[2020] EWHC 3525 (Admin)

Case No: CO/942/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2020

Before :

LADY JUSTICE SIMLER
and
MR JUSTICE PICKEN

- -

Between :

VIDAL EULALIE MARTIN	**Appellant**
- and -	
SOLICITORS REGULATION AUTHORITY	**Respondent**

- -
- -

Ms Nicola Newbegin (instructed by **Leigh Day Solicitors**) for the **Appellant**
Mr Giles Wheeler QC (instructed by **Capsticks Solicitors**) for the **Respondent**

Hearing dates: 8 and 9 December 2020

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Approved Judgment

Lady Justice Simler and Mr Justice Picken:

Introduction

1. Ms Martin, who is the appellant on this appeal but was the respondent below, appeals pursuant to s.49(1) of the Solicitors Act 1974 against an order made by the Solicitors Disciplinary Tribunal ("the Tribunal") on 19 November 2019, striking her from the Roll of Solicitors and ordering her to pay costs (summarily assessed in the sum of £47,000 odd) incurred by the Solicitors' Regulation Authority ("the SRA") in relation to the disciplinary allegations it pursued against her. The order followed an 11 day hearing before the Tribunal. A written judgment was later sent to the parties dated 13 February 2020 ("the judgment").

2. Ms Martin was a solicitor admitted to the Roll of Solicitors on 3 May 2005. In 2010 and 2011 she was working for Bright and Sons solicitors, which had offices in Witham and Maldon, and was based at the Witham office. Her principal work was dealing with probate and estate administration. She left Bright and Sons in 2015, and set up in practice as a sole practitioner and notary at V Martin Legal Services in Romford. She held a practising certificate that was free from conditions.

3. There were nine allegations pursued by the SRA against Ms Martin before the Tribunal (and all but one involved allegations of dishonesty). Of the nine allegations, only two were found proved to the necessary criminal standard of proof, the remainder being dismissed as not proved on the facts.

4. The two allegations found proved were that "whilst in practice as a solicitor at Bright and Sons ("the Firm"):

   Estate of Ms M

   Misappropriation of client money

   1.1 On or after 4 January 2011 she:

   i) procured a cheque from Beneficiary SAM in the sum of £4,700, made payable to herself ("the Cheque");

   ii) failed to pay the Cheque into client account;

   iii) caused or allowed the Cheque to be paid into her own bank account;

   iv) failed to document, justify or explain this transaction on file, adequately or at all;

   v) dealt with the funds as her own;

   and therefore breached all or any of:

   vi) Rules 1(a), 1(b), 1(c), 1(f) and 15(1) of the Solicitors Accounts Rules 1998 ("1998 SARS");

vii) Rules 1.02, 1.04 and 1.06 of the Solicitors Code of Conduct 2007 ("the 2007 Code").

Misleading forensic investigator

1.2.1 On or after 15 June 2017 she made the following representations to the SRA's forensic investigation officer ("FIO") in relation to the Cheque, which were false and/or misleading:

i) that a sort code corresponding to the bank account referred to in allegation iii) above was not and never had been hers, or words to that effect;

ii) that Nationwide Building Society had informed her that the Cheque had been returned, or words to that effect;

and therefore breached all or any of Principles 2, 6 and 7 of the SRA Principles 2001."

5. In relation to both allegations, the Tribunal found dishonesty had been proved, and that this amounted to serious misconduct justifying the sanction applied.

6. On this appeal, Ms Martin, who appears by Ms Newbegin, contends by grounds 1 and 2 that the Tribunal was wrong to find the factual allegations contained in 1.1 and 1.2 proved, and/or those findings were unjust because of serious procedural or other irregularity. Those errors are said by ground 3 to mean that the Tribunal was wrong to hold that there had been misconduct, dishonesty or any breach of the rules governing solicitor conduct. She also seeks by ground 4 to overturn the costs order made against her, both consequentially on the substantive appeals and separately because she contends that the costs order was wrong and disproportionate in any event.

7. The appeal is resisted. For the SRA, Mr Wheeler QC contends that although Ms Martin's appeal is presented in various different ways, in substance it represents a full-scale challenge to the findings of fact made by the Tribunal, and is necessarily advanced in that manner as, on the findings of fact made by the Tribunal, Ms Martin quite plainly acted dishonestly and is guilty of very serious misconduct.

8. We are grateful to both counsel for their detailed submissions both in writing and orally.

The background to allegations 1.1 and 1.2

9. Following the death of Ms M, her residuary estate was left to her niece, Beneficiary SAM, but to whom we shall refer as Ms X. Ms Martin was the fee earner responsible at the Firm for dealing with the estate, which required the sale of Ms M's house, Foxmead, during 2010 and 2011. The house was being actively marketed in late 2010 but no sale had been agreed by the end of that year.

10. There was no dispute before the Tribunal that in late December 2010 significant water damage was discovered at Foxmead, caused by a broken water tank in the loft (assumed to have frozen and burst). Ms Martin spoke to Ms X by telephone on 30 December 2010, and arranged to meet her to look at the damage. The two met at Foxmead on 4 January 2011 and the damage was inspected. As well as visiting the property, Ms X also attended the Firm's offices on 4 January 2011, the SRA's case being that, during

that visit, Ms X wrote a cheque in favour of Ms Martin in the sum of £4,700. Ms X's evidence was that she wrote the cheque in response to Ms Martin's request for funds to repair the damage to the property. However, no such repairs were in fact undertaken before the sale of the property and the estate accounts made no reference to the cost of repairs at the property.

11. Certain conduct alleged by the SRA against Ms Martin initially came to the attention of the SRA in November 2015 when it received a report from Christopher Hayward, who was then the Firm's compliance officer for legal practice. His report set out various concerns about Ms Martin's handling of some matters while at the Firm. The conduct giving rise to allegation 1.1 was drawn to the SRA's attention by a letter from Ms X's solicitors dated 15 August 2016 and related to her handling of the estate of Ms M. The SRA commissioned a forensic investigation of the matters raised by Ms X on 27 September 2016 and a final report was received on 28 September 2017.

