SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12140-2020

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

PETER HOBSON BROTHWELL Respondent

Before:

Mr E. Nally (in the chair)
Mr J. Evans
Dr A. Richards

Date of Hearing: 24 to 25 February and 7 April 2021

Appearances

Louise Culleton, counsel, of Capsticks Solicitors LLP, for the Applicant

Kenneth Hamer, counsel, Henderson Chambers, instructed by Girlings Solicitors LLP, for the Respondent

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JUDGMENT

Allegations

1. The allegations against the Respondent were that, while in practice as a sole practitioner at PH Brothwell ("the Firm") and whilst in the position of Compliance officer for Legal Practice ("COLP") and Compliance officer for Finance and Administration ("COFA"):

1.1 Between 23 May 2011 and 29 July 2019, in respect of the administration of the Estate of GGF deceased, the Respondent:

1.1.1 between 25 February 2011 and 28 February 2017, overcharged the estate by around £4,069.50;

1.1.2 between 1 March 2017 and 29 July 2019, improperly raised six invoices totalling around £9,041.

In doing so, the Respondent breached any or all of Principles 2 and 6 of the SRA Principles 2011 ("the Principles").

1.2 On or around 5 February 2013 and/or 7 October 2015, in dealing with the Department of Work and Pensions ("DWP") in respect of the administration of the estate of GGF deceased, the Respondent:

1.2.1 provided incomplete and/or inaccurate information in failing to notify the DWP of the sum in the region of £3,035 to £3,525.72 received in respect of an insurance payment for stolen jewellery;

1.2.2 overstated the legal fees that the Firm had incurred.

In doing so, the Respondent breached any or all of Principles 2 and 6.

1.3 On or around November and December 2015, the Respondent failed to correct the DWP in respect of the true position of the monies owed to it and/or improperly accepted a settlement of £3,500. In doing so, the Respondent breached any or all of Principles 2 and 6.

1.4 On or around 3 December 2015 onwards, having agreed a settlement with the DWP for £3,500 which stated that "if more assets are found they should be used to pay off the balance", the Respondent failed to notify the DWP of, or pay the DWP, the sum in the region of £3,035 to £3,525.72. In doing so, the Respondent breached any or all of Principles 2 and 6.

2. In addition, allegations 1.1 - 1.4 were advanced on the basis that the Respondent's conduct was dishonest. Dishonesty was alleged as an aggravating feature of the Respondent's misconduct but was not an essential ingredient in proving the allegations.

Documents

3. The Tribunal considered all of the documents in the case which comprised an electronic trial bundle containing:

Applicant

- Amended Rule 12 Statement and originating application dated 30 October 2020 with exhibits
- Reply dated 16 December 2020
- Witness statement of Marc Banyard dated 17 November 2020
- Supplementary report of Marc Banyard dated 23 February 2021
- Schedules of costs at issue and at the hearing dated 30 October 2020 and 17 February 2021
- Letter to Girlings Solicitors dated 26 November 2020

Respondent

- Answer dated 2 December 2020 with exhibits
- Respondent's witness statements dated 28 January, 8 February and 23 March 2021 with exhibits
- Email to Capsticks Solicitors dated 20 January 2021
- Letter to Capsticks Solicitors dated 23 February 2021
- Closing submissions dated 24 February 2021

Preliminary Matters

Application to adduce the Respondent's witness statements

4. Mr Hamer applied for two statements from the Respondent filed after the deadline set by the Tribunal to be admitted into evidence. One statement, made as to financial means, was submitted one day late. The statement dealing with the allegations was said to have been filed late for two main reasons: the service by the Applicant on 26 November 2020 of an expert report, permission to rely on which was given by the Tribunal on 26 January 2021, which required consideration and a response; and also discussions between the parties which continued in December 2020 and January 2021.

Application to adduce a supplementary expert report from Marc Banyard

5. The Applicant invited its expert on costs, Marc Banyard, to review and comment upon the witness statement submitted by the Respondent. The Applicant sought permission to rely on a supplementary expert report from Mr Banyard dated 23 February 2021. Ms Culleton, for the Applicant, submitted that it would be fair to admit the supplementary report as it flowed from the original report, the author Mr Banyard would be available for cross-examination and as an expert his duty was to the Tribunal. The Applicant indicated that in the event this application was opposed then it would oppose the Respondent's application directly above.

6. Mr Hamer, for the Respondent, objected to the admission of the supplementary report. This was on the basis that he had been provided with it the day before the hearing, it was not compliant with Rule 30(6)(c) of the Solicitors (Disciplinary Proceedings) Rules 2019 ("the SDPR") relating to expert evidence, it sought to give new evidence, it contained comment and argument in addition to evidence and covered topics (such as contingent liability) on which the author was not qualified to opine. Mr Hamer

submitted that he would be unable to meet what he described as the new case advanced against the Respondent if the supplementary statement were admitted.

The Tribunal's Decision on both applications

7. The Tribunal admitted both the Respondent's statements and the supplementary report of Mr Banyard into evidence. The Tribunal noted the late service, in particular of the supplementary report, with regret, but considered the balance of fairness favoured admission. Mr Banyard's report addressed his duty to the Tribunal as an expert witness, albeit not in the terms set out in the SDPR. The Tribunal did not accept the submission that the supplementary report advanced a new case against the Respondent, and noted that submissions could be made on the matters raised and having heard the totality of the evidence and submissions the Tribunal could afford the matters raised appropriate weight. Both the Respondent and Mr Banyard were available for cross examination. With regard to Rule 27(2) of the SDPR, relating to the admission of evidence, the Tribunal considered that it would be fair in all the circumstances, and may assist the Tribunal with the matters to be determined, for both applications to be granted and for the relevant documents to be admitted into evidence.

Factual Background

8. The Respondent was admitted to the Roll of Solicitors in October 1974. The Firm was based in Folkestone and was the recognised sole practice of the Respondent. The Firm's areas of practice were probate and estate administration (70%), conveyancing (25%) and wills, trust and tax planning (5%). The Respondent was COLP and COFA for the Firm.

9. At the date of the Rule 12 Statement the Respondent did not hold a current practising certificate as this was automatically suspended upon the Applicant's Intervention into the Firm on 27 May 2020.

10. The matters giving rise to the allegations first came to the Applicant's attention following an Accountant's Report prepared on 27 September 2019. A forensic investigation began on 4 March 2020. The Forensic Investigation Officer ("FIO"), Sarah Taylor, produced a report dated 24 April 2020 which identified issues with the Respondent's administration of the estate of GGF.

11. The Firm acted in the administration of the estate of GGF (for which the Respondent was the sole Executor). GGF signed a revised will on 10 June 2002 and the Respondent was appointed as the Executor and Trustee of the will. He was also a beneficiary under the will: he was detailed to receive the residue. GGF died on 10 February 2011 and probate was granted on 5 May 2011. The Respondent subsequently administered GGF's estate. Fifteen invoices were raised between February 2011 and July 2019 for legal fees totalling £24,099.60.

12. The matters with which the allegations were concerned were:

    - The Firm's professional charges for the work carried out in administering the estate of GGF (Allegation 1.1); and

- The Respondent's dealings with the DWP in relation to the administering the estate of GGF (Allegations 1.2, 1.3 and 1.4).

Witnesses

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

Findings of Fact and Law

14. The Applicant was required by Rule 5 of The Solicitors (Disciplinary Proceedings) Rules 2019 to prove the allegations on the balance of probabilities. The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

15. **Allegation 1.1: Between 23 May 2011 and 29 July 2019, in respect of the administration of the estate, the Respondent:**

1.1.1 between 25 February 2011 and 28 February 2017, overcharged the estate by around £4,069.50;

1.1.2 between 1 March 2017 and 29 July 2019, improperly raised six invoices totalling around £9,041.

In doing so, the Respondent breached any or all of Principles 2 and 6.

<u>The Applicant's Case</u>

Background applicable to all four allegations

15.1 The Rule 12 Statement contained considerable detail about the background to the allegations including the Respondent's dealings with GGF after he first prepared her will in 1999. This will was subsequently changed in 2002 after GGF had fallen out with her relatives and made the Respondent her main beneficiary. She also gave a lifetime gift to the Respondent of £15,667.87 which he accepted on the basis that it would be held at the Firm and if for any reason she needed any of the money she need only ask. The revised will stated that any solicitor Executor or Trustee of the will would be entitled to charge and be paid free of all death duties and in priority to all other bequests for all work done.

15.2 GGF died on 10 February 2011. The DWP subsequently claimed recovery against the estate for the overpayment of state benefits provided to GGF prior to her death. In May 2011 the DWP asked for the value of the estate and at that time their further correspondence indicated that the Respondent had advised that the assets were £33,849.56. Correspondence between the DWP and the Respondent continued and in June 2011 the DWP advised that GGF may have been paid too much income related benefit and stated "we strongly advise you not to distribute the estate".

15.3 In January 2012, the DWP wrote to the Respondent indicating that a total of £17,297.65 was owed to the DWP and requesting payment. The Respondent submitted an appeal against this later in January 2012. Despite the DWP's letters the Respondent made distributions of £1,000 and £500 from the estate in April and May 2012. He explained to Ms Taylor that he did so as he wanted to comply with GGF's wishes.

Allegation 1.1

15.4 Allegation 1.1 related to alleged overcharging to the estate and the allegedly improper raising of six invoices. During correspondence in October 2014 and November 2015, about the recovery of overpaid benefits to GGF, the DWP had raised concerns about the level of the Respondent's fees considering the size of the estate. The Respondent raised 15 bills between February 2011 and 29 July 2019 relating to the administration of GGF's Estate totalling £24,099.60.

15.5 On 16 March 2020, Ms Taylor instructed an independent Costs Draftsman, Marc Banyard, to cost the file. Mr Banyard produced a report based on a review of 14 invoices raised between 23 May 2011 and 29 July 2019. The Rule 12 Statement contained a table setting out his conclusions. In summary, Mr Banyard was of the opinion that the estate had been overcharged by £13,110.50. This figure was the total of £4,069.50 alleged to have been overcharged and £9,041 included in allegedly improperly raised invoices.

Allegation 1.1.1 – Overcharging of £4,069.50

15.6 Mr Banyard's evidence was that most invoices contained a lack of narrative detail as to what was being charged for. His opinion was that the narratives to these bills were insufficient for any third party to be able to identify exactly what work was being charged for. However, he pointed to one invoice of 8 May 2014 which contained a very detailed and comprehensive narrative which he stated could not be criticised. Mr Banyard also concluded that it was unclear from a number of the invoices how the figure charged had been reached.

15.7 Mr Banyard provided analysis of each invoice and an opinion on whether in his view there had been any overcharge. Some of the invoices he considered reasonable or even produced a higher estimated cost than the Respondent had invoiced for. On others he set out what he considered the amount overcharged was and how he came to that conclusion.

