SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12127-2020

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ROBERT ALAN DOWNIE Respondent

Before:

Ms T Cullen (in the chair)
Mr A Ghosh
Ms E Chapman

Date of Hearing: 19 January 2021

Appearances

Louise Culleton, Counsel employed by Capsticks Solicitors LLP, 1 St George's Road, Wimbledon, London SW19 4DR instructed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant

The Respondent did not appear and was not represented

JUDGMENT ON AN APPLICATION HELD REMOTELY

Allegations

1. The allegations against the Respondent, Robert Alan Downie, made by the SRA, were that, while in practice as a solicitor at and sole equity owner of Bathurst Brown & Downie LLP ("the Firm"):

1.1. Between approximately 1 July 2019 and 30 September 2019 ("the Relevant Period"), he caused or allowed the Firm to make transfers of round sums totalling up to £193,210.00, from client to office account, all or any of which were unjustified and/or improper transfers. He therefore:

1.1.1 breached all or any of Rules 1.2, 6.1, 17.2, 17.3, 17.7, 20.1, 20.3 and 20.6 of the SRA Accounts Rules 2011 ("the Accounts Rules");

1.1.2 breached all or any of Principles 2, 4, 6, 7 and 10 of the SRA Principles 2011 ("the Principles");

1.1.3 failed to achieve Outcomes 1.1 and/or 1.13 under the SRA Code of Conduct 2011 ("the Code").

1.2. On or about 19 July 2019 he caused or allowed an improper payment to be made from client account in the sum of around £204,217.94,* thereby creating a minimum cash shortage of equal amount, which was not remedied promptly on discovery or by 30 September 2019. He therefore:

1.2.1 breached all or any of Rules 1.2, 6.1, 7.1, 7.2, 20.1 and 20.6 of the Accounts Rules;

1.2.2 breached all or any of Principles 2, 4, 6 and 10 of the Principles.

[*The figure in the Forensic Investigation Report from which this figure was derived was corrected in the FIO's witness statement to £204,217.97 and the Tribunal has used this latter figure which is therefore stated in the Findings section of this judgment below.]

1.3. On or after 5 August 2019, he failed to pay Stamp Duty Land Tax ("SDLT") to HMRC on behalf of Client FK or to account for what he did with monies paid to him, including for that purpose, adequately or at all. He therefore breached all or any of Principles 2, 4, 6 and 7 of the Principles.

1.4. Between approximately 30 August and 4 October 2019 he failed to distribute and/or to account, adequately or at all, for the full proceeds of a sale due to be split equally between Person CE and Client NE. He therefore:

1.4.1 breached Rule 1.2 of the Accounts Rules

1.4.2 breached all or any of Principles 2, 4, 6 and 7 of the Principles.

1.5. From around 21 September 2018, he failed to ensure that the Firm had in place a designated Compliance Officer for Legal Practice ("COLP") and/or Compliance Officer for Finance and Administration ("COFA") or to explain such failure to the SRA, adequately or at all. He therefore:

1.5.1 breached Rule 8.5 of the Authorisation Rules;

1.5.2. breached all of any of Principles 6, 7 and 8 of the Principles;

1.5.3 failed to achieve all or any of Outcomes 7.2 and/or 7.3 of the Code.

Dishonesty

2. Dishonesty was expressly alleged in relation to allegation 1.1 above but proof of dishonesty was not required in order to establish those allegations or any of their particulars. Dishonesty was alleged as an aggravating feature of the Respondent's misconduct.

Recklessness

3. Further or alternatively, recklessness was expressly alleged in relation to allegations 1.1 and/or 1.2 above but proof of recklessness was not required in order to establish those allegations or any of their particulars. Recklessness was alleged as an aggravating feature of the Respondent's misconduct.

Documents

4. The Tribunal reviewed the documents including:

Applicant

- Rule 12 Statement dated 23 September 2020 with exhibit RTM1
- Email from the Tribunal dated 28 September 2020 serving proceedings
- Letter from Capsticks to the Respondent dated 29 September 2020
- Email from the Tribunal to the parties dated 18 November 2020
- Email from the Tribunal to the Respondent dated 24 November 2020
- Rule 28(2) Notice dated 16 December 2020
- Witness statement of Person OB dated 15 December 2020 with exhibit OB1
- Rule 28(2) Notice dated 18 December 2020
- Witness statement of Person SK dated 18 December 2020 with exhibits SK1-SK7
- Applicant's Schedule of Costs at issue dated 23 September 2020
- Applicant's Schedule of Costs relating to Investigation, Preparation and Presentation of the Hearing between 19-21 January 2021 dated 11 January 2021

Respondent

- Email letter from the Respondent to the Tribunal and Capsticks (undated)
- Email from the Respondent to the Tribunal and Capsticks dated 26 October 2020 with attachment

- Email from Russell-Cooke to Person OB dated 13 November 2020 with attachment
- Email from the Respondent to the Tribunal dated 27 November 2020 with attachment
- Email letter from the Respondent to the Tribunal and Capsticks dated 15 January 2021

Preliminary Issue

5. The Respondent was not present. For the Applicant, Ms Culleton applied to proceed in his absence. She referred the Tribunal to the Respondent's email letter dated 15 January 2021 including:

> "I am writing to let you and the Tribunal know that I will not be attending the hearing listed for Tuesday 19th January 2021 at 10.00 am by Zoom.
>
> I accept that the proceedings will continue in my absence, and no disrespect is meant to the Tribunal."

6. Ms Culleton submitted that the email letter was a clear indication from the Respondent about his intentions of not attending the hearing. As to service of the proceedings upon the Respondent, Ms Culleton referred the Tribunal to the email letter from the Tribunal office dated 28 September 2020 dealing with service of the Rule 12 Statement, attachments and necessary documents. Ms Culleton submitted that the proceedings had been properly served under Rule 13(5) of the Solicitors (Disciplinary Proceedings) Rules ("SDPR") 2019:

> "If a panel or solicitor member certifies that a case to answer is established in respect of all or any of the allegations made, a clerk must serve a copy of each of the documents referred to in rule 12(3) or (4), as the case may be, on each respondent."

7. The Tribunal's letter was the letter of service in accordance with that rule.

8. Ms Culleton also referred the Tribunal to Capsticks' post issue letter to the Respondent dated 29 September 2020. It included the date of the substantive hearing. The Tribunal had issued Standard Directions dated 28 September 2020 and these included at direction 1.1 the details for the Case Management Hearing ("CMH") in November 2020 and at 1.2 the dates for which the substantive hearing was listed as 19-21 January 2021. The CMH had taken place and the Memorandum from the hearing was before the Tribunal. It had been sent by email to the Respondent on 18 November 2020. The Memorandum included a clear reference to the hearing being listed for the dates commencing 19 January 2021 at point 1. It was clear from the Respondent's letter of 15 January 2021 quoted above that he was aware of the dates for the substantive hearing; the Respondent specifically referred to the hearing starting on 19 January 2021. In all the circumstances of the correspondence to and from the Respondent Ms Culleton invited the Tribunal to find that good service of the proceedings had been effected as required by Rule 13(5) and that proper notice had been given both by the Tribunal and the Applicant of the time, date and substantive nature of the hearing including the direction that the hearing was to be held remotely by Zoom.

9. The Tribunal was satisfied that good service had been effected upon the Respondent in accordance with the SDPR; he had notice and had made reference to good service and to the date of the hearing.

10. Ms Culleton then invited the Tribunal to proceed in the absence of the Respondent as permitted by Rule 36 of the SDPR which provided:

> "If a party fails to attend and is not represented at the hearing and the Tribunal is satisfied that notice of the hearing was served on the party in accordance with these Rules, the Tribunal may hear and determine any application and make findings, hand down sanctions, order the payment of costs and make orders as it considers appropriate notwithstanding that the party failed to attend and is not represented at the hearing."

Ms Culleton reminded the Tribunal that it must employ the utmost care and caution in exercising its discretion to proceed in the absence of the Respondent in accordance with the principles laid down in the case of R v Hayward, Jones and Purvis QB 862 [2001] as qualified and explained in R v Jones [2003] AC 1 as far as relevant to this case.

11. Relying on his letter of 15 January 2021 quoted above, Ms Culleton submitted that the Respondent knew the time, date, nature and venue of the hearing but had voluntarily absented himself and as a result voluntarily waived his right to be present. Ms Culleton acknowledged that fairness to the Respondent was of prime importance but it was also necessary to take into account fairness to the Applicant given it had done all reasonably possible to progress the case to this hearing.

12. Ms Culleton also submitted that there had been no application for an adjournment and there was no public interest in one. There was little prospect of the Respondent attending in future given the position set out in his letter. It was unclear when the case could be re-listed having regard to the ongoing Covid situation but that was perhaps a minor point given the Respondent's clear indication that he wished the matter to proceed. The Respondent had chosen not to attend and give his version of events at a hearing consistent with his approach to the Applicant's investigation which the Tribunal had seen from the papers; he did not co-operate adequately or very little. From the statement of Mr OB the Forensic Investigation Officer ("FIO"), the Tribunal could see that the Respondent had refused to be interviewed. The Respondent had not provided the evidence requested by the FIO. Ms Culleton submitted that there was little risk of the Tribunal reaching an improper conclusion seeing that the Respondent did not seek to defend the allegations and indicated that he had admitted them all save for dishonesty. Regarding his denial of the allegation of dishonesty, the Respondent had not provided any reasoned explanation or account as he was requested to do at the CMH. There was also a general public interest in the hearing proceeding expeditiously and it was also in the interests of the witnesses who were available if the Tribunal wished to hear from them. Ms Culleton did not propose to call them given the Respondent's admissions but they were ready and available.