12. Ms Martin was first spoken to about the cheque in an interview with Mr Esney, the SRA's forensic investigator, on 13 June 2017 – and so more than six years after the cheque had been written by Ms X. She could not recall receiving or cashing a personal cheque from Ms X. On 14 June 2017 Mr Esney sent Ms Martin a copy of the cheque. It was dated 4 January 2011, payable to her personally and signed by Ms X. Ms Martin was asked to provide answers to questions surrounding receipt of the cheque and the account into which it was paid. She responded by email dated 14 June 2017 as follows:

> "1. I cannot recall receiving the cheque.…
>
> 3.To the best of my recollection, as more than six years have passed since then, the cheque was made out to me personally because the money was owed to me personally. As discussed it is in my nature to help anyone in need and I can only surmise that I must have helped [Ms X] out in her time of need. You stated that the money was paid to me around the time the property was damaged which was unexpected and must have delayed the monies due to her from the estate. I can vaguely remember she had tried, I believe, to get a loan from Lloyds bank but she failed to do so.……
>
> 4. I cannot recall cashing the cheque but my working assumption is that I must have done so. As previously stated more than six years have passed since then and therefore it is impossible for anyone, not just myself, to recall something that happened a long time ago concerning a particular cheque. Nevertheless I might be able to assist further once I've had the opportunity to investigate the matter with the bank.
>
> 5. I do believe that it [account number ending 65] was [mine] but I will investigate this with Nationwide. I stopped using Nationwide actively in 2011 and moved to another bank, which is being used by me since then on a regular basis. …"

13. By a further email dated 15 June 2017, Mr Esney noted that two potential account numbers had been identified. He gave Ms Martin the numbers. He asked her to confirm whether she had ever held the accounts identified. Her response the same day was:

> "..I confirm the account number [ending 53] belongs to me and I note the sort code on the cheque next to the account number is 074456 which does not and has never belonged to me. My sort code is 070116. Bright & Sons can confirm that as it was my main account where my salary was being paid into until sometime in 2011…"

14. By email dated 23 June 2017 Ms Martin wrote to Mr Esney. The email included the following:

> "…As a result I had to go to a Nationwide branch in person to discuss the copy cheque. They inspected the copy cheque printout and stated to me that:
>
> (a) the cheque was presented on 04-01-11;
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> (b) it was processed immediately but was never cleared;
>
> (c) the reason for not clearing is because it has the wrong sort code;
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> (d) it was returned to the paying bank, i.e. RBS on 05-01-11;
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> (e) the copy cheque does not have the stamp "paid" on it, which is usual once a cheque has been processed in order to avoid duplication;
>
> (f) the sort code used was for a Nationwide branch at Swindon and therefore the person who paid it in had, in all likelihood, a readily printed paying in slip from that branch…"

15. In a further email on 23 June 2017, responding to a question from Mr Esney asking whether Ms Martin had ever operated a Nationwide bank account with the sort code 074456 and the account number [ending 53], she responded:

> "Once again, this is something that has previously been discussed and answered. The account number is mine but the sort code is not. To the best of my knowledge and belief and having discussed the matter with Nationwide they have confirmed to me that I have never had such an account. …"

The hearing and the judgment

16. The Tribunal had written evidence from 10 witnesses including Ms Martin and Ms X, and a substantial bundle of documents. All but three of the witnesses attended to give evidence and were cross-examined. In the case of Ms X and Ms Martin the cross-examination was extensive.

17. At the conclusion of the SRA's case, a submission of no case to answer in relation to a number of allegations (including 1.1 and 1.2) was made on behalf of Ms Martin. Ms Newbegin also contended that to continue with allegation 1.1 would amount to an abuse of process and/or a breach of her fair trial rights under article 6 of the Convention because of delay and failures in the investigation which meant that she was denied the opportunity to obtain evidence as to who paid the cheque into her account, and in particular a copy of the paying-in slip that would have accompanied the cheque when it was paid into her account on 4 January 2011, so that a fair hearing was no longer possible. The Tribunal rejected the submission of no case to answer in relation to all allegations to which it related, and concluded that the delays and asserted failings in the investigation and proceedings were not such that Ms Martin's article 6 rights had been or would be breached if the matter proceeded; a fair hearing remained possible. In the judgment, the Tribunal set out the submission of no case in relation to each allegation in respect of which it was pursued, recording the submissions made on both sides and its decision, and also addressed the abuse application, again recording the submissions made by both sides and its decision.

18. On the substantive issues, the Tribunal summarised in some detail the rival cases in relation to allegation 1.1 at paragraphs 10.1 to 10.48. Where relevant we shall return to some of the points made by the parties as recorded in the judgment. At paragraphs 10.49 to 10.58 the Tribunal set out its decision on allegation 1.1 as follows:

> "10.49 The Cheque was made out to the Respondent. The Respondent accepted meeting Ms X on 4 January 2011 (the day the cheque was written and on which it was paid into the Respondent's account). The Respondent acknowledged meeting Ms X at the property which was to be sold but denied that they also met at the Firm's offices on the same day. The Respondent gave evidence that cheques received from her notarial clients were occasionally paid into her personal bank account (the account with the Nationwide Building Society into which the Cheque was paid). The Respondent's evidence was that her paying-in book was at the Firm's offices for this purpose and that the Firm's staff would occasionally pay these cheques in for her without reference to her.
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> 10.50 As the residual beneficiary who wrote the Cheque, Ms X's actions were central to the allegation. The Tribunal considered Ms X's evidence to be generally unreliable. She presented as a somewhat vulnerable witness and her account had changed over time. She had made comments with racial overtones, whilst strongly denying any such attitude or intent. Ms X disputed contemporaneous notes made by her own solicitor, HSD, and the Applicant's FIO, Mr Esney. It was not credible that two experienced professionals would mis-record meetings in the same way. During cross-examination Ms X had disavowed comments made in a previous witness statement stating that she 'hadn't read it'. Nevertheless, whilst the Tribunal approached her evidence with a great degree of caution and care, the Tribunal did not consider that everything that Ms X had said should

inevitably be disbelieved in its entirety. Her evidence was to some extent corroborated by other evidence and she was resolute and clear on key elements of her evidence. The date on which she had stated she met the Respondent (4 January 2011) was corroborated by the Firm's visitor book and the Respondent acknowledged meeting her at the property on that date; the Cheque was dated 4 January 2011 and had been paid into the Nationwide that day. The Tribunal accepted that what Mr Wheeler described as the essence of Ms X's account, that she made payment at the request of the estate's solicitor in respect of damage to the property, had remained unchanged. To that limited extent, and to the extent it was corroborated to that extent by other evidence as mentioned above, the Tribunal found the core of Ms X's account credible.

