1.5 acted dishonestly, save that the allegation of dishonesty was not made in respect of the deduction made from client W's damages described at specified paragraphs of the Rule 5 Statement.

Allegation 8 - He [the Respondent] provided inadequate, confusing and/or unclear information to clients regarding costs. He thereby:

8.3 (in respect of the facts and matters pleaded at a specified paragraph of the Rule 5 Statement only):

8.3.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Rule 1(a) 1990 Rules / Principle 2);

8.3.2 failed to act in the best interests of his clients, contrary to Rule 1.04 of the 2007 Code (Rule 1(c) 1990 Rules / Principle 4); and

8.3.3 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Rule 1(d) 1990 Rules / Principle 6).

(For allegations 8.1 and 8.2 see below.)

Submissions for the Applicant

178.1 Mr McClelland submitted that allegation 1 related to deduction of costs from damages and allegation 8.3 concerned the Respondent's failure to advise clients of those deductions. The relevant paragraph of the Rule 5 Statement in respect of allegation 8.3 set out:

> "Before making those deductions, the Respondent did not advise or (alternatively) adequately advise those clients. In particular, the Respondent did not advise clients that the proposed deductions were contrary to the legal aid scheme under which their cases were, or had been, conducted and that they were free to take the entirety of their damages without deduction unless and until a legal aid assessment was undertaken. (For the avoidance of doubt, no amount of advice could have legitimised the deduction of damages from clients' damages.)"

178.2 Mr McClelland submitted that regarding allegation 1, recklessness related to costs taken from clients where there was no entitlement to take them and so the Respondent was reckless as to the risk of there being no entitlement to take the fees. He was aware of the risk that he was not entitled to take those amounts.

178.3 Mr McClelland referred to the two limbed test for dishonesty in the case of Twinsectra Ltd v Yardley [2002] UKHL 12 which the Tribunal would employ in respect of allegation 1, (no dishonesty was alleged regarding allegation 8.3). It provided that conduct would be considered dishonest by the ordinary standards of reasonable and honest people - the objective limb and that the solicitor was aware that his or her conduct was dishonest by such standards - the subjective limb. Mr McClelland submitted that there were two ways for dishonesty to have occurred; if the Respondent was aware that his conduct breached the legal aid regime if there was specific advertence and the second way was if the Respondent suspected that he was or might be in breach and turned a blind eye that is he suspected but chose not to enquire because his suspicions might be confirmed to which Bryant v Law Society would be the more relevant case.

178.4 Mr McClelland relied on the facts set out in the FI Reports and the documents exhibited to them. It was common ground that the Respondent embarked on clinical negligence work in 1982. By the early 1990s he was a specialist practising in high value claims for personal injury and clinical negligence and he specialised in hypoxia

injuries to the brain; he was a leader in his field. The website of the firm with which he was presently a consultant described him as follows:

> "[The Respondent] is one of the foremost Clinical Negligence and Catastrophic Personal Injury Lawyers in the UK today with a wealth of knowledge and experience. [The Respondent] has acted in some of the most significant, complicated and high-profile cases the UK has seen. [The Respondent] is working in the background, with [JD], reviewing case notes, medical records and circumstances surrounding alleged negligence or injury."

178.5 The Respondent was the only person in his former firm who carried out this work. In his witness statement he described himself as ploughing his own furrow. Most of his work on clinical negligence was undertaken through legal aid. He said that there was a heavy shift to CFAs in about the year 2000. He had manifest facility with these claims under the legal aid regime and in his statement said that he was running a caseload of sometimes more than 100 cases. Mr McClelland submitted that the Respondent was more involved in costs matters than his evidence would suggest.

178.6 The Access to Justice Act 1999 provided at section 10(i):

> "An individual for whom services are funded by the Commission as part of the Community Legal Service shall not be required to make any payment in respect of the services except where regulations otherwise provide."

178.7 Section 10(ii) set out that regulations might provide that in prescribed circumstances an individual for whom services were so funded should pay a fee or contribution but that an individual was not required to pay unless it was under regulations in subordinate legislation. Section 22(2) provided:

> "A person who provides services funded by the Commission as part of the Community Legal Service or Criminal Defence Service shall not take any payment in respect of the services apart from—
>
> (a) that made by way of that funding, and
>
> (b) any authorised by the Commission to be taken."

Crucially this section meant that a solicitor acting for a legally aided client could recover inter-partes cost but could only seek to recover any shortfall between that recovery and the solicitor's actual costs through legal aid assessment. Such costs could only be paid by the LSC at fixed rates or subject to a cap at legal aid rates which were much less attractive than private rates. Solicitors could obtain remuneration at private rates from the other side and could retain payment from the other side but if they were paid by the LSC they had to keep back money for recoupment by the LSC. Solicitors were at risk of not recovering all their costs via an inter parties recovery and might have to wait a long time for payment through a legal aid assessment and could not be sure of obtaining their total costs through that route.

178.8 Mr McClelland referred the Tribunal to an extract from the Legal Aid Practice Manual of February 2003 taken from the Law Society Library:

"Payment only as authorised by the Commission

The basic rule

D8.1 The Act provides that neither solicitor nor counsel may receive any payment for work done in respect of CLS funded services" ... apart from that made by way of that funding, and any authorised by the Commission to be taken." (AJA 1999, s.22(2)

In effect, the Commission, not the client, is liable to pay for work done by a legal representative within the scope of the certificate. Unless the Commission takes the extreme step of revoking a certificate, clients cannot be required to pay, even indirectly, for work done under the certificate except in so far as they are liable to the Commission for contributions under the terms of the certificate or by virtue of the statutory charge (see AJA 1999, s.10(1)).

Where costs in proceedings are recoverable from an opponent, arrangements for reporting and accounting to the Commission are now contained in the General Civil Contract (see further below), but essentially they mirror the former arrangements under the old civil legal aid scheme. It remains possible to recover costs from an opponent at the higher rates applicable to a costs assessment under the CPR rather than the fixed "prescribed" rates which apply to costs payable by the Commission. Recovery from an opponent at higher rates is 'authorised by the Commission' in the terms of s.22(2).

…
D8.5 Once a client has CLS funding, all payments made or received in relation to the case must be made by or cleared through the Commission. As we have seen elsewhere, there are very few exceptions to this rule. Reg.22(4)-(7), CLS (Costs) Regs 2000 deals with its application to the recovery of pre-certificate costs, in other words costs incurred on a private basis by the client prior to the issue of a CLS-funding certificate. (This provision essentially replicates the procedure that applied formerly under the old civil legal aid scheme).
…

D8.22 At the conclusion of a case the solicitor must submit a report on the case and a claim for costs in the prescribed form. Normally CLSCLAIMl. The only exception to this is where the solicitor (and counsel where relevant) is willing to accept costs agreed and paid by an opponent in full and final satisfaction of any claim for costs under the certificate. In that event a simpler form, CLSCLAIM2, is used as there will be no claim against the fund or, for that matter, the client. Form CLAIM2 can also be used where part only of the costs have been recovered from an opponent, leaving a balance due from the fund or the client (either directly via the statutory charge or indirectly in the form of contributions paid during the case)."

The Manual was a standard work setting out the principles; Mr McClelland relied on it to show that deductions from client damages were not permissible. This was set out in primary legislation. Someone of the Respondent's experience and standing could

not but have been well aware of these provisions and so felt ethical discomfort at what he was doing.

178.9 The underlying facts were that hundreds of thousands of pounds were deducted from damages. There were five cases before the Tribunal in which the Applicant alleged that improper deductions were made from legally aided clients. Mr McClelland went through the detail of the case of client E as the facts were largely admitted in respect of all the clients.

178.10 The Respondent acted for client E, a widow, in a clinical negligence claim arising out of the death of her husband. The case, which commenced in March 2007, was funded by way of a legal aid certificate, the costs limit on which was £45,000 which Mr McClelland submitted was quite modest. No private retainer was put in place, meaning that the matter was funded by way of a legal aid certificate throughout. As a consequence, the firm was not entitled to recover any of its costs, over and above which it recovered inter partes, without those costs first being subject to legal aid assessment. No such assessment was ever undertaken. On 28 June 2010, a liability judgment was obtained in E's favour. This was followed by a substantial interim payment in respect of costs and damages (£115,000) on 2 August 2010. On 2 February 2011, the parties settled and a consent order was entered awarding E £252,500 in damages, further to which, on 9 February 2011, the firm received a transfer in respect of damages of £202,500. At the time of the second FI Report 28 November 2013, the costs position had not been finalised between the parties. However the ledger showed that the firm received the following payments totalling £362,500 from the Defendant:

Date of receipt	Sum received	Ledger narrative
02.08.10	£115,000.00	Interim costs and damages
19.11.10	£30,000.00	Costs - payer Welsh Health
09.02.11	£202,500.00	Damages - Payer HMPG
16.05.12	£15,000.00	Payer NHS Wales

178.11 The ledger additionally showed that the firm raised invoices for profit costs totalling £114,000, which were subsequently paid by way of client to office account transfers:

Date of payment	Amount of bill	Ledger narrative
02.08.10	£82,250.00	Profit costs
23.11.10	£20,000.00	Interim profit
23.02.11	£11,750.00	Profit costs

178.12 The ledger also showed that various payments were made by the firm in respect of disbursements. The effect of these deductions (none of which the firm was permitted to make) was that only £196,400 was paid to client E, depriving of her of £56,100, corresponding to in excess of 20% of the total damages to which she was entitled. The Respondent was central to obtaining these deductions. He said in his statement that he visited client E at home and obtained her authority for the transfers in respect of costs. He said he "discussed" the deduction with client E who "readily gave permission". There was no record of this meeting. It was abundantly clear that, neither client E nor

any of the other clients from whose damages deductions were made, had been properly advised as to their rights. Specifically, they were not told that the deductions the Respondent was proposing to make would involve a breach of his statutory duties and a contravention of the legal aid scheme which specifically provided for them to take their damages free from any deduction unless and until a legal aid assessment was undertaken. They could not have been so advised because the Respondent claimed not to have been aware of those matters himself. The Respondent did not make clear what explanation he had provided to the client when seeking permission.

178.13 Mr McClelland submitted that the Respondent had, in effect, obtained client E's consent to providing the firm with a zero-interest, unsecured loan of indefinite duration, which was to be taken from compensation that she had been awarded following the death of her husband. Deductions were made in August and November 2010 and in February 2011. By June 2013, client E still had not been reimbursed and she wrote to the firm (which the Respondent had by then left), in the following terms (spelling as per original)

> "I lost my husband in 2005 due to the negligence of [W] Hospital. [The Respondent] took on the case and we went to trial in 2010. [The Respondent] presented the evidence and the judge's decision went in our favour. We were (me and my three daughters) awarded £252,500. I had £20,000 9/9/2010, £1,000 19/10/2010 and £10,000 26/11/2010 then £100,000 17/02/2011. [The Respondent] did not persent us with a formal plan of payment for the remaining amount. We have recieved ad hoc payments over the last 3 years. This has meant we have lost any intrest that this money could of gained. I am concerned as I would have thought the hospital would have paid the full amount.
>
> This money was for my family to live on due to the absence of my late husband's wage.
>
> I am unable to work and my GP has recently increased my anti-depressants which I have been dependant on since my late husband's death.
>
> We (and my 3 daughters) could have livid off the intrest of this payment and my concern is that the remaining £54k is gaining intrest for someone other than me and my girls.
>
> I have been avised to write to you since [the Respondent's] departure.
>
> I would like this matter given priority and I am struggling financially, this in addition to my grief is difficult to both myself and my family."

178.14 Mr McClelland submitted that this was a loan taken until sums were recovered from the other side. He asserted that the Respondent needed money to bank roll the firm and the client was lending him money to do it. Client E was substantively prejudiced by what the Respondent did. The client was kept out of her money for a prolonged period of time when she had lost the family breadwinner. In the instances of the other clients, serious injury had been suffered and the clients needed money to provide for their requirements.

178.15 Mr McClelland submitted that the Respondent's defence to allegation 1 regarding recklessness and dishonesty was that whilst nominally admitting "regulatory liability", he relied on a wholesale abrogation of responsibility. He claimed that he was "not directly involved" or "not significantly involve[d]" in costs or administration; that he relied on the "direction and guidance" of the firm's administrative staff (none of whom, it appeared, were lawyers) as set out in his Defence Case Statement, and that he believed as he said in his witness statement that "they knew what they were doing"; "had a proper understanding of things" and were "properly on top of these things" However the Respondent was the only fee earner who knew how the legal aid regime operated as it applied to his cases and so it was not right to say that he relied on some sort of legal expertise among these staff. It was also clear that he authorised the deduction of costs from the clients' damages in improper circumstances and he knew that it was improper to do so. The origin of the decision to make deductions was quite clear. However it had dropped out of view in the Defence Case Statement, in the Respondent's witness statement and in the Skeleton for the Respondent. If one looked at his early Note to the Applicant one could see the real genesis of this practice. The first page was headed up "Marcus Nickson; [KC]' Work Regime". The fourth page had a different title "Marcus Nickson; Relationship with Practice Management". The document was not dated but was recorded in the FI Report as dating from August 2014.

178.16 Mr McClelland referred the Tribunal to what the Respondent said in the August 2014 document about the legal aid regime and what had happened to it since 2000. He stated that he worked extremely hard on a number of very tricky cases and worked unsocial hours. He said: "I would be in sole charge of the cases…" He also said:

> "The Legal Aid Board, later the Legal Services Commission, are extremely good at changing the regulations without altering the rules. During the course of the late 90s and the early part of this century, they made things extremely difficult for Practitioners in High Street Firms, like mine, which had a large publically-funded (sic) base. Until the late 1990s, for example, I was able to apply the payment of fees on account in these big cases; I remember getting one legal aid cheque over £160,000 late in the 20th century, by way of example."

178.17 Mr McClelland submitted that this showed that the Respondent was conversant with the regulations and rules. He was not unaware of what the regime provided for at any given time. He described changes to the legal aid regime:

> "In about 2000, that facility was taken away, and there was a heavy shift towards the operation of cases on Conditional Fee Agreements.
>
> It meant that firms like mine could no longer get paid on account at a realistic rate.
>
> Accordingly, when I finished one of these "heavy" cases, I was under extreme pressure to produce a Bill of Costs and get paid as quickly as possible…"

Later in the document the Respondent said:

> "Put simply, the management of the firm had wages to pay, bills to pay and overheads to discharge. There was a continued squeeze on publically funded work, and the payment on account system had been abolished. No corresponding change of the regulations appeared in order to assist Practitioners in firms such as mine. It is taking longer and longer to get an assessment hearing listed in respect of costs and disbursements."