15.8 Mr Banyard's opinion was that the estate was of no particular complexity, and that although the dealings with the DWP were somewhat protracted the estate appeared to have comprised a few accounts and cash and did not include any property. The skill

and work required was no more than would be required on any other estate, and possibly slightly less given the very limited nature of the estate. He stated that very few documents were prepared or perused. As a result, he considered the reasonable costs for this file from 23 May 2011 onwards to be no more than £7,982.10 inclusive of VAT. His opinion was that the degree of overcharge included in five of the first nine invoices (raised between February 2011 and September 2016) was £4,069.50.

15.9 The Applicant emphasised that the Respondent was the residuary beneficiary under the will. The effect of this was said to be that whilst in many cases an estate being overcharged will impact only on the residuary beneficiary, in this case it was submitted that such overcharging impacted on the DWP's claim as a creditor of the estate.

Allegation 1.1.2 – six improperly raised invoices totalling around £9,041

15.10 The final six invoices raised between 1 March 2017 and 29 July 2019 were during a period described by Mr Banyard as one of complete inactivity on the file. The last item of correspondence received was stamped 16 August 2016, however, after 27 September 2016, a further six invoices were raised without any correspondence either being sent or received and without any indication at all that work had been undertaken on the file. This accounted for £9,041 of fees. It was further submitted that there should not have been any work to undertake at that time as pecuniary legacies had been distributed and the Respondent had advised the DWP that the estate was insolvent. Mr Banyard was unable to identify what those costs related to and stated "… I harbour very significant concerns as to the billing over this period".

15.11 The Applicant rejected the explanation that the Respondent had given to the FIO, Ms Taylor, when she asked why the bills from 1 March 2017 to 29 July 2019 had been raised. He had stated that there remained "an ongoing contingent liability on the estate" such that he may be left with a personal liability to the DWP to make repayment. He described this as a responsibility which "was ongoing and is still ongoing". He stated that responsibilities existed throughout the relevant time and they were the basis of the bills raised. The Applicant submitted, and Mr Banyard stated in his supplementary report, that a contingent liability ("the spectre of further action by the DWP" in Mr Banyard's words) did not give rise to any need for any actual work and so no charge should have been levied. Mr Banyard's opinion was that "costs must relate to some work actually done."

15.12 In his supplementary report and oral evidence, Mr Banyard's opinion was that the need for monthly 'reconciliation' of client monies or annual audit by the Firm's accountants did not give rise to any chargeable work. He described such tasks as part of the Firm's overheads and not costs that were chargeable to the estate and stated that he had never seen work of this nature charged to any client.

Breach of the Principles

15.13 Principle 2 states "you must act with integrity". By allegedly overcharging the estate of GGF and/or improperly raising invoices, it was submitted that the Respondent failed to act with integrity. The Applicant relied upon the case of Wingate v SRA [2018] EWCA Civ 366, in which the Court of Appeal held that the term integrity "connotes adherence to the ethical standards of one's own profession." As the Executor, the Respondent had

responsibilities to all interested persons under the will and not just himself as the residuary beneficiary. The Applicant's case was that the Respondent's overcharging impacted on the DWP's claim. It was submitted that a solicitor acting with integrity would only have charged what was properly due and would have been scrupulous in ensuring that invoices were accurate.

15.14 Principle 6 states "you must behave in a way that maintains the trust the public places in you and in the provision of legal services". The conduct alleged was submitted to have undermined public trust and confidence in both the Respondent and the provision of legal services.

Dishonesty alleged in relation to allegation 1.1

15.15 It was alleged that the Respondent's conduct in relation to both limbs of allegation 1.1 was dishonest. The Applicant relied upon the test for dishonesty in Ivey v Genting Casinos [2017] UKSC 67, paragraph [77] of which states:

> *"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."*

15.16 The Applicant's case on dishonesty was in summary:

- Whilst the Respondent referred to a further potential claim being made by the DWP and the possibility of distributing further legacies there was said to be no evidence of any work on the file to justify the raising of invoices to the value of £9,041;

- In paying such legal costs to himself when no work was undertaken to warrant such fees, the Respondent was alleged to have known that he was not entitled to such fees and was simply seeking to enrich himself further from the estate rather than to see any more money paid to the DWP, a legitimate creditor entitled to those assets from the estate;

- In relation to the general overcharging of the estate identified by Mr Banyard as summarised above, the Respondent was alleged to have paid himself inflated fees for a level of work which he had not undertaken in order to benefit himself financially at the expense of the DWP whom he knew was a bona fide creditor and liable to receive money that the Respondent had thought was rightfully his.

15.17 It was submitted that such conduct would be regarded as dishonest by the standards of ordinary decent people.

The Respondent's Case

15.18 It was denied that the Respondent overcharged or improperly invoiced the estate or breached Principles 2 and 6.

Allegation 1.1.1 – Overcharging of £4,069.50

15.19 Between 25 February 2011 and 27 September 2016, the Respondent rendered nine bills of costs to the estate of GGF totalling £15,058.60. The Applicant's case was that Mr Banyard, a costs draftsman, claimed that the Respondent overcharged the estate in respect of these nine bills the sum of £4,069.50. In other words, the correct sum for these nine bills should have totalled £10,989.10.

15.20 It was the Respondent's case, firstly, that the level of his costs for these nine bills was reasonable having regard to the work undertaken by the Firm. The bills covered a period of six years from the date of death and were described as normal administration fees including the ordering and supervising of GGF's funeral together with all attendant personal duties. Secondly, even if Mr Banyard was right and the estate was overcharged £4,069.50, it was submitted that a difference of 27% was not so excessive as to amount to a breach of Principles 2 and 6.

15.21 Mr Hamer noted that Mr Banyard had accepted that he reviewed one folder which was marked "2nd File". He did not have access to the first file. Mr Banyard had acknowledged that "As such it is inevitable that I will be unable to ascertain certain information". Mr Hamer provided various examples in his closing submissions of pages within the 2nd File which referred to other documents which were not present within that file. He also stated that a ledger card, to which the Tribunal was referred, contained references to a "host" of other matters being carried out in connection with the administration of GGF's estate for which there was no documentation present. Mr Banyard accepted when questioned that he had not seen everything from 17 May 2011 onwards, that he had seen nothing prior to this date and that it was inevitable some information was missing from the documents he reviewed.

15.22 It was submitted that the exercise undertaken by Mr Banyard of making some allowance for missing material was incomplete and inaccurate. Mr Hamer submitted that by costing only what was physically provided to him, Mr Banyard's conclusions were not sufficiently reliable to discharge the burden of proof which was on the Applicant.

15.23 Mr Hamer highlighted two specific examples where Mr Banyard had discounted the Respondent's invoices. In one case this was because only 39 of 55 listed items of correspondence were found on the physical file and in the other because only 14 of 17 listed items were found. These, and other, discounts were submitted to have been applied without the full facts or based on inadequate information. The Tribunal could not know what was on the first file, and Mr Hamer submitted that it was a reasonable inference that it contained some material from after 17 May 2011 (the date from which Mr Banyard costed the file). Accordingly, it was submitted that allegation 1.1.1 could not be proved to the requisite standard and should be dismissed.

Allegation 1.1.2 – six improperly raised invoices totalling around £9,041

15.24 Between 1 March 2017 and 29 July 2019, the Respondent rendered six bills of costs to the estate totalling £9,041. It was alleged by Mr Banyard that no work of any substance was done during this period and therefore the whole amount was improperly raised. The Respondent's case was that whilst the amount of work undertaken during this period was limited, the Firm nonetheless was entitled to render bills of costs periodically, and that the amounts were not excessive. The period involved approaching 2½ years and throughout there was a balance on client account that required normal monthly administration, accounting and file review, although no note was necessarily recorded on the file as the matter was on-going.

15.25 In his witness evidence the Respondent stated that there remained an on-going contingent liability on the estate during the period of the second batch of invoices. He stated that whilst the file may indicate a lack of activity during this period, there remained the possibility that the DWP may seek to reopen matters or challenge the residuary gift to him. Mr Hamer submitted that the settlement with the DWP was on the basis that they may reopen the case at any time and there was therefore an ongoing contingent liability on the estate.

15.26 In any event, even if any of the bills of costs may have been high, the Respondent was the residuary beneficiary of the estate and save for the DWP there were sufficient funds in the estate to pay the legacies in full and any other debts. In other words, anything left in the estate after paying the funeral and testamentary expenses and the debts of the estate would have gone to the Respondent either as costs of administration or residue.

15.27 Mr Hamer submitted that the reasons provided by Mr Banyard for disallowing the nine invoices were different in his first and second reports. The first report stated that no invoices ought to have been rendered because no work was done. The second report (received the day before the substantive hearing) stated that the work done "was simply part and parcel of the firm's overheads and not costs that are chargeable to the estate". Mr Hamer submitted that this assertion from the second report was not supported by any guidance or case-law and was opinion evidence outside Mr Banyard's expertise as a costs draftsman. Mr Hamer further submitted that the Tribunal was not entitled to rely on the experience of its solicitor members to determine the question of whether or not the Respondent was entitled to charge for the items highlighted by the Applicant. He submitted that in any event, whether or not a costs judge would allow the costs was beside the point; the key question for the Tribunal was whether the Respondent genuinely considered he was entitled to charge in the way he did.

Breach of the Principles

15.28 Mr Hamer submitted that when considering the standard of proof, the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Tribunal concludes that the allegation is established even on the balance of probabilities (by reference to In re H and others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563. He referred the Tribunal to comments made by Lord Nicholls of Birkenhead at [586D] and in particular:

> *"… 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 probability, its occurrence will be established."*

15.29 Mr Hamer submitted that the Tribunal should acquit the Respondent of any breach of Principles 2 and 6 in respect of either group of invoices. The first group of invoices in allegation 1.1.1 were submitted not to be excessive, and certainly not so excessive as to justify a finding of professional misconduct. It was submitted that the Respondent had given a credible explanation for the second group of invoices in allegation 1.1.2, whether he is right or wrong in law. It was submitted accordingly that there was no basis for finding a lack of integrity (a very serious allegation to make against any professional person) or that the Respondent behaved in a way that damaged public trust in himself or the profession.

Response to the allegation of dishonesty in relation to allegation 1.1

15.30 Mr Hamer accepted the Ivey test for dishonesty relied upon by the Applicant was the applicable one. He referred the Tribunal by comments made by Lord Hughes JSC in that case at [60]:

> *"[D]ishonesty", where it appears, is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts."*

15.31 Mr Hamer repeated his submissions about stronger evidence being required before an inherently unlikely allegation is established even on the balance of probabilities.