10.51 The Tribunal considered the Respondent's evidence to be hesitant, evasive and lacking credibility. Her own account had also changed over time; in ways the Tribunal considered significant. The day after she had met with the FIO, Mr Esney, the Respondent had written to him and stated 'to the best of my recollection, as more than 6 years have passed since then, the cheque was made out to me personally because the money was owed to me personally'**.** It was submitted on her behalf that the Respondent was under pressure and trying to think of a reason why Ms X might have written out the Cheque. However, this statement was not made in the heat of the meeting with Mr Esney, but the following day and the Tribunal did not accept this submission. The position was subsequently disavowed by the Respondent. Even allowing for the six years which had passed since relevant events by the time of the interview with Mr Esney, this was a troubling account for the Respondent to have given at any state. There would never have been circumstances in which money should have been owed to her personally by a client (or in this case residuary beneficiary) for whom the Firm held significant funds at the time.

10.52 The Respondent subsequently informed Mr Esney that Nationwide had no records they could refer to, but based on an inspection of the Cheque had told her that it had been rejected. She also informed him that Nationwide had confirmed that she had never held any account with details matching the one into which the Cheque was paid. Mr Esney sought details from the Respondent in order to investigate further and it was subsequently established that Nationwide did have relevant records, the Cheque had not been rejected and the account in question was the Respondent's. The Tribunal did not find the Respondent's account of being provided with plainly incorrect information by Nationwide to be credible or capable of being believed. The Tribunal considered that statements were made by the Respondent to fit the available information and her

perception of her immediate interests before being abandoned when it was clear they were unsustainable. The Respondent had also stated to Mr Esney that she stopped using the relevant account in 2011 whilst her statements demonstrated that a payment of £20,000 was made into the account in 2014. These were not minor matters. The Tribunal found that the Respondent's evidence lacked credibility and her account was not accepted. Whilst not central to its findings on the allegations brought, the Tribunal did not consider there was any persuasive evidence to support the Respondent's contention that the recording of the meeting she had with Mr Esney had been tampered with.

10.53 The Tribunal had careful regard to all of the authorities to which it was referred. In particular, the Tribunal reminded itself that the Applicant must prove its case beyond reasonable doubt; the Respondent simply had to raise a doubt, she was not bound to prove that she did not commit the alleged acts (Woolmington) and that great care must be taken to avoid starting from limited physical evidence (or its absence) and assuming (without sufficient evidence) any deliberate failure or act on the Respondent's part (Soni). In January 2011 the Firm held money for the estate of which Ms X was the residuary beneficiary. This was clear from the financial ledger. There was no reason for a cheque to be made payable to the Respondent on account of any work needed on the property, which was suggested at different times by both Ms X and the Respondent. Both parties accepted that no repair works were in fact completed on the property and that it was sold "as is". The Tribunal considered that it was inconceivable that anyone at the Firm would invite Ms X to write a cheque payable to the Respondent and pay it into her personal account even with the Respondent' knowledge or direction, much less without it. Any such request would have plainly been improper.

10.54 It had been submitted on the Respondent's behalf that Ms X may have written the Cheque of her own volition, out of some misunderstanding about what was required in relation to the damage to the property or indeed for some other reason of her own. Again, the Tribunal considered such an explanation highly implausible. The Tribunal did not find it credible that some form of gift of £4,700 was written out to the Respondent but provided by Ms X to someone else at the Firm (who paid the money into the Respondent's personal account without reference to her). Similarly, the Tribunal did not find it remotely credible that Ms X, who by the Respondent's own account knew the financial position of the estate in some detail at all times, had written out the Cheque for £4,700 unbidden in respect of damage to the property and provided it to someone else at the Firm (who paid the money into the Respondent's personal account without

reference to her and without taking any steps to ascertain what the payment related to).

10.55 Having found the essential element of Ms X's account to be credible, and supported to some extent by the physical evidence of the Cheque which was credited to the Respondent's personal account, having found the Respondent's own account to lack credibility and having found any other explanation for why the Cheque came into existence to be highly implausible, the Tribunal accepted the submission that it was inconceivable that Ms X had written the Cheque for any reason other than she had been asked to do so by the Respondent. Accordingly it found this had been proved beyond reasonable doubt; based on its assessment of the evidence presented the Tribunal was sure the Respondent had asked Ms X to write the Cheque out payable to her.

10.56 Having found that the Respondent had requested the Cheque, and that in response Ms X had written it, the Tribunal was also satisfied beyond reasonable doubt that the Cheque had been provided to the Respondent on 4 January 2011 (the date on the Cheque, the date the Respondent acknowledged they met, and the date that the Cheque was paid into the Respondent's account) and that the Respondent either paid it into her account or knew that this had happened. The Tribunal found any other explanation to be highly implausible.

10.57 The Tribunal heard evidence from the Respondent and Mr DJC that the Respondent was the main earner within the family at the relevant time. With her salary at the time, the Tribunal did not find it credible that the Respondent was unaware of the Cheque being paid into her account. Over £2,200 of the sum credited had been spent before the Respondent's next monthly salary was paid into her account. Given the Respondent's evidence that sizeable payments from commercial clients for her notarial work were paid into her personal Nationwide account from time to time, the Tribunal found it inconceivable that she would not have checked the account balance or statements at any stage before the interview in June 2017, not least for tax purposes relating to her notarial income. Further, the Tribunal did not consider it credible that a receipt of £4,700 could have been overlooked in an account which had a balance of £370.82 before the Cheque was credited and where over £2,200 was spent between 4 and 24 January 2011 when her salary was paid into the account. As stated above, the Tribunal found the Respondent's evolving explanations to be unreliable and to lack credibility. The Tribunal was satisfied beyond reasonable doubt that the funds had been spent as the Respondent's own.