13. Ms Culleton submitted that the principles of Hayward and Jones as relevant to this matter were a useful starting point but the case of GMC v Adeogba and Visvardis [2016] EWCA Civ 162 set out that it was important to bear in mind that there was a difference between continuing a criminal trial in the absence of the Defendant and a

decision to continue a disciplinary hearing. Disciplinary hearings also had to be guided by the context and the main statutory objective of the regulator and:

> "In that regard the fair, economical, expeditious and efficient disposal of allegations …is of very real importance."

In addition to that and very relevant to this matter there was a burden on Respondents:

> "to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."

Ms Culleton submitted that this was a relevant feature in this case when the Respondent had clearly set out his position of not attending but also it was consistent with his approach to the investigation and correspondence up to now.

14. Finally Ms Culleton referred the Tribunal to Rule 37 of the SDPR which allowed the Respondent to make an application for a rehearing if he was dissatisfied with the decision reached by the Tribunal in his absence.

15. The Tribunal had regard to the submissions for the Applicant, the evidence to which it had been taken and to the communications from the Respondent, particularly his email letter of 15 January 2021 and to the guidance given in the authorities. The Tribunal was aware of the prime importance of fairness to the Respondent and the need to balance the various constraints about fairness to the Respondent. The Tribunal had seen all the correspondence which was very helpful in guiding the Tribunal's decision. The Tribunal determined that it would proceed in the absence of the Respondent; he had made clear his awareness of the hearing date and arrangements for it, of his intention not to attend and his acceptance that it would continue in his absence.

Factual Background

16. The Respondent, who was born in 1958, was admitted to the Roll on 2 April 1997. At all relevant times he was one of two partners in the Firm and its sole equity owner. According to the Firm's Renewal of Practising Certificates and Payment of Periodical Fees form for 2018-2019, its income was derived mainly from residential property work as to 57% with probate and estate administration accounting for 19% and wills, trusts and tax planning 10%. The Firm also undertook some work in the areas of commercial property, commercial/corporate, employment, non-litigation (other), family/matrimonial and immigration.

17. The Respondent did not hold a current practising certificate as this was automatically suspended upon the Applicant's intervention into the Firm and his practice on 18 November 2019.

18. The Firm commenced trading on 15 August 2005. At all material times, the Respondent was a member of the Firm and its sole equity owner. There was another individual B who was also a member of the Firm but did not own any equity in it.

19. The Respondent's main work areas were commercial and residential property, probate and estate administration and wills. B's main work area was employment law.

20. From 21 September 2018 onwards, the Firm did not have a COLP or COFA. Prior to this, B had held those roles.

21. The Respondent had access to and control of the Firm's client and office bank accounts.

22. The Applicant received the following reports from clients who had instructed the Firm to act for them on conveyancing transactions:

    - The Firm acted for Client SK and her sister on the purchase of their parents' property. On 9 September 2019, Client SK reported that the purchase had completed on 19 July 2019 but, despite the Firm being in funds, her parents' mortgage on the property had not been redeemed and SDLT had not been paid.

    - The Firm acted for Client FK on the purchase of a property. On 12 September 2019, she reported that the purchase had completed on 5 August 2019 but, despite the Firm being in funds, SDLT had not been paid.

    - The Firm acted for Person CE and her daughter-in-law Client NE on the sale of a property. On 25 September 2019, she reported that the sale had completed on 30 August 2019, but she had not yet received her full share of the sale proceeds.

SK transaction

23. Client SK stated that the Respondent had acted for her and her sister in the purchase of a property in X Road, London from her parents. From the information available to the FIO, it appeared that the Respondent had also acted for Client SK's parents.

24. Client SK reported that her parents had a mortgage with an entity "P" in the sum of £310,042.64, which needed to be redeemed upon completion. SDLT in the sum of £22,400.00 needed to be paid to HMRC upon completion. Completion had taken place on 19 July 2019. On 22 July 2019, SK's parents received £65,220.52 from the Firm, which they understood to be the balance of the completion monies. However, their mortgage with P had not been redeemed.

25. On 30 August 2019, Client SK was contacted by HMRC who stated that SDLT in the sum of £22,400.00 was still outstanding.

26. Client SK stated that P had continued to take mortgage payments from her parents' account and that she was now making mortgage payments on the same property. She complained, "In effect we are paying 2 mortgages but to different lenders all because of [the Respondent's] dishonesty". Client SK enclosed a copy of an entity N's mortgage offer dated 3 June 2019 in relation to the X Road property. This stated that the loan amount was £405,000.00 and that C Limited were acting for N.

27. On 3 October 2019, Client SK provided copy email correspondence between herself and the Respondent:

- On 4 September 2019 at 12:41, Client SK emailed the Respondent and expressed her concern that she had been contacted by HMRC, who had requested payment of £22,400.00 following the conveyance of the X Road Property. She asked him to confirm whether payment had been made and, if not, when it would be made.

- The Respondent replied at 13:52 the same day and stated that he would *"*... look into this and sort immediately".

- On 6 September 2019 at 15:06, Client SK asked the Respondent for an update regarding the tax due to HMRC. She also flagged that her parents' mortgage with P had not been redeemed and that they had made payments in service of this loan on 1 August 2019 and 2 September 2019. She also stated that she had made payments to her own lender (N) on 5 August 2019 and 5 September 2019 (in relation to the same property). She requested an explanation and confirmation of what had become of the funds paid into the Respondent's client account "as a matter of urgency".

- The Respondent replied at 16:19 the same day and stated that he would check with his cashiers and revert when he had an answer.

- On 25 September 2019 at 19:35, Client SK sent an email to Ms S (a non-solicitor employee at the Firm) and stated that she had not heard from the Respondent since his email to her of 6 September 2019. Since then she had received another letter from HMRC. Two mortgages had been paid on the property for the last three months and that two further mortgage payments were due to be paid at the end of the month. Client SK further stated that she was becoming "extremely frustrated" and requested a response by 1pm on Thursday 26 September 2019 with confirmation that all payments had been made to the lender and to HMRC.

- Following further communications between Ms S and Client SK, on 26 September 2019 at 11:58, the Respondent contacted Client SK and apologised for not being in regular contact. He stated:

  > "I and my cashiers are trying to get this sorted as quickly as possible and I expect the stamp duty to be paid shortly. I should have received the monies on Monday but now it appears they are being sent by cheque which I will receive tomorrow and then I will have it expedited to settle the stamp duty. Sorry I had asked for a faster payment".

- On 2 October 2019 at 20:43, Client SK asked the Respondent to clarify comments made in his previous email, principally why it was that he expected to receive (further) monies on Monday 23 September 2019 and what had happened to the monies that were supposed to be used to redeem her parents' mortgage with P. Client SK stated:

  > "I want you to be absolutely honest and tell us EXACTLY what has happened to the funds you received from [C] on the 19 July 2019, as clearly they were not used for what they were meant for?"

28. As at 3 October 2019, Client SK had not received a response from the Respondent. On or about 15 October 2019, Client SK received a letter from HMRC, headed "Notice of warning of enforcement by taking control of goods". HMRC stated that following completion on 19 July 2019, there was an unpaid debt of £22,545.60 (£22,400.00 + £145.60 representing accrued interest).

29. On 5 November 2019, Client SK provided the Applicant with copy bank statements which evidenced a number of mortgage payments to N from August to November 2019 totalling £5,307.47. Client SK also provided corresponding evidence that these payments related to the purchase of the X Road property.

30. On 28 October 2019, the Respondent produced a partial client file for Client SK's purchase of the X Road property. This did not include the client ledger for the matter. Included was a copy redemption statement from P dated 19 July 2019 which stated:

> "Thank you for your recent request for a settlement figure in respect of the mortgage on the above security property".

This stated that the amount required to redeem Client SK's parents' mortgage was £310,042.64 and gave instructions on how to make payment.

FK transaction

31. On 12 September 2019, Client FK made a report to the Applicant in relation to the Firm. Client FK alleged that the Respondent had acted for her in the purchase of a property in Y Road. Funds of £544,830.26 had been paid into the Firm's client account on 5 August 2019, including stamp duty, and completion took place that day.

32. The Firm thereafter failed to register title.

33. On 28 August 2019, HMRC issued a demand for outstanding SDLT in the sum of £30,924.00.

34. In her report to the Applicant dated 12 September 2019, Client FK said that on 9 September 2019, she sent an email to the Firm which requested confirmation that SDLT had been paid. She received no response to that email.