15.32 Mr Hamer noted that the allegation was that the Respondent "knew" that he was not entitled to charge the fees that he did. Mr Hamer submitted that the Applicant would first need to establish to the requisite standard of proof that the Respondent knew that the invoices he was rendering to the estate were overcharged and improper. In other words that he had no genuine belief in the invoiced amounts. This was submitted by Mr Hamer to be a tall order by any stretch of the imagination for the reasons given in responding to allegation 1.1.

15.33 The Respondent vehemently denied that his conduct was dishonest or that his state of knowledge or belief at the time of the facts alleged was dishonest. As set out above, his evidence was that he honestly believed that the level of the Firm's charges was fair and reasonable. It was denied that his conduct was dishonest by the standards of ordinary decent people.

The Tribunal's Decision

15.34 The Applicant was required to prove the allegations on the balance of probabilities. In assessing the inherent probability of elements of the allegation, the Tribunal had regard to the surrounding context. It was agreed between the parties that the Respondent had received a gift of some £15,667.87 from CCG in August 2002 (in respect of which no allegations were made). The Respondent was one of the signatories of GGF's revised will in 2002. He was the residuary beneficiary under the will. He was also appointed Executor and Trustee. The Tribunal considered these various factors placed him in a position of heightened trust.

15.35 The Tribunal considered that the Respondent's evidence that he had been content to act as a witness to GGF's revised 2002 will on the basis that "if the residuary gift to me was challenged at any point it would fail with the result that any residue would go to the two charities named in the Will on the basis of a partial intestacy" was an unconventional and somewhat eccentric approach to his obligations.

15.36 The estate contained no property, and the Tribunal accepted the Applicant's contention that the estate was not complex. The Respondent did not seek to contend otherwise. The DWP had raised the level of fees charged with the Respondent in correspondence (which the Tribunal noted was based on the size of the estate and not any detailed knowledge of the work involved or of the estate itself on the part of the DWP). Based on the estate cash accounts on the Respondent's file, the value of the estate was £32,512.37.

15.37 Both allegations 1.1.1 and 1.1.2 rested heavily on the report and evidence of Mr Banyard. He had over eighteen years' experience as a costs draftsman which the Tribunal considered qualified him to offer an expert opinion on the legal charges in this case. The Tribunal considered Mr Banyard to be a cogent and credible witness who gave balanced and fair evidence. The Tribunal accepted that there were gaps in the file which had been costed by Mr Banyard. Mr Banyard had acknowledged this in his report and under cross-examination. However, the Tribunal also accepted that Mr Banyard had noted and made allowances for absent material. The Tribunal considered Mr Hamer's submission that this process was limited and could not be wholly accurate had some force. The Tribunal assessed the evidence which was presented about the reasonableness of the fees charged with this inevitable limitation firmly in mind.

Allegation 1.1.1 – the alleged overcharging of £4,069.50

15.38 The Tribunal carefully reviewed the bills raised by the Respondent. Mr Banyard's evidence that there was little detail provided as to the basis of the charges was plainly accurate. Whilst he strongly denied any overcharging, the Respondent himself had stated that costings were to some extent based on "experience, knowledge and responsibility rather than actual recorded time". In his oral evidence the Respondent also made reference to his methodology in calculating bills as being "slightly random".

15.39 The Tribunal had been invited by Mr Hamer not to be swayed by "emotive" figures. Specifically, the evidence of Mr Banyard that the Respondent's legal fees represented 74% of the value of the estate. The Tribunal considered that the proportion of the estate spent on legal fees was part of the factual matrix to which it was entitled and obliged to

have regard. Whilst it was described as emotive the figure itself was not disputed. The Respondent had not demonstrated any compelling evidential basis for the level of his fees either in his oral evidence or the documents before the Tribunal. The burden of proof was on the Applicant, and the Tribunal reminded itself that the Respondent was not required to prove anything.

15.40 Mr Banyard's report included his description of the evidence of activity on the paper file, which was the sole basis of his costing, for each of the six invoices to which allegation 1.1.1 related. He also set out the basis for his assessment of the time which should be allowed for the activities in the relevant period and for his application of an hourly rate of £225 for the work completed by the Respondent (by reference to the Guideline Rates for Summary Assessment). The Tribunal considered that this exercise was credible, thorough and persuasive. Mr Banyard declined to cost one earlier invoice on the basis that the time covered extended into the missing first file. He concluded in relation to a further invoice that based on the file "I do not feel that I can state with any certainty that there has been any overcharge for this period and am prepared to accept the fee charged as proper". Of the six subsequent invoices, with which allegation 1.1.1 was concerned, in one case Mr Banyard's own costing of the file exceeded the fees charged by the Respondent. Mr Banyard set out the methodology and specifics of his costing exercise and where he concluded there had been an overcharge this was based on his assessment of the work completed and also an assessment that there were no grounds for concluding there was further unrecorded work.

15.41 The Tribunal did not consider that the Respondent was a persuasive witness. His answers lacked detail and were muddled when he appeared unable or unwilling to answer a direct question directly. He was resolute in his evidence that he had not overcharged the estate, but was not able to provide a coherent and compelling account explaining or justifying the fees he had charged. As stated above, the burden of proof was on the Applicant and not the Respondent. The main thrust of his case, and of Mr Hamer's submissions, was that there were gaps in the material which formed the basis of Mr Banyard's costings and so his conclusions were unreliable.

15.42 The Tribunal gave detailed consideration to the acknowledged gaps in the file which had been costed by Mr Banyard. The Tribunal accepted that the process of making allowances in his report for the time properly spent on paperwork not present in the file he reviewed must necessarily be somewhat imprecise. Mr Banyard had explained in his report and his oral evidence the methodology he adopted. The Tribunal considered that the allowances he had made where there appeared to be missing documents were coherent and appeared reasonable, even generous. My Banyard was an experienced costs draftsman instructed as an expert whose acknowledged duty was to assist the Tribunal. The Tribunal reviewed the ledger card and documents highlighted by Mr Hamer as mentioning documentation to which Mr Banyard did not have access. These matters appeared to the Tribunal to be matters of routine correspondence and did not begin to approach a level which would undermine Mr Banyard's conclusions or change the overall picture. The references to missing documents were, in any event, available to Mr Banyard and his evidence was he had sought to make allowances for these documents where appropriate.

15.43 The Tribunal had regard to the various roles occupied by the Respondent in relation to GGF, as set out above, the unchallenged assessment that the Respondent's fees had amounted to 74% of the value of the estate and that it was a straightforward estate to administer legally. As set out above, the written and oral evidence from Mr Banyard had been detailed and persuasive. The Tribunal did not consider that the gaps in the documents to which Mr Banyard had had access were sufficient to bridge the gap of the £4,069.50 which in Mr Banyard's assessment had been overcharged. The Tribunal considered that it was more likely than not that the position described by Mr Banyard was accurate. The Tribunal accepted his conclusion and found proved that the estate was overcharged by around £4,069.50 as alleged.

Allegation 1.1.2 – six improperly raised invoices totalling around £9,041

15.44 Allegation 1.1.2 covered six invoices raised between 1 March 2017 and 29 July 2019. By the start of this period the dispute with the DWP had been settled. Mr Banyard's evidence was that there was no activity on the file. He also gave the opinion that the 'reconciliation' of client monies or annual audit by the Firm's accountants which had been completed did not give rise to any chargeable work.

15.45 The Tribunal accepted the submission that the Respondent was not entitled to charge for potential work. Whilst it may have been the case, as the Respondent had stated, that there remained the possibility that the DWP may seek to re-open matters, unless and until they did so this did not necessitate or involve any actual work. The Tribunal concluded that no reasonable solicitor could think that it was acceptable repeatedly to charge an estate a cumulative sum of over £9,000 on the basis that a dispute which had been settled may be re-opened.

15.46 Taking the Respondent's case at its highest there was a paucity of evidence to seek to justify the fees charged. The Tribunal rejected the invoice narratives as contrived. By way of example, one of the relevant six invoices, that dated 13 November 2017, stated by way of narrative accompanying the fees of £1,175 (excluding VAT):

> *"Professional charges to acting in the Administration of the Estate from the 2nd March 2017 to the 30th October 2017.*
>
> *Regular inspection of the file and perusing the correspondence to date. Dealing with the accounts and the reconciliation thereof as between the client's and office account.*
> *General care and attention throughout.*
> *Recorded Attendances on the basis of a monthly inspection at the file in detail 5 hours"*

The Tribunal accepted that review and inspection of a live file may be required, but considered the fees charged, for a period where there was no substantive activity on the file, to be extraordinary, plainly unacceptable and improper.

15.47 The Tribunal rejected Mr Hamer's submission that there was a new and/or inconsistent position advanced in Mr Banyard's supplementary report. The Tribunal accepted Mr Banyard's opinion evidence that the costs charged to the estate must relate to work

actually done. The very limited reviews which may have been necessary did not justify fees in excess of £9,000 during a period of substantive inactivity.

Breach of the Principles

15.48 The Tribunal had regard to the test set out in Wingate to which it was referred. As a solicitor the Respondent had an obligation to adhere to the ethical standards of the profession. As stated above, as Executor of GGF's estate the Respondent had responsibilities to all interested persons under the will. The Tribunal accepted that despite the Respondent being the residuary beneficiary under the will, his overcharging had an impact on the money available to meet the DWP's claim and that he benefited from inflated fees. The Tribunal accepted the submission that a solicitor acting with integrity would only have charged what was properly due and would have been scrupulous in ensuring that the invoices were accurate. The Tribunal did not consider that any solicitor could have considered that it was proper to raise the six invoices, totalling £9,041, during the period of substantive inactivity on the file. The Tribunal found the Respondent's evidence on his purported justification to be hesitant, contrived and unconvincing. The Respondent was a very experienced solicitor and the Tribunal was satisfied to the requisite standard that he must have been aware that these six invoices as a minimum were improper.

15.49 The Tribunal rejected the submission that any overcharging was "not so excessive as to justify a finding of professional misconduct". Solicitors were obliged to be scrupulous in relation to client money and this extended to the level of fees charged, particularly in circumstances where the Respondent was in effect preparing invoices for himself as Executor where the usual client scrutiny of charges was absent. For the reasons set out above, the Tribunal had found to the requisite standard that the Respondent had overcharged the estate and improperly raised six invoices. The Tribunal found proved on the balance of probabilities that this amounted to a clear failure to act with integrity in breach of Principle 2.

15.50 The Tribunal also found proved to the requisite standard applying the same reasoning described above that such overcharging was conduct which would undermine the trust placed by the public in the Respondent and in the provision of legal services in breach of Principle 6.