10.58 It was self-evident and not contested that the Respondent had failed to pay the £4,700 into the Firm's client account. The

> Tribunal was also satisfied, and the Respondent did not contest, that she had not documented the payment or explained it adequately on the file. The Tribunal rejected her case that she was unaware of the Cheque, how it came to be credited to her account and that the money was spent from her account without her knowledge. The Respondent's partner had given evidence that he used the Respondent's account and that he believed that he had done so on the day on which the Cheque was paid into the Respondent's account. For the reasons summarised above, the Tribunal found that the Respondent was aware that the money had been paid into her account and it found that allowing the money to be spent from her account by her then partner amounted to dealing with the funds as her own.
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> 10.59 The Tribunal referred to the test for conduct lacking integrity set out in Wingate. The Tribunal considered that procuring a cheque to which she was not entitled, failing to document the transaction and spending (or allowing to be spent) the funds as her own was a stark example of a failure to adhere to the ethical standards of the profession. Once the findings of fact had been made as set out above, the Tribunal considered that a finding that the Respondent had acted without integrity in breach of Rule 1.02 of the 2007 Code inevitably followed. Similarly, procuring a cheque to which she was not entitled from Ms X was self-evidently not in Ms X's best interests and accordingly the conduct amounted to clear breach of Rule 1.04 of the 2007 Code. The Tribunal considered that such conduct was very clearly capable of undermining public trust in the Respondent and the legal profession and that she had therefore acted in breach of Rule 1.06 of the 2007 Code. The Tribunal found that all three alleged breaches of the 2007 Code were proved beyond reasonable doubt.
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> 10.60 Rule 1(a),(b),(c) and (f) of the 1998 SARs required that the Respondent: keep money belonging to others separate from money belonging to her or the practice; keep other people's money in an identifiable client account; use each client's money for their matter only and keep proper accounting records respectively. The Tribunal found that it was proved beyond reasonable doubt that by procuring the Cheque, it having being paid into her account and the funds having been spent as the Respondent's own the Respondent had breached the four elements of Rule 1 of the 1998 SARs as alleged. Given that the funds were paid into the Respondent's personal account and not a client account, and that none of the limited exceptions applied, the Tribunal found beyond reasonable doubt that the Respondent had also breached Rule 15(1) of the 1998 SARs."

19. Accordingly the Tribunal found the following proved beyond reasonable doubt:

    i) Ms X wrote the cheque at the request of Ms Martin;

ii) The cheque was provided to Ms Martin on 4 January 2011, the date on the cheque, the date Ms Martin acknowledged they met, and the date that the cheque was paid into Ms Martin's account;

iii) Ms Martin either paid it into her account or knew that this had happened;

iv) Ms Martin's account had a balance of £370 odd before the cheque was credited and over £2200 was spent between 4 and 24 January 2011 before her salary of about £2500 was paid. It was not credible that she was unaware of the cheque being paid into her account and the Tribunal found that the funds had been spent as her own.

20. Having made these findings, the Tribunal dealt with lack of integrity (at paragraphs 10.59 and 10.60) concluding that procuring a cheque to which she was not entitled, failing to document the transaction and spending or allowing to be spent the funds as her own was a stark example of a failure to adhere to the ethical standards of the Solicitors' profession. The Tribunal concluded that Ms Martin had acted without integrity as a consequence. So far as dishonesty is concerned, the Tribunal applied the test set out in *Ivey v Genting Casinos* [2017] UKSC 67 [2018] AC 391 and at paragraphs 10.61 and 10.62 the Tribunal found dishonesty proved beyond reasonable doubt in light of its earlier findings. Ms Martin contends by ground 3 that the findings of breaches, misconduct and dishonesty and the imposition of sanction all rely upon wrong and/or unjust findings in respect of allegations 1.1 and 1.2 and so cannot be upheld.

21. So far as allegation 1.2 is concerned, once again, the Tribunal set out the rival cases, including as to the submission of no case to answer (at paragraph 11.1 to 11.13). The Tribunal's substantive findings are as follows:

> *"*11.14 As indicated in the Tribunal's decision on allegation 1.1, the Tribunal did not find the Respondent's evidence about what she had been told by Nationwide to be credible. The Tribunal found the Respondent a generally unimpressive witness and unreliable historian. As indicated above, her evidence was vague and hesitant. The Respondent's account was that she had been told by an employee of her bank that the Cheque, a copy of which the Respondent had shown them, did not clear into her account as the sort code was wrong. The Tribunal found it wholly implausible that an employee of the building society would state something fundamentally inaccurate and simple to check and debunk. During an exchange of correspondence with Mr Esney on 15 June 2017, the Respondent had stated that the sort number on the cheque "does not and never has belonged to me". The following day Mr Esney received confirmation from the Firm that the Respondent's salary was paid into an account with the sort code she had stated was not and never had been hers.
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> 11.15 The Respondent had informed Mr Esney by email that "having discussed the matter with Nationwide they have confirmed to me that I have never had such an account...". It was subsequently established that the account number and sort code quoted by Mr Esney, relating to the account into which the

> Cheque was paid, was the Respondent's account. The sort code had changed by virtue of changes made by Nationwide. The Tribunal accepted the submissions made by Mr Wheeler that Nationwide could not conceivably have provided the Respondent with the incorrect information she stated she had received from them. When the Respondent's solicitor contacted the Nationwide he received confirmation that the relevant sort code and account number belonged to the Respondent at the relevant time, and the Tribunal accepted the further submission that there was no reason to think the Respondent would have received a different answer had she asked the same question as she claimed to have done.
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> 11.16 When providing her personal bank statements to Mr Esney, which confirmed that the funds from the Cheque had been credited to her account, the Respondent stated in an email of 26 June 2017 that Nationwide "cannot explain why the amount was only credited and not reversed, since the cheque copy you provided to me appears to have been returned to RBS uncleared as the details were incorrect". The Respondent provided no evidence to support the suggestion that the Cheque was returned. It plainly was not, the funds having been credited to her account, and there was nothing presented on the Respondent's behalf which suggested it was remotely credible that she would have been told something (repeatedly) so demonstrably false by an employee of Nationwide. The Tribunal was satisfied beyond reasonable doubt that the Respondent's account was untrue and was contrived to obscure her own conduct in relation to the Cheque. The Tribunal considered carefully the many glowing testimonials which were presented on her behalf in support of the submission that she had no propensity for such conduct. In assessing the evidence the Tribunal was not required to make conclusions as to the Respondent's motivation in procuring the Cheque, but that it was sure that the Respondent had made misleading statements to Mr Esney concerning the sort code and having been informed by Nationwide that the Cheque had been returned."