178.18 Mr McClelland reminded the Tribunal that the Respondent's case was culpable ignorance of the rules; he should have known but he did not. Here he was saying that he was aware of what was and was not changing. The change was relevant to the Respondent's motivation; it meant a critical cash flow problem in his type of work. He mentioned that the time to have assessments listed involved significant delay even if he could then obtain the money. Mr McClelland placed considerable emphasis on this part of the August 2014 document:

> "The payment system got slower, and slower, and slower. The Reader will remember, please, that the payment on account arrangement with the Legal Aid Board had been removed. Accordingly, I authorised, in some cases, payment of costs out of the damages provided [as underlined in the document] that the costs were proportional, would be recovered on assessment, and the Client consented."

and

> "I was uncomfortable with this system; however, it seemed to me that provided the bills were properly done, the costs charged on account were proportionate and recoverable, and the Clients were informed and had thereby agreed. (sic)"

It was the Applicant's case that the Respondent knew that this was not the right thing to do but also that it was a way to make the system work and so he said it was acceptable if clients were informed and agreed. He was telling them, not explaining to them that he was asking them to lend him the money. The firm raised a bill, took the money and did not discount it to reflect what it might receive on a future assessment. The Respondent was forcing a credit risk on his own client because if the firm collapsed before the assessment occurred the client would have to resort to the Compensation Fund.

178.19 Mr McClelland then referred to the second part of the August 2014 Note where the Respondent suggested that for the first eight years or so his relationship with Mr KC was relatively good but there were money problems which caused acrimony later because money was not coming from the LSC:

> "…I was put under more and more pressure to reduce costs quickly, not an easy thing to do in this field of litigation, and just before the 2005 General Election I tried to leave the practice…"

and

> "It got to the stage that any damages I recovered on behalf of Clients were descended upon by Miss [M] and Mr [KC], and my very competent PA… suddenly left because she could stand the pressure no longer. I had every sympathy with her."

178.20 Mr McClelland submitted that the following paragraph was very significant because it showed the Respondent's motivation for making the deductions and regarding his involvement in costs in the firm:

> "The weekly "Costs Meetings" to which I was subjected were absolutely horrific. I was "grilled" for hours at a time as to when fees could be expected, and how much could be expected and if for any reason, God forbid, forecast costs had been delayed, I was for the high jump. I found these meetings extremely traumatic and my secretary [S] who is still with me tells me she could hear Messrs [KC] and [M] yelling at me through the wall which divided the offices"

In order to attend these meetings, the Respondent had to know from the client ledger what monies had been paid, what disbursements had been paid and if money was being held back for the LSC because all of these were of fundamental importance in knowing how the money held affected the cash flow of the business.

Dishonesty in respect of Allegation 1

178.21 Mr McClelland relied on the points he had already made in respect of the Respondent's August 2014 Note and further submitted:

178.22 Regarding ongoing contact with clients about costs during the lifetime of the case, the Respondent's witness statement said in respect of client B:

> "I believe I would have had oral conversations with the client as things went along which would have kept them updated as to the position, and I hope would have explained things more clearly, but I do accept that the file does not show me writing enough or in clear enough terms about this."

This was a privately funded matter but indicative of the Respondent's involvement in the costs process, not in writing but by way of conversations. In order to update clients he would have had to explain fees and disbursements incurred and interim damages and what costs if any were to be taken from interim damages received. He did not just hive the matter off to the costs staff.

178.23 Regarding costs recovery after the end of the case and in respect of interim damages, Mr McClelland referred the Tribunal to the Respondent's attendance note dated 21 May 2009 of his conversation with Mr GH regarding client W whose matter was also the subject of freestanding allegations 3 and 4. GH came to the Respondent as solicitor with conduct when he had identified that the terms of the order did not permit costs to be taken from damages.

178.24 In a note sent on 2 November 2011 in the case of B the Respondent's secretary advised:

> "We have therefore overtaken by £8,983.19.
>
> I know you have talked to her about a shortfall of £8,000 but she also tells me that you were going to try and recover this from the Insurers, although, with my limited knowledge, I am not sure how this will work.
>
> Could you please dictate your letter with the cheque of £6625.49 to go out to her, explaining the situation?"

This note showed that the Respondent was actively involved in dealing with the client in costs recovery and the provision of damages. He had already spoken to the client and he was coming up with proposals for how the situation could best be addressed. His secretary did not profess expertise; she said she did not know how it would work and asked him to dictate a letter to explain. She identified him as the appropriate person to engage with the client. On 15 June 2012, the matter was picked up again; the Respondent's secretary wrote:

> "Marcus
>
> I have typed your letter to [B] but have not sent it as yet due to the following reason:
>
> Our **full** bill for profit costs was £38,016.81 (WIP was actually less than that so [GH] had bumped the bill up a little already).
>
> On [GH's] advice we took £47,000.00 in two separate bills. We therefore took £8,983.19 over and above our full bill and this money has to go back to the Client as it was not ours to take and we will <u>not</u> be able to justify it if challenged. I suppose it could be seen as theft and if investigated could land us in big trouble.
>
> Once we have paid this money back to the Client she will still have a shortfall of around £15,000 but this is, as you rightly explained to her, covered by the Client Care Letter and she will just have to life (sic) with that.
>
> I'm sorry to spell this out so plainly but I am rather concerned about the situation.
> [S]"

The Respondent had written a letter to the client about costs and was substantively engaged with the client about it. The shortfall had already been the subject of discussions between the Respondent and the client as shown by the use of the words "you rightly explained to her".

178.25 Mr McClelland also referred the Tribunal to the Respondent obtaining authority for deduction of costs and damages in legal aid cases and cited the case of E. The Respondent stated that he obtained the client's consent and that he also did this regarding AB. By letter of 10 March 2005 to Mr AB, the Respondent said:

> "Firstly may I advise that I have discharged your Certificate of Public Funding which is no longer appropriate in view of the fact that I have received a cheque for £575,000 (five hundred and seventy five thousand pounds) by way of interim payment yesterday.
>
> I enclose here with the appropriate client care letter for your signature and return, please. The copy is for you to keep. I also attach a copy of my firm's interim bill. This reflects the huge amount of work which went into this case which resulted in a successful outcome for you. Without that degree of work, it would have failed.
>
> This is an interim bill. A final bill will be submitted to the defendants at the end of the case and I fully expect to recover a substantial amount of your costs and disbursements.
>
> …
>
> The balance of the cheque I have sent to [JC] in Glasgow. I suggest you treat yourself to a richly deserved holiday pending the result of the case, which will be later this year."

Mr McClelland submitted that this showed that the Respondent was involved in setting out an agreement to the deduction of costs and damages in legally aided cases. The letter was relevant to advice not being provided to clients about the deduction of costs from damages. The 10 March 2005 letter to client AB told the client that his certificate was discharged. He had not previously been introduced to this bill which was for a large amount and he was given no indication that it was to be deducted from damages. He was being informed and not advised; this was a fait accompli and it was clear that the monies had already been deducted. The bill dated 10 March 2005, the same date as the letter, was before the Tribunal in the sum of £352,500 inclusive of VAT. The client ledger showed "Interim damages £500000 Cost Payer MOU". MOU was the Defendant. The explanation for the figure was in an order made dated 18 February 2005 which concluded:

> "Unless the Defendant do agree to pay to the Claimant's solicitors £75,000 on account of costs and £500,000 on account of damages by 9th March 2005 the Claimant do have permission to apply to Court for an interim payment on account of costs and an interim payment on account of damages on 48 hours' notice."

This order was made at the liability stage and the firm received £575,000. Mr McClelland submitted that £352,000 was taken as costs in addition to the £75,000 provided for in the order and this was not explained in the letter to the client. The legal aid regime prevented the Respondent taking more than the £75,000.

178.26 Mr McClelland also highlighted the Respondent's involvement with the LSC when there was a shortfall in costs. He referred the Tribunal to the LSC's "Report in civil cases – costs met in part or in full by other party" form CLS CLAIM2 in the case of H dated 17 March 2008. The form was in the Respondent's handwriting and he had signed it. It showed that he was involved in the process after the conclusion of the

client's matter. In order to complete the form the Respondent had to be apprised of the position at least in respect of profit costs and counsel's fees. The same form had been completed in respect of the client AB and was before the Tribunal also dated 17 March 2008.

178.27 Mr McClelland also referred to the Respondent's involvement in trust arrangements for clients. He had a number of civil matters where damages were obtained and trusts were set up, the aim being not to deprive the client of state benefits if they were still under a disability and to provide for their care. He referred in the case of client C to an exchange of correspondence in August 2007 with another firm of solicitors whom the Respondent had instructed to draft the trust documentation. They requested details and the Respondent responded point by point including:

> "I attach the [MS] Care Report of June 2006 which we have used as the definitive document for the care package
>
> Interim payments of £505,000 have been made and used to purchase the house and furnish it (£400,000), provide a car (£60,000) and care from the date of liability (the balance)…"

In the letter, the Respondent went on to list the trustees of whom he was the third of four. Mr McClelland submitted that money was paid out of the firm into trust accounts. The provision of the trust was to provide for the care of the individual and so trustees must know how much was coming into the trust, what would be expected to come in and if it was enough for care and also to authorise expenditure. Mr McClelland accepted that this was part and parcel of the litigation but only if one treated trusts as part of the litigation process. The Tribunal noted that the correspondence showed work at two levels, one regarding the operation of the trust but nothing regarding ongoing involvement by the Respondent in costs issues. Mr McClelland accepted that regarding this correspondence but referred to the file notes which demonstrated the Respondent's ongoing involvement in costs.

178.28 Mr McClelland submitted that all his above five points went to the Respondent being uncomfortable with the arrangements to which he had acceded. In the circumstances it is submitted that the Respondent's conduct was: dishonest, lacking in integrity and likely to diminish public trust.

178.29 As to the allegation of recklessness and dishonesty, Mr McClelland relied on the Rule 5 Statement which stated:

> "At all material times the Respondent must have known or (alternatively) was reckless of the fact that under the applicable legal aid regime it was not permissible to take payment from clients' damages other than subject to and by means of a legal aid assessment. This was a basic feature of the legal aid system under which the Respondent had conducted cases for many years and with which he was familiar. This notwithstanding, the Respondent authorised the taking of substantial payments from clients' damages (as admitted in the Respondent's statement of 12 August 2014 at paragraph 11), and reflected in the cases of E, W, C, AB and G, as set out in the paragraphs of this document referred to in respect of Allegation 1 above [covered in the Factual

Background section of this judgment above]. The Respondent authorised the taking of those payments because it suited his firm's interests to do so (not least the firm's cash-flow requirements).

Before making those deductions, the Respondent did not advise or (alternatively) adequately advise those clients. In particular, the Respondent did not advise clients that the proposed deductions were contrary to the legal aid scheme under which their cases were, or had been, conducted and that they were free to take the entirety of their damages without deduction unless and until a legal aid assessment was undertaken. (For the avoidance of doubt, no amount of advice could have legitimised the deduction of damages from clients' damages.)

When (a) authorising the making of deductions from clients' damages per se or (b) authorising the making of deductions from clients' damages without properly advising clients (as above), or ensuring they were properly advised (as above), the Respondent must have:

- known that the firm was not permitted to make deductions in this way or, alternatively, suspected that it was not permitted to do so, turning a blind eye to that possibility rather than making inquiries; and

- known that to have proceeded to make deductions in those circumstances was dishonest by the standards of a reasonable and honest person."

Mr McClelland submitted when addressing allegations 7 and 13 that it should be noted, in passing, that the Respondent's response in respect of those allegations revealed one of the many anomalies in the defence, namely that the Respondent admitted to having known that he was required to retain recovered costs in order to pay disbursements and recoup the LSC, but, when seeking to resist a finding of dishonesty/lack of integrity in relation to allegation 1, he claimed not to have understood the still more basic costs rule, namely that he was prohibited from deducting profit costs from client damages. There was a convenient and implausible asymmetry in his purported understanding of the rules. Mr McClelland submitted that even if the Tribunal concluded that the Respondent was not dishonest in making the deduction it was plainly dishonest not to advise the client regarding the deduction or how it played into the regime.

Submissions for the Respondent

178.30 For the Respondent, Mr Nesbitt clarified the basis upon which the Respondent admitted breach of the integrity principle. He submitted that the integrity principle while featuring a lot in proceedings of this kind was the subject of little authority directly from the Tribunal's proceedings. Mr Nesbitt accepted that authority existed that if there was a breach of duty that could be categorised in some way as a departure from an ethical code which one would expect a solicitor to follow then a breach of the integrity principle existed. In his own Skeleton he had referred to the matter of client E which was the subject of allegation 1. He also referred to Mr McClelland's Skeleton which set out the facts of the matter. There had been a transfer of funds without legal aid assessment. The Respondent on his own account discussed the deductions with the

client and sought permission to make them from damages. It was plain from that and from the witness statement that the Respondent acknowledged what he had done; he admitted that he knew of the transfer and sought permission. He said that he did not know that it was unlawful; he had not identified the provision in the Access to Justice Act. He admitted his lack of understanding of how the legal aid system worked was highly culpable because he had not taken the care that he should have to understand that system. The impression that emerged from the interview was the vagueness of his knowledge and understanding of such matters which led to the firm's resolution that he should have nothing to do with costs. The Respondent accepted his failure as a solicitor in clinical negligence matters for publicly funded clients; his failure to get to grips with the rules which constituted a failure to adhere to an ethical code and so the Tribunal would be right to conclude that there had been a breach of the integrity principle. The Respondent also accepted that on an objective assessment his conduct should be seen as tending to diminish public trust.

178.31 Mr Nesbitt invited the Tribunal to read the testimonials submitted for the Respondent because they went to the issue of dishonesty. The Tribunal was not looking for a generalised awareness on the part of the Respondent that it would be wrong to transfer money from client to office in legally aided matters in advance of legal aid assessment. The Tribunal needed to find an act or omission of the Respondent in each of the individual cases and that the evidence established that in respect of the act or omission at that point in time when he made the transfer, the Respondent had a dishonest state of mind as established by the subjective test in Twinsectra. The Tribunal had to be sure that even if the Respondent knew of the existence of the rule, at the point of the act or omission he was not being absent-minded or forgetting how the legal aid system worked. Also if something came to the attention of the Respondent the Tribunal would need to be sure he knew it was wrong at the time when he failed to put it right.