The Tribunal's decision concerning dishonesty in relation to allegation 1.1

15.51 The Tribunal accepted the summary of the test for dishonesty provided by the parties. When considering the allegation of dishonesty, the Tribunal applied the test in Ivey. The test for dishonesty was set out at [74] of the judgment in that case, and accordingly the Tribunal adopted the following approach:

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

- secondly, once that was established, the Tribunal then considered whether this conduct would be thought to have been dishonest by the standards of ordinary decent people.

15.52 The Tribunal had found that the Respondent had overcharged the estate and improperly raised six invoices for over £9,000. The Tribunal had rejected the Respondent's account that he genuinely believed he was entitled to raise the six invoices where no substantive work had been completed and had found that no reasonable solicitor could genuinely have held such a belief. Further, the Tribunal found that as an experienced solicitor the Respondent knew that overcharging was not allowed and that he also knew that the estate was modest and what reasonable charges for its administration would have looked like. The Respondent knew that given the surrounding circumstances scrutiny of his bills was unlikely. Applying the second limb of the Ivey test, the Tribunal considered that ordinary decent people would regard the Respondent's actions as dishonest. The Tribunal found proved on the balance of probabilities that the Respondent had dishonestly overcharged the estate and improperly raised six invoices.

16. **Allegation 1.2: On or around 5 February 2013 and/or 7 October 2015, in dealing with the DWP in respect of the administration of the estate of GGF deceased, the Respondent:**

1.2.1 provided incomplete and/or inaccurate information in failing to notify the DWP of the sum in the region of £3,035 to £3,525.72 received in respect of an insurance payment for stolen jewellery;

1.2.2 overstated the legal fees that the Firm had incurred.

In doing so, the Respondent breached any or all of Principles 2 and 6.

The Applicant's Case

16.1 As indicated above, the Respondent had been notified by the DWP in January 2012 that £17,297.65 was owed in respect of overpayments and should be repaid from the estate. The Respondent had appealed against that determination on 19 January 2012. He provided documentation in support of the appeal.

16.2 The Respondent received a payment of £3,525.72 from insurers on 11 May 2012 in respect of an insurance claim on GGF's jewellery which had been stolen from the Firm's safe. This money was said to have been paid into a personal savings account.

16.3 At the beginning of 2013 the Respondent informed one of the charity beneficiaries under the will that the Firm had terminated the appeal and asked the DWP to confirm the total repayment sum owed. On 31 January 2013 the DWP confirmed this was £22,363.68.

The Respondent's letter of 5 February 2013

16.4 On 5 February 2013, the Respondent wrote to the DWP thanking them for their letter of 31 January and indicating that "regrettably the balance held on Clients Account is currently £19,222.37 and there remains outstanding Pecuniary Legacies and of course outstanding Legal Costs". He stated that in the circumstances the Firm wished to pay the outstanding pecuniary legacies and final legal costs and pay the remainder to the DWP. The Respondent had not included the money received from the insurance pay-out for the jewellery stolen from the safe in the figure he reported to the DWP. The

Applicant's case was that the money remained in the Respondent's saving account when it should have been in the Firm's client account.

16.5 On 7 February 2013, the DWP wrote to the Respondent and explained that, as an executor, he must collect the assets, pay creditors and distribute any residue to beneficiaries. The DWP explained that, based on the statement of assets dated 23 May 2011, the estate did have sufficient assets to repay the claim in full but, based on the Respondent's assertion (of 5 February 2013) that there was only £19,222.37 in the client account, currently it did not. Accordingly, the DWP requested a copy of the estate accounts if the Respondent asserted that the claim could not be met in full. The DWP explained that the debts of the estate took priority over any pecuniary legacies and the DWP did not accept that they should be paid before its claim (only funeral and administration costs being priority debts of an estate). The DWP explained that HM Treasury expects all benefits overpayments to be repaid in full to ensure that taxpayers are protected and funds are returned to the public purse.

16.6 There was further correspondence between the DWP and the Respondent and he provided a copy of the estate accounts. On 4 March 2013 the DWP stated that the administration expenses seemed excessive and accounted for almost a third of the estate's total value. A complete breakdown of these expenses was requested. Further information was provided and requested over the following months. In October 2013 the Respondent proposed an offer of £15,000 to settle the DWP's claim and the DWP requested payment of £22,363.38.

16.7 The correspondence with the DWP continued throughout 2014 (as did the periodic raising of invoices). On 29 August 2014 the DWP again requested payment of £22,363.38. On the same day, in reply to a letter from the Respondent, the DWP stated that on the basis that the Estate held no further funds it would require payment of £19,145.97 (the balance in the estate accounts as February/March 2013 before the Respondent made payments to beneficiaries – and before further invoices from the Firm were paid). In October 2014 the DWP wrote to the Respondent to query the administration expenses which were listed in the estates accounts as being £10,368.00. The DWP considered that these were exceptionally high if they related to legal fees. The DWP also requested an up-to-date account of the estate so they could check the amount that they would accept in respect of the claim.

16.8 There was further correspondence from October 2014 to October 2015 without much progress being made. The Respondent explained that he was in difficulty as the executor was reluctant to instruct the Firm for solicitors to do work for which they may not get paid as the DWP was already arguing over the fees incurred to date. In July and August 2015 the DWP again sought payment of £22,368.68.

The Respondent's letter of 7 October 2015

16.9 On 7 October 2015, the Respondent wrote to the DWP indicating that further legal costs had been incurred and enclosing accounts which showed that there was a deficit in the estate of £9,130.11. He stated that the estate was therefore insolvent and not able to make repayment of the claim for overpaid income support and pension credit of £22,363.68. The letter included a copy of the Revised Estate Accounts which provided:

- The assets (savings accounts and cash) totalled £32,512.37;
- The liabilities totalled £41,642.72 comprising:
    - Administration Expenses (excluding legal fees) of £756.80;
    - Respondent's legal fees of £12,780;
    - Debts due (excluding the DWP's claim) of £2,242;
    - The DWP's claim of £22,363.68;
    - Legacies of £3,500;
- A deficit balance of £9,130.11.

16.10 The revised accounts did not include the sum in respect of the insurance pay-out for the stolen jewellery (said by the Applicant to be in the region of £3,035 to £3,525.72).

16.11 The Applicant's case was that at the time of writing the letters of 5 February 2013 and 7 October 2015, the settlement in respect of the theft of the jewellery claim had already been paid to the Respondent (on 10 May 2012) and so the estate figures should have included this sum which had been paid into the Respondent's personal savings account. In failing to include that sum in the estate figures the Respondent was therefore providing inaccurate information to the DWP.

16.12 The Applicant also maintained, for the reasons set out in allegation 1.1.1, that the figures provided to the DWP in respect of the Respondent's fees for administration expenses during this period were overstated.

Breaches of the Principles

16.13 The conduct alleged was submitted to constitute a breach of Principles 2 and 6. It was submitted that a solicitor acting with integrity (Principle 2) would have paid the insurance monies into the client account and recorded it on the estate's ledger. He would not have paid it into his personal account, whether he was a residuary beneficiary or not. He would have informed the DWP of the correct position. Furthermore, a solicitor acting with integrity would not have overstated his professional fees in correspondence with another party (or at all).

16.14 In relation to maintaining public trust (Principle 6) it was submitted that the conduct alleged would undermine public trust and confidence in both the Respondent and the provision of legal services.

Dishonesty alleged in relation to allegation 1.2

16.15 The Applicant referred again to the dishonesty test set out in Ivey.

16.16 The Applicant's case on dishonesty was in summary:

- The Respondent was an experienced solicitor who regularly undertook probate work. Estate administration, wills and trusts accounted for 75% of his practice;

- The Respondent would have been aware of the importance of including the full assets in the estate accounts provided to the DWP and ensuring that his own fees were not overstated. He would know that such matters were highly relevant to the

DWP's claim and entitlement to money from the estate in order to repay the overpayment that GGF had received from the DWP;

- To fail to include the amount of the insurance pay-out in respect of GGF's stolen jewellery from the Firm's safe, and to overstate his own administration expenses was alleged to be seeking to mislead the DWP as to the true value of the estate and the availability of assets on which they had a claim.

16.17 It was submitted that such conduct would be regarded as dishonest by the standards of ordinary decent people.

16.18 It was submitted that the Respondent's response to the FIO, Ms Taylor, was instructive as to his knowledge and belief as to the facts when he stated:

> *"(t)he DWP had mistakenly overpaid a 90 year old for some considerable years and when she was approximately 93 or 94 they made a claim against her and apparently that claim was satisfactorily dealt with in some way. The DWP then continued to overpay her and I have no idea how and so my feelings were that the DWP had really brought this situation upon themselves by their poor management of this old lady".*

16.19 It was submitted that this appeared to show the reality of what the Respondent thought about the DWP's claim and his attitude to wanting to limit their claim as much as possible. This was alleged to have led to the Respondent being dishonest about the full value of the assets in the estate in order to minimise any potential repayment to the DWP and to the Respondent seeking to inflate his legal costs, so as to benefit himself rather than to allow the DWP to have a greater claim over the estate. Whilst GGF may have wanted her estate to go to the Respondent rather than the DWP, the DWP had an obligation to the wider public purse to recover any overpayment of benefits and it was submitted not to be open to the Respondent to go behind that.

<u>The Respondent's Case</u>

16.20 It was admitted that the information provided to the DWP on 5 February 2013 and 7 October 2015 as to the value of the estate was erroneous in that it did not include the sum of £3,525.72 received in respect of the insurance repayment for GGF's stolen jewellery.

16.21 However, the monies received from the insurers for the loss of GGF's jewellery were recorded in the accounting records of the Firm and the Respondent maintained a client file relating to the theft of the jewellery. The insurance payment of £3,525.72 included repair damage to the Firm's property as a result of the break in (the jewellery having been kept for safe custody in the Firm's safe). Consequently, the insurance monies were not paid into client or office account as they represented both client and office money, but were paid into a separate savings account normally used by the Firm for VAT purposes, and where it could be retained separately and readily identified. The account was part of the Firm's accounting records and was subject to annual inspection by the Firm's auditors. In May 2019, the Respondent transferred £3,400 representing the insurance monies to the Firm's client account when the VAT aspect of the account was no longer being used by the Firm.

16.22 The Respondent's evidence was that after GGF's death and the grant of probate he responded on 23 May 2011 to an enquiry from the DWP and enclosed a Statement of Assets in the estate. His evidence was that he could not recall if the value of the jewellery was included but he would be surprised if it were not. A copy of this statement was not on the administration file costed by Mr Banyard and the DWP records were said to no longer be available. Mr Hamer submitted that it was a reasonable inference that the Statement of Assets did include the valuation figure for the jewellery at the time of GGF's death. On 20 April 2011 the Respondent paid £180 for the probate valuation of the jewellery and it was shortly after this that he sent the Statement of Assets to the DWP.