22. The Tribunal was satisfied beyond reasonable doubt that making misleading statements to Mr Esney, the SRA's forensic investigating officer, during an investigation, was an unambiguous failure to adhere to the ethical standards of the profession and that Ms Martin had breached principle 2 in consequence. Her conduct would inevitably undermine the trust placed by the public in her and her provision of legal services. Principles 6 and 7 were also found to have been breached. Principle 7 required open cooperation with the regulator and by knowingly making misleading statements the Tribunal was satisfied beyond reasonable doubt that Ms Martin had acted in breach of this requirement.

23. It is unnecessary to refer in any detail to the allegations that were rejected by the Tribunal. In each case the Tribunal found either that facts alleged were not proven to

the requisite criminal standard, or that such deficiencies in, for example, Ms Martin's record keeping as were established did not translate into the misconduct alleged.

The appeal

24. Against that background we turn to consider the grounds of appeal advanced on behalf of Ms Martin. We start with the grounds of challenge in relation to allegation 1.1.

Allegation 1.1

25. In support of her contention that the Tribunal was wrong to find allegation 1.1 proved and/or the decision was unjust because of procedural or other irregularities, Ms Martin relies on five broad grounds summarised as follows:

    i) The Tribunal erred in its approach to, and conclusions in respect of, Ms X's evidence with the result that it was wrong to find that allegation 1.1 was proved.

    ii) The Tribunal erred in law in its approach to allegation 1.1 by failing to give any or any appropriate weight to A's good character.

    iii) The Tribunal erred in its approach to the burden of proof in respect of allegation 1.1 and, in doing so, ignored key gaps in the SRA's case against Ms Martin.

    iv) The Tribunal erred in relying on purported findings in respect of allegation 1.2 to uphold allegation 1.1.

    v) The decision to uphold allegation 1.1 was unjust due to a serious procedural irregularity.

    Before addressing these points, it is convenient to set out the proper approach to appeals against decisions of specialist disciplinary tribunals. Much but not all was common ground.

26. The starting point is to identify the task of this court. There is and can be no dispute that the task of this court is not to engage in a rehearing or re-evaluation of the facts. It is to assess whether the Tribunal was "wrong": CPR 52.21 (3). That means there must be a material error of law, a material error of fact, or an error in the exercise of discretion.

27. Where questions of fact are concerned, we were referred by both sides to a number of well-known authorities dealing with this question including (but not limited to) *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577; *Datec Electronics Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325; *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29; *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600; and *Perry v Raleys Solicitors* [2019] UKSC 5; [2020] AC 352.

28. Ms Newbegin submitted that the threshold for interference by an appellate court with findings of fact and more particularly, inferences drawn from facts found, made by a first instance tribunal after hearing evidence is not as high as some authorities have suggested and can include situations where the fact-finding tribunal has failed to take

into account relevant factors or is wrong in its assessment of those factors that have been taken into account. She contends that this court is entitled to substitute its own view in relation to a tribunal's findings in an appropriate case (see *Law Society v Waddingham & Ors* [2012] EWHC 1519 at [46]) and to adopt what she described as a more interventionist approach. Ms Newbegin placed particular reliance on a passage from the judgment of Clarke LJ in *Assicurazioni Generali* cited by Lord Mance in *Datec* at [46] as follows:

> "17. …Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellant court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence. In the present case, however, while there was oral evidence, its content was largely uncontentious".

29. We do not consider that this passage (or indeed the other authorities she relied on) support the submissions Ms Newbegin made.

30. It seems to us to be clear that the approach of the court when considering a challenge to findings of fact and inferences drawn in any particular case will inevitably depend upon the nature of the issues being determined. For example, in *Waddingham* the primary facts were not in issue at all. In *Datec* the issue was the correctness of the inferences drawn, again from primary facts which were not in dispute, as regards the causation of loss. A number of possibilities had to be weighed by the judge in order to determine causation, and the correctness of his approach to that exercise was challenged. The test approved by Lord Mance in *Datec* in the context of that particular case, was that the appellate court ought not to interfere "unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible": *Todd v Adams & Chope (trading as Trelawney Fishing Co)* [2002] EWCA Civ 509; [2002] 2 Lloyd's Rep 293 at [129] (Mance LJ) approved in *Assicurazioni Generali* at [22] (Clarke LJ) and at [197] (Ward LJ). That is a high threshold applied to the assessment of the fact finder's inferences or evaluation. That is because, although in principle there may be a difference between findings of primary fact, inferences drawn from such facts and the evaluation of factual matters, it seems to us that in practice these often run into one another with significant overlap.

31. In cases where findings of fact depend upon disputed oral evidence and/or an assessment of witness evidence that conflicts, it is well established that appellate courts should be reluctant to interfere because of the advantage the fact-finding tribunal has in having seen and heard the witnesses give evidence and also because the judge who presides over a trial becomes immersed in the evidence in a way that is not replicated on appeal where particular issues are more narrowly focused upon. As has previously been observed, in making decisions at first instance, the fact-finding tribunal has regard to the whole of the sea of evidence presented, whereas an appellate court will only be "island hopping". Moreover, not every detail of the relevant evidence is or could be captured in the reasons given by the judge, as Lord Hoffmann explained in *Biogen Inc* v *Medeva Plc* [1996] UKHL 18; [1999] RPC 1 at p.45, where he referred to the expressed findings being "*always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation*".