178.32 Mr Nesbitt then turned to the Respondent's awareness. He referred to the legal aid manual in respect of which it had been said that the Tribunal must conclude the Respondent knew of the language of the relevant regulations and statutes but those requirements did not carry weight unless he knew about it. Mr Nesbitt agreed that it looked as if the Respondent's practice was that in an appropriate case if his client qualified for public funding the case would start off with legal aid. The Respondent would then get the matter to the stage where liability was admitted or compromised in some shape or form and a payment on account of costs was made and then in each case the client was then advised or directed that the legal aid had been brought to an end. If there was a payment of damages interim bills were rendered and the matter passed to private funding and there was never a legal aid assessment. Mr Nesbitt submitted that the Respondent's case was that when he took costs and damages in such circumstances the Respondent did not appreciate that the firm was not permitted to do that. He asked the Tribunal to be very careful about the gap between the practitioner being expected to know something and what he in fact did and what he should know. The Respondent was a highly experienced professional man who sometimes got things badly wrong. He was ashamed and embarrassed but the fact that he might warrant harsh judgement for a misunderstanding of that kind was a long way short of establishing actual knowledge. The Applicant asked the Tribunal to infer from textbooks and the like that the Respondent must have known of the rules but that was a bridge too far. The Tribunal might feel that it was unlikely that he made a

catastrophically basic error but even if he made a cardinal mistake that would not necessarily suggest a finding of dishonesty. General points could not be relied on to establish a state of mind. If the practitioner knew the basic rule of practice it would be unlawful and almost theft to take costs and damages before a legal aid assessment. In such circumstances would the Tribunal expect there to be frequent discussions with the costs draftsman; consideration of whether there was an obligation to report himself; and reports to external professionals including in instructions to counsel? Was it likely that the Respondent would conduct himself so manifestly in this way knowing that the accountants were regularly auditing and could see these matters. Would someone with the state of mind that the Applicant said the Respondent had, leave so obvious a paper trail on the ledger? If the Respondent had the state of mind the Applicant suggested would the Tribunal not expect there to be some sort of external evidence or something said to other people giving the game away. It was plain that he went to see the client E to obtain her permission to take costs and damages and it was unlikely that he would go to obtain permission to do what he knew was wrong. Both the IOs had no sense at all that that was a very powerful feature of the evidence. If the Tribunal could not exclude as a possible explanation that the Respondent had behaved idiotically then the Tribunal should resolve the issue in accordance with the burden of proof. Mr Nesbitt submitted that on a strict application of the burden of proof the ingredients for dishonesty were not made out.

Determination of the Tribunal

178.33 The Tribunal had regard to the evidence including the oral evidence for the Applicant, and the submissions for the Applicant and for the Respondent. This allegation related to five clients, E, W, AB, C and G. The Respondent admitted allegation 1.1, 1.2, 1.3 and 1.4 but denied recklessness and dishonesty. This was the only allegation which had dishonesty attached to it and the Tribunal did not have the benefit of hearing oral evidence from the Respondent for reasons which Mr Nesbitt had explained. The Tribunal attached considerable weight to the Respondent's August 2014 Note about the firm's Work Regime and the admission it contained that he authorised payment of costs out of the damages in some cases and in some circumstances although he was uncomfortable with this system. In making his admissions the Respondent did not rely on the division of responsibilities in the firm and the resolution about his non involvement in costs made in 2012. He asserted that he was not aware of the legal aid regulations preventing him from taking costs and damages in advance of legal aid assessment but the Tribunal noted that in the Work Regime Note the Respondent specifically referred to the regulations stating that "the payment on account system had been abolished. No corresponding change of the regulations appeared in order to assist Practitioners in firms such as mine…" The Tribunal found that the Respondent, an experienced legal practitioner and the only person in the firm undertaking this particular type of work had embarked on a course of conduct which was evidenced in respect of all these clients because in his words: "The payment system got slower, and slower, and slower." The Tribunal found that the Respondent knew the legal aid regime and that it was not permissible to take costs and damages without a legal aid assessment and it was this knowledge that led him to say in the Note "I was uncomfortable with this system; however, it seemed to me that provided the bills were properly done, the costs charged on account were proportionate and recoverable, and the Clients were informed and had thereby agreed…"

178.34 The Tribunal considered the exemplified cases. In respect of client AB, the Respondent wrote to the costs draftsman and asked for a bill to be prepared on 22 February 2005. He stated that there would be 700 – 750 hours working on the case which was to be charged for at 100% uplift for reasons which he set out. The Tribunal had before it a bill in the amount of £352,500 dated 10 March 2005. On 9 March 2005, the firm received £500,000 by way of interim damages and £75,000 by way of costs in one payment. The Respondent wrote to the client on 10 March 2005 informing him that his certificate of public funding had been discharged because the cheque for £575,000 by way of interim payments had been received included the firm's interim bill and informed the client that a final bill would be submitted to the Defendants at the end of the case and that the Respondent fully expected to recover a substantial amount of the client's costs and disbursements. The detailed final bill ran to 60 pages and totalled £485,601.91 of which £225,494.82 was profit costs. That bill gave the firm's profit costs for the liability stage as £177,926.81 inclusive of VAT which was £174,573.19 less than the sum billed on an interim basis on 10 March 2005 and subsequently paid. There was no evidence on the file to suggest the reason for the difference between profit costs on the interim bill in 2005 and the profit costs assessed by the cost draftsman in 2006 or that the Respondent brought this difference to AB's attention and/or explained the reason for it; and/or that the difference was refunded or that a refund was considered. Following billing at the liability stage the Respondent moved the client onto a CFA charging £400 per hour. The Tribunal considered that in acting as he did in taking AB's damages the Respondent was reckless as to the outcome for the client and whether the client would be out of pocket.

178.35 In respect of client E's matter which Mr McClelland went through in detail, she received £56,100 less than she had been awarded in damages. E complained but by then the Respondent had left the firm. He maintained that he had visited her home to obtain her authority to the payments from damages and it was clear from her letter of complaint that she had not understood what the result would be. Again the Tribunal considered that the Respondent was reckless in taking E's damages.

178.36 In the case of client G, the Respondent's actions resulted in a shortfall of £113,058.48 to the client. On 2 December 2008, the Respondent raised a bill for profit costs of £195,500 including VAT and sent it to the client referring to the fact that costs would be taken from damages. On 5 December 2008, an interim damages payment of £220,295.68 was received and the firm's invoice was paid by way of a client to office account transfer. Other payments were made including counsel's fees and at least £223,573.43 was taken / paid by the firm for costs and disbursements for the liability stage but it only recovered £110,514.95 inclusive of interest from the Defendant at that stage. The Tribunal considered the Respondent's conduct to be reckless in view of the clear risk to the client.

178.37 In the case of client W, where the Respondent maintained that the order did not reflect the agreement between parties, there was a shortfall of £127,818.87 comprising £50,000 contribution towards W's costs which should have been retained on client account, £65,000 the balance of the firm's invoice dated 3 March 2009 taken from W's damages the following day in breach of the order and almost £13,000 paid to the costs consultants on 29 April 2009. Whatever the accuracy or not of the order in reflecting the parties intentions, the Tribunal considered the Respondent's actions reckless in ignoring the risk to the client again leading to a significant shortfall.

178.38 The Tribunal considered the case of client C in some detail in respect of allegation 2. The chronology (see below) with particular reference to the Respondent's knowledge in respect of costs was also relevant to allegation 1 particularly the finding that he was reckless with regard to the risk to the client from the shortfall that he created by taking costs in excess of the agreed amount.

178.39 The Tribunal found proved on the evidence to the required standard the breaches set out under allegation 1.1, 1.2, 1.3 and 1.4 which the Respondent admitted. In respect of integrity the Tribunal had been asked to make clear the standard of proof it applied. The Tribunal followed the authorities including the most recent Scott v SRA and had no difficulty where it found want of integrity proved in identifying it as being present by reference to the facts of the particular case. In respect of all the clients covered by allegation 1, the Tribunal considered that the Respondent drew money when he was not entitled to do it and in respect of some of the money he might never have become entitled. He knew the regulations and embarked on a course of action knowing that there was a risk that there would be a shortfall to the client because the costs which he took might not be completely recoverable; he did not know what he would ultimately obtain by way of costs in the case. He had certainly not followed the rule which he had described as having set for himself in the Work Regime Note because the costs he took were not proportionate, he could not be sure they would be recovered on assessment and even where the client consented to his taking the damages they did not really understand what the implications could be and in any event what he did was in breach of the rules. The Tribunal therefore found recklessness proved on the evidence to the required standard in respect of all five clients covered by allegation 1.

Allegation of Dishonesty in respect Allegation 1

178.40 The allegation of dishonesty covered all the clients save in respect of client W the withdrawal from the trust fund in excess of the amount required to repay the LSC in respect of which the Applicant did not allege dishonesty. The Tribunal had considered this allegation in accordance with the two limbed test for dishonesty set out in the case of Twinsectra. The Tribunal considered that by the ordinary standards of reasonable and honest people it would be considered dishonest to take costs to which the Respondent was not entitled where the clients were legally aided and there was no private retainer at that point. The Tribunal had found that the Respondent had been reckless but it had to consider whether when he acted in a way which was objectively dishonest he was aware that by those standards he was acting dishonestly. The Tribunal considered the subjective aspect of the test with particular care. In arriving at its decision the Tribunal had regard to the testimonials which had been submitted for the Respondent. The Tribunal had not heard from the Respondent but Mr Nesbitt had given reasons for that and in the particular circumstances the Tribunal did not draw any significant adverse inference. The Tribunal had arrived at its decision purely on the basis of the documents. The Tribunal did not attach much weight to the witness statement and considered that the best evidence as to the Respondent's state of mind was the Note of August 2014; which the Tribunal believed to be an honest account of what had happened, of what the Respondent was doing and why and had looked at each of the transactions in that context. In all the circumstances and in the absence of hearing from the Respondent, the Tribunal was not satisfied on the evidence to the required standard that the Respondent had known that what he was doing was

dishonest by the required standards and had been subjectively dishonest and therefore the Tribunal found the allegation of dishonesty in respect allegation 1 was not proved.

Tribunal Determination in respect of Allegation 8.3

178.41 The Respondent admitted allegation 8.3.2, breach of the requirement to act in his client's best interests in respect of all the clients covered by the allegation and that he was thereby in breach of the requirement not to diminish public trust. He denied failing to act with integrity. The Tribunal found in the case of all the clients that the allegations admitted that is 8.3.2 and 8.3.3 were proved on the evidence to the required standard. As to allegation 8.3.1 lack of integrity which was denied, while there was considerable confusion in the provision of costs information to clients, the Tribunal did not consider that there was evidence of lack of integrity. Accordingly allegation 8.3.1 was found not proved.

179. **Allegation 2 - In the case of client C, in breach of a High Court order which required that the Firm's costs either be subjected to a legal aid assessment, or otherwise waived, the Firm neither submitted its costs to legal aid assessment nor waived them, but instead retained those costs, which it had already wrongly deducted from C's damages (as above), resulting in a shortfall in C's funds of at least £247,459.05. He [the Respondent] thereby:**

2.1 failed to comply with a court order requiring him and/or his firm to take a particular course of action, in breach of Rule 11.02 of the 2007 Code;

2.2 acted without integrity contrary to Rule 1.02 of the 2007 Code;

2.3 failed to act in the best interests of his clients, contrary to Rule 1.04 of the 2007 Code; and

2.4 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

179.1 For the Applicant, Mr McClelland submitted that the Respondent had admitted breach of Rule 11.02 of the 2007 Code and that he had failed to act in the best interests of his client and acted in such a way as to diminish public trust but denied that he acted without integrity or had been reckless. Mr McClelland relied on the facts in the Rule 5 Statement. On 24 October 2007, the C order was made by consent. In addition to provision for damages the Defendant agreed to pay, and paid, a total of £225,000 in respect of global costs (i.e. for both the liability and quantum phases of the case, and to include profit costs, disbursements and VAT). The C Order contained the following provisions regarding costs, at paragraph 7:

> "the Defendant do pay the Claimant's costs of this action to be the subject of detailed assessment on the standard basis if not agreed";

and at paragraph 8:

> "There to be a detailed assessment of the Claimant's costs incurred up to and including 4 October 2007 [i.e. the date of the hearing at which the C Order was approved by the Court] in accordance with Regulation 107 of the Civil Legal Aid (General) Regulations 1989… except that the Claimant's solicitors shall be at liberty to waive any claim for further costs beyond those referred to in paragraph *7* above in which circumstances legal aid assessment shall be dispensed with"

179.2 Mr McClelland submitted that including the four bills for profit costs raised up to 1 October 2007, (shortly before the hearing on 4 October 2007 at which the C Order was approved), totalling £357,438.41 and the other payments which were also made as set out in the Factual Background above, a total of £472,459.05 was paid out by the firm in respect of costs (profit costs, disbursements, and LSC recoupment payments) on C's case. The payments out amounted to £247,459.05 more than the £225,000 costs which were recovered from the Defendant inter-partes. This difference was, in effect, paid out of C's damages creating a shortfall of at least £247,459.05 in respect of client C's funds. This was not only in breach of the legal aid regime, but also a breach of the C Order, since the firm was not entitled to recover costs of more than £225,000 without a legal aid assessment of those costs being undertaken. It was not clear upon what basis the allegation was resisted. The additional element in allegation 2 was that the Respondent had breached a court order. Mr McClelland submitted that the Respondent did not say that he was unaware of it and referred the Tribunal to the Respondent's statement. It was the Respondent's evidence that he was involved up to and including the drafting of the Order. The case was settled; he had conduct and there was no other fee earner in the firm involved. The Respondent contended that he handed over the file to practice management and assumed that matters were dealt with appropriately. Given the very substantial sums in issue, this did not square with the Respondent's burdensome responsibility for both forecasting and justifying the inflow of costs from his practice. The Tribunal was invited to make a finding of a lack of integrity and recklessness. Mr McClelland asked the Tribunal to consider the movement of monies against the background of the weekly meetings that the Respondent had with his partner when he was vigorously pressed about when and what sums were coming in and asked to account on a fairly minute basis for costs being received. He agreed the settlement, observed the monies coming in and going to office account. The Applicant did not assert that the Respondent needed to have had present in his mind the terms of the order and the amounts at which costs have been set as the amount of £267,000 was carried across on 1 October 2007 but it was of significant size and was transferred just before the court order in respect of the settlement. It was relevant to the Respondent's relationship with his partners, which blighted his life at that time and he must have been aware of when such a payment could be expected to arrive.