16.23 The Respondent's case was that it was simply an oversight that the insurance payment representing the stolen jewellery got missed from the estate cash account. He did not have a computerised office system at the time and the only available records would have been the physical handwritten ledger card reconciled with the administration file.

16.24 Responding to the allegation that the Respondent improperly overstated the costs due to the Firm, the Respondent summarised the amounts charged to the estate as at 5 February 2013 and 7 October 2015. As at 5 February 2013 the Firm had submitted six bills of costs totalling £8,798.20. The amount said by Mr Banyard to have been overcharged on two invoices was £1,403.10 with one invoice under-charged by £219.00: a net figure overcharged of £1,184.10.

16.25 By October 2015, one additional bill of costs had been rendered on 8 May 2014 in the sum of £2,412. Mr Banyard claimed this was overcharged by £238.50. The amount allegedly overcharged on these invoices was accordingly 12.7% of the total sum of £11,210.20.

16.26 In summary, the invoices rendered by the Firm to the estate up to 7 October 2015 amounted to £11,210.20. Additionally, it was stated that there appeared to have been a sum due of £1,576.80 covering the period from the last invoice dated 8 May 2014. The allegation was that the Respondent had improperly overstated the legal fees that the Firm had incurred. It was submitted that the figures only had to be stated to show that this was unlikely to be made out to the requisite standard. The Respondent's evidence was that he merely reported the figures to the DWP as they appeared against the account and there was no conscious decision to alter any of those amounts at all.

Breaches of the Principles

16.27 It was submitted that the test for establishing lack of integrity (Principle 2) was not made out. Mr Hamer submitted that it would be wrong to equate failing to pay a cheque into client account, which may be an Accounts Rules breach, with a lack of integrity. The Respondent did not "run off" with the insurance money but instead paid the cheque into an account used by the Firm. The Respondent gave a credible explanation of how the insurance monies came to be paid into the savings account and were overlooked when writing to the DWP in 2013 and 2015. The case of Wingate states that integrity connotes adherence to ethical standards and it was submitted that the oversight described by the Respondent did not meet the test set out in that case. Mr Hamer invited the Tribunal to consider whether the Respondent had any intention to hide the funds for the jewellery when he received the insurance cheque. Similarly, it was submitted that

there had been no improper overstating of the Firm's fees, and in the alternative, that any overstating had been reckless (recklessness not having been alleged).

16.28 As to Principle 6, Mr Hamer submitted that the court in Wingate emphasised that negligence or incompetence would not be enough. There would need to be an act of manifest incompetence to engage Principle 6. Again, it was submitted that the test was not met in relation to the insurance money or the Firm's legal fees.

Response to the allegation of dishonesty in relation to allegation 1.2

16.29 Mr Hamer repeated the submissions based on Ivey, inherent probability and the quality of evidence required to discharge the burden of proof on the Applicant.

16.30 As stated above, the Respondent vehemently denied that his conduct was dishonest. His evidence was that he did not seek or intend to mislead the DWP as to the true value of the estate.

16.31 Mr Hamer noted that the Applicant alleged that in failing to include the amount of the insurance pay-out in respect of GGF's stolen jewellery from the Firm's safe, and to overstate his own administration expenses, the Respondent "was seeking to mislead the DWP as to the true value of the Estate and the availability of assets on which they had a claim". He submitted that the evidence presented fell well short of establishing that the Respondent intentionally sought to mislead the DWP – which was what dishonesty would mean in this context. The Respondent's evidence was that it was due to a simple oversight that the insurance monies were missed from the estate cash account. The sum was held in a specific account as set out above and not dissipated. The Respondent was submitted to have given a credible explanation of how this happened. It was submitted such conduct would not be considered dishonest by ordinary decent people.

The Tribunal's Decision

16.32 The Respondent had admitted that the insurance monies had been omitted from the figures provided to the DWP. His evidence was that this was an oversight. Accordingly, there was no underlying factual dispute as to the basis of allegation 1.2.1.

16.33 As with the previous allegation, the Respondent denied that his fees had been overstated. The Tribunal accepted that the Respondent had accurately conveyed to the DWP what the relevant fees charged had been, but did not consider that this was what "overstating" meant in allegation 1.2.2. It plainly meant that the Respondent had overcharged the estate and conveyed the inflated figures to the DWP. In allegation 1.1 the Tribunal had found that the Respondent had overcharged the estate by £4,069.50 during the period between February 2011 and September 2016. The two letters with which both limbs of allegation 1.2 were concerned were dated 5 February 2013 and 7 October 2015. The fees to which the Respondent had referred in these letters accordingly included differing degrees of the overcharging found proved in allegation 1.1. The Tribunal found proved to the requisite standard that the Firm's fees had thereby been overstated in the two letters. The Respondent's letter to the DWP of 7 October 2015 in which he stated that the estate was insolvent was premised on the Firm's overcharging. By accurately conveying the details of this overcharging to the DWP the Respondent necessarily overstated the Firm's fees as alleged.

16.34 The Tribunal rejected the Respondent's account that the insurance monies were omitted in error from the information conveyed to the DWP. The correspondence with the DWP about the possibility of an overpayment of benefits to GGF had begun in June 2011. By the date of the first of the two letters with which this allegation was concerned, 5 February 2013, the Respondent had had extensive correspondence with the DWP about their claim. The Tribunal did not find the Respondent's evidence that the insurance payment, which included the monies for GGF's jewellery and which was paid into his/the Firm's account in May 2012, had slipped his mind to be credible. Neither did the Tribunal find the submission that he may have included this sum in a Statement of Assets sent to the DWP in May 2011 (something Mr Hamer described as a reasonable inference based on this being sent to the DWP shortly after the Respondent had paid for the probate valuation of the jewellery) to be an adequate answer to an allegation based on letters sent in February 2013 and October 2015.

16.35 As stated in relation to allegation 1.1, the Tribunal had not found the Respondent a compelling witness in relation to the overcharging. The Tribunal accepted and had regard to the submission that the more improbable the alleged event, the more cogent was the evidence required in order to prove it on the balance of probabilities. Given the overcharging found proved, the formal and protracted correspondence with the DWP about their claim against the estate of GGF, and the Respondent's appeal against the amount said to be owed in December 2012, the Tribunal considered that it was more likely than not that this sum was in his mind and that he nevertheless omitted it from the two letters.

16.36 The Tribunal did not think it likely that an experienced solicitor in correspondence with the DWP about repayments would forget the receipt of money for jewellery stolen from the Firm's premises. These were unusual circumstances, the Respondent was in correspondence about related matters over an extended period of time and had overcharged the estate during the same period. The Tribunal found proved to the requisite standard that the Respondent had knowingly provided incomplete and/or inaccurate information in failing to notify the DWP of the sum in the region of £3,035 to £3,525.72 received in respect of an insurance payment for stolen jewellery and had also overstated the legal fees that the Firm had incurred.

Breach of the Principles

16.37 The Tribunal again had regard to the test for conduct lacking integrity set out in Wingate. The Tribunal had found that the Respondent had provided misleading information to the DWP, had rejected his account that this was an oversight and found that it was more likely than not that the insurance monies received were in the Respondent's mind when he wrote the letters of 5 February 2013 and 7 October 2015 to the DWP. The Tribunal had also found that details of the financial position of the estate conveyed to the DWP included overstated fees. The DWP was a public body seeking to ensure public funds were protected. The Tribunal accepted the submission made on behalf of the Applicant that a solicitor acting with integrity would have included the insurance monies in the information he conveyed to the DWP. Similarly, the Tribunal accepted that a solicitor acting with integrity would not have conveyed overstated legal fees to the DWP (or indeed to any third party). To do so was to fail to adhere to the ethical standards of the profession which require a high degree of probity in relation to billing, client monies and representations to third party creditors of the

estate with whom the Respondent's own interests as residuary beneficiary conflicted. The Tribunal found proved to the requisite standard that the Respondent's conduct had lacked integrity in breach of Principle 2.

16.38 The critical importance of probity with regards to client monies and charging meant that given the above findings the Tribunal also considered that public trust in the Respondent and in the provision of legal services would be undermined. The alleged breach of Principle 6 was accordingly also proved to the requisite standard.

The Tribunal's decision concerning dishonesty in relation to allegation 1.2

16.39 The Tribunal applied the two-stage test from Ivey set out above. The Tribunal had found on the balance of probabilities that the Respondent had knowingly provided incomplete and/or inaccurate information to the DWP and had overstated the legal fees that the Firm had incurred. That the insurance pay-out money should have been disclosed was something which was self-evident and which the Respondent had acknowledged. The Tribunal had rejected the Respondent's account that it was omitted in oversight. The Tribunal found that ordinary decent people would regard such conduct as dishonest. The Tribunal accordingly found the aggravating allegation of dishonesty proved to the requisite standard in relation to allegation 1.2.

17. **Allegation 1.3: On or around November and December 2015, the Respondent failed to correct the DWP in respect of the true position of the monies owed to it and/or improperly accepted a settlement of £3,500. In doing so, the Respondent breached any or all of Principles 2 and 6.**

The Applicant's Case

17.1 As stated above, in January 2013 the Respondent withdrew his appeal against the DWP's calculation of the sums owed to it (£22,363.68). The DWP's consistent position was that, in order to protect public funds, it was entitled to recover the sum properly due to it from the estate. The DWP would only accept any lesser sum if it was satisfied that the estate did not hold the requisite funds, i.e. the estate was insolvent.

17.2 Although the figure varied, the DWP had consistently sought over £17,000. It was said by the Applicant in the Rule 12 Statement to be unclear how the DWP came to accept £3,500 in full and final settlement.

17.3 As set out above, on 7 October 2015 the Respondent wrote to the DWP indicating that further legal costs had been incurred and enclosing accounts which showed that there was a deficit in the estate in the sum of £9,130.11, stating that the estate was therefore insolvent and not able to make repayment of the sum claimed for overpaid income support and pension credit (£22,363.68). The letter included a copy of the revised estate accounts which provided a breakdown including legacies of £3,500. As stated in allegation 1.2, the revised accounts did not include the sum representing the insurance pay-out received by the Respondent in respect of the stolen jewellery.

17.4 In a reply dated 3 November 2015, the DWP reminded the Respondent that "creditors have to be repaid in a specific order before the legacies can be discharged" and stated that the £3,500 bequeathed should be set against their claim as payment. The DWP

asked the Respondent "to repay the £3,500 as settlement of the estate within 28 days of receipt of this letter."