CE transaction

35. Person CE alleged that the Respondent had acted for the joint owner of her property, Client NE, in the sale of Z Road. The sale had completed on 30 August 2019 and the net proceeds of £698,471.00 were supposed to have been split equally between Person CE and Client NE. £349,235.00 was due to Person CE but only £333,000.00 had been received, leaving £16,235.00 outstanding.

36. On 30 September 2019, Person CE wrote again to the Applicant. She stated that there was an outstanding balance still owed to herself and Client NE in the sum of £50,971.00 and that she believed estate agents' fees were also outstanding in the sum of £12,825.00. She further stated that the Respondent was not contactable by telephone and had provided her with 'various excuses' by email.

37. Bank statements subsequently provided by the Respondent showed:

    a. Completion monies of £657,500.00 were received by the Firm on 30 August 2019;

    b. Immediately prior to the receipt of these completion monies the balance on client bank account was £4,260.49: and

    c. That CE (and NE) had been paid different amounts (£333,000.00 and £314,500.00 respectively) as there were insufficient funds on client bank account on 3 September 2019 to make equal/matching payments.

38. In the Forensic Investigation ("FI") Report email communications attached by CE to her 30 September letter to the Applicant were summarised as follows:

    - On 16 September 2019, the Respondent wrote to CE's husband RE and stated: "Profound apologies for making such a cock of everything. [S], did a great job and I have made a mess of it". He further stated that he had been away and asked if he could have until the end of the week to provide the "final tranche".

    - On 18 September 2019, RE emailed the Respondent and asked when the outstanding monies might be expected. He also stated that the estate agents had been in contact regarding their commission payment, which was still outstanding.

    - On 20 September 2019, the Respondent wrote to RE:

      > "I am not sure if any more can go wrong. I was expecting a TT today and I have now been told they sent a cheque. I will try and get some funds from somewhere else. I will revert when I have some positive news".

      It had not been possible to verify what further funds the Respondent was referring to in this email.

- RE responded on 23 September 2019 and (again) asked when he might expect to receive the balance of the sale funds.

- The Respondent responded on 24 September 2019 and stated:

  > "I am trying to get this sorted as quickly as I can and I appreciate your patience. If I could get it done quicker I would have done so"

- On 25 September 2019, RE asked if he might be better off making a claim against the firm's insurance or the Solicitors Indemnity (Compensation) Fund. He added, "Hopefully things aren't that bad but I have to say even I am a bit concerned now";

- The Respondent responded on 26 September 2019. He stated that he had asked for monies (it was unclear what monies the Respondent was referring to) to be paid to him by "faster payment" but he was going to be receiving a corresponding cheque the following day (27 September 2019). Once this payment had cleared his client bank

account he would make the outstanding payment. The Respondent stated, "I can only continue to apologise for this most humiliating turn of events".

39. On 4 October 2019, CE's husband contacted the Applicant and confirmed the monies had been paid.

Investigation

40. The Applicant's Forensic Investigation unit was commissioned to inspect the Firm. Without notice being given, the FIO Mr OB commenced his inspection on 22 October 2019. The FIO produced an FI Report dated 8 November 2019.

41. The FIO stated that he was not able to meet the Respondent and he declined to be interviewed. In broad summary, the FI Report identified the following issues:

- A minimum client account shortage of £204,217.94 (corrected by the FIO's witness statement to £204,217.97) arose on 19 July 2019 which had not been replaced as at 30 September 2019.

- There were, potentially, three further shortages:

    - £310,042.64 caused by the Respondent's failure to redeem a mortgage

    - £182,210.00 caused by 21 round sum, client to office transfers, purportedly for costs (The difference between the number of transfers and their total was explained in submissions in relation to allegation 1.1 below.)

    - £53,469.60 caused by the Respondent's failure to pay SDLT on two separate matters.

42. On or about 18 November 2018, (after the FI Report was produced), the Applicant received an email from the Respondent's solicitor, attaching four round sum invoices totalling £34,000.00 (including VAT), dated 4, 5 and 19 (two invoices) July 2019. These related to the estate of D, of which the Respondent was the executor and trustee. The narratives did not contain a clear breakdown of what was being charged for, the basis of such charges, and how they came to be in round sums.

43. On 18 November 2019, an Adjudication Panel decided to intervene into the Firm and the Respondent's practice.

44. A Notice recommending referral to the Tribunal and supporting materials dated 8 April 2020, were served on the Respondent.

45. On 23 March 2020, the Respondent's solicitor confirmed that the Respondent had no representations to make in respect of the Notice, would not oppose any (reasonable) proceedings brought and accepted that he would be struck off.

46. On 8 April 2020, an Authorised Officer of the Applicant decided to refer the conduct of the Respondent to the Tribunal.

Witnesses

47. No witnesses were required to be called.

Findings of Fact and Law

48. The Applicant was required to prove the allegations to the civil standard of proof (the balance of probabilities) under Rule 5 of The Solicitors (Disciplinary Proceedings) Rules 2019 as amended by The Solicitors (Disciplinary Proceedings) (Amendment) Rules 2020. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

General Submissions for the Applicant

49. For the Applicant, Ms Culleton submitted generally that the Respondent showed a total disregard for the investigation process and did not co-operate in the investigation. The Respondent had not provided evidence throughout the investigation and to date to demonstrate that the transfers of client money he made were legitimate. His response to production orders was by no means complete and there had been nothing further from him to explain any of the matters alleged; he simply admitted them but provided no account or no adequate evidence.

50. In respect of all the allegations Ms Culleton submitted that there were numerous breaches of the SRA Principles set out in the Rule 12 Statement which were most serious in the circumstances of this case. The breaches of Principle 2 relating to integrity were of significant concern.

51. By way of background, Ms Culleton informed the Tribunal that post intervention the Respondent appeared to have transferred his work over to RAD Legal Ltd which was incorporated on 16 December 2019. He and his wife were its directors and joint equity owners. According to its website it provided legal advice in non-contentious commercial contracts in employment, human resources, family, GDPR and wills. It appeared the Respondent had contacted former clients of the Firm to tell them directly about the new company. An email, which was before the Tribunal, had been received by the Applicant from one former client. It did not explain why the Firm had closed. The Respondent appeared to have transferred work which did not require regulation by the Applicant but was none the less providing that sort of work.

Responses by the Respondent or Received on his Behalf

52. Ms Culleton referred the Tribunal to a letter dated 23 March 2020 from a firm then acting for the Respondent including:

> "I can confirm that:
>
> 1. We have no representations to make and concede that [the Respondent] will be referred to SDT.
> 2. [The Respondent] will not oppose any (reasonable) proceedings brought by SRA to SDT.

3. [The Respondent] accepts that he will be struck off.
4. We do hope that SRA need not incur much further in the way of costs in what should be a relatively simple case to bring to SDT. [The Respondent] will not be able to pay the costs of the intervention, the FI inspection or the SDT proceedings."

Ms Culleton also referred the Tribunal to an email letter sent by the Respondent which she described as the sum total of his initial response to the Rule 12 Statement which included:

> "In respect of my obligation to file an answer to the Applicant's Rule 12 Statement by 4.30 pm Monday 26th October 2020, I am currently unable to finance legal advice. I am responding to this deadline without any legal advice. Therefore, my answer is subject to being advised otherwise when I am able to obtain advice.
>
> In the meantime, I make no comment as to the allegations, they are neither denied nor admitted.
>
> Further, I have no documents to serve, and I have been unable to deliver any bills on the unbilled work as I am still to receive the files requested from the archive department."

53. Ms Culleton submitted that at that point the Respondent made no comment about the allegations; he said they were neither denied nor admitted. A CMH was then held and it was set out that he was required to provide an Answer and it was then provided on 27 November 2020 including:

> "I am sorry that my reply was not as full as you require. For the avoidance of doubt, all allegations are admitted (1.1, 1.2, 1.3, 1.4 and 1.5) except that in respect of Allegation 1.1, where it is pleaded as dishonest, that is not admitted. Both allegations, 1.1 and 1.2, are admitted as reckless. I accept, as I have for some time, that I deserve to be struck off and will be struck off. I hope this is sufficient answer for SDT and SRA.
>
> As to the figures to which the allegations refer, since I have not had access to any files or accounts for some time I cannot confirm them but I am sure that the investigation team has satisfied themselves that they are correct and I will not dispute their figures."

Ms Culleton understood the reference to "figures" to be those in the FI Report. That was the sum total of the Respondent's response to the matters which were served on him.

Adverse Inference

54. Ms Culleton also submitted that an adverse inference should be drawn. Principle 7 required a solicitor to comply with their legal and regulatory obligations and deal with their regulators and ombudsmen in an open, timely and co-operative manner. The Respondent failed to do that in an adequate manner. He provided some documentation

but gave no adequate explanation for the matters alleged against him. Ms Culleton quoted Rule 33 of the SDPR:

> "33. Where a respondent fails to—
>
> (a) send or serve an Answer in accordance with a direction under rule 20(2)(b); or
>
> (b) give evidence at a substantive hearing or submit themselves to cross-examination;
>
> and regardless of the service by the respondent of a witness statement in the proceedings, the Tribunal is entitled to take into account the position that the respondent has chosen to adopt and to draw such adverse inferences from the respondent's failure as the Tribunal considers appropriate."