179.3 The Tribunal asked Mr Nesbitt to comment on how the Respondent could assert that he had not become aware in the case of C where costs are been agreed at £225,000 that bills in excess of £450,000 had been transferred where the Respondent was an equal equity partner in the firm who would get the benefit of those bills. Mr Nesbitt responded that it might be a serious mistake and the Respondent had admitted charges of fault in respect of that matter but if the Tribunal could not be sure that a mistake reached the threshold necessary for the integrity principle to be breached then the charge could not be found proved.

179.4 The Tribunal considered the evidence including the oral evidence for the Applicant, and the submissions for the Applicant and the Respondent. In this matter a court order was made by consent on 4 October 2007 awarding £1.15 million to the client with the Defendant to pay the Claimant's costs of the action following a detailed assessment on the standard basis if not agreed. The Respondent had a choice of waiving the shortfall between that amount and the costs he had incurred and if he wished to recover more than the agreed sum it was necessary for him to have a legal aid assessment carried out. It was not suggested that the Respondent did that. The Tribunal found on the undisputed facts that £247,459.05 more than the agreed costs was taken from client C's damages. It was advanced in the Defence Case Statement:

> "The Respondent admits that the way in which the costs were dealt with was a breach of the Consent Order made by the Court. He accepts that although he personally did not directly handle this aspect of the case as a partner in the firm with conduct of the matter he was responsible for what happened and should have ensured the correct course was followed…
>
> However, in circumstances in which the breach was inadvertent, and in which he did not directly handle this aspect of the case it is denied that his conduct involved him acting without integrity… or that he was reckless in relation to it."

179.5 Against this the Tribunal noted the admission in the document entitled "Marcus Nickson; [KC] Work Regime" where the Respondent stated:

> "Accordingly, when I finished one of these "heavy" cases, I was under extreme pressure to produce a Bill of Costs and get paid as quickly as possible. Once the case finished, I would take the files into a quiet place, usually my home (or sometimes the Magistrates Court if I was Duty Solicitor) and prepare a bill by painstakingly working through every piece of paper on (sometimes) a dozen or more lever arch files. I would then prepare a bill, the purpose of which was to enable my cash office to know the sort of funds that they could expect on assessment.
>
> The payment system got slower, and slower, and slower. The Reader will remember, please, that the payment on account arrangement with the Legal Aid Board had been removed. Accordingly, I authorised, in some cases, payment of costs out of the damages provided that the costs were proportionate, would be recovered on assessment, and the Client consented."

179.6 In his witness statement, the Respondent dealt specifically with the case of Client C:

> "…I note what is said about the contents of that order in the Rule 5 Statement. Although I have no specific recollection of it I accept that the order was in the form identified, and that it provided for detailed assessment of the Claimant's costs.
>
> Having dealt with the successful conclusion of the substantive litigation as usual have ensured that the file was in the state in which a costs bill could be prepared I handed the file over to the practice management department to deal

> with resolution of costs issues. I assumed a costs bill was drafted on their direction by a cost draftsman and that they dealt with it appropriately.
>
> I note what is said in the Rule 5 Statement about the costs that were in fact recovered and how they were recovered. I don't think I had any specific knowledge of those matters at the time, although I may have been involved in signing authorisations that I was requested to but I do not challenge the figures thrown up by the [Applicant] investigation (sic) how those costs were dealt with by the firm.
>
> …
>
> In relation to this part of the allegations against me as I have explained to the handling of this side of things was passed over to others within the firm. I am not sure exactly what I would have known about how this was dealt with at the rime (sic), but I think not very much…"

179.7 The Tribunal noted that on 13 September 2007, C Cost Consultants Ltd wrote to the firm using the Respondent's reference and enclosing "the Draft Bill of Costs for your [the Respondent's] approval and signature". The letter stated:

> "We understand that you had expectations of exceeding £300,000.00 costs in respect of this Bill. Whilst we understand how you arrived at this figure, (i.e. the handwritten calculations contained on the front of the correspondence clips), we must advise in costing the file, the Bill has amounted to £186,285.00.
>
> Upon consideration of your own calculations it would appear that you utilised an hourly rate through out of £400.00 per hour. Within the Bill we have utilised an hourly rate of £300 (in accordance with the rate shown within the Conditional Fee Agreement). Prior to entering into of the Conditional Fee Agreement, your retainer was of course the legal aid certificate. We believe the hourly rate of £300.00 per hour to be an appropriate rate for work of this nature, bearing in mind the status of the conducting fee-learner and the period of conduct…. As you are aware the Conditional Fee Agreement entered into provides for a 0% Success Fee.
>
> As we have discussed with you, we understand that the file has not yet concluded with the matter been listed for Approval Hearing…"

The Tribunal noted that this letter was received by the Respondent before the final and largest bill was transferred across on 1 October 2007 and before the order concluding the matter had been sealed. The letter was addressed to the Respondent's reference and referred to discussions which the costs draftsman had had with him as well as referring to the Respondent's handwritten calculations. The letter specifically asked the Respondent "if you could please check and sign the document and return it to us as soon as possible". The Tribunal found that when the bills were raised and the money transferred between 17 June 2005 and 1 October 2007 the Respondent was still very much involved in the conduct of the case and it was inconceivable that he would not have known about the bills even about the final and largest bill. The

Tribunal found based on the evidence that this case settled in August 2007 and was listed for approval, on 4 October 2007. On his own evidence given to the Applicant about the work regime at the firm the Respondent weighed the file and raised a bill in circumstances where two weeks earlier he had received a firm indication that the firm would get nowhere near the amount of costs which he was looking for. The Tribunal also noted that the Respondent personally completed a CLSCLAIM 2 form dated 14 March 2008 in which he reported that he was making no claim on the legal aid fund and that costs including profit costs, disbursement and counsel's fees for liability only which were agreed in 2005, totalled £94,406.29. At the point when he prepared that form the Respondent knew that the total amount agreed for the costs of the liability and the quantum stages of the matter was £225,000 He had already billed approximately £90,000 in profit costs and then with the added knowledge of the letter from the cost draftsman raised a bill in excess of a further £267,000. The Tribunal was in no doubt that the Respondent was well aware of the true position regarding costs in this matter. He was handling the file throughout; he might well have passed it to the costs draftsman to prepare the bill but then he had carriage of it again. In those circumstances the Tribunal found proved on the evidence that the Respondent had been in breach of Rule 11.02 of the 2007 Code by failing to comply with the Court Order, that he had failed to act in the best interests of his client contrary to Rule 1.04 and that he had acted in such a way as to diminish public trust contrary to Rule 1.06. These three parts of allegation 2 were admitted.

179.8 In addition the Tribunal found proved to the required standard that in acting as he had, retaining a large amount of money in the form of wrongfully deducted costs where he was personally involved with the file throughout from taking instructions under legal aid confirmed by his letter of 17 April 2000 through to the conclusion of the matter in March 2008 when he submitted the form CLAIM2 to the LSC and with full knowledge of the billing position on the file that the Respondent had acted without integrity contrary to Rule 1.02. As to recklessness, the Respondent did not even follow what he said in his Work Regime document where he set out that he authorised payment of costs out of the damages <u>provided</u> that the costs were proportionate, would be recovered on assessment, and the Client consented. The underlining was the Respondent's own. There was no evidence that the client had approved costs coming from damages which would in any event have been contrary to statute (the legal aid certificate was not discharged until 1 April 2008 as evidenced by letter from the LSC South East Region office of that date which also asked for payment back (recoupment) of £25,638.49 in respect of payments on account of profit costs and disbursements and counsel's fees). The Tribunal found proved to the required standard on the evidence that the Respondent acted recklessly because with knowledge of the risk to the client that the shortfall might never be recovered he proceeded to take costs in excess of the amount agreed. The Tribunal accordingly found all aspects of allegation 2 proved on the evidence to the required standard.

180. **Allegation 3 - In the case of client W, he [the Respondent] breached a High Court Order requiring £496,529.75 to be paid into court on or before 10 March 2009, in that £419,133.01 was paid into court on 6 May 2009, but the balance was not paid in, either at that time or thereafter. He thereby:**

3.1 failed to comply with a court order requiring him and/or his firm to take a particular course of action, in beach of Rule 11.02 of the 2007 Code;

3.2 acted without integrity contrary to Rule 1.02 of the 2007 Code; and

3.3 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

Allegation 4 - Having been advised by his in-house costs draftsman and three barristers that his firm had improperly taken costs from client W's damages, he [the Respondent] took no steps at all to rectify the situation. He thereby:

4.1. failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Principle 2); and

4.2 acted in such a way as to diminish the trust the public placed in him or the legal profession contrary to Rule 1.06 of the 2007 Code (Principle 6).

180.1 For the Applicant, Mr McClelland submitted that these two linked allegations related to a deduction from the damages of a legally aided client (as above), but with the additional element that the Respondent retained those sums in the face of a court order directing that they be paid into Court, and he did so even in the face of clear and repeated advice from a costs draftsman and no less than three Counsel that he had no right to those sums. The Respondent admitted that he was in breach of the court order, and therefore of Rule 11.02 of the 2007 Code. He also admitted that by failing to remedy the situation he acted in such a way as to diminish public trust, contrary to Rule 11.06 of the 2007 Code and acted without integrity. However, he denied that he acted recklessly in respect of allegation 3. Mr McClelland relied on the facts underpinning these two allegations set out in the Rule 5 Statement and in the Factual Background to this judgment which were largely admitted in the Respondent's Defence and the Admissions document. They were stark. The firm paid less than ordered and paid two months late. The payment was incomplete because, in addition to taking the costs paid inter partes (£50,000), the firm had deducted £65,000 from the client's damages for its own profit costs and £12,918.87 to pay its costs draftsman. If the Respondent was initially not aware that he was in breach of the order, then he became so on 21 May 2009 when his in-house costs draftsman raised it with him expressly and he recorded their discussion in an attendance note. The settlement was global so it was not possible to treat part of it as a recovery by way of costs and the firm was limited to recovery from the LSC. The Respondent considered that this had arisen due to an error in drawing up the Order. He felt that it should have provided for a global sum on account of both damages and costs of £550,000, rather than separate sums for damages (£500,000) and costs (£50,000). The latter was less favourable because it meant that, unless he proceeded by legal aid assessment, he was limited to recovering £50,000, being the only costs recovered inter partes. Whilst the Respondent might have wished that the Order provided for a global sum, the simple point was that it did not.

180.2 Mr McClelland submitted that the Respondent sought and obtained advice from his in-house costs draftsman (whom he believed also consulted "various other Counsel"), Counsel who had appeared at the hearing, a costs Counsel, and a third barrister. The Respondent recorded these various consultations in attendance notes dated 22 May 2009 and 2 June 2009. It was repeatedly confirmed to him that he was in breach of the order. The Respondent was advised that he could not recover from the

client and there was a discussion of a possible application under the Slip Rule but the Respondent said he was not inclined to do that because it was not in the client's interests. The Respondent recorded in a note of 2 June 2009:

> "[NB costs counsel] advised that the £50,000 that had been taken should be put back into the Court Office and that the bill should be withdrawn, strictly speaking."

It was remarkable that the Respondent then did nothing. He remained at the firm for another three and a half years (until 17 December 2012), but the deduction was not reversed, no further sum was paid into Court, and no application was made to change the terms of the order. He provided no meaningful explanation for this. In his statement, the Respondent said:

> "Given the conflicting advice there was a while I really did not know what should be done. The practice management department was involved in trying to sort it out. At the end of the day I thought what should happen to resolve the position was that the firm should re-pay the sum, and that the sum should come from office account or a loan to the firm. I understand that a loan was taken out from the bank to do about it and it appeared in the firm's accounts as the [W] loan. I understood at the time that the payment into Court had been made. I intended that in due course a permanent resolution should be reached by an appropriate application under the slip rule being made. Unfortunately that this was something that got away from me and with all the huge pressure of work I was under and the other difficulties I have mentioned I never got round to it. I also never checked that the loan had been paid into Court – my belief was that it had been and I had seen the reference to the [W] loan in the accounts which made me believe that this had been organised."

180.3 Mr McClelland submitted that the Respondent referred to a loan mentioned in the firm's accounts but there was no documentary evidence to support it and nor was it previously referred to before his witness statement filed just before the hearing. Mr Nesbitt referred to the client ledger which referred to a payment into Court of £77,396.74 in April 2010 which matched the required amount. Mr McClelland submitted that even if the Respondent's account was accepted that he was under the apprehension that the money was to be repaid he did not take any steps to confirm it had occurred. Mr McClelland submitted there was a tension between the Respondent saying that the money was to be repaid to the client and the reference to the Slip Rule which was based on the firm being entitled to the monies. He acknowledged in the conference with the costs draftsman that it was not appropriate to make an application under the Slip Rule; that it was not in the client's interests and he knew that such an application could not be considered because he stated in a letter of 2 March 2010 to Counsel's professional indemnity insurers:

> "As has been stated, the writer was not involved in the drafting of the Order in any way and, when the error was finally spotted, it was too late to do anything about it. Indeed, the District Judge at the Carlisle District Registry indicated that he could not consider an application under the Slip Rule because the Order had been made, by Consent, and by Counsel."

180.4 Mr McClelland submitted that (contrary to his denial) the Respondent's conduct plainly involved a lack of integrity. In particular, having learnt that £55,000 had been misappropriated in breach of a Court order, anyone whose moral compass pointed in the right direction would have ensured that the position was corrected without delay. The Respondent's conduct in relation to Allegation 3 was also, at least, reckless as to a breach of the Order by failing to pay the outstanding balance of the £496,529.75 sum (£77,396.74) into Court.

Tribunal's Determination in respect of Allegation 3

180.5 The Tribunal had regard to the evidence including the oral evidence for the Applicant, and the submissions for the Applicant and for the Respondent. The matter of client W began in 1999 and was funded throughout by legal aid until on around 19 January 2009 a settlement was agreed pursuant to which W would recover a global sum of £550,000 to include damages, legal costs, disbursements and VAT. The order filed on 3 March 2009 provided for W to receive £496,529.75 net after the deduction of monies due back to the CRU for state benefits W had received. The firm was required to pay the money into the Court Funds Office on or before 10 March 2009 for investment. It was not disputed that the firm received that money on 4 March 2009 but it was not until two months later on 6 May that any funds were paid into Court and the amount paid in was £77,396.74 less than that required by the order. The Respondent's explanation for what had happened was that it was all a mistake which occurred because he was not present when the order was made and that the intention behind the settlement agreed between the parties was the amounts paid by the Defendant were a global figure which would include the costs of the firm which would therefore fall to be deducted from the sums paid by the Defendant. (This was of course not permissible because this was a legally aided matter throughout.) The Tribunal accepted that on several occasions the Respondent took advice in respect of how the mistake might be rectified under the Slip Rule and was told that nothing could be done. In his witness statement, the Respondent stated:

> "As with other matters having dealt – successfully I thought – with the legal conclusion to the case I passed the file to the practice management team to deal with the issues of costs."