17.5 The Respondent responded on 13 November 2015 and noted that the DWP claimed that the £3,500 bequeathed would be set against the DWP's claim as payment. He requested confirmation that the payment of £3,500 would be in full and final settlement of the claim against the estate. On 18 November 2015, the DWP replied and stated that they could accept £3,500 to settle the claim because there was not enough money in the estate to pay back the full amount. They further stated:

> *"We will send a receipt that will show the outstanding balance. We will not pursue payment of this amount, but if more assets are found they should be used to pay off the balance".*

17.6 The Respondent paid £3,500 to the DWP on 1 December 2015. At the date of this payment £13,310 remained on the client account (excluding the sum in the region of £3,035 to £3,525.72 representing the insurance monies for the stolen jewellery). There was said to have been no indication on the file of any further correspondence with the DWP. Even on the revised estate accounts at that time there was £16,553.57 due to the DWP and the Applicant submitted that the only explanation for the DWP's acceptance of £3,500 was that it was a mistake or misunderstanding on the DWP's part.

17.7 When asked by Ms Taylor about the balance of £13,310.37 remaining on 1 December 2015, and whether that should have been money due to the DWP, the Respondent stated:

> "*The DWP out of the blue rather made an offer of £3,500 in settlement and the last thing I was going to do was reopen any dialogue with the DWP".*

17.8 The Applicant's case was that, as Executor, the Respondent had a responsibility to administer the estate in accordance with the provisions of the will and legal requirements. The DWP was a creditor to the estate and, having decided to withdraw the appeal, the Respondent had no basis to dispute the sum claimed by the DWP. Even on the revised estate accounts, which the Respondent had himself prepared, the DWP was entitled to receive £16,553.57 to pay into public funds. It was submitted to be improper in all of the circumstances to agree a figure of £3,500 with the DWP or, at least, to fail to correct the DWP's misunderstanding.

Breach of the Principles

17.9 The conduct alleged was submitted to constitute a breach of Principles 2 and/or 6. It was submitted that a solicitor acting with integrity would have ensured that the correct sums were paid to the DWP, a public body managing public funds. The Respondent was fully aware that it was a low offer and was alleged to have taken advantage of any mistake or misunderstanding that the DWP may have made. A solicitor acting with integrity would have informed the DWP of the correct position.

17.10 The conduct alleged was also submitted to have undermined public trust and confidence in both the Respondent and the provision of legal services in breach of Principle 6.

Dishonesty alleged in relation to allegation 1.3

17.11 The Applicant referred again to the dishonesty test set out in Ivey and relied upon the Respondent's comments made to the FIO set out above.

17.12 The Applicant's case on dishonesty was in summary:

- The Respondent was fully aware from correspondence that the DWP could only accept a sum less than that due if the estate genuinely did not hold the funds. The Respondent knew that the DWP was due significantly more than the £3,500 agreed and that it was improper to take advantage of a mistake or misunderstanding of the DWP.

17.13 It was submitted that such conduct would be regarded as dishonest by the standards of ordinary decent people.

17.14 It was submitted that an honest solicitor would have paid the DWP what it was properly due in December 2015 (if not before) (i.e. approximately £20,000). An honest solicitor would not have settled the claim for £3,500, and then "drained" the estate over the subsequent years for his own benefit under the pretence of legal expenses which were not properly incurred. It was submitted that in these circumstances, the Respondent was dishonest by the standards of ordinary decent people.

The Respondent's Case

17.15 It was admitted that in November and December 2015, the Respondent did not correct matters and inform the DWP that there was another £3,525.72 in the estate in respect of the insurance payment for GGF's stolen jewellery (less the sum due to the Firm as a result of damage to its property as a result of the break in). There was submitted to be no evidence that the Respondent failed to correct the DWP in respect of what monies might be due to it from the estate of GGF (a necessary part of the allegation), assuming, which was submitted to be debatable, that he owed any duty to the DWP to make any such correction. In any event, the Respondent's case was that the DWP was fully aware what money was owed to it. This was demonstrated by numerous letters from 5 January 2012 onwards in which the DWP had stated what was owed (an assessment informed by the information the Respondent had provided).

17.16 As to the assertion that the Respondent "improperly accepted a settlement of £3,500", the Respondent's case was that the DWP itself put forward the figure of £3,500 and chose to settle its claim against the estate for that amount. It was submitted that the author of the Rule 12 Statement had candidly accepted that "The only explanation is that it was a mistake or misunderstanding on the DWP's part". It was noted by the Respondent that the author of the DWP's letter of 3 November 2015 in which the offer was made had been handling the matter since October 2013. The author had written several letters to the Respondent in which she repeatedly referred to the amount of the DWP's claim. She was described throughout as "Operations Manager".

17.17 By the time of the DWP's offer to settle their claim for £3,500 the dialogue had been ongoing for over four years. The Respondent had made clear his concerns about the way the DWP had gone about its claim (pursuing a claim after death in circumstances

where they had previously settled matters with GGF during her lifetime and then immediately began making overpayments again despite seemingly having investigated her financial circumstances). When he replied on 13 November 2015 to the DWP's offer letter he specifically asked whether this was in full and final settlement. By letter dated 18 November 2015 the DWP confirmed "We can accept £3,500 to settle this claim." Subsequently on 3 December 2015 the same Operations Manager wrote and thanked the Respondent for the payment of £3,500.

Breaches of the Principles

17.18 It was denied that on or around November and December 2015, the Respondent failed "to correct the DWP in respect of the true position of the monies owed to it and/or improperly accepted a settlement of £3,500". It was denied that he breached Principles 2 and 6.

17.19 Mr Hamer submitted that it was untenable to suggest that the Respondent took advantage of the DWP. The DWP's claim was being handled by an official described as an Operations Manager which suggested a degree of seniority. The £3,500 proposal was made by the DWP. The DWP was aware of their claim and the assets of the estate. The Respondent asked for, and received, confirmation that the settlement was for the entire claim. The Applicant did not call any evidence from the DWP to suggest that it misunderstood the offer it made in November 2015 (nor had the DWP ever come back and suggested that the settlement was based on a mistake or should otherwise be re-opened). It was submitted that on these the Respondent ought not to be found guilty of a breach of Principle 2 and a lack of integrity within the Wingate case, or a breach of Principle 6.

Response to the allegation of dishonesty in relation to allegation 1.3

17.20 Mr Hamer repeated his submissions about inherent improbability and stronger evidence that something unlikely occurred being required before, on the balance of probability, its occurrence will be established.

17.21 The Respondent denied that he had improperly accepted a settlement of £3,500 as set out above. Mr Hamer noted that the allegation was that it was improper of the Respondent "to take advantage of a mistake or misunderstanding made by the DWP" and that an honest solicitor would not have settled the claim for £3,500. Mr Hamer submitted that there had been no evidence from the DWP presented that it made a mistake in December 2015 nor that the DWP was unaware of its rights. The Applicant had stated in the Rule 12 Statement that the only explanation for the settlement figure was that it was a mistake or understanding on the DWP's part. Mr Hamer stated this was speculation that may or may not be correct. He also reminded the Tribunal that the matter was being handled within the DWP at a senior level by someone who had been involved in the case for over 2 years.

17.22 Further, the Respondent had, in 2013, sought to settle the claim for a substantially higher figure but his attempts to do so had been rejected. It was submitted that the allegation of dishonesty was without foundation.

The Tribunal's Decision

17.23 The Tribunal carefully reviewed the exchange of letters between the Respondent and the DWP leading up to the settlement of the DWP's claim against GGF's estate for £3,500. In their letter dated 18 November 2015 the DWP had stated:

> "*We can accept £3500.00 to settle this claim. This is because there is not enough money in the estate to pay back the full amount".*

17.24 Prior to this, by letter in August 2015, the same individual, as Mr Hamer noted described as Operations Manager, stated that the amount owed was £22,363.56. Whilst, as Mr Hamer had also noted, it was true that no evidence had been called from the DWP to explain why the offer to accept £3,500 had been made, the Tribunal considered that it was clear from the face of the correspondence.

17.25 It was clear from the documentation before the Tribunal, and the Respondent did not dispute, that the DWP had consistently sought to recover in excess of £17,000 in respect of overpayments made to GGF. As set out above in the extract from the DWP's letter of 18 November 2015, the confirmation that £3,500 could be accepted was expressly stated to be "because there is not enough money in the estate to pay back the full amount". The accounts that the Respondent had sent to the DWP showed that the estate was insolvent (and excluded the insurance pay-out monies).

17.26 The Tribunal accepted that the Respondent had queried the initial offer to settle for £3,500 and asked whether this was in full and final settlement of the DWP's claim against the estate. However, the Tribunal found the Respondent's account of his actions in failing to provide further information to be contrived, self-serving and unpersuasive. When confirming that £3,500 could be accepted as there was not enough money in the estate to pay back the full amount the DWP also expressly stated:

> *"We will send a receipt that will show the outstanding balance. We will not pursue payment of this amount, but if more assets are found they should be used to pay off the balance."*

17.27 Even by the accounts that the Respondent himself had submitted, leaving aside the exclusion of the insurance monies and the level of the Respondent's fees, there was £16,553.57 available to repay to the DWP. The Respondent had withdrawn his appeal against the money said by the DWP to be owed. The DWP had made it clear that if more assets were found they should be used to pay off the balance. The Tribunal considered that as a solicitor corresponding with a public body the Respondent had a duty to correct the DWP or, as a minimum, confirm in response to their letter of 18 November 2015 that there were additional funds available. The Respondent had told the FIO that when the DWP had made an offer of settlement for £3,500 "rather out of the blue" that "the last thing I was going to do was reopen any dialogue with the DWP". Given his roles as solicitor, sole Executor and residuary beneficiary, the Tribunal considered that the Respondent had a clear duty to provide fuller information to a creditor of the estate he was administering.

Breaches of the Principles

17.28 The Tribunal had further regard to the case of Wingate and the test for conduct lacking integrity. In [100] Lord Justice Rupert Jackson states that a solicitor conducting negotiations will take particular care not to mislead and is "expected to be even more scrupulous about accuracy than a member of the general public in daily discourse." The Tribunal considered that the Respondent's position was analogous to such negotiations. In the circumstances in which the Respondent found himself, as sole Executor and residuary beneficiary corresponding about public funds with a public body that had for whatever reason seemingly failed to take account of the funds available when stating £3,500 would be accepted as the estate was insolvent, integrity required that the Respondent clarify the true position. The Respondent did not go far enough in simply asking for confirmation that the £3,500 would be in full and final settlement against the estate.

17.29 It was not open to a solicitor acting with integrity, and adhering to the ethical standards of the profession, to gloss over the context of the DWP's offer. The Respondent's comments to the FIO indicated that he considered the DWP had brought the position on themselves. Whilst this may have been the Respondent's opinion the Tribunal considered that it was overwhelmingly clear that a solicitor acting with integrity would have done very much more to inform the DWP of the funds available for settlement of their claim (even where this information had previously been provided by the Respondent). The Respondent had improperly taken advantage of a third party. The Tribunal found proved to the requisite standard that his conduct in doing so lacked integrity in breach of Principle 2.