Ms Culleton submitted that the Tribunal should draw an adverse inference from the Respondent's failure to attend, to give evidence and to submit to cross examination. The Tribunal could draw the inference that he had no reasonable explanation regarding the allegations including in particular in relation to dishonesty. The Memorandum of the CMH set out that an explanation or account must be provided for any allegation that was not admitted. His response was simply that he did not admit dishonesty. Ms Culleton submitted that the Respondent's failure to attend and face cross examination and potentially questions from the Tribunal meant that the Tribunal could correctly draw an adverse inference that he had no explanation and was dishonest regarding allegation 1.1. This was consistent with his inability to provide any adequate response to production notices as required to do in compliance with Principle 7. (In the course of the investigation two production notices dated 21 October 2019 and 1 November 2019 respectively were issued against the Respondent.)

55. **Allegation 1.1. Between approximately 1 July 2019 and 30 September 2019 ("the Relevant Period"), he [the Respondent] caused or allowed the Firm to make transfers of round sums totalling up to £193,210.00, from client to office account, all or any of which were unjustified and/or improper transfers. He therefore:**

1.1.1. breached all or any of Rules 1.2, 6.1, 17.2, 17.3, 17.7, 20.1, 20.3 and 20.6 of the SRA Accounts Rules 2011 ("the Accounts Rules");

1.1.2. breached all or any of Principles 2, 4, 6, 7 and 10 of the SRA Principles 2011 ("the Principles");

1.1.3. failed to achieve Outcomes 1.1 and/or 1.13 under the SRA Code of Conduct 2011 ("the Code").

55.1 For the Applicant, Ms Culleton submitted that allegation 1.1 concerned 22 client account to office bank account round sum transfers over a three month period 1 July 2019 to 30 September 2019 totalling £193,210.00. They were improper of themselves but dishonesty was also alleged in respect of this allegation as was recklessness. The Respondent admitted the allegation and recklessness but did not admit dishonesty. Ms Culleton submitted that round sum transfers of costs were a breach of Rule 17.7 of the Accounts Rules 2011 which set out:

> "Costs transferred out of a client account in accordance with rule 17.2 and 17.3 must be specific sums relating to the bill or other written notification of costs, and covered by the amount held for the particular client or trust. Round sum withdrawals on account of costs are a breach of the rules"

Ms Culleton referred the Tribunal to the relevant paragraphs of the Rule 12 Statement as follows.

55.2 The FI Report set out that, during the Relevant Period, the Firm made 21 client account to office bank account (round sum) transfers totalling £182,210.00. They were tabulated in the FI Report having been identified by the FIO during his review of the Firm's client bank account statements. The FIO's witness statement also identified a further round sum transfer in respect of which he sought to amend the FI Report and add in the figure of £11,000.00, transferred into the office account on 27 September 2019, (purportedly in respect of costs), bringing the total to £193,210.00 referred to in the FI Report. The largest round sum amount transferred was £28,000.00 on 26 July 2019. Ms Culleton submitted that they also included £20,000 (two transfers in that amount) and one of £25,000. The smallest amount was £750.00 on 18 September 2019. The table in the FI Report included sums from the SK and FK matters. In the SK matter immediately after completion on 19 July 2019 there were round sum transfers going out to the office account of £20,000 and £25,000. On 26 July 2019 there was a further £28,000 transfer so that a total of £73,000 seemed to have gone out in round sum transfers from the money that came into the account from the completion of the property purchase.

55.3 The Rule 12 Statement alleged that given that the Respondent was the sole equity owner of the Firm, with control of its bank accounts, it should be inferred, on a balance of probabilities that the Respondent caused or allowed the round sum transfers in question to be made.

55.4 Ms Culleton also submitted that the FK matter showed the same pattern with completion on 5 August 2019 and round sums immediately going out between 5 August 2019 and 23 August 2019 totalling £66,000. These sums also fed into the larger table in the FI Report referred to above.

55.5 Ms Culleton submitted that it was clear those transfers did not relate to the costs of the Firm for their services because they were in round sums which was very rarely the case as set out in the Accounts Rules and they were extremely excessive sums in relation to any costs there might be to the firm in dealing with those matters. Following the investigation and discovery of the round sum transfers on 1 November 2019, a Production Notice was served on the Firm, which required the Respondent to produce information and documents by close of business on 5 November 2019 in relation to, among other matters, the Firm's billing during the Relevant Period. In particular, the Respondent was required to provide a chronological statement of account, listing all monies transferred from client bank account by way of costs transfer during the Relevant Period and, for each transfer identified, to state the details of the bank account to which the transfer was made and to provide corresponding Bills of Costs (or other written notification of costs)

55.6 The rationale behind that request was that Rule 20.3 of the Accounts Rules provides that costs might not be withdrawn from client account absent prior compliance with Rules 17.2 and 17.3, ("Office money may only be withdrawn from client account when it is….properly required for payment of your costs under rule 17.2 and 17.3.") meaning that the solicitor must first serve a bill or other written notification of costs. Adverse inferences should be drawn against a solicitor who had made round sum transfers but was unable to demonstrate that valid bills or other written notifications of costs were served before doing so:

> "17.2 If you properly require payment of your fees from money held for a client or trust in a client account, you must first give or send a bill of costs, or other written notification of the costs incurred, to the client or the paying party.
>
> 17.3 Once you have complied with rule 17.2 above, the money earmarked for costs becomes office money and must be transferred out of the client account within 14 days."

55.7 On 5 November 2019, the Respondent's solicitor produced office account bank statements corresponding to the round sum transfers tabulated in the FI Report. Those showed that each of the transfers from client account was paid into the office account, as was the £11,000.00 transferred on 27 September 2019 and referred to in the FIO's statement. The amounts in round sums could be seen going in from the client account but also round sums equally rather rapidly going out again by "FP" Fast Payment soon after the round sums had been transferred into the office account. These pages showed the round sums coming into the office account were swiftly being transferred out in round sums whereto was not known. Ms Culleton submitted that this very clearly showed that the Respondent was using client money as his own, transferring from client account into the office account and then beyond in large round sum amounts often and not for any business or fees related to clients from where the funds were taken and certainly from the evidence of SK and the investigation, not with those client's consent, authority or knowledge.

55.8 In terms of any further evidence produced by the Respondent, Ms Culleton submitted that on 4 November 2019, the Respondent said that he was "still compiling" the list and would revert once it had been confirmed with his cashiers. To date the Respondent had not provided or produced any documents as required by the production notices and in particular, the Respondent had wholly failed to demonstrate that valid bills or other written notifications of costs were served in advance of each of the round sum transfers being made. On a balance of probabilities, it should therefore be inferred that they were not valid or legitimate transfers; they did not relate to genuine costs on those client matters.

55.9 The Rule 12 Statement set out that on or about 15 November 2019 the Applicant received an email from the Respondent's solicitor, attaching four round sum invoices totalling £34,000.00 (including VAT), dated 4, 5 and 19 (two invoices) July 2019. These related to the estate of D, of which the Respondent was the executor and trustee. The narratives were vague, very limited with no clear breakdown of what was being charged for or the basis of such round sum charges. The Applicant had serious concerns about the Respondent's prolific billing of the D estate generally, which totalled nearly a quarter of its value. In any case the invoices provided by the Respondent did not

provide sufficient explanation for, or evidence to support the round sum transfers. The Intervention Panel stated:

> "He [the Respondent] has not provided sufficient explanation for or evidence to support the round sum transfers. We note that [the Respondent] has now produced four invoices relating to the [D] estate. However, we are unconvinced as to their validity in view of the way in which they are calculated."

55.10 Ms Culleton also referred the Tribunal to a document provided to the Applicant on 13 November 2019 by the Respondent's then representatives. It was an extracted bank statement annotated for costs. Regarding the round sum transfers, it seemed to show that in July 2019 eight totalling £89,800 were made in the D matter, four of those totalling £76,000 on 19 and 26 July 2019 were also included in the FIO's calculation and table in the FI Report; this was the only other evidence provided by the Respondent in response to the production notices. It only showed round sums and excessive round sums transferred from client to office account by the Respondent on the D matter. It was consistent with the picture of large round sum transfers from client account to office account with no explanation for any legitimate reason or purpose for them.

55.11 While it was of course for the Applicant to prove its case, it was submitted that there was an evidential burden on the Respondent as a professional solicitor to show that his transfers of costs were legitimate at the time they were made. Principle 7 requires solicitors to comply with their legal and regulatory obligations and to deal with their regulators and ombudsmen in an open timely and co-operative manner. To date, despite being asked and given ample opportunity to do so, the Respondent had failed to provide any or adequate evidence to explain or justify the round sum transfers. As a result on a balance of probabilities, it should be inferred that he was unwilling and unable to do so because the transfers were improper transfers. It was inherently improbable that the round sum transfers (or any of them) related to costs genuinely due to the Firm on those client matters from which money was transferred. Ms Culleton also submitted that the fact the Respondent had decided not to attend this hearing, not to give evidence, not to open himself up to cross examination was consistent with that. He was unable to provide the Tribunal with an explanation about those round sum transfers because they were quite simply improper.