The Respondent went on to refer to his belief that a loan was taken out which appeared in the firm's accounts as the W loan. The Tribunal rejected the Respondent's assertion that he thought other people were dealing with the problem. Primary documents showed that he continued to be involved right to the point where it was firmly established that £77,000 ought to be paid into Court and there was no prospect of altering the advice that he could not take advantage of the Slip Rule. He became aware of the problem on 21 May 2009 by way of a visit from the firm's internal cost draftsman GH who gave him "some very bad news indeed." There were further attendance notes dated 22 May 2009, 2 June 2009; in the latter the Respondent himself recorded that Counsel (NB) advised that the £50,000 taken from the damages should be paid to the court and the bill should be withdrawn. On 10 June 2009, the Respondent prepared instructions to the same counsel. On 10 August 2009 the Respondent prepared instructions to the trial Counsel and on 23 October 2009 he prepared further instructions to NB of Counsel. The Respondent realised the importance of the mistake that had been made because he considered whether he

needed to report himself to the LSC or the Applicant but decided in conference and recorded in the 22 May 2009 note that he did not because what occurred was a mistake. The Tribunal found all aspects of allegation 3 which Respondent admitted that is breaches of Rules 11.02, 1.02 and 1.06 proved on the evidence to the required standard.

180.6 As to the allegation of recklessness in respect of allegation 3, the Tribunal found that the Respondent by not ensuring that the money ordered to be paid into Court was not so paid in its entirety, took the risk that the money never would be paid and so the client would not receive it. He set out in the 10 June 2009 instructions to counsel that:

> "What had been intended was the Claimants' (sic) solicitors would receive a sum in the region of £300,000 in respect of costs, disbursements, Counsel's fees and VAT and the balance would go to the client."

Because of the way the order was drawn up the Respondent was in fact limited to the amount of £50,000 which was specified by the order as the Defendant's contribution to W's costs. The Tribunal found it was the Respondent's duty to see this matter through and that it was a feeble excuse to say that he saw a reference in the accounts to the W loan. He took the view that the client had been made "a present of about £130,000 in solicitors and Counsel's fees that being the difference between the bill as drawn and the likely Legal Aid award" (instructions to counsel dated 10 August 2009). In March 2010, the Respondent wrote to trial Counsel's indemnity insurers with a view to making a claim. On 4 June 2013, he wrote to Ms Bond one of the IOs including:

> "The point that I wish to make, therefore, is that I did not have the opportunity of correcting matters but the Claimant will not suffer any loss as a result of the mistake."

180.7 His statement regarding the client was based on his understanding that his former firm's professional indemnity insurers would cover the loss. The Tribunal noted that the mistake in this matter was made in 2010 and the Respondent did not leave the firm until December 2012 he therefore had a considerable time to resolve the issue and he did not do so. The Tribunal considered that by failing to comply with the court order in its entirety the Respondent was reckless as to the risk of loss to the client. The Tribunal therefore found all aspects of allegation 3 including recklessness proved to the required standard on the evidence.

Tribunal's Determination in respect of Allegation 4

180.8 The Respondent admitted both aspects of allegation 4 including breach of the integrity Rule 1.02 and the Tribunal found the allegation proved on the evidence to the required standard.

181. **Allegation 5. His [the Respondent's] firm took funds pursuant to interim invoices on client B's case, for sums which were significantly higher than the costs which had actually been incurred. He thereby:**

5.1 failed to act in his client's best interests, contrary to Rule 1.04 of the 2007 Code; and

5.2 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

Allegation 6 - Notwithstanding that a member of staff prepared two written file notes expressing concern about the circumstances described at allegation 5 above, no steps were taken to rectify those circumstances. He [the Respondent] thereby:

6.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Principle 2);

6.2 failed to act in his client's best interests contrary to Rule 1.04 of the 2007 Code (Principle 4); and

6.3 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Principle 6).

181.1 For the Applicant, Mr McClelland submitted these allegations concerned the deduction of costs from Client B's damages in an amount that was significantly in excess of the fees actually incurred (allegation 5), and the Respondent's failure to take any steps to remedy this, even having received two written file notes from a colleague (his secretary) expressing the most emphatic concerns about the situation including referring to "theft" (allegation 6). Mr McClelland pointed out that the position regarding costs was not drawn to the attention of Miss M or any other member of the administrative team but to the Respondent, again showing his ongoing involvement in client matters. It was alleged that this was conduct that was likely to diminish public trust, and amounted to a failure to act in Client B's best interests. In addition, the failure to remedy the overpayment involved a lack of integrity. The Respondent admitted that the excessive deduction was made and that, by failing to make sure that this did not happen, he failed to act in his client's best interests and at the hearing admitted diminishing public trust and lack of integrity. He claimed to have been initially unaware of the overpayment. He admitted that he became aware of the excessive deduction and, in "failing to respond sufficiently or appropriately" he failed to act in his client's best interests and breached public trust. However, he claimed that his misconduct was simply a "mistake" and therefore denied recklessness. Mr McClelland relied on the facts set out at Rule 5 Statement. The background to the excessive deduction was itself disquieting and the Tribunal was invited to review it. In view of the Respondent's responsibilities for this matter, it was submitted that a breach of public trust was made out. Mr McClelland referred the Tribunal to Lord Bingham's definition of "trustworthiness", in Weston:

> "…the duty of anyone holding anyone else's money to exercise a proper stewardship in relation to it. That is violated if one solicitor with a duty to see that the rules are observed fails to do so."

181.2 In relation to the failure to remedy the excessive deduction, Mr McClelland submitted that the position was little short of shocking. On 2 November 2011, The Respondent's secretary reviewed the costs position on the file and prepared a file note in which she recorded that: once the balance held on B's client account was forwarded to her, there would be a shortfall of £24,374.51 in the sum due to the client; in view of the fact that the firm's profit costs were eventually settled at £22,574.58, the firm had "overtaken" by £8,983.19 (this was understood to mean the firm had taken £8,983.19 more in profit costs than it had been entitled to). On 15 June 2012, the Respondent's secretary prepared a further file note in which she repeated that the firm had taken £8,983.19 more in respect of profit costs than it was entitled to, and stated:

> "…this money has to go back to the client as it was not ours to take and will (sic) not be able to justify it if challenged. I suppose it could be seen as theft and if (sic) were investigated could land us in big trouble"

She noted that once the sum of £8,983.19 had been paid back, there would still be a shortfall of "around £15,000" but that this would be covered by the client care letter and "she [i.e. B] will just have to live with that". In addition, from as early as September 2011, B herself made clear in correspondence with the Respondent that she was unhappy with the prospect of having to pay any shortfall in the costs recovered inter-partes. This notwithstanding, when the Respondent left the firm in December 2012 nothing had been done to correct this situation. In his Defence Case Statement the Respondent did not deny that his attention was drawn to these matters by his secretary, and he recognised that he should have taken charge of the issue, but claimed that "against a background in which he remained heavily over worked he failed to do so". In his statement he now said:

> "I thought my secretary would have been liaising with the practice management department over the resolution of these issues"

Mr McClelland submitted that this was an unfounded and wholly inappropriate assumption for any solicitor, let alone one of over 30 years standing. The Respondent also asserted:

> "…these notes [from his secretary] date from after it had been formally recorded by the firm in a resolution that I was not to be involved in costs issues…"

Mr McClelland submitted that this was incorrect. The resolution was made on 15 February 2012, more than three months after the secretary's first note of 2 November 2011. In any event, no amount of resolutions could have relieved the Respondent of the task of ensuring that a substantial, unjustified deduction from client account was immediately remedied. Mr McClelland submitted that the Respondent's attempt to rely on the resolution demonstrated the fact that implicitly he accepted the position changed after the resolution and that it did not represent the status quo.

181.3 Mr McClelland submitted that what was striking about this episode was that what was obvious to a junior and unqualified member of staff (namely that "...this money has to go back to the client as it was not ours to take…") failed to register with the Respondent, at least with anything like the same urgency. In terms of the allegation of

recklessness, Mr McClelland submitted that the Respondent was plainly aware of the risk that the client would not be reimbursed and she was not and if no steps were taken then she would remain out-of-pocket. The Respondent did not act on the risk; his secretary was not legally qualified but applying common sense she said that what had happened could constitute theft. Mr McClelland submitted that there could not be a brighter red light than this. The Respondent demonstrated a clear lack of integrity, and a reckless disregard for the need to reimburse the client.

181.4 In respect of allegation 6, Mr Nesbitt submitted that the allegation was connected to allegation 5. The Respondent had originally admitted failure to act in the best interests of the client and breach of the public trust principle but now also admitted breach of the integrity principle.

Tribunal's Determination in respect of Allegation 5

181.5 The Tribunal had regard to the evidence including the oral evidence for the Applicant, and the submissions for the Applicant and for the Respondent. In this matter which was privately funded throughout an amount of £8,983.19 in excess of what the firm was entitled to, had been billed in 2010. In his witness statement the Respondent stated:

> "I accept that the firm's charging in relation to this matter showed errors and too much was charged. However, as I have explained I was not directly involved in what happened in relation to that and was not at the time aware of it.…"

The Respondent admitted breach of the requirement to act in the client's best interests on the basis that the firm transferred more costs than it was entitled to from the client's damages and that although he was not directly responsible for or aware of what happened he failed to ensure that it did not occur. He also admitted undermining public trust in that connection. The Respondent however denied recklessness in respect of allegation 5. The Tribunal noted that the Respondent wrote to the client on 11 October 2011 advising that an offer of £38,000 for costs had been obtained by the cost draftsman against a bill of just over £48,000. The offer/settlement calculator before the Tribunal recorded the bill total as £48,275.03 and the offer as £37,000. The Tribunal found the breaches of Rule 1.04 that he had failed to act in the best interests of the client, Rule 1.04 and undermined public trust Rule 1.06 alleged in allegation 5 proved on the evidence to the required standard but the Tribunal was not sure on the evidence that the Respondent appreciated the precise figures when the bill was raised and so did not find recklessness proved on the evidence to the required standard in respect of allegation 5.

Tribunal's Determination in respect of Allegation 6

181.6 In respect of allegation 6, the Respondent's secretary alerted him on 2 November 2011 to the amount which had been taken. This showed that he was clearly still involved in the matter and had talked to the client, according to his secretary's note "about a shortfall of £8000". There could be no doubt that from this point the Respondent was well aware of the issue but he did nothing about it. He then received a very stark note from his secretary dated 15 June 2012 in which she said

that she supposed "it could be seen as theft". The Respondent admitted breach of the integrity principle Rule 1.02, that he had failed to act in the best interests of the client, Rule 1.04 and undermined public trust Rule 1.06 but denied he had been reckless. In respect of these notes in his witness statement the Respondent relied on the resolution that he was not to be involved in costs matters, said he thought his secretary would have been liaising with the practice management department but accepted: "I should have reacted to the file note and chased things up and made sure this was sorted out." He also relied on it being a time of great pressure and anxiety. The Tribunal considered that at least from the time of the second note in June 2012 which made the position crystal clear the Respondent was aware that there was a risk that the client would not receive all the money to which she was entitled but he did nothing about it. The Tribunal rejected the Respondent's reliance on the resolution about the allocation of costs work in the firm, because setting aside whether this relieved him of responsibility, the resolution was dated 15 February 2012 and the second note post dated it. The Tribunal found proved to the required standard on the evidence that the Respondent was reckless in doing nothing about this matter. The Tribunal therefore found proved on the evidence to the required standard all aspects of allegation 1.6.

182. **Allegation 7 - Following costs being settled and received on an inter-partes basis in the case of DS, his [the Respondent's] firm applied those costs towards its own fees but failed to pay (i) disbursements and (ii) sums due to the Legal Services Commission, together totalling approximately £39,000. He thereby:**

7.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code (Principle 2); and

7.2 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Principle 6).

Allegation 13 - Following receipt of costs payments from counterparties in legal aid funded cases on which he [the Respondent] was acting, his firm failed to retain in client account sums sufficient to reimburse the LSC and/or LAA for payments which it had made in order to fund such cases. He thereby:

13.1 breached Rule 21(3) of AR 1998 (Rule 19(3) AR 2011); and

13.2 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code (Rule 1(d) of the 1990 Rules/Principle 6).

182.1 For the Applicant, Mr McClelland submitted that the facts underlying these allegations were not disputed. Allegation 7 applied to the client DS only, while allegation 13 related to clients DS, W, AB and G. Regarding allegation 7 Mr McClelland relied on the case of client DS where in breach of SAR 21(3), the firm failed to retain at least £22,144.13 on client account in respect of DS's liability to the LSC following receipt of £50,000 in respect of costs on 28 January 2011. In respect of allegation 13 Mr McClelland relied again on DS. It appeared that the firm applied almost all of the £110,000 in agreed costs towards its own profit costs (£106,250), leaving it unable to pay disbursements or the bulk of the recoupment due to the LSC; however, it should have settled disbursements incurred on the case from the £110,000

and, if it had wished, sought to recover any shortfall in its profit costs via legal aid assessment. In respect of client W throughout its conduct of W's matter, the firm received a total of £67,126.91 from the LSC in respect of its profit costs and disbursements. Pursuant to Rule 21(3) AR 1998, upon receipt of the £50,000 costs contribution from the Defendant, that sum should have been retained on client account in respect of a possible future recoupment by the LSC of its contributions. However, the £50,000 was applied towards the settlement of the firm's invoice dated 3 March 2009. In respect of client AB, between 25 September 2000 and 5 July 2005, a total of £35,396.30 was received from the LSC on account of costs (£18,094.10) and disbursements (£17,302.20). However, once the firm had received the £75,000 interim costs payment on 9 March 2005, it did not retain a sum in client account equivalent to the payments received from the LSC, in breach of SAR Rule 21(3). Rather, that sum was applied towards the payment of the firm's invoice of 10 March 2005. In respect of client G, the ledger recorded that various payments had been received from the LSC throughout the conduct of the liability stage of the case. On 5 November 2009, a recoupment payment to the LSC of £17,965.34 was made from client account. In effect, this payment was made from client G's damages. However, following receipt of the £75,000 interim costs payment from the Defendant on 27 February 2009, funds sufficient to repay those payments to the LSC (that is to recoup them) were not set aside for that purpose.