17.30 Failing to inform the DWP of the correct position, particularly in circumstances where the Respondent stood to benefit personally either as residuary beneficiary or through legal fees associated with the administration of the estate, meant that given the above findings the Tribunal also considered that public trust in the Respondent and in the provision of legal services would be undermined. The alleged breach of Principle 6 was accordingly also proved to the requisite standard.

The Tribunal's decision concerning dishonesty in relation to allegation 1.3

17.31 The Tribunal applied the two-stage test from Ivey set out above. The Tribunal had found on the balance of probabilities that the Respondent had taken unfair advantage of the DWP by failing to inform the DWP as to the true position of monies owed and available to it when he improperly accepted a settlement of £3,500. The Respondent had been aware that there was substantially more than £3,500 available for payment towards the money owed to the DWP. He was aware that the DWP had consistently sought repayment of over £17,000. He was aware that the DWP was seeking to protect public funds, that he was obliged to administer the estate according to the law and that the DWP was a creditor of the estate. The Respondent knew that the DWP did not consider that the DWP regarded the debt as discharged by the settlement of £3,500 and had stated as set out above "if more assets are found they should be used to pay off the balance." The Tribunal found proved on the balance of probabilities that failing to correct the DWP as to the true position and improperly accepting the settlement would be regarded by ordinary decent people as dishonest.

18. **Allegation 1.4: On or around 3 December 2015 onwards, having agreed a settlement with the DWP for £3,500 which stated that "if more assets are found they should be used to pay off the balance", the Respondent failed to notify the DWP of, or pay the DWP, the sum in the region of £3,035 to £3,525.72. In doing so, the Respondent breached any or all of Principles 2 and 6.**

The Applicant's Case

18.1 In May 2012, the Respondent paid the insurance monies (for the stolen jewellery) of £3,525.72 into his personal account. The sum (less "office monies") was omitted from the estate accounts as set out above.

18.2 The Respondent explained that this was an error. The Applicant's case, however, was that he must have been aware of this money because, on 29 May 2019, the Respondent paid £3,400 into the Firm's client account. However, at that point no notification or payment was made to the DWP.

18.3 In response to Ms Taylor's questions sent to the Respondent on 23 March 2020, the Respondent stated that he had paid the insurance money into an account that he used for VAT credit and was earning some degree of interest. He said that he was prompted to move the money to the Firm's client account in May 2019 because the VAT aspect of the account was not being used any longer and the account therefore became dormant. Ms Taylor asked the Respondent why he had not informed the DWP of the additional assets to the Estate and the Respondent stated:

> *"The DWP had mistakenly overpaid a 90 year old for some considerable years and when she was approximately 93 or 94 they made a claim against her and apparently that claim was satisfactorily dealt with in some way. The DWP then continued to overpay her and I have no idea how and so my feelings were that the DWP had really brought this situation upon themselves by their poor management of this old lady".*

18.4 It was submitted by the Applicant that whilst the assets were always available, and had not been "found" as such, they were new for the purposes of the agreement with the DWP (since the Respondent had not previously notified them of those assets) and the DWP ought to have been notified or paid.

Breaches of the Principles

18.5 The conduct alleged was submitted to have breached Principles 2 and/or 6. Having reached a settlement with the DWP on the basis that additional payment would be made if further assets were found, it was submitted that a solicitor acting with integrity would have notified the DWP and made further payment when further assets were found. It was not the Respondent's role to punish the DWP for what he considered to be the mistaken overpayment of benefits.

18.6 The conduct alleged was also submitted to undermine public trust and confidence in both the Respondent and the provision of legal services in breach of Principle 6.

Allegation of dishonesty in relation to allegation 1.4

18.7 The Applicant referred again to the dishonesty test set out in Ivey.

18.8 The Applicant's case on dishonesty was in summary:

- The Respondent was fully aware that he improperly held the insurance pay-out and that this was due to the DWP, and that it was improper to withhold this sum from the DWP.

18.9 It was submitted that such conduct would be regarded as dishonest by the standards of ordinary decent people.

The Respondent's Case

18.10 As set out above, it was admitted that following the settlement of the DWP's claim against the estate in December 2015, the Respondent did not notify the DWP of, or pay the DWP, the sum of £3,525.72. The Respondent's case was that no additional assets were "found" after 3 December 2015 for the reasons set out above. The insurance monies had been received by the Firm in May 2012, some 3½ years earlier. The Respondent's evidence was that it did not occur to him in May 2019, when closing the relevant account, that he was under a professional obligation or duty to notify or pay the DWP the insurance monies following the settlement reached years previously. He stated that it never occurred to him that he ought to have gone back to the DWP at that time.

18.11 As mentioned above, this was a long-running dispute with the DWP. There had been correspondence over a considerable period during which the Respondent expressed his concern at the time it was taking to bring the administration of the estate to a conclusion, and the way the DWP had gone about its claim. In his witness statement the Respondent stated:

> *"On reflection now my actions in 2019 may have been influenced by my assessment that the DWP had largely brought the situation upon themselves as a result of their inefficient handling of [GGF's] claims for income support and pension support during her lifetime. However, it never occurred to me that I ought to go back to the DWP at that time."*

He also stated that he readily accepted with hindsight and acknowledged that he should have realised in May 2019 that the insurance pay-out for the jewellery had possibly been omitted from the figures supplied to the DWP in October 2015 on which the previous settlement, some four years earlier, had been based.

18.12 Mr Hamer submitted that what happened in May 2019 was simply that the Respondent transferred £3,400 from one account to the Firm's client account and posted the sum on GGF's ledger card. The transfer was made for the simple reason that by this date the relevant account was to be closed as it was no longer required as a deposit for VAT payments by the Firm. By this date, May 2019, the DWP claim was long-settled and it was submitted that it would be remarkable if many practitioners might be expected to recall the correspondence from November 2015, and consider that they would now be

expected to go back to the DWP and say that there were additional funds that were overlooked at the time of the settlement. It was also submitted that the Respondent had no duty towards the DWP after the settlement was concluded. Mr Hamer stated that the Applicant had produced no authority to indicate that the Respondent owed any such duty to the DWP.

Breaches of the Principles

18.13 Mr Hamer referred the Tribunal to the comments in Wingate that neither courts nor professional tribunals must set unrealistically high standards. The duty of integrity does not require professional people to be paragons of virtue. It was submitted that neither Principle 2 nor Principle 6 should be found to be established.

18.14 A letter from the Respondent's solicitors dated 23 February 2021, the day before the hearing, was placed before the Tribunal which stated:

> *"… we confirm that our client has placed us in funds in the sum of £3400, together with an additional sum of £238 by way of nominal interest. We are instructed by our client to contact the DWP in order to confirm and agree the arrangements which will be necessary for that sum to be paid to the DWP (representing the insurance payment in respect of the jewellery items) in further settlement of the over payment of benefits claim."*

Response to allegations of dishonesty in relation to allegation 1.4

18.15 Mr Hamer repeated the overarching submissions on inherent probability, the burden of proof and dishonesty as summarised above.

18.16 Mr Hamer submitted that the Applicant was required to prove that the Respondent was fully aware that he improperly held the insurance pay-out and that this was due to the DWP. Mr Hamer submitted that in order to establish dishonesty in respect of allegation 1.4, the Applicant would need to satisfy the Tribunal to the requisite standard of proof that the Respondent knew from December 2015 onwards that he should have paid the insurance monies to the DWP and he deliberately kept the money for himself throughout this period. Such an assertion was described as improbable when the insurance pay-out remained at all time in an account designed for VAT and in May 2019 the sum representing the value of GGF's stolen jewellery was transferred from this account to the Firm's client account and posted to the estate ledger.

18.17 Mr Hamer invited the Tribunal to have regard to the first limb of Ivey as well as Re H. The Respondent was submitted to have given a perfectly reasonable explanation why he paid the insurance monies into the account designed for VAT, and again an explanation why he later transferred £3,400 representing the value of the stolen jewellery to the ledger account. It was submitted that his conduct would not be regarded as dishonest by ordinary decent people and that the allegation of dishonesty was without foundation.

The Tribunal's Decision

18.18 The Respondent admitted the underlying facts in that he accepted that when he closed the relevant account, in May 2019, he did not inform the DWP of any aspect of this. He denied that any professional obligations were breached on the basis that this was inadvertent and, in any event, he had no continuing duty to the DWP years after the settlement.

18.19 On his own case, the Respondent was plainly aware of the relevant money as he transferred it from one account to another in May 2019. Mr Hamer had summarised what had happened as the Respondent simply transferring £3,400 from one account to the Firm's client account and posting the sum on GGF's ledger card. Posting the sum on GGF's ledger card demonstrated that the Respondent had not overlooked the fact that the money related to GGF's estate.

18.20 The Tribunal did not consider it to be credible that the Respondent was unaware at the time of transferring this sum and posting it on GGF's ledger card of the surrounding circumstances, which were unusual. The money originated from an insurance pay-out following the theft of this client' jewellery from the Firm's offices. The administration of the relevant estate had given rise to a long running dispute with the DWP which was ultimately settled by the DWP making an offer "out of the blue", in the Respondent's words, to settle for what he knew was less than was owed and available.

18.21 The Tribunal had previously found that the Respondent had not done enough to inform the DWP of the correct position when their claim was settled in November 2015. The settlement with the DWP, the possibility of which being reopened was used by the Respondent as a justification for billing during periods of inactivity on the file as set out above under allegation 1.1.2, was expressed by the DWP to be on the basis that if any more assets were found they should be used to pay off the balance. In this context, including his comments to the FIO that the DWP had "really brought this situation upon themselves by their poor management of this old lady" the Tribunal found it more likely than not, and to be proved on the balance of probabilities, that the Respondent had not forgotten about the obligation to use any further assets found to pay towards the balance owed. Whilst the money was not "found" in that it had been available since the insurance funds were received by the Respondent, the closing of the relevant account, the transfer to the Firm's client account and the posting of the sum on GGF's ledger were triggering events which should have led the Respondent to notify the DWP about the funds. The Tribunal noted that shortly before the hearing the Respondent had belatedly instructed his solicitors to make contact with the DWP to explore repayment of this sum.