Accounts Rules

55.12 As to the alleged breaches of the Accounts Rules it was set out in the Rule 12 Statement that absent prior compliance with Rules 17.2 and 17.3, the monies in question would not have become earmarked for costs and would therefore have remained client money, not office money. The circumstances in which client money might be withdrawn from client account were exhaustively set out in Rule 20.1. None of those circumstances would apply to the improper, round sum transfers in question and so each represented a material breach of Rule 20.1.

55.13 Further or alternatively it was submitted that the round sum transfers were in material breach of:

- Rule 1.2 (a)-(c):

> "You must… (a) keep other people's money separate from money belonging to you or your firm;
> (b) keep other people's money safely in a bank or building society account identifiable as a client account (except when the rules specifically provide otherwise);
> (c) use each client's money for that client's matters only…"

- Rule 6.1:

> "All the principals in a firm must ensure compliance with the rules by the principals themselves and by everyone employed in the firm. This duty also extends to the directors of a recognised body or licensed body which is a company, or to the members of a recognised body or licensed body which is an LLP. It also extends to the COFA of a firm (whether a manager or non-manager)."

- Rule 20.6:

> "Money withdrawn in relation to a particular client or trust from a general client account must not exceed the money held on behalf of that client or trust in all your general client accounts except as provided under rule 7.1…"

If, which was denied, the round sum transfers (or any of them) did relate to costs genuinely due to the Firm, then they were transferred to office account in material breach of Rule 20.3 because there had not been prior compliance with Rules 17.2-3. In any event, all or any of the round sum transfers constituted a material breach of Rule 17.7, which stated:

> "Costs transferred out of a client account in accordance with rule 17.2 and 17.3 must be specific sums relating to the bill or other written notification of costs, and covered by the amount held for the particular client or trust. Round sum withdrawals on account of costs are a breach of the rules"

Principles

55.14 Further or alternatively: by causing or allowing improper transfers from client to office account as described above it was submitted that the Respondent failed to act with integrity, contrary to Principle 2 "you must act with integrity" that is "with moral soundness, rectitude and steady adherence to an ethical code" (Hoodless & Blackwell v FSA [2003] UKFTT FSM007). In Wingate & Evans v SRA v Malins [2018] EWCA Civ 366, the Court of Appeal held that the term integrity:

> "connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty... The duty to act with integrity applies not only to what professional persons say, but also to what they do. It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors: … Making improper payments out of the client account (Scott)."

It was submitted that it was well established that a solicitor who dipped into client account – even with the intention of repaying the money taken – lacked integrity as set out in Newell-Austin v SRA [2017] EWHC 411 (Admin) (Morris J):

> "because a client account is sacrosanct and regardless of the risk of the money not being repaid."

55.15 The Respondent breached Principle 4 "you must act in the best interests of each client" because it was not in the best interests of clients for their funds to be transferred to office account and used for office side purposes absent service of genuine bills or other written notification of costs.

55.16 The Respondent breached Principle 6 "you must behave in a way that maintains the trust the public places in you and in the provision of legal services" because the conduct alleged would clearly undermine public trust and confidence in the Respondent and the provision of legal services.

55.17 The Respondent breached Principle 7 "comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner" because the conduct alleged was in material breach of the Respondent's regulatory obligations.

55.18 The Respondent breached Principle 10 "you must protect client money and assets". because the conduct alleged demonstrated a material failure to protect client money.

55.19 Further or in the further alternative, it was alleged that the conduct alleged constituted a culpable failure by the Respondent to achieve either or both of the following, mandatory Outcomes under the Code of Conduct:

> "O(1.1) ("you treat your clients fairly");
>
> O(1.13) ("clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter").

55.20 The Tribunal had regard to the evidence and the submissions for the Applicant. The facts which gave rise to allegation 1.1 were not in dispute. The Respondent had made 22 unjustified and/or improper round sum transfers from client account to office account totalling up to £193,210.00. The Tribunal found proved on the evidence to the required standard, the balance of probabilities, that the transfers were made in breach of Rules 1.2, 6.1, 17.2, 17.3, 17.7, 20.1, 20.3 and 20.6 of the SRA Accounts Rules 2011. It was also alleged that the Respondent had breached Principles 2, 4, 6, 7 and 10 of the SRA Principles 2011. As set out in the case of Newell-Austin client account was sacrosanct and for the Respondent to have treated client money in this way clearly demonstrated a failure to adhere to the ethical standards of his profession. In Wingate making improper payments out of the client account was referred to as an example of lack of integrity. The Tribunal found the Respondent to be in breach of Principle 2. The Tribunal also found the Respondent to be in breach of Principle 4 because such conduct could not be in the best interests of clients, Principle 6 because it would clearly undermine public trust, Principle 7 as being in breach of the Respondent's regulatory

obligations and Principle 10 because by his conduct he had failed to protect client money. He had also failed to treat clients fairly and thereby failed to achieve Outcome (1.1) and in failing to inform the clients of what he was doing with their money or seeking their authority he failed to achieve Outcome (1.13). The Tribunal therefore found all aspects of allegation 1.1 proved on the evidence to the required standard indeed it was admitted.

Dishonesty regarding Allegation 1.1

55.21 Ms Culleton submitted that the Respondent had failed to set out the reasons for his denial of dishonesty as he had been requested to do. The Rule 12 Statement set out the basis upon which the case for dishonesty was put as follows. The test for dishonesty was laid down by the Supreme Court in Ivey v Genting Casinos [2017] UKSC 67, which applied to all forms of legal proceedings, namely that the accused had acted dishonestly by the ordinary standards of reasonable and honest people:

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

It was submitted that the Respondent made a total of 22 round sum, client to office transfers totalling £193,210.00 in the relevant period. He had not provided any or (in the case of the four 'D' invoices) adequate evidence to justify or explain the transfers. It was inherently improbable that the transfers related to costs genuinely due to the Firm because the transfers were for round sum amounts. In addition the transfers were made without the knowledge or authority of clients as shown, for example, by the statement of Client SK. They did not relate to known or anticipated costs on the files and no associated bills had been provided by the Respondent to justify or explain the round sum transfers. The Respondent failed to settle liabilities on the SK and FK matters from the money that had been received on completion of the property sales but was no longer available because those sums had been transferred out in round sum transfers to the office account. When those clients questioned the Respondent in the case of SK about why the mortgage had not been dealt with and by FK as to why the SDLT had not been paid the evidence showed that the Respondent was not open with those clients as to why he did not have money available to settle the liabilities. It was very clear from what SK said in her statement about her communications with the Respondent, that he was not being open about what happened with her money. He looked to give excuses when what had happened was that he had transferred it out to the office account for unknown purposes; it was not available to be used for the purposes for which it should have been for those clients.

55.22 Ms Culleton submitted that the transfers would ultimately directly benefit the Respondent as he was the sole equity owner of the Firm. He was also the person who had sole control over the client account and the office account; over the money that came into the Firm. (Insofar as the Respondent was the client (for example, in his capacity as executor of the D estate), he had failed to demonstrate that those costs were legitimately incurred in the round sum amounts taken.) In all those circumstances Ms Culleton submitted the Respondent's conduct must have been dishonest; it was inconceivable that the Respondent believed himself to be genuinely entitled to the monies he transferred out in round sums but he nonetheless did so and dealt with that money as his own. He had not subsequently provided any explanation or evidence as to what he did with that money or why those round sums were transferred to prove that they were legitimate. Ms Culleton submitted that an adverse inference flowed from that.

55.23 Ms Culleton submitted that the phrase "inherently improbable" derived from the case of Re H (minors) [1996] AC 563 where Lord Birkenhead said:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is less likely than negligence… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before on the balance of probabilities the occurrence will be established"

55.24 Ms Culleton submitted that was why the phrase was used in the Rule 12 Statement. The authorities made clear that inherent probability was therefore a relevant factor in proving dishonesty; other factors being documentary evidence, plausibility, circumstantial evidence and also motive and case theory. Ms Culleton submitted that the inherent probability in this case was strong; it was inherently improbable that the Respondent was in this instance not being dishonest. The only documentary evidence before the Tribunal was the FI Report and a small amount produced by the Respondent which only went to the fact he was dishonest; he had not provided anything to show the round sums were legitimate or genuine. Instead in particular, the office account bank statements showed that not only was the money transferred out of the client account into the office account in round sums but it was then transferred onwards somewhere else also in round sums very rapidly which painted a rather dishonest picture.