182.2 Mr McClelland submitted that the Respondent's defence was, in essence, that he was unaware that the relevant funds had not been retained; having left costs recovery to the firm's administration. He should have paid the disbursements from the recovered costs and then sought to recover any shortfall in his profit costs via legal aid assessment. He therefore admitted a breach of Rule 21(3) of the SAR 1998 (relevant to Allegation 13 only), but denied any lack of integrity (Allegation 7), or breach of public trust (alleged in respect of both Allegations 7 and 13). Mr McClelland submitted that in view of the intense pressure on the Respondent not just to bring in costs, but to provide accurate forecasts of when fees would come in and then to justify any delays, it was simply unreal to assert that he was unaware that, once costs were received, they were applied immediately to meet the firm's profit costs, rather than retained on client account to recoup the LSC. Indeed, the Respondent all but admitted as much in one of the passages cited above from his August 2014 Note for the Applicant that it got to the stage that any damages he recovered on behalf of clients were "descended upon" by Miss M and Mr KC.

182.3 Mr McClelland submitted that for the avoidance of doubt, the Respondent could not deny knowledge or avoid responsibility by pointing (as he did repeatedly) to the fact that a resolution was passed in the firm providing that he was to have no involvement in relation to costs. First, this occurred on 15 February 2012, which was not long before he left the firm (December 2012), but long after most of the events relevant to these proceedings had occurred. Secondly and more fundamentally still, the very fact that the Respondent was so concerned to obtain this resolution (which was pointedly forward-looking: "The Board of Directors agrees that henceforth the following system will apply…"), reflected how burdensome he found his existing responsibility for costs and how uncomfortable he truly was with the process of taking substantial deductions from client damages – a process which, he himself had authorised.

182.4 Mr McClelland submitted that the allegation of lack of integrity in respect of allegation 7 was made in circumstances in which it was repeatedly brought to the Respondent's attention that monies were not held back for disbursements. Mr McClelland relied on the evidence with the Rule 5 Statement for that assertion. The allegation relating to diminishing public trust would extend to failure to ensure the rules regarding client monies were followed and to questions of competence. To the extent that the Respondent was happy to borrow from client's damages he was also happy to do that from the LSC because rather than holding its money back he took it as profit costs to maintain cash flow in the expectation that he could replenish the money from inter-partes costs. This was not just a necessary inference but there was documentary evidence in respect of it. There was an e-mail from SJ the secretary appointed to the Respondent after the firm was incorporated following KC's death to LT the person appointed practice manager after Miss M left on the subject of the client DS which included:

> "Not what you want to hear first thing but I think DS needs to be brought up in the next Directors Meeting.
>
> As I am sure you are aware there is no more money to come on this and we only have £889.56.
>
> Mr [W] phoned yesterday chasing his fee of £9912.86 and [PE] is owed £7,949.69. We also still have to pay back the LSC a whopping £22,143.13.
> …
> We are running out of excuses for Counsel and Mr [W] when they phone chasing their fees and [the Respondent's] answer usually is that he did not settle this one…"

182.5 Mr McClelland submitted this was a case where there was a large indebtedness to the LSC and no money had been retained for recoupment and large sums were owed for disbursements. The Respondent did not say why there was no retention for the LSC; it appeared that he had not done anything. If he had operated under the belief that money was being held back he would have expressed disbelief and raised it at the partners' meeting himself. Mr McClelland submitted based on this note that the secretary had had a conversation with him and been rebuffed and that if the last two lines of the note meant that the Respondent said he was not dealing with the costs aspects of the matter that would be the most favourable explanation but that was sufficient for breach of the integrity principle whatever was said about the internal division of responsibilities in the firm. Any solicitor with his ethical compass pointing in the right direction would see that he was responsible for the money being returned to the LSC. Mr McClelland relied as his authority on Rule 21(3) of the SAR 1998 which set out in respect of payments from a third party:

> "If the Legal Services Commission has paid any cost to a solicitor or previously nominated solicitor… or has paid professional disbursements direct, and costs subsequently settled by third-party:
>
> (a) The entire third-party payment must be paid into a client account.
> (b) A sum representing the payments made by the Commission must be retained in the client account.

` (c) Any balance belonging to the solicitor must be transferred to an office account within 14 days of the solicitor sending a report to the Commission containing details of the third party payment.
(d) The sum retained in the client account as representing payments made by the Commission must be:

(i) either recorded in the individual client's ledger account, and identified as the Commission's money;
(ii) or recorded in a ledger account in the Commission's name, and identified by reference to the client matter;

and kept in the client account until notification from the Commission that it has recouped an equivalent sum from subsequent payments due to the solicitor. The retained sum must be transferred to an office account within 14 days of notification."

Mr McClelland submitted that this rule made it clear that monies to be retained for the LSC were client monies and not an indebtedness that the solicitor had to provide for. The Tribunal pointed out that the note did not make clear what the Respondent's involvement in the matter was, the Tribunal did not know what the note meant. It been not been copied to the Respondent and the Tribunal had not seen his answer; all the note set out was what the Respondent usually said.

182.6 Mr McClelland referred the Tribunal to the resolution made by the incorporated practice about division of responsibility regarding costs dated 15 February 2012. The document included:

"The Board of Directors agrees that henceforth the following system will apply in relation to the management of costs in Clinical Negligence/Personal Injury cases, whether those cases are funded under Legal aid, Conditional Fee Agreement, or any other source of funding. The day to day responsibility in relation to preparation of schedules of costs, negotiation of costs, payment of interim and final costs and disbursements and transfer of profit costs shall be the responsibility of the Firm's in house Costs Draughtsman [MC]… who in turn shall be answerable and accountable to the Managing Director [T] in the name of the Board as a whole…

Save for initial discussions with clients about proposed costs [the Respondent] will have no involvement or authority in relation to any such matters herein before referred to. It is recognised by the Board that [the Respondent] has considerable expertise and skill in relation to the conduct of highly complex cases and that his energies should be channelled accordingly…"

182.7 Mr McClelland submitted that the resolution was a fairly unusual document providing for division of responsibilities and it was clear that it was a forward-looking document that said henceforth the system would apply in personal injury and clinical negligence claims however funded. The fact that the Respondent felt it necessary to have the document drawn up arose out of his explanation of the state of matters in the firm. He was under enormous pressure regarding costs. Mr McClelland accepted that the Applicant did not have evidence that the Respondent had initiated the document. He

said it was evidence of his disengagement in costs and there was evidence that it did not describe the status quo. The Respondent acknowledged that he authorised taking costs from client's damages and so in the absence of any fuller explanation Mr McClelland submitted that the resolution reflected the Respondent distancing himself from matters he was uncomfortable with. The Respondent said that in his Note of 2014 to the Applicant that he was content for the separation to be put in place. He could not rely on the document as recognition of the position as it stood in the firm.

182.8 The Tribunal noted that in his witness statement the Respondent stated:

> "I should note that when we were discussing new arrangements for the firm it was recognised by everyone that I had no interest or affinity for dealing with financial costs matters (in part because of my Dyscalculia) and the Board formerly (sic) recorded in the resolution of 15 February 2012 that I was not to be involved in costs matters."

Mr McClelland pointed out that the Respondent here referred to new arrangements for the firm which applied to the incorporated business. He could not rely on it as describing the position prior to that and the costs meeting showed he was heavily involved in costs matters. Most of the matters before the Tribunal predated the resolution but Mr McClelland informed the Tribunal that there was an aspect of the matter of client B which occurred afterwards.

182.9 For the Respondent, having regard to the issue of whether the Applicant had proved the applicable standard (so that the Tribunal was sure) in relation to DS that the failure to pay disbursements and retain sums for recoupment by the LSC in priority to the firm's costs involved acts on the part of the Respondent that were a breach of the integrity and of the public trust principle, Mr Nesbitt submitted that there had been exchanges regarding the meaning of the e-mail of 25 January 2012 from SJ to LT of the firm. Mr Nesbitt submitted that it did not bear the burden which the Applicant sought to place upon it.

<u>Tribunal's Determination in respect of Allegation 7</u>

182.10 The Tribunal had regard to the evidence including the oral evidence for the Applicant, and the submissions for the Applicant and for the Respondent. The Respondent acted for DS in a clinical negligence claim commencing in 2007 which was funded by legal aid throughout but the certificate was limited to £22,500 costs. In the Defence Case Statement, the Respondent admitted that he represented this client but stated that he did not deal directly with the raising of bills of costs or the transfers of such costs from client account but he did not challenge the figures provided by the Applicant:

> "He also admits in the course of dealing with those costs issues the Firm failed to settle bills for disbursements and retain sums for recoupment of payments to the LSC."

182.11 The Respondent also admitted breach of Rule 21(3) of the SARs 1998 and Rule 19(3) of the AR 2011 to retain sufficient money to recoup legal aid payments (allegation 13). The Respondent admitted the facts but denied allegation 7 breaches of the

integrity Rule 1.02 and the public trust principle Rule 1.06 on the basis that he denied acting personally in a way which involved breaches of those rules. The Tribunal had not been provided with any evidence of the Respondent's direct involvement in making decisions as to whether sums were retained or not and on that basis the Tribunal did not find allegation 7.1 relating to failure to act with integrity proved to the required standard on the evidence. The Tribunal considered however that these shortcomings in operating the rules for which the Respondent was responsible would undermine public trust and therefore allegation 7.2 was found proved on the evidence to the required standard.

Tribunal's Determination in respect of Allegation 13

182.12 In respect of allegation 13 which applied to clients DS, W, AB and G, the Respondent admitted that he was in breach of Rule 21(3) (allegation 13.1) and the Tribunal found allegation 13.1 proved on the evidence to the required standard. The Respondent denied that he had undermined public trust because of lack of personal involvement (allegation 13.2). Again the Tribunal considered that the shortcomings in operating Rule 21(3) which applied to all the clients covered by the allegation and for which the Respondent did not dispute he was responsible as a partner would undermine public trust and that allegation 13.2 was also proved to the required standard on the evidence.

183. **Allegation 8 - He [the Respondent] provided inadequate, confusing and/or unclear information to clients regarding costs. He thereby:**

8.1 breached Rule 2.03 of the 2007 Code (Rule 15 of the 1990 Rules / Outcome 1.13 of the 2011 Code); and

8.2 failed to provide a good standard of service to clients, contrary to Rule 1.05 of the 2007 Code (Principle 5);

183.1 For the Applicant, Mr McClelland submitted that alongside the specific advisory failings in allegations 8.3, 9 and 10, it was alleged that the Respondent more generally provided inadequate, confusing and unclear information to clients regarding costs and thereby breached Rule 2.03 of the 2007 Code and failed to provide a good standard of care. This allegation related principally to client care letters and other documentation sent to clients, which failed properly to explain their potential liability for costs. The allegation now appeared to be admitted. Mr McClelland invited the Tribunal to review the details provided in the Rule 5 Statement concerning client B, client H. client C, client AB and client G.

183.2 The Tribunal had regard to the evidence including the oral evidence for the Applicant, and the submissions for the Applicant and for the Respondent. The Respondent admitted the written information provided was confusing or inadequate in each of the cases involved client B, client H, client C, client AB and client G. He also admitted that this gave rise in each case to a breach of Rule 2.03 relating to outcomes for clients (allegation 8.1) and Rule 1.05 the obligation to provide good service to clients (allegation 8.2). The Tribunal noted that there were specific issues in respect of each client and the information which had been provided.

- The client care letter sent to client B on 30 August 2006 provided a costs estimate of between £2,500 and £5,000 but the bill drawn up by the costs draftsman for assessment was £48,275.03. The Tribunal agreed that the wording of the client care letter which promised the client would be advised if more costs than estimated were to be incurred had not been fulfilled and that the explanation of the client's potential liability for the firm's costs was confusing in the client care letter and otherwise.

- The client care letter dated 2 February 2005 on the evidence comprised the only costs advice given to H's parents.

- In the case of both client B and clients H, the Tribunal agreed with the Applicant's submissions that the client care letter did not explain the potential liability of the client for the firm's costs in the event that there was a shortfall in what was recovered inter partes; that it contained confusing references which suggested the client might only be liable in respect of funds already paid to the firm on account of costs and that the words "the vast majority of fees expended will be recovered" were vague and confusing and did not reflect the reality of litigation.

- In the case of Client C, the alleged failure related to costs information relating to CFAs. Client C's mother and father each signed CFAs which contain different information. The Respondent was unable to explain to the IO why this was, save he stated that the CFA signed by the father was wrong.

- In the case of client AB, the Tribunal noted that there was no evidence on the file to suggest the reason for the difference between the profit costs on the interim bill of 10 March 2005 and the profit costs assessed by the firm's costs draftsman in 2006; that the Respondent had brought the difference to AB's attention and/or explained the reason for it; and/or that the difference was refunded to AB or that the Respondent had considered making such a refund.

- In the case of client G, the matter began with public funding but then moved to a CFA which provided for an hourly rate of £450 with a 0% success fee and which was sent under cover of a letter of 7 November 2008. On 5 January 2009, a further client care letter was sent containing a table with hourly rates for various grades of fee earners and that which included the Respondent was given as £250 and an unsigned and amended CFA was found in the file showing an hourly rate of £250 but there was no evidence to suggest the client had been provided with it or that its terms had been explained.

183.3 The Tribunal found in the case of all the above clients that the allegations admitted that is 8.1 and 8.2 were proved on the evidence to the required standard.

184. **Allegation 9 - He [the Respondent] failed to provide adequate advice to clients about the benefits and/or detriments of switching from legal aid to private funding for their cases. He thereby:**

9.1 failed to act in his clients' best interests, contrary to Rule 1.04 of the 2007 Code (Principle 4); and

9.2 failed to provide a good standard of service to his clients, contrary to Rule 1.05 of the 2007 Code (Principle 5).

Allegation 10 - He [the Respondent] advised clients that they were no longer eligible for legal aid funding as a result of payments made to those clients by defendants in their cases, without first confirming the position with the LSC (and/or its successor, the Legal Aid Agency (LAA)). He thereby:

10.1 failed to act in his clients' best interests, contrary to Rule 1.04 of the 2007 Code (Rule 1(c) of the 1990 Rules / Principle 4); and

10.2 failed to provide a good standard of service to his clients, contrary to Rule 1.05 of the 2007 Code (Rule 1(e) of the 1990 Rules / Principle 5).