Breaches of the Principles

18.22 The Tribunal accepted the Applicant's submission that having reached a settlement with the DWP on the basis that additional payment would be made if further assets were found, a solicitor acting with integrity would have notified the DWP and made further payment when further assets came to light. The Tribunal had found that the Respondent was aware of the monies in May 2019, through the triggering events of the closing of the account, the transfer of the funds and the entering of the sum on GGF's ledger and of his obligation to make further payments. The failure to do so or to contact the DWP

at all was conduct which failed to adhere to the ethical standards of the profession. The Respondent put his own interests above those of a creditor of the estate seeking to protect public funds. The Tribunal found proved on the balance of probabilities that the Respondent had thereby breached Principle 2.

18.23 Failing to take steps to inform the DWP of the additional money when the triggering events set out above brought it to light again was also conduct which the Tribunal considered would undermine public trust in the Respondent and in the provision of legal services. The alleged breach of Principle 6 was accordingly also proved to the requisite standard.

The Tribunal's decision concerning dishonesty in relation to allegation 1.4

18.24 The Tribunal applied the two-stage Ivey test. The Tribunal had found that the Respondent was aware, in May 2019, of the obligation to put additional available sums "found" or available when the triggering events described above brought them to light, towards the money owed to the DWP. The Tribunal accepted that the Respondent had an otherwise unblemished disciplinary history, and Mr Hamer's submissions about the inherent improbability of such an experienced professional taking such steps for what amounted to relatively modest sums of money. However, viewed in the context and pattern of conduct set out above, the Tribunal found that the Respondent had knowingly failed to do inform the DWP of the available money and had put his own interests above those of a creditor of the estate. The Tribunal found proved to the requisite standard that ordinary decent people would regard such conduct as dishonest.

Previous Disciplinary Matters

19. There were no previous Tribunal findings.

Mitigation

20. Mr Hamer stated that the Respondent had cooperated fully with the investigation throughout, and had admitted the underlying facts at the outset in his Answer. Subsequently, in his witness statement, he had not disputed the underlying facts. He was open and cooperative with the FIO, Ms Taylor.

21. Mr Hamer stated that the Respondent was a retired solicitor who was unlikely to seek to practise again. He had been a solicitor for some 46 years and ran his own practice for 33 years. The allegations and the proceedings had taken a heavy toll on him. Mr Hamer stated that the Respondent had also paid a heavy financial price for the investigation and its consequences.

22. The Respondent had no previous regulatory or criminal history. Mr Hamer submitted that the case was far removed from where a solicitor had "raided" the client account for personal gain and that the dishonest acts found by the Tribunal were more a lack of judgement arising from wishing to give effect to the wishes of an elderly client. The Respondent was a sole practitioner with no staff with whom to discuss the matter.

23. Mr Hamer submitted that the facts in this case were unusual and that the matter was exceptional. The Firm was a properly run practice and following a thorough investigation issues were only identified with the administration of one estate. The conduct found proved related to a single client file, if not a single incident. The Respondent had recently instructed his solicitors to pay £3,400 (plus interest) to the DWP.

24. Mr Hamer submitted that when considering whether 'exceptional circumstances' existed such that strike-off should not be the sanction applied notwithstanding the findings of dishonesty, the Tribunal was entitled to take all relevant circumstances into account when carrying out its balancing exercise. He referred the Tribunal to [54] in the Tribunal's Guidance Note on Sanctions (8th Edition) which stated that "As a matter of principle nothing is excluded as being relevant to the evaluation, which could therefore include personal mitigation." Mr Hamer invited the Tribunal to consider a suspension of up to five years as an alternative to strike-off from the Roll.

Sanction

25. The Tribunal referred to its Guidance Note on Sanctions (8th Edition) when considering sanction. The Tribunal assessed the seriousness of the misconduct by considering the level of the Respondent's culpability and the harm caused, together with any aggravating or mitigating factors.

26. In assessing culpability, the Tribunal found that the motivation for the Respondent's conduct found proved was personal financial gain. The conduct was sustained and could not be described as spontaneous. As set out above, given his role as Executor, Trustee and residuary beneficiary, the Tribunal considered that the Respondent was in a position of heightened trust. He was an extremely experienced solicitor, having run his own practice for 33 years and having been admitted to the Roll in 1974. The Tribunal acknowledged that the Respondent had not misled the Applicant. The Tribunal found that the Respondent was fully responsible for his actions, with a high degree of culpability.

27. The Tribunal then turned to assess the harm caused by the misconduct. The Tribunal considered that to some extent GGF had been misled by the approach, described above, that the Respondent had taken to witnessing her will on the basis that if challenged elements of it would fail. He had taken it upon himself to make this judgement and had not explained the position adequately to GGF which involved some degree of harm. More overtly, when administering the estate the DWP and the public purse had been harmed. The sums involved were not huge, but they represented a significant and high percentage of the value of a modest estate and the harm was nevertheless real. The reputational harm to the profession of a solicitor acting dishonestly when administering an estate was very serious and something which should have been obvious to the Respondent.

28. The misconduct found proved was aggravated by the fact that the allegations included four findings of dishonest conduct. The conduct was repeated and extended over time. The Tribunal considered that by concealing the true value of the estate in his correspondence with the DWP the Respondent concealed the degree of personal financial benefit that he obtained whilst administering it. The fact that the Respondent

should have known that dishonestly depriving the public purse of funds properly due was conduct in material breach of his obligations as a solicitor to protect the public and the reputation of the legal profession was a further aggravating factor.

29. The Tribunal noted that the Respondent had no prior disciplinary findings against him and had belatedly taken steps to make good the £3,400 due to the DWP in respect of the insurance money received for the stolen jewellery. The allegations all arose out of a single administration in a career which extended over 40 years, however, there were a multitude of failures in that single administration. The Respondent had cooperated with the Applicant throughout the investigation. He made factual admissions at an early stage. The Tribunal did not consider that the Respondent had demonstrated significant insight into the misconduct found proved, and so this could not be a significant mitigating factor. He was no longer practising and given his age may not have sought to do so again. Mr Hamer had set out outline details of the Respondent's financial position and the significant expenditure incurred defending the proceedings brought by the Applicant.

30. The Tribunal had regard to the case of SRA v Sharma [2010] EWHC 2022 (Admin), and the comment of Coulson J that, save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck of the Roll. The Tribunal was not persuaded that any exceptional factors were present such that the normal penalty was not appropriate. As stated in Sharma, in considering what amounts to exceptional circumstances, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, or over a lengthy period of time; whether it was a benefit to the solicitor, and whether it had an adverse effect on others. The nature of the dishonesty involved overcharging and raising improper invoices over a period of several years and providing misleading and/or improper information and communications to the DWP. The conduct related to just one client file, but to many actions over a long period of time. It was not momentary, benefitted the Respondent personally and had an impact on others, most directly the DWP.

31. The Tribunal accepted that personal mitigation may be taken into account as part of the balancing exercise it was required to undertake, but did not consider that in the above context the matters raised by Mr Hamer in his submissions or by the Respondent in his evidence and pleadings amounted to exceptional circumstances as envisaged by Sharma and SRA v James et al [2018] EWHC 3058 (Admin).

32. Having found that the Respondent had acted dishonestly, the Tribunal did not consider that a reprimand, fine or suspension were adequate sanctions. The Tribunal had regard to the observation of Sir Thomas Bingham MR in Bolton v Law Society [1994] 1 WLR 512 that the fundamental purpose of sanctions against solicitors was:

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

The Tribunal determined that the findings against the Respondent, including dishonesty, required that the appropriate sanction was strike off from the Roll.

Costs

33. The Applicant's costs were set out in a statement dated 17 February 2021. Ms Culleton applied for these costs of £31,422.90. Of this figure, £9,222.90 related to the Applicant's own investigation and the remainder to Capsticks' fixed fee. The Capsticks fixed fee, £18,500 excluding VAT, was calculated by reference to the lowest category of fixed fee. No additional costs were claimed in respect of the additional third day which had been required for the substantive hearing as this cost was subsumed within the fixed fee. Mr Banyard's fee, £375, was similarly included within the fixed fee. By reference to the work undertaken, as summarised on the schedule of costs, Ms Culleton stated that the fixed fee equated to a notional hourly rate of £108 which she submitted was reasonable.

34. Mr Hamer noted that the Applicant's Forensic Investigator spent 85 hours on the investigation and producing her detailed report. This was followed by 20 hours of review of the case papers by Capsticks and then 96 hours on investigation, preparation of the Rule 12 Statement and documents for issue. Mr Hamer submitted that given that the Applicant had produced a detailed Forensic Investigation Report, a further 117 hours of work to issue proceedings seemed excessive. He submitted that the claimed 28.4 hours in respect of "directions, Answer, Reply and Case Management" appeared generous. Mr Hamer took no issue with the advocacy fee claimed for the substantive hearing but queried whether 6 hours for attendance by a paralegal was necessary. Mr Hamer submitted that whilst there was a fixed fee arrangement in place, the Tribunal should be concerned with the reasonableness of the time spent and fees charged. He submitted that the Schedule of Costs included a very generous amount of time.

35. The Respondent submitted a signed statement of financial means. As indicated above, Mr Hamer also provided an outline summary of the Respondent's financial position. Without setting out exhaustive detail, the submission was that his means were essentially limited to a house valued at around £380,000 (on which the Respondent had taken out an equity release mortgage) and savings of around £36,000. His income was the state pension.

36. The Tribunal assessed the costs for the hearing. The Tribunal had heard the case and considered all of the evidence. The Tribunal considered that the FIO's investigation costs and Mr Banyard's costs were reasonable. Given the detailed FIO report which had been prepared, the Tribunal shared Mr Hamer's view that 171 hours to issue proceedings was excessive. The hearing bundle was not particularly sizeable, running to 352 pages (of which 133 was the FIO's report). The Tribunal considered that half of the 96 hours claimed for the review of the case papers, investigation, preparation of the Rule 12 Statement and documents for issue was reasonable and a reduction in the costs claimed should be made accordingly. Following the issuing of proceedings, the Tribunal noted the extensive early factual admissions made by the Respondent. The alleged breaches were all contested but this was not a factually or legally complex case. Based on its review of the schedule of costs claimed, the complexity and documentation involved in the case and its experience of comparable cases, the Tribunal considered that the fees reasonably incurred by the Applicant were £25,000.

37. The Tribunal carefully considered the information provided about the Respondent's financial means. He had supplied detailed evidence of his means. The Tribunal did not consider that the information indicated that the Respondent was unable to meet the costs figure that the Tribunal had determined was reasonable. In all the circumstances the Tribunal did not consider that it was appropriate to reduce the costs based on the Respondent's means. The Tribunal ordered the Respondent to pay the Applicant's costs of and incidental to this application fixed in the sum of £25,000.

Statement of Full Order

38. The Tribunal Ordered that the Respondent, PETER HOBSON BROTHWELL, 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 £25,000.

Dated this 26th day of May 2021
On behalf of the Tribunal

E Nally
Chair