32. For these reasons the well-established approach is that an appellate court should not interfere with a finding of fact unless satisfied that the conclusion is "plainly wrong": see *McGraddie v McGraddie* (above) and *Henderson v Foxworth Investments Ltd* (above). That means it must either be possible to identify "*a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence*" (*Henderson v Foxworth Investments Ltd* at [67] (Lord Reed)); or if there is no such identifiable error and the question is one of judgment about the weight to be given to the relevant evidence, the appellate court must be satisfied that the judge's conclusion *"cannot reasonably be explained or justified"* ([67]). Lord Reed made clear that, in determining whether a decision cannot reasonably be explained or justified, "*It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached*." Again, we emphasise, that is a high threshold: see to this effect, *Perry v Raleys* (above) at [63] (Lord Briggs).

33. The effect of these authorities in the context of an appeal against a decision of the Solicitors Disciplinary Tribunal ("the SDT") was summarised in *SRA v Day* [2018] EWHC 2726, where, in addition to what we have said above, a number of additional considerations specific to appeals from decisions of the SDT were identified. First, the SDT is a specialist tribunal particularly equipped to appraise what is required of a solicitor in terms of professional judgment, and an appellate court will be cautious in interfering with such an appraisal. Secondly, decisions of specialist tribunals are not expected to be the product of elaborate legal drafting. Their judgments should be read as a whole; and, in assessing the reasons given, unless there is a compelling reason to the contrary, it is appropriate to take it that the tribunal has fully taken into account all the evidence and submissions. That does not mean that a decision which has failed in its basic task to cover the correct ground and answer the right questions will be upheld. A patently deficient decision cannot be converted by argument into an acceptable one.

34. We adopt and apply the approach set out above in this appeal and, with those observations in mind, we turn to the criticisms made of the Tribunal's findings in relation to allegation 1.1, dealing with them in turn.

I Approach to Ms X's evidence

35. Ms Newbegin emphasised as correct the Tribunal's statement at paragraph 10.50 that *"Ms X's actions were central to the allegation"*: she is alleged to have written the cheque, and is also the only witness who claimed any knowledge of how the cheque came into existence. However, her evidence was unreliable (as the Tribunal found) and, in those circumstances and given a number of other points which Ms Newbegin submits were not taken into account by the Tribunal at all, the only rational response to Ms X's evidence was to reject it altogether.

36. In support of this submission, Ms Newbegin relied on the following. First, the matters identified by the Tribunal itself should have led to a greater degree of caution about Ms X's evidence than that adopted. Certainly, it was perverse to conclude (as the Tribunal did) that her *"evidence was to some extent corroborated by other evidence and she was resolute and clear on key elements of her evidence"* so that the core of her account was accepted. In fact, Ms X's account was not corroborated since Ms X could not recall the date on which she met Ms Martin, there was no evidence that Ms Martin met Ms X at the office and no other evidence that the request for the cheque was made by Ms Martin that she made any request for funds from Ms X. The mere fact that a cheque existed and was paid into Ms Martin's personal account, or that the Tribunal found Ms Martin's evidence to be lacking credibility (discussed below) did not mean that Ms X's evidence was reliable and nor did it mean the "essential element" of her evidence was corroborated.

37. Secondly, the Tribunal was wrong to find that Ms X had been consistent as regards what it referred to as *"the essential elements of Ms X's account"*. In reaching that conclusion, the Tribunal ignored attendance notes made by Mr Hugh Storry Deans (of HGW Solicitors, referred to as "HGW"), Ms X's former solicitors, when Ms X first raised the issue of repair work undertaken in relation to Foxmead. In particular, when Ms X first instructed HGW about the work Ms Martin had undertaken in respect of the sale of the property (repairs which Ms X later claimed she wrote the cheque to pay for) Ms X made no reference to having paid any money to Ms Martin in respect of repairs or otherwise. When Ms X did later claim a memory of having paid for repairs, she said that she paid £5,000 (the wrong sum) in cash (the wrong mode of payment). Ms X did not claim to have any direct recollection of any request being made by Ms Martin. Instead she is recorded as saying *"it all happened a long time ago but she thinks she gave the money to the girl"*. The Tribunal also ignored the inconsistencies between the witness statements prepared by Ms X, and the further inconsistencies between those statements and her oral evidence.

38. Thirdly, Ms Newbegin criticised the fact that the Tribunal overlooked or ignored the stark inconsistency in the oral evidence given by Ms X at the hearing demonstrating, on the one hand, a total lack of recall of the process and events leading to the sale of Foxmead: the clearance process, missing deeds, sellers pulling out, attendance at the property on 4 January 2011 to inspect water damage; and, on the other hand, her claimed clear recollection of the isolated circumstances in which she came to write the cheque made payable to Ms Martin on 4 January 2011 and at her specific request.

39. Fourthly, the Tribunal ignored the clear concerns raised by the SRA's own forensic investigator, Mr Esney, as to whether or not Ms X was likely to misrepresent what had been said or indeed make things up. Mr Esney raised concerns about Ms X's reliability

as early as 22 May 2017, and accepted in his oral evidence to the Tribunal that he would not want to be left alone with her for both their protection. He said, "*It would be more a case of she says, "X" and yes, actually, when you get down to it X becomes Y.*" Ms Newbegin also relied on concerns apparently identified in an attendance note dated 15 August 2018 made by a paralegal at the SRA's solicitors relating to a remark understood to have been made by Mr Deans, noting that Ms X had "*some quite severe mental health issues*" which were clearly capable of *"calling into question [her] reliability and/or credibility as a witness"* (email of 16 October 2018). She submitted that the Tribunal should, at the very least, have caused an investigation of these matters to be undertaken, but instead, merely referred to Ms X as "*somewhat vulnerable*" and failed to address the consequences of that vulnerability.

40. Fifthly, she submitted that the Tribunal failed to take into account in any meaningful way Ms X's racist attitude towards Ms Martin and the potential impact that had on the reliability of her evidence. Finally, the Tribunal failed to take into account Ms X's attitude towards giving evidence, and its likely impact upon her credibility, including her demand for payment *"big time"* (she asked for more than £10,000) if she were to go to London to give evidence. It also failed to take into her account her stated approach to the witness statements provided and signed by her, which Ms X explained to the Tribunal she had *"just signed"* and that she *"didn't read it properly"*.