184.1 For the Applicant, Mr McClelland submitted that these separate but related allegations concerned the advice provided (or, rather, not provided) to clients H and AB whom the Respondent switched from legal aid to private retainers after they had succeeded at the liability stage. Mr McClelland relied on the facts set out in the Rule 5 Statement. AB had received an award of interim damages in excess of £500,000 and in the case of client H liability had been settled but no cheque had yet been received. This process of switching at the quantum stage, which the Respondent said in his August 2014 Note he applied "universally" or in his witness statement "almost invariably", had obvious and substantial benefits for the Respondent and his firm. At the liability stage, legal aid guaranteed him some costs recovery whilst liability (and therefore the prospect of costs recovery) remained uncertain. Once a finding or concession on liability was locked-in, interim damages would be received and/or a pay-out was all but certain; a private retainer allowed the Respondent to recover uplifted costs, avoid the cost caps placed on legal aid certificates (which he was finding it extremely difficult to extend), and recover his costs directly from clients' damages, rather than being dependent on inter partes recovery and, in the event of a shortfall, a legal aid assessment. It was alleged that the Respondent failed to provide adequate advice to clients about the benefits and/or detriments of switching from legal aid to private funding: allegation 9 (thereby failing to act in clients' best interests and failing to provide a good standard of service); and advised clients that they were no longer eligible for legal aid funding without first confirming the position with the LSC: allegation 10 (thereby, again, failing to act in clients' best interests and failing to provide a good standard of service and acting recklessly).

184.2 Mr McClelland submitted that the Respondent denied both allegations on the basis that he provided detailed and careful advice as to the relative benefits of the two retainers. In his statement he said of client H's matter:

> "The case was, as noted in the Rule 5 Statement, initially funded by legal aid. The claim was very obviously of substantial potential value. In or around February 2005 the case was settled as to liability.
>
> My view at that point in time was that where there was such an admission and/or a large interim payment it was preferable for the client that the funding arrangements be private arrangements – that is either funded out of any interim payments or through a conditional fee arrangement. I took this view

> because in my view at the time trying to work under a public funding certificate tended to cause constraints on one's freedom to choose what was in the client's best interests to do, because of the need for approval, and also often led to delay. It was also my experience that privately funded claimants often got quicker and better settlements than publicly funded ones, no doubt because of the impact of private funding arrangements on the thinking of the defendants/ insurers. As I usually did I weighed up in my mind the pros and cons of this, but as I almost invariably would have done in such a situation I took the view that it was best to enter into private funding arrangements from that point in time. I believe I carefully discussed this with H's parents.
>
> In the light of this advice I believe that we entered into a CFA...
>
> …
>
> As I say I had detailed discussions with H's parents about both of these aspects of the case…"

184.3 Mr McClelland submitted that this was untrue; there was no documentary record of any kind that such advice was given. Mr McClelland referred the Tribunal again to the letter of 10 March 2005 to Mr AB where the client was informed of the discharge of his legal aid without advice being provided; there was no advice about the benefits and disbenefits of proceeding with legal aid or under private retainer he was simply told that the certificate had gone. Mr McClelland asked the Tribunal to contrast that letter with the witness statement where it referred to Mr AB:

> "In due course the claim was settled on the basis of an initial award of £1.15 million, with provision for further periodical payments in the future. The award was embodied in an order. I note what is said about the contents of that order in the Rule 5 Statement. Although I have no specific recollection of it I accept that the order was in the form identified, and that it provided for a detailed assessment of the Claimant's costs."

184.4 More fundamentally, however, it was clear that the Respondent could not have given, and did not give, this advice. Until it became inconvenient to do so, the Respondent claimed to have believed that when a client received interim damages at the conclusion of the liability stage, this automatically disqualified them from further legal aid as demonstrated by the Respondent's comments in the August 2014 Note:

> "I was of the opinion that an award of monies by way of interim payment in respect of damages disqualified a Publically (sic) Funded Litigant from continuing to receive public funding. I now realise that I may have been wrong about that, but at the time, and universally, I transferred such Client's [sic] to Conditional Fee Agreements rather than public funding."

184.5 Mr McClelland submitted that the Respondent had sought to back-pedal from this, and now said in his statement that "at times I thought that was the position" but this was incoherent and was intended to obscure a basic contradiction in the defence. The Respondent claimed (as above) that he "weighed up in my mind the pros and cons" and then "carefully discussed" them with H's parents. This would, however, have

been an utterly pointless exercise if the Respondent had believed that H was simply ineligible for legal aid funding and was doing no more than applying a "universal" policy of switching her to a private retainer. As to this, the account provided in the Respondent's witness statement stood in direct contradiction of the recollection recorded in a letter written to the Applicant on 26 November 2014:

> "… I remember going to my clients' [sic] then home in Sunderland after the interim award with a CFA believing [H] had been disqualified on grounds of means following the substantial interim"

This was the basis on which he proceeded and the message he conveyed. Mr McClelland submitted that the burden of allegation 10 was that, before advising clients that they were no longer eligible for legal aid, the Respondent should first have confirmed the position with the LSC. The Respondent admitted that he did not do this: it was submitted that his failure to do so was reckless. Mr McClelland submitted that the level of misconduct was not as serious regarding these allegations as it was in respect of allegation 1.

184.6 Mr McClelland submitted that paragraph 15 of the second part of the August 2014 document was relevant regarding the significance of interim payments for the client's ability to continue under the legal aid regime:

> "I was of the opinion that an award of monies by way of interim payment in respect of damages disqualified a Publically Funding Litigant from continuing to receive public funding. I now realise that I may have been wrong about that, but at the time, and universally, I transferred such Client's (sic) to Conditional Fee Agreements rather than public funding. Secondly, I had begun to find public funding extremely obstructive, and a in a (sic) the most automatic refusal of any request to extend the Certificate, whether it be the scope of the cost limitation, without strong reasoning at some considerable cost which could not be recovered. Put simply the way in which the Legal Aid Board was running the Legal Aid Fund in civil cases made it impossible to work."

The Respondent saw it as a hard edged rule regarding interim payments. He said he advised clients very carefully about legal aid vis-a-vis a private retainer but this showed that he approached it as a universal standard. Regarding the constraints upon certificates he said that it was almost impossible to extend them; one needed to put cogent reasons to the LSC for which process one would not get paid.

184.7 The Tribunal asked Mr McClelland to make further submissions about the basis upon which recklessness was alleged in respect of allegations 9 and 10. (It was common ground between the parties that the legal aid provisions were not conclusive that a client receiving any interim payment in excess of the financial eligibility limits would automatically cease to be entitled to legal aid.) Mr McClelland submitted that if there was a risk that the client could proceed with legal aid and the Respondent decided to press on without confirming the position that satisfied the test for recklessness. The issue was that the Respondent did not involve the client in the choice rather than whether the Respondent was right or wrong in his understanding of the legal aid provisions. Furthermore it was in the firm's interest to proceed by way of private retainer because it was easier to take costs and damages and it opened up the

possibility of an uplift in costs. Mr McClelland accepted that a solicitor could inform the other side that the CFA included a 100% uplift and it could be in the client's interests. However Mr McClelland submitted that there were significant disbenefits to proceeding in that way.

Tribunal's Determination in respect of Allegation 9

184.8 The Tribunal had regard to the evidence including the oral evidence for the Applicant and the submissions for the Applicant and for the Respondent. These allegations related to clients H and AB. The Respondent denied all aspects of each allegation. In respect of allegation 9, the Respondent's case was that he provided advice orally. In respect of allegation 10, he accepted he did not check the position with the LSC and at various points might have misunderstood the position about eligibility for legal aid following receipt of an interim payment. He asserted that he advised clients to switch on the basis of what was in their best interests. In his Note of August 2014, the Respondent stated that he was of the opinion that an award of monies by way of interim payment in respect of damages disqualified a publicly funded litigant from continuing to receive public funding. He accepted that he might have been wrong about that but he said: "but at the time, and universally, I transferred such Client's (sic) to Conditional Fee Agreements rather than public funding." The Tribunal considered that the best evidence it had, was the Note which indicated that the Respondent undertook the transfer as a fait accompli so far as the client was concerned. The use of the word "universally" was telling. The Tribunal found this was supported by what the Respondent said in his letter to the Applicant sent on 26 November 2014 quoted above. In respect of client AB, in a letter of 10 March 2005 the Respondent advised the client that he had discharged his public funding certificate on the basis it was no longer appropriate following receipt of the interim payment. As with client H, the Tribunal found that the Respondent had not advised the client about the benefits and/or detriments of switching from legal aid to private funding. He simply told the client what he had done.

184.9 The Tribunal found allegation 9.1 and 9.2 proved on the evidence to the required standard in respect of clients H and AB because the Tribunal was satisfied that the Respondent did not provide adequate advice to the clients. It was unclear whether he had given any information to H's parents and in the case of AB the Respondent simply told him what was being done. This was not in the clients' best interests and nor did it fulfil the Respondent's obligation to provide good service to clients. In respect of allegation 9.3, the Tribunal did not consider that recklessness had been established. There was no evidence that the Respondent was cognisant of any risk in what he was doing he simply took the decision without regard to the clients believing that it was the better of the two options for future funding of the case.

Tribunal's Determination in respect of Allegation 10

184.10 In respect of allegation 10, the Respondent accepted that he did not check the position with the LSC and at various points might have misunderstood the position in relation to it but he asserted that he advised clients to switch on the basis of what was in their best interests. The Tribunal could not say what the Respondent would have found out if he had checked with the LSC but he should have taken that step in order to discharge his duty to the client. The Tribunal found it proved to the required standard

on the evidence that the Respondent had failed to act in the best interests of clients and failed to discharge his obligation to provide them with a good service (Rules 1.04 and 1.05 respectively). Again the Tribunal did not consider that recklessness had been proved to the required standard for same reasons as in respect of allegation 9 above.

185. **Allegation 11 - He [the Respondent] procured the withdrawal of £124,504.30 from trust funds belonging to client AB for the repayment of funds due to the LSC, when (i) only £35,396.30 was due to the LSC in respect of AB's matter, and (ii) those funds should in any event have been taken from funds set aside in client account for that purpose. He thereby:**

11.1 acted without integrity contrary to Rule 1.02 of the 2007 Code (Principle 2);

11.2 failed to act in his client's best interests contrary to Rule 1.04 of the 2007 Code (Principle 4); and

11.3 failed to provide a good standard of service to his client contrary to Rule 1.05 of the 2007 Code (Principle 5).

185.1 For the Applicant, Mr McClelland submitted that this allegation related to the Respondent arranging unjustified withdrawals from a trust (of which he was himself a trustee) which had been set up to conserve and invest the compensation obtained for the legally aided client AB. Mr McClelland relied on the facts are set out in the Rule 5 Statement. They were largely admitted, but the Respondent sought to play them down as mistakes. He therefore admitted failing to provide a good standard of service, or act in the best interests of his client but denied acting without integrity. The Respondent was the professional trustee of a trust holding compensation for a young stroke victim, AB. In May 2009 he arranged the withdrawal of £112,039.76 from that trust, ostensibly on the basis that it was needed to pay the LSC and he should have deducted funds for LSC recoupment before transferring the victim's compensation into the trust. He made the withdrawal without informing AB's mother (who was also a trustee of the fund), and she, on discovering the withdrawal, had to phone the Respondent to say that over £100,000 had been taken from the trust. The Respondent repeatedly and emphatically reassured AB's mother that this money was required for the LSC: he did so on the phone on 28 July 2009; in writing the same day, and then at a trustees meeting on 17 December 2009. In fact only £35,396.30 was required for this purpose. Of the balance, £34,579.88 was paid to a barrister for work on AB's case and £89,923.42 was wrongly paid to the LSC as an overpayment.

185.2 It was submitted that the Respondent's account showed a lack of integrity, in particular given that the Respondent was not just AB's solicitor but a trustee of the very trust from which he made withdrawals, and to withdraw £112,039.76 from a victim's trust was a grave and irregular matter of obvious importance, calling for great care. This was particularly so when the purpose of the withdrawal was said to remedy a mistake made by the Respondent himself. Nevertheless the Respondent said in his Defence Case Statement that he simply followed the advice from administrative staff and did not question their figures. He did not explain the need for making payment to the barrister. Knowing that he had not checked the position, he nevertheless made repeated personal assurances as to the necessity for the deductions, and held himself

as having a firm grasp of the position as in his attendance note of his telephone conversation with AB's mother when he recorded "I said I would explain all to her at the trustees meeting in October". In the light of his failure to check matters in respect of the explanation it was not ethical or appropriate to give assurances without checking, and making withdrawals in that fashion showed lack of integrity (Rule 1.02).

185.3 The Tribunal had regard to the evidence including the oral evidence for the Applicant and the submissions for the Applicant and for the Respondent. Allegation 11 was brought in respect of client AB only. The Tribunal found that the Respondent had failed to check whether the amount paid back to the LSC was the right amount owing and that it was a considerable overstatement of the debt and that by his failure he had failed to act in the best interests of AB and failed to provide a good standard of service so that allegations 11.2 and 11.3 were proved to the required standard on the evidence. In respect of allegation 11.1, the Tribunal had not had any evidence to repudiate what the Respondent said in his letter to the Applicant of 26 November 2014 that he authorised the withdrawal of around £112,000 from the trust fund because he had been told that it was to be repaid to the LSC and that he could readily accept that the sum in that amount could be repayable having regard to the size and complexity of the case. Accordingly the Tribunal found allegation 11.1 not proved on the evidence to the required standard as there was no indication of lack of integrity.

186. **Allegation 12 - He [the Respondent] amended a Conditional Fee Agreement between his firm and client G on the advice of his costs draftsman for his and/or his firm's benefit, without informing client G of this. In doing so he:**

12.1 acted without integrity contrary to Rule 1.02 of the 2007 Code; and

12.2 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

Allegation 12A - He [the Respondent] altered his assessment of risk in the Conditional Fee Agreement which is the subject of Allegation 12 above, not as a result of genuinely revising his assessment of the risks involved, but as a device to produce a more favourable funding arrangement. Specifically, the original CFA stated that no uplift was warranted because the Respondent was confident of success; the revised CFA stated that a 100% uplift was justified because of, amongst other things, there being "lively issues" between the parties. He thereby:

12A.1 failed to act with integrity contrary to Rule 1.02 of the 2007 Code; and

12A.2 failed to act in his client's best interests, contrary to Rule 1.04 of the 2007 Code; and

12A.3 acted in such a way as to diminish the trust the public placed in him or the legal profession, contrary to Rule 1.06 of the 2007 Code.