55.25 Ms Culleton also submitted that subsequently in other authorities the point had been that there must be some fact that tilted the balance and justified an inference of dishonesty. She submitted that the following facts or matters tilted the balance and

justified an inference of dishonesty in this case. The Respondent made 22 round sum transfers in a three month period without knowledge or authority of the relevant clients which were in any case inherently improbable by way of being round sums. It was therefore not a case of just one or two round sum transfers that could perhaps be excused as a mistake. Furthermore Ms Culleton pointed to the timing and rapidity of the transfers, for example immediately after the receipt of funds from completion of a sale or purchase; this was also indicative of knowledge or premeditation; certainly awareness of what he was doing. Also the evidence showed that the money was almost immediately transferred on somewhere else also in round sums. Such transfers would have benefitted the Respondent as the sole equity owner of the firm. He had not provided any evidence to justify or explain them. His communications with clients about the outstanding liabilities on their matters were misleading; he gave the impression he was waiting for funds to settle the liabilities for clients SK and FK when in fact he knew he had already received the funds and transferred them on to the office account and used them for other purposes. The Respondent appeared to have been operating a system of "teeming and lading" where he was not using those clients' funds for their purposes which was a fundamental requirement of the accounts rules but rather using clients' money for other purposes; dealing with it as his own, transferring large sums out to the office account and then further beyond. That in Ms Culleton's submission was essentially a teeming and lading fraud.

55.26 Ms Culleton submitted that the next matter adding to this inference of dishonesty which tilted the balance was that the documents provided on behalf of the Respondent stated that the SDLT had successfully been submitted to HMRC for the SK and FK matters but they did not state or record that corresponding payment had been received by HMRC. There was no proof of that and the client account bank statements that were previously provided by the Respondent did not record a corresponding payment to HMRC on the dates indicated. Ms Culleton submitted that in general it was difficult to see how costs of £193,210.00 would be chargeable on these three residential property transactions which was what the round sums related to.

55.27 The Rule 12 Statement set out that ordinary, decent people would consider this conduct to be dishonest. Ms Culleton submitted that dishonesty should be found proved; all of the factors set out above weighed into that inference of dishonesty. If the Tribunal did not find dishonesty proved then Ms Culleton submitted there was an allegation that the Respondent was reckless as to whether the round sum transfers were proper or improper. The Applicant relied upon the test for recklessness which was adopted and approved by Wilkie J in the case of Brett v SRA [2014] EWHC 2974:

> "78. I remind myself that the word "recklessly", in criminal statutes, is now settled as being satisfied: "with respect to (i) a circumstance when he is aware of a risk that it exists or will exist and (ii) a result when he is aware that a risk will occur and it is, in circumstances known to him, unreasonable for him to take the risk" (See R v G [2004] 1AC 1034 Archbold para 11-51.)

However Ms Culleton submitted the evidence was clear in showing that the Respondent was dishonest and there was an inherent improbability that his conduct could have been honest conduct on his part.

55.28 The Tribunal had regard to the evidence and the submissions for the Applicant. The Tribunal applied the test in the case of Ivey. The Respondent admitted having made improper round sum transfers from client account to office account without the authority of the clients from whose accounts the money was taken. The money was shortly thereafter paid away from office account to unknown destinations. The Respondent denied the allegation of dishonesty but despite having been given the opportunity to explain his conduct on several occasions he had failed to do so. The Tribunal considered the state of the Respondent's knowledge. He knew that the money he was transferring belonged to clients and that the firm had possession of the money for a particular purpose for example the discharge of a mortgage or payment of SDLT as part of residential conveyancing transactions that the firm was instructed to carry out or as estate monies where the Respondent was the executor and trustee. The Respondent knew that he did not have the clients' permission to transfer the money. Indeed in the exemplified cases the clients were enquiring after their funds in respect of which the Respondent's own actions had left him in difficulty. When clients challenged him he prevaricated. The Respondent was the sole owner of the firm and had sole control of and access to the firm's office and client bank accounts. The Tribunal agreed that it was inherently improbable that the Respondent believed himself to be entitled to the money transferred not least because round sums rarely equated to amounts due by way of costs and that the Tribunal could and should make an adverse inference from the Respondent's complete failure to explain his handling of client money in the manner that he did. The Tribunal was satisfied that ordinary decent people would consider the Respondent's conduct to be dishonest. The Tribunal found the allegation of dishonesty in relation to allegation 1.1 proved on the evidence to the required standard. As to the further or alternative allegation of recklessness the Respondent admitted that he had been reckless. In any event, the Tribunal having found dishonesty did not feel it relevant to conduct a detailed analysis of the allegation of recklessness.

56. **Allegation 1.2 On or about 19 July 2019 he [the Respondent] caused or allowed an improper payment to be made from client account in the sum of around £204,217.97, thereby creating a minimum cash shortage of equal amount, which was not remedied promptly on discovery or by 30 September 2019. He therefore:**

1.2.1. breached all or any of Rules 1.2, 6.1, 7.1, 7.2, 20.1 and 20.6 of the Accounts Rules;

1.2.2. breached all or any of Principles 2, 4, 6 and 10 of the Principles.

56.1 Ms Culleton referred the Tribunal to the Rule 12 Statement and the witness statement of SK. The FI Report set out that the Firm's books of account were not in compliance with the Accounts Rules and that the FIO was unable to calculate its liabilities to clients, owing to the Respondent's failure to produce a current list of the liabilities or a properly supported client account reconciliation. However, the FIO was able to calculate that a minimum cash shortage of £204,217.97 existed as at 30 September 2019 ("the extraction date"), which had been caused by an improper payment from client account in the sum of £204,217.97 on 19 July 2019.

56.2 Ms Culleton referred to the chronology; on 19 July 2019 £404,980 was received into the client bank account with the reference of E Conveyancing and various numbers and letters thereafter and the balance in the client account immediately prior to that receipt was £2,699.44. Those monies related to the purchase of a property in X Road.

Immediately following the receipt of £404,980.00 on 19 July 2019, the Respondent made three round sum client bank account to office bank account transfers which totalled £46,000.00 addressed in allegation 1.1. The Respondent also made a payment in the sum of £204,217.97 with the reference *"Redemption*……*NATWEST*TFR"*. This payment did not correspond with Client SK's parents' mortgage with P. It was set out in SK's statement and in the FI Report that her parents' mortgage had not been redeemed. As a result she and her parents were both left paying mortgages for a period of months on that same property. In SK's statement she set out that she made the Respondent aware in communications to him that her father had not yet been released from his mortgage with the Property by his lenders P as they had not received funds from the Respondent. She stated that the Respondent contacted her later on 6 September 2019, to explain that he was investigating the situation with the Firm's cashiers. Ms Culleton submitted that that was not an adequate excuse or reason because the funds had been available immediately upon completion but the Respondent had transferred round sums out and he had also then made a payment in the sum of £204,217.97 which did not correspond with SK's parents' mortgage with P. In fact the extracted bank statements provided to the Applicant on 13 November 2019 by the Respondent's representatives showed the payment of £204,217.97 as appearing to relate to a matter in the name of a Client H. The Respondent had not provided any further explanation or supporting documents for that payment. Therefore on the face of it he used completion funds on SK's matter to redeem someone else's mortgage which Ms Culleton submitted was another example of teeming and lading. In any event at the date of the FI Report and since, the Respondent had not given reasons for the payment apart from this document with the reference of Client H. On that basis it was submitted that the transfer was clearly improper because the Respondent was using SK's client money which was due to P for her parents' mortgage to pay a different unrelated client liability. He was certainly not using the money for the purpose for which it had been paid to him.

56.3 Ms Culleton submitted that recklessness was alleged and admitted in relation to this matter. The Respondent was reckless as to whether the payment in question was a proper payment for him to make; would create a shortage on client account; and would prejudice the interests of the clients whose funds were incorrectly deployed to make it.

<u>Accounts Rules</u>

56.4 It was submitted that the conduct alleged was in material breach of the following provisions of the Accounts Rules (or any of them):

- Rule 1.2 –

  You must…
  (a) keep other people's money separate from money belonging to you or your firm;
  (b) keep other people's money safely in a bank or building society account identifiable as a client account (except when the rules specifically provide otherwise);
  (c) use each client's money for that client's matters only;
  (d) use money held as trustee of a trust for the purposes of that trust only;
  (e) establish and maintain proper accounting systems, and proper internal controls over those systems, to ensure compliance with the rules;

(f) keep proper accounting records to show accurately the position with regard to the money held for each client and trust;
(g) account for interest on other people's money in accordance with the rules;
(h) co-operate with the SRA in checking compliance with the rules; …

- Rule 6.1 quoted under allegation 1.1

- Rule 7.1

  Any breach of the rules must be remedied promptly upon discovery. This includes the replacement of any money improperly withheld or withdrawn from a client account.

- Rule 7.2

  In a private practice, the duty to remedy breaches rests not only on the person causing the breach, but also on all the principals in the firm. This duty extends to replacing missing client money from the principals' own resources, even if the money has been misappropriated by an employee or another principal, and whether or not a claim is subsequently made on the firm's insurance or the Compensation Fund

- Rule 20.1 summarised under allegation 1.1 above.

- Rule 20.6 quoted under allegation 1.1 above.

Principles

56.5 Further or alternatively, the conduct alleged constituted a material breach of the following Principles (or any of them):

56.5.1 Principle 2 A solicitor acting with integrity would not use funds belonging to one client to pay the liability of another. In the event that this occurred in error, the solicitor would remedy the breach promptly upon discovery, using their own resources if necessary. The Respondent failed to do so notwithstanding multiple complaints from Client SK. Instead he prevaricated, failed to address what had become of the money and eventually stopped responding altogether. This was a very serious falling short of the complete probity and trustworthiness to be expected of a solicitor set out in Bolton v Law Society [1994] 1 WLR 512.