41. Forcefully and clearly as these submissions were advanced, we do not accept them. Our reasons follow.

42. Although Ms X's actions were central to this allegation, her evidence was not the sole evidence on which the Tribunal relied. There was contemporaneous documentary and other evidence relied on by the Tribunal as follows:

    i) There was an attendance note made by Ms Martin dated 30 December 2010 which recorded her receiving a telephone call about the damage at Foxmead. The note recorded "*to-ing and fro-ing*" in relation to whether the damage was likely to be insured with the conclusion that this was unlikely. Towards the end of the note, the following is recorded, "*I spoke to [Ms X] and she has told me to get on with the work. I have asked Adam to cut a set of keys. He has got somebody going in and I'm giving another set of keys to a neighbour of mine who is a builder and decorator to go and give us an estimate. [Ms X] is coming into the office on the 4 January 2010 to have a look at the damage…"*

    ii) The Firm's log book for Tuesday, 4 January 2011 recorded Ms X arriving at the office at 1 o'clock and leaving at 1.10pm. She was then recorded as arriving at the office again at 1.30pm and leaving again at 1.55pm. Although Ms Martin denied meeting Ms X at the office (on her account they were only at Foxmead together on that day), this document supports the account given by Ms X that she went to the Firm's office where she wrote the cheque.

    iii) The cheque itself is dated 4 January 2011, made out to Vidal E Martin, and drawn on Ms X's account with the Royal Bank of Scotland (number ending 65) in the sum of £4,700. That same amount appears on Ms X's bank statement for the same account, and the sum was debited on 6 January 2011.

iv) Ms Martin's Nationwide Building Society bank statements (account number ending 53) reflect a *"cheque credit"* for £4,700 on 4 January 2011.

v) There was evidence from the Firm's financial ledger that the Firm held money for Ms M's estate of which Ms X was the residuary beneficiary in January 2011. That meant there was no reason for a cheque to be made payable to Ms Martin on account of any work needed at Foxmead. Indeed, both Ms Martin and Ms X accepted that no repair works were in fact completed on the property and that it was sold *"as is."*

vi) The account into which the cheque was paid was Ms Martin's personal account. Her monthly salary from the Firm was paid into that account. As at 4 January 2011, the account balance stood at just over £300 odd. Between 4 January and the 25 January 2011, when her salary of £2,777.70 was paid into that account, cash and other withdrawals (of amounts of £200 and £300 at a time on occasion) were made totalling about £2,200. On at least one view of that evidence, it was consistent with Ms Martin being aware of the payment made into her account that was almost empty at the time, given how quickly it was spent, and that the level of expenditure over that period was unsustainable from her monthly salary.

43. Further, although Ms Newbegin relied on the way Ms X's account emerged initially and then through investigation to undermine her reliability, we are not persuaded that this justifies a conclusion that what she had to say concerning the cheque ought not to have been accepted. The essence of the account given by Ms X was that she made a payment at the request of Ms Martin in respect of damage repairs at Foxmead. We agree with Mr Wheeler that the way her account first emerged is striking in its uncontrived manner: she initially recalled being charged £5,000 for a replacement boiler as there had been a flood, but then corrected herself to recall (accurately) that damage had been done by a burst water tank. She told HGW that she recalled making a payment at the request of the estate's solicitors for water damage to the property. When Ms X was subsequently told that Foxmead was sold without the water damage being repaired, she expressed surprise saying "*she had been asked for and had paid £5,000 (she thinks in cash) to the solicitors to effect repairs*". She was asked to approach her bank for evidence, and those enquiries revealed the cheque for £4,700 paid to Ms Martin on 4 January 2011. In the circumstances, having seen and heard Ms X give evidence (where she was resolute in her insistence on remembering writing a cheque at the request of the solicitor for damage repairs); and seen the way this complaint first emerged (with an initial somewhat hazy recollection that clarified over time but from the outset included a complaint that she had paid a reasonably substantial sum of money at the request of the solicitor) and was then corroborated in its essential elements by the documents to which we have just referred, we are quite unable to say that it was irrational or perverse for the Tribunal to find the core of Ms X's account credible in these circumstances. To the contrary, we consider that it was very much open to the Tribunal to accept Ms X's evidence on this fundamental point, notwithstanding that the Tribunal was alive to, and confronted, the difficulties presented by her evidence.

44. As to those difficulties, true it is that, in confronting the difficulties in relation to Ms X's reliability, the Tribunal referred at paragraph 10.50 to her account changing over time and to aspects of her evidence that were not credible, but did not expressly address the stark fact that she could recall writing the cheque at the request of Ms Martin for repairs yet had no memory of anything else that happened in that period, nor other

inconsistencies in what she said initially, between her witness statements, and between her written evidence and her oral evidence. However, we have no doubt that the Tribunal was alive to these issues because they are recorded in considerable detail at paragraphs 10.33 to 10.34 when the Tribunal set out Ms Martin's substantive case. The Tribunal's judgment must be read as a whole. Although it would perhaps have been better if the Tribunal had revisited these matters when it came to set out its reasoning (however briefly), this is not a reasons challenge; and the Tribunal's judgment is rationally explained in light of all the evidence to which we have referred. In assessing its reasoning, we consider that we must proceed on the basis that the Tribunal took full account of the submissions in the absence of compelling reasons to do otherwise. It seems to us that the careful findings in relation to Ms X's evidence, the limited extent to which the Tribunal found her evidence to be credible and the degree of caution it identified was required in relation to her evidence for a number of reasons, necessarily relate back to the evidence and submissions which the Tribunal earlier set out. We do not begin to consider that this decision failed in its basic task.

45. The same point is true of the criticisms made by Ms Newbegin in relation to Mr Esney's own expressed concerns about Ms X's reliability. Again, those concerns are carefully recorded by the Tribunal at paragraph 10.35 as part of Ms Martin's substantive case and there is no reason to assume that they were overlooked. In any event, we see force in Mr Wheeler's point that the concerns he expressed do no more than echo concerns formed and expressed by the Tribunal itself on the basis of the evidence that it heard. Moreover, that other people formed a particular view of her credibility as a witness, was of limited relevance or utility. It was for the Tribunal to form its own views based on the totality of evidence before it. That is what it did. Ultimately, this argument amounts to no more than a challenge to the weight attached to the difficulties presented by Ms X's evidence. It is an argument that was run and addressed by the Tribunal. We can see no error in its approach in this regard.

46. So far as concerns the suggestion that Ms X had mental health issues that should have been investigated and addressed in the context of her credibility, there is nothing in this point. It is based on an attendance note prepared by a paralegal at the SRA's solicitors relating to a remark understood to have been made to her by Mr Deans. Mr Deans' own note of the same conversation is in starkly different terms and, when shown the SRA's solicitors note, he made clear at the time that it misstated what he had said (as the Tribunal itself noted at paragraph 40 of an earlier decision of 14 October 2019, dismissing an application for Ms X's evidence to be heard by video-link). Beyond that attendance note, we have not been shown any evidence supporting the suggestion that Ms X had mental health issues relevant to her reliability as a witness. We also note in this context that when the SRA sought permission for Ms X to give evidence by video link on the basis of her asserted vulnerability, Ms Martin resisted that application on the ground that Ms X was not a vulnerable witness, and the Tribunal rejected the application as having been made on very weak grounds.

47. The suggestion that the Tribunal failed to take into account Ms X's undoubtedly racist remarks as recorded in notes of telephone conversations between her and the SRA's solicitors, is also not borne out. The submission regarding this feature of Ms X's evidence is recorded at paragraph 10.36 and the Tribunal revisited it expressly at paragraph 10.50.

48. As for the remarks made by Ms X about wanting payment "*big time*" if she were to go to London to give evidence before the Tribunal, it is clear from paragraph 10.36 that the Tribunal was fully aware of those remarks.

49. Equally, it is clear that the Tribunal was well aware of the evidence that Ms X did not read her witness statement properly before signing it (paragraphs 10.36 and 10.50).

50. These points all go to the weight to be attached to Ms X's evidence. None is an example of a material mistake of fact or the overlooking of material evidence. Having spelt out the various challenges to Ms X's evidence at paragraphs 10.33 to 10.36, there is no basis for concluding that those matters were not appropriately weighed in the balance by the Tribunal at paragraph 10.50, despite its somewhat compressed reasoning, in coming to its conclusions on Ms X's credibility, and which aspects of her evidence, if any, could be relied upon. As Lord Reed made clear in *Henderson*, we are bound to assume that the Tribunal took the whole of the evidence and submissions into its consideration. We are strengthened in this view by the fact that, as previously explained, the Tribunal rejected the seven other allegations which had been levelled at Ms Martin. It is plain that the Tribunal carefully considered each of the allegations in arriving at its determinations.

II Good character

51. There was no dispute before the Tribunal that Ms Martin was of good character: she had an unblemished regulatory record before these matters, and many positive professional and personal testimonials. She had achieved and pursued all her professional endeavours while at the same time taking responsibility for supporting her family financially, first as the primary breadwinner and, from 2014, as a single mother of children born in 2000 and 2004. Since evidence of good character is relevant to credibility and propensity (and not just to sanction), Ms Newbegin submitted that it was an error for the Tribunal to make no reference to Ms Martin's good character when dealing with allegation 1.1. Moreover, the fact that seven allegations were rejected with findings being made that were consistent with her evidence, and the inherent unlikelihood of Ms Martin risking everything for the sake of a relatively small sum, meant that the Tribunal was wrong to discount Ms Martin's evidence as it did.

52. Mr Wheeler did not dispute before the Tribunal (or before us) that evidence of good character is relevant to credibility and to propensity in relation to allegations of dishonesty: *Donkin v Law Society* [2007] EWHC 414. However, he submitted that the significance of such evidence ought not to be overstated and should not detract from the primary focus on the evidence directly relevant to the alleged wrongdoing. We agree.

53. Moreover, the Tribunal made express reference to Ms Martin's previous good character and expressly considered the testimonials (referred to as part of the documents in the case at paragraph 3 of the judgment) when it addressed allegation 1.2, stating that it had *"considered carefully the many glowing testimonials which were presented on her behalf in support of the submission that she had no propensity for such conduct*" (paragraph 11.16 of the judgment). Although it would have been better for the Tribunal to have spelt out its consideration of good character in reaching its conclusion on allegation 1.1, allegation 1.2 was so closely connected with allegation 1.1 that there is no reason for thinking that the Tribunal did not consider these matters in the context of

allegation 1.1 as well. Applying the approach set out in the authorities to which we have referred, there is no reason to suppose that Ms Martin's good character and its significance were overlooked.

54. This ground of appeal is, in reality, no more than a challenge to the weight the Tribunal attached to Ms Martin's previous good character. Decisions as to the weight to be attached to particular parts of the evidence are pre-eminently a matter for the fact finder and ought not to be disturbed on appeal unless the decision is one that no reasonable tribunal could have reached. We cannot say that here: for the reasons given both above and below, the Tribunal's conclusion was open to it on the evidence.

III Burden of proof

55. Ms Newbegin submitted that despite the burden being on the SRA to prove its case to the criminal standard throughout, the reasoning of the Tribunal demonstrates that it required Ms Martin to prove a negative, namely that the acts alleged had not occurred. She relied on the following passages:

    i) At paragraph 10.53 the Tribunal states that it found it *"inconceivable"* that someone other than Ms Martin would have requested the cheque and paid it into her account as that would have been *"improper"*. In doing so, the Tribunal was looking at where Ms Martin had been able to explain what may have happened, despite her knowing nothing of it, rather than focussing on whether the SRA had proved beyond reasonable doubt that Ms Martin had procured the cheque;

    ii) At paragraph 10.54 the Tribunal dismissed as *"highly implausible"* a suggestion that Ms X might have written the cheque unbidden, despite there being no evidential burden on Ms Martin to show why Ms X did what she did;

    iii) A paragraph 10.55 the Tribunal found any other explanation for why the cheque came into existence to be *"highly implausible"*, despite there being no evidential burden on Ms Martin.

56. She submitted that Ms Martin's position was clear and simple: she