(References to client G generally include his litigation friend and mother WG.)

186.1 For the Applicant, Mr McClelland submitted that these allegations related to amendments made by the Respondent to a CFA drawn up in G's case. It was alleged, in essence, that on the advice of his costs draftsman the Respondent amended the CFA for his firm's benefit without informing his client (Allegation 12), and that, when amending the CFA, he altered the assessment of risk, not as a result of genuinely revising the merits of the case, but as a device to produce a more favourable funding arrangement (allegation 12A). In so doing, the Respondent acted in a manner likely to diminish public trust, failed to act in his client's best interests, and (in relation to the risk assessment) acted with a lack of integrity. The Respondent denied the allegations in their entirety, claiming that the amended CFA was provided to his client and that the amendments were properly made. Mr McClelland relied on the facts set out in the Rule 5 Statement. On its original terms, the CFA provided for the Respondent to have an hourly rate of £450, with a 0% success fee on the basis that the firm was "confident that your case will succeed". Mr McClelland reminded the Tribunal that a CFA was a document to be shared with the Defendants if there was a dispute about the costs or the uplift. The Respondent's contemporaneous table of fee rates (included in a client care letter) recorded that "Grade A" fee-earners (of which he was one) had a rate of £250. The CFA was sent to WG on 7 November 2008. On 27 August 2009, the Respondent had a telephone conversation with his costs draftsman, GH. His note of that conversation recorded the following:

> "… [The Respondent] said that he did not think that he could charge an uplift on £450 per hour, because, despite the size of this case, it was too much. GH advised that it was much better to charge a base fee of £250 and 100% uplift because it was less for the Defendants to attack (they could attack an hourly rate of £450 quite easily) and that any shortfall be justifiably gained from the client on the solicitor/client taxation.
>
> [The Respondent] amended the CFA."

On 4 September 2009 the Respondent made a further file note, stating:

> "[The Respondent] checking the file to see if the amended CFA had been done following the chat with [GH]; it appeared to have found its way back to the file in unamended form!"
>
> Amending it – see my note with [GH]
>
> [GH] had suggested that I amend the hourly rate from £450 to £250 and put in an uplift of 100% because the client was much more likely to recover the money. Good idea I thought"

An unsigned and undated CFA on the file provided for an hourly rate of £250, with a success fee of 100%. The reason given for the uplift was said to be that the case was an "extremely complicated and extremely substantial clinical negligence case" with "lively issues on life expectancy involving clinical neurologists and statisticians."

186.2 Mr McClelland submitted regarding the unsigned CFA found on the file that there was no evidence that the risk in the matter had changed; the Respondent did not say so in his witness statement. The change was made in order to obtain a better prospect

of recovery. The conversation with the costs draftsman recorded in the attendance note of 27 August 2009 was the genesis of the change. As to whether the amended CFA was provided to, or agreed by client G, there was no record on the file to indicate that this occurred. The original CFA was sent a substantial period of time after the client care letter. This was a case in which the absence of evidence amounted to evidence of absence: if client G had been provided with the CFA this would have had to be in correspondence seeking, and then recording, his agreement to the same. There was no trace of this. The Respondent's response in his statement was wholly unpersuasive:

> "Although I note that there does not appear to be written evidence on the file of the client being given a copy of the CFA I am sure that one would have been provided"

186.3 As to the terms of the amendment, Mr McClelland submitted that the position was deeply troubling. The change from characterising the claim as one in which the Respondent was confident of success, to one in which there were sufficient risks to justify a 100% success uplift, occurred not in response to a genuine change in the perceived risks of the matter but instead as a device to produce a more favourable funding arrangement. As the attendance note made clear, the arrangement was intended to be more favourable because it would increase the chances of recovering the fees not just inter partes but also from G himself, if necessary on solicitor-client taxation. This was clearly improper. Risk assessments could not be modified to manufacture a favourable outcome on assessment. The Respondent sought to defend the amendment in his statement:

> "I have little recollection at this stage of how I came to propose the terms the CFA that was agreed, however I did think that in relation to issues of quantum this was a complicated case which carried significant risk depending upon the strategy adopted by the Defendants (I would have anticipated amongst other things risks in relation to Part 36 payments)…"

Mr McClelland submitted that this was, of course, directly contradicted by the risk assessment that the Respondent undertook at the time and recorded in the CFA, before it was suggested to him he could improve his recovery if he recast it. A risk assessment in a CFA was a representation by a solicitor of his honest and informed view as to the risks presented by the case he was conducting. Further, it was a representation upon which others were intended to rely, not least on assessment. Mr McClelland submitted that the Respondent's willingness to amend that representation to suit his own ends was reckless and lacking in integrity. The Respondent very clearly did not conduct himself with "moral soundness, rectitude and steady adherence to an ethical code".

186.4 The Tribunal had regard to the evidence including the oral evidence for the Applicant, and the submissions for the Applicant and for the Respondent. Allegations 12 and 12A related only to client G. The Respondent denied allegation 12 because he believed that the client was provided with a copy of the revised CFA and that it was discussed. In respect of allegation 12A he denied that alterations to the risk assessment were other than genuine reflections of his own views. The Tribunal found proved that there was an original CFA and that it was amended as alleged. Further

there was no evidence that the Respondent wrote to the client for approval of the alterations. If the second CFA was effective, the client was potentially exposed to a far higher amount of costs but a copy of the second CFA which was before the Tribunal was not signed. The Tribunal noted what the Respondent said in his statement about having little recollection of how he came to propose the terms of CFA but the Tribunal had no doubt that the changes were prompted by input from the costs draftsman. However the Tribunal lacked information in respect of these allegations. It did not know on what costs basis the matter was settled and whether settlement was based on the original CFA or the purported amended version. It had no evidence in support of either the original assessment of risk in the case or of that in the amended CFA. In those circumstances the Tribunal found allegations 12 and 12A not proved to the required standard on the evidence.

Previous Disciplinary Matters

187. None.

Mitigation

188. For the Respondent, Mr Nesbitt submitted that the Respondent recognised that the conclusions to which the Tribunal had come purely on his admissions if nothing else would, in the light of his age, end his career as a solicitor. The Respondent was currently assisting Mr JD in the background and was without a practising certificate. Before the incorporation of the firm the Respondent had been an equity partner in equal shares with Mr KC. After incorporation he was a shareholder and director although on a lesser basis. Mr Nesbitt asked that the Tribunal impose an indefinite suspension on the Respondent but draw back from striking him off. The Respondent would even offer an undertaking not to seek to be restored to the Roll if the suspension were lifted although Mr Nesbitt realised this was not an attractive way to proceed for the Tribunal. The Respondent had always recognised that things went seriously wrong in the cases which the Tribunal had considered and that there had been considerable carelessness on his part in failing to ensure that things were dealt with properly in respect of them in the firm. He recognised that he had a high degree of culpability. The Tribunal had not found dishonesty proved but the Respondent recognised there were wide ranging findings of recklessness and culpability.

189. Mr Nesbitt wished to place the misconduct in context. He submitted that the balance of the evidence indicated that the primary responsibility for handling costs and the day-to-day management for how cases were managed after their conclusion lay elsewhere in the firm. The resolution passed in February 2012 reflected an understanding in the firm which was usually the position that costs and the collection of costs was not the Respondent's strength. (The Tribunal pointed out that Mr Nesbitt should not assume that it agreed that the primary responsibility for costs lay elsewhere. The Respondent had been found to have prepared handwritten schedules for each case with the purpose of their being sent to the cost draughtsman and there were communications about them with the cost draftsman regarding bills and what could be achieved in respect of costs.)

190. Mr Nesbitt further submitted regarding context that the Tribunal had seen medical evidence and he invited the Tribunal to have regard to the accounts which the Respondent had advanced in his witness statement of his poor health. Over a decade he had suffered from and been treated for episodes of depression. It was identified as being frequently related to stress and anxiety at work. He had had substantial periods away from work because of it including in 2012 before he left the firm. He had a long history of depression and his psychiatric treatment would continue in the aftermath of the proceedings. Whatever mistakes he had made regarding the management of costs the Respondent was extremely unhappy in his workplace. Mr Nesbitt referred the Tribunal to his witness statement for the detail. He was a solicitor but also a human being and not immune to such suffering. He felt extremely pressured. That and his illness impacted on the Respondent's judgement. He should not be judged as being as blameworthy as a solicitor who was perfectly well and trying to work in those circumstances. Mr Nesbitt asked for leniency because of the Respondent's personal circumstances which were a story of trauma upon trauma. Mr Nesbitt also detailed the physical ill-health from which the Respondent had suffered and current uncertainties about it and the effect of that upon the Respondent.

191. The third aspect of context which Mr Nesbitt wished the Tribunal to consider was the Respondent's split from the firm and the trauma created by the death of his former partner which formed the immediate background to the allegations. Subsequently, the firm was re-formed with three other directors and the Respondent had fallen out with them. The unincorporated firm's overdraft became entirely the Respondent's personal liability. The Respondent believed that the overdraft was much greater than it should have been. The firm's bank now had judgment against the Respondent and had placed a second charge on the equity of his house. His financial picture was bleak as a result of this issue. As to his personal life he was in the midst of divorce proceedings. He had also had the stress and trauma of the Tribunal proceedings accompanied by vilification in the local area where he had been characterised in the most unpleasant way. This was causing real distress and isolation. This was the sad story of a person whose life over the last decade had been a succession of traumas visited on someone who was hitherto completely blemish free.

192. As to the Respondent's career record the Tribunal had before at a number of testimonials to his practice; it would have been perfectly possible to obtain dozens more. The impression from those documents was that over the 30 year period since the Respondent had begun clinical negligence work he had provided a really excellent level of service to people who had suffered catastrophic medical injuries. He had obtained compensation for them in hundreds of thousands of pounds which they otherwise would not have received. The Respondent had gone beyond the call of duty as a solicitor over a very long period of time; he had made a very positive contribution to society through his work.

193. Having regard to the Respondent's financial position he had completed a Personal Financial Statement. His principal asset was his home which had an approximate value of £350,000 of which he had a half share in the equity. It was subject to a first mortgage and to the second charge to the firm's bank. Mr Nesbitt submitted that the effect was that his only substantial asset was of no value to him. He had also been subject to the expense of his defence which the Respondent had of course brought upon himself. He therefore had additional personal debts of around £52,000. He also

had a half interest in a flat worth around £150,000 which was an asset of his SIPP. In reality it had no greater value than what he owed outside the mortgage. He had no other assets in the SIPP. He was presently earning £46,000 a year but Mr Nesbitt submitted that when considering his debts and the position regarding his assets in reality he should be assessed as someone who was close to bankruptcy. Mr Nesbitt asked the Tribunal to bear in mind that its decision would deprive the Respondent of his livelihood as a solicitor and future employment might be difficult. The Respondent's financial circumstances indicated that the right result would be to say that enough was enough and for no order for costs to be made against him. If the Tribunal was not persuaded of that Mr Nesbitt asked that the Tribunal direct the costs award should not be enforced without leave of the Tribunal.

Sanction

194. The Tribunal had regard to the Guidance Note on Sanctions and the testimonials which had been submitted for the Respondent. In terms of the seriousness of the misconduct, the Tribunal found that the Respondent was culpable for what had occurred and his motivation had been to improve the firm's cash flow. His actions had been planned in that he had followed a course of action and particularly in the case of W he had acted in breach of a position of trust. He had direct control of the situation, he was the only person in the firm who specialised in clinical negligence work and had a great deal of experience therefore the commensurate harm to the reputation of the profession was all the greater. There was also harm to clients. The Tribunal found that there were aggravating factors in that while the Respondent's career hitherto was unblemished, what the Respondent had done was deliberate in that he followed a policy and repeated and continued it over a period of time. His clients could all be described as vulnerable people because they had suffered very serious brain injuries. There had been no concealment but the Respondent should have known that his conduct was in material breach of his obligations to protect the public and the reputation of the legal profession. The Respondent had made admissions but he had not shown genuine insight into his misconduct as he regarded what he had done as a mistake. The Tribunal had heard personal mitigation but had received no medical evidence that the Respondent's health problems had affected his behaviour. What he described as his unhappy working atmosphere had not prevented him doing his job. The Tribunal therefore regarded his personal mitigation to be very limited. This case was clearly far too serious for no order or a reprimand to be made and even a fine would not be sufficient in the circumstances. The Tribunal considered as it had been asked by Mr Nesbitt whether it might impose an indefinite suspension upon the Respondent but in circumstances where there had been serious lack of integrity, recklessness involving vulnerable clients and lack of trustworthiness in handling damages running to hundreds of thousands of pounds combined with the Respondent's lack of insight, the Tribunal did not think that an indefinite suspension would be sufficient to maintain the reputation of the profession and it determined that the Respondent should be struck off the Roll.

Costs

195. For the Applicant, Mr McClelland applied for costs. He acknowledged that a substantial element of the costs related to the investigations but pointed out that there had been four FI Reports and not insubstantial material and if the Respondent had not

made admissions the Applicant would have had to have recourse to more material. He reminded the Tribunal that a number of questions had been put to the IOs in cross-examination suggesting that they should have undertaken additional enquiries. He submitted that the costs had been properly incurred and the only issue was the Respondent's ability to pay. It was not appropriate for a line to be drawn as Mr Nesbitt requested and for no order to be made; that would result in substantial costs falling on the profession. Mr McClelland did not seek to go behind the Respondent's Personal Financial Statement but submitted that the Respondent had not insubstantial income and while he had substantial indebtedness the Applicant should be in the same position as other potential creditors and to prove in any bankruptcy. Mr Nesbitt took no issue with the schedule of costs. The Tribunal's assessment was that the costs were broadly reasonable. The Tribunal awarded costs in the amount sought of £99.963.41 but having regard to the Respondent's financial circumstances ordered that this should not be enforced without leave of the Tribunal.

Statement of Full Order

196. The Tribunal Ordered that the Respondent, Marcus Paul Nickson, solicitor, be struck off the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £99,963.41, such costs not be enforced without leave of the Tribunal.

Dated this 14th day of September 2016
On behalf of the Tribunal

L. N. Gilford
Chairman