56.5.2 Principle 4 It was not in the best interests of Client SK's parents for the Respondent to use their funds for any other purpose than to redeem their mortgage with P. As a result of the Respondent's misconduct, Client SK and her parents were paying two mortgages on the same property.

56.5.3 Principle 6 The conduct described above would clearly be profoundly damaging to public trust in the Respondent and the profession.

56.5.4 Principle 10 Far from protecting client money, the Respondent dissipated it in an unauthorised transaction and then failed to replace it promptly or at all.

56.6 The Tribunal had regard to the evidence and the submissions for the Respondent. The facts giving rise to the allegation were not in dispute. Monies which should have been used to redeem the outstanding mortgage in the amount of £310,042.64 held by SK's parents were not used for that purpose leaving SK and her parents both making mortgage payments upon the same house and SK incurring a liability to HMRC including interest upon the unpaid SDLT. Some monies were paid direct by the firm to SK's parents and the amount of £204,217.97 had been used from client account to discharge a mortgage for another client H. That payment created a shortage on client account which the evidence showed was not remedied. The Respondent controlled both client and office account and when money was received into client account it was he who decided how it should be dealt with. The Tribunal found proved to the required standard that the Respondent's actions had breached Rules 1.2, 6.1, 7.1, 7.2, 20.1 and 20.6 of the SRA Accounts Rules. The Tribunal also found proved that the Respondent had breached Principle 2 in that his dealings with client money showed a disregard for the ethical standard required of a solicitor in dealing with client money and he prevaricated when Client SK challenged him about the transaction. His conduct also constituted a breach of Principles 4, 6 and 10.

56.7 Recklessness was also alleged in relation to allegation 1.2. The Tribunal considered that the Respondent had clearly acted recklessly in the actions which led to the creation of this minimum cash shortage on client account given the history of the transaction. He had shown recklessness towards clients and their money in dealing with the money as he did.

56.8 The Tribunal found all aspects of allegation 1.2 proved on the evidence to the required standard indeed the allegation, including the associated allegation of recklessness, was admitted.

57. **Allegation 1.3 - On or after 5 August 2019, he [the Respondent] failed to pay Stamp Duty Land Tax ("SDLT") to HMRC on behalf of Client FK or to account for what he did with monies paid to him, including for that purpose, adequately or at all. He therefore breached all or any of Principles 2, 4, 6 and 7 of the Principles.**

57.1 Ms Culleton referred to the facts of the transaction set out in the background to this judgment. The FI Report contained the FIO's analysis of the partial client file provided by the Respondent in relation to this matter on 28 October 2019 (which did not include a client ledger) and of relevant bank statements. During the period 8 to 23 August 2019, the Respondent made five round sum client to office account transfers totalling £46,000.00, leaving a balance of £4,260.49 on client account. Those were incorporated into allegation 1.1. The FIO stated:

> "Neither the client bank statements, nor the partial client file provided by [the Respondent] evidenced the payment of SDLT in relation to this transaction".

Although a submission receipt was produced in relation to the SDLT return, this document did not state or record that a corresponding payment had been received by HMRC. Further, no corresponding proof of payment, such as a bank statement, was provided in support. On 6 November 2019, the Respondent stated that he was reviewing the client file and accounts in relation to this matter and would provide a full response once he had consulted with his cashiers and solicitor but as with the other

matters he provided nothing further. The Respondent had failed to demonstrate that SDLT had been paid or explain the failure to do so. Ms Culleton that there was the evidence before the Tribunal to support the allegation that the Respondent did not pay the SDLT, despite having been put in funds to do so.

57.2 Ms Culleton submitted that this was the same pattern that emerged in respect of the SK matter where there was also an issue with the SDLT payment as set out in the FI Report. In the SK matter the Respondent provided a document saying that the SDLT had been successfully submitted to HMRC on 23 August 2019 but the document did not state or record that a corresponding payment had been received. There was also no corresponding proof of payment on the bank statements. The client account bank statement previously provided by the Respondent for the month of August 2019 did not record a corresponding payment to HMRC on or after 23 August 2019. There was no corresponding evidence to support what the Respondent provided in relation to saying it had been paid. The FIO went on to say that the only (possible) payment to HMRC for SDLT as recorded on the client account bank statements previously provided by the Respondent pre-dated the submission to HMRC in this matter; a payment on 23 July 2019 for £7,500. So while the Respondent in relation to this matter and the FK matter sought to suggest that he had dealt with it, the evidence did not support his assertion. On that basis and on the basis of the Respondent's admissions Ms Culleton invited the Tribunal to find the allegation proved.

Principles

57.3 It was submitted that by reason of the Respondent's failure to provide a complete client file, including a ledger, the Applicant was not in a position to say what the Respondent did with the money, beyond noting that £46,000.00 was improperly transferred to office account within days of receipt (see allegation 1.1 above). That was profoundly unsatisfactory and represented a serious falling short of the complete trustworthiness expected of a solicitor. A solicitor acting with integrity would scrupulously account for all client money entrusted to him, especially when directed to do so by his regulator. The Respondent has failed to do that and therefore breached Principle 2.

57.4 It was submitted that the Respondent has also breached:

- Principle 4 because the conduct was clearly not in the best interests of the client
- Principle 6 because such conduct was liable to undermine public trust in the Respondent and the provision of legal services
- Principle 7 because such conduct represented a serious failure to comply with his regulatory obligations and to deal with the Applicant in an open, timely and cooperative manner.

57.5 The Tribunal had regard to the evidence and the submissions for the Applicant. The facts giving rise to the allegation were not disputed. As with Client SK, the Respondent had been in funds to pay SDLT incurred by Client FK upon completion of the transaction but had failed to do so. On 5 August 2019, the Respondent completed the purchase of a property for FK. There was no evidence that the SDLT arising was paid to HMRC. On 6 November 2019, the Respondent stated that he was reviewing the client

file and accounts in relation to the matter and would provide a full response once he had the opportunity to consult with his cashers and legal representative. He never did so and the SDLT remained unpaid. The Tribunal found proved on the evidence to the required standard that the Respondent had breached Principle 2 by failing to discharge the SDLT and by failing to account for the money to the client. He had also breached Principles 4, 6 and 7. The Tribunal therefore found all aspects of allegation 1.3 proved on the evidence to the required standard indeed they were admitted.

58. **Allegation 1.4 Between approximately 30 August and 4 October 2019 he [the Respondent] failed to distribute and/or to account, adequately or at all, for the full proceeds of a sale due to be split equally between Person CE and Client NE. He therefore:**

1.4.1. breached Rule 1.2 of the Accounts Rules
1.4.2. breached all or any of Principles 2, 4, 6 and 7 of the Principles.

58.1 Ms Culleton referred to the facts of the transaction set out in the background to this judgment. On 25 September 2019, Person CE made a report to the Applicant concerning the Firm's handling of a conveyancing matter. Person CE also provided email correspondence from the Respondent. The Respondent advanced various excuses for the shortfall in payment and indicated that he was not in funds to make the payment until receipt of other monies which he was expecting. It appeared to mean that he had used the funds, which were clearly there originally, for other matters. As a result a complaint was made to the Applicant but it appeared the matter was resolved because on 4 October 2019, CE's husband contacted the Applicant and confirmed the monies had been paid over a month after completion. The FI Report contained the FIO's analysis of the partial client file provided by the Respondent in relation to this matter (which did not include a client ledger) and of relevant bank statements. The Rule 12 Statement set out that, by reason of the Respondent's failure to produce the entire client file in relation to this matter, it was not possible for the FIO to verify whether the Firm had received deposit monies following exchange of contracts on 27 June 2019. It was also not possible to verify the funds from which any rectification or replacement payments had been made. On the face of it however, the Respondent misappropriated around £14,260.00 following receipt of £657,000.00 on 30 August 2019. In any event, he failed to account adequately for his handling of the sale proceeds.

<u>Breaches</u>

58.2 It was submitted in the Rule 12 Statement that the Respondent's conduct constituted a very serious breach of all or any of the following:

- Rule 1.2 of the Accounts Rules quoted above

- Principle 2 as a solicitor acting with integrity would distribute funds as instructed or account for any failure to do so. Breaches of Principles 4, 6 and 7 were also alleged.

58.3 Ms Culleton submitted that in terms of his lack of response or lack of co-operation the Respondent had failed to account adequately for handling of the sale proceeds. Therefore on that basis as set out in the Rule 12 Statement supported by the FI Report

and the evidence as well as the Respondent's admission, Ms Culleton invited the Tribunal to find allegation 1.4 proved.

58.4 The Tribunal had regard to the evidence and the submissions for the Applicant. The facts giving rise to the allegation were again undisputed. The Respondent had failed to distribute and/or to account adequately or at all for the full proceeds of sale resulting from this transaction for some weeks. The Tribunal found that he had thereby breached Rule 1.2 of the SRA Accounts Rules. The Tribunal determined that to treat client money in this way constituted a breach of Principle 2 and also Principles 4, 6 and 7. The Tribunal therefore found allegation 1.4 proved on the evidence to the required standard, indeed it was admitted.

59. **Allegation 1.5 From around 21 September 2018, he [the Respondent] failed to ensure that the Firm had in place a designated Compliance Officer for Legal Practice ("COLP") and/or Compliance Officer for Finance and Administration ("COFA") or to explain such failure to the SRA, adequately or at all. He therefore:**

1.5.1. breached Rule 8.5 of the Authorisation Rules;
1.5.2. breached all of any of Principles 6, 7 and 8 of the Principles;
1.5.3. failed to achieve all or any of Outcomes 7.2 and/or 7.3 of the Code.

59.1 Ms Culleton referred the Tribunal to the Rule 12 Statement and the FI Report. The latter set out that, on 8 October 2019, an Investigation Officer within the Applicant's Authorisation Directorate wrote to the Respondent, in relation to allegations that he had, amongst other issues, failed to ensure that the Firm had in place a designated COLP or and/or a designated COFA. The obligation on every firm to have in place a designated COLP and COFA "at all times" was imposed by Rule 8.5 of the SRA Authorisation Rules 2011, which remained in force until 25 November 2019. There had been a COLP and a COFA between 26 September 2016 and 21 September 2018 in the person of Mr X. He had ceased to hold those roles on 21 September 2018 and that the Firm had not subsequently appointed anyone else.

59.2 Ms Culleton submitted that the Applicant had raised this matter with the Respondent previously in 2019 and that investigation had been closed on the basis that the Respondent would promptly make the necessary applications to register new compliance officers. No application was made. The Applicant had also written to the Respondent on 4 July 2019 seeking an explanation of his failure to appoint those compliance officers but nothing was received regarding it.

Breaches

59.3 It was submitted in the Rule 12 Statement that by failing to have in place a designated COLP and/or COFA from 21 September 2018, the Respondent was in continuing breach of his obligations under Rule 8.5 of the Authorisation Rules, which required every firm to have such designated compliance officers in place at all times (in particular, rules 8.1, 8.5(b) and 8.5(d) of those rules).

59.4 Further or alternatively, the Respondent breached the following Principles or any of them:

- Principle 6 as his conduct would clearly undermine public trust and confidence in the Respondent and the provision of legal services;

- Principle 7 as his conduct was in material breach of the Respondent's regulatory obligations;

- Principle 8 as his conduct constituted a serious failure by the Respondent to "run your business effectively and in accordance with proper governance and sound financial and risk management principles".

59.5 Further or in the further alternative, the conduct alleged constituted a culpable failure to achieve either or both of the following, mandatory 'Outcomes' under the Code of Conduct:

> "O(7.2) ("you have effective systems and controls in place to achieve and comply with all the Principles, rules and outcomes and other requirements of the Handbook, where applicable");
>
> O(7.3) ("you identify, monitor and manage risks to compliance with all the Principles, rules and outcomes and other requirements of the Handbook, if applicable to you, and take steps to address issues identified")."

59.6 Ms Culleton submitted that there was evidence before the Tribunal, and it was admitted by the Respondent, that he failed to ensure that he had those compliance officers appointed as he should have done and he had not explained that failure.

59.7 The Tribunal had regard to the evidence and the submissions for the Applicant. The facts giving rise to the allegation were again undisputed. The Tribunal found proved that the Respondent had by his failure to appoint a COLP and COFA following X's resignation from the roles breached Rule 8.5 of the Authorisation Rules and Principles 6, 7 and 8. He had also failed to achieve Outcomes 7.2 and/or 7.3. The Tribunal therefore found all aspects of allegation 1.5 proved on the evidence to the required standard.

Previous Disciplinary Matters before the Tribunal

60. None.

Mitigation

61. None was offered.

Sanction

62. The Tribunal had regard to its Guidance Note on Sanctions (December 2020). All the allegations had been found proved against the Respondent including the allegation of dishonesty which he denied but in respect of which he had not tendered any explanation. The Respondent had also failed to act with integrity in respect of his actions which gave rise to allegations 1.1 to 1.4. He had admitted recklessness in respect of allegations 1.1 and 1.2. The Respondent had a high degree of culpability for what had occurred as he

was the sole equitable owner of the firm and sole signatory to office and client accounts with direct control of and responsibility for the circumstances giving rise to the misconduct. From September 2018 to the intervention into the firm, as a result of the Respondent's failure to appoint, in spite of communications from the Applicant, there was no COLP or COFA to monitor the way the Respondent operated the firm's business. As owner of the firm the Respondent benefitted directly from the round sum transfers made from client account to office account. His conduct appeared to be planned. He acted in breach of a position of trust in respect of transfers made from the estate of D deceased as he was executor and trustee. The Respondent was an experienced solicitor having been admitted in 1997. The Respondent's conduct under allegations 1.1 to 1.4 had resulted in harm to clients and all the allegations resulted in harm to the reputation of the profession both of which were considerable in extent. The misconduct represented a major departure from the complete integrity, probity and trustworthiness expected of a solicitor and was completely foreseeable for example failure to redeem a mortgage or pay SDLT was obviously going to cause financial loss to the client. There were several aggravating factors; the dishonest round sum transfers had been repeated over a period of three months and there was no indication that any of the misconduct was anything other than deliberate and calculated. The Respondent had not co-operated with the Applicant's investigation in any meaningful way and had not complied with production notices. There were few mitigating factors; the Respondent had not previously been before the Tribunal and he made partial admissions in general terms. He denied dishonesty but in spite of the Tribunal's direction he gave no detailed explanations of his denial although he had been given every opportunity to do so. It was impossible to gauge what if any insight the Respondent had into the misconduct. The Tribunal considered the available sanctions and determined that only suspension or strike off would be appropriate in the circumstances of the case where dishonesty had been found proved. Its guidance set out that the misappropriation of client money would invariably lead to strike off. No personal mitigation had been offered and the Tribunal determined that there were no exceptional circumstances in this case. The Respondent stated in his letter of 15 January 2021 "I have never denied that I deserve to be struck off." Solicitors previously representing him had said in an email of 23 March 2020 to the Applicant that the Respondent accepted that he would be struck off. The Tribunal determined that only strike off would be sufficient to protect the public and the reputation of the profession.

Costs

63. Ms Culleton applied for costs for the Applicant. She referred to the Applicant's Schedule of Costs at the date of issue and the updated Schedule dated 11 January 2021 which totalled £31,258.80. The schedules included the costs of the investigation. The matter was set as a category 1 fixed fee case which was the lowest level. The nominal hourly rate (arrived at by reference to work done and the fixed fee) in terms of Capsticks' involvement would be £106 per hour. Ms Culleton added that the hours claimed needed to be reduced as the hearing had not run to the estimated three days because of the Respondent not attending and not disputing the allegations save for dishonesty. There would be a saving of 12 hours for each of Ms Culleton's time and of a paralegal. This made the hourly rate £124 per hour. Ms Culleton submitted both hourly rates were entirely fair and reasonable. She reminded the Tribunal that it was only the previous Friday that the Respondent had indicated that he would not be attending and so preparations had had to be made on the basis that he would attend.

64. The Tribunal had regard to the submissions for the Applicant. All the allegations had been found proved and costs would be awarded to the Applicant. The Respondent had also commented upon costs in his letter of 15 January 2021:

> "In respect of costs, my solicitor, [name of former solicitor], under cover of his email of the 23rd March 2020 to [LH] of the SRA (see below), set out my position, which has not changed. In the circumstances, I believe the schedule of costs provided by Messrs Capsticks could and should have been lower since I have not disputed the points of the claim, save for dishonesty. I hope the Tribunal will note that I have tried to keep the costs to a minimum, and my absence should assist in this."

The email of 23 March 2020 to which the Respondent referred included:

> "We do hope that SRA need not incur much further in the way of costs in what should be a relatively simple case to bring to SDT, [the Respondent] will not be able to pay the costs of the intervention, the FI inspection or the SDT proceedings."

The Tribunal also bore in mind that the case had originally been estimated for three days and had concluded on day one. The Tribunal would not reduce the costs in respect of the Respondent not attending. The case still had to be proved and his absence meant that the Tribunal had to consider an application to proceed without him being present. It would however make a reduction to reflect the reduced hearing time. The Tribunal allowed the amount claimed for the Applicant's investigation in full at £9,058.80 and reduced Capsticks' claim from £18,500 plus VAT to £17,300 plus VAT, totalling £26,356.80. The Respondent had made representations about his financial circumstances saying that he had completed an online application for personal bankruptcy, which he would be filing as soon as he was able to find the money to pay for it. He would send the Tribunal and Capsticks the reference when he had it. However the Respondent had not complied with the Standard Direction as to the provision of supporting evidence if he wished to have his financial circumstances taken into account. The Tribunal would award the Applicant its costs in the amount of £26,358.80.

Statement of Full Order

65. The Tribunal Ordered that the Respondent, ROBERT ALAN DOWNIE, 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 £26,358.80.

Dated this 17th day of February 2021
On behalf of the Tribunal

T Cullen
Chair

JUDGMENT FILED WITH THE LAW SOCIETY
17 FEB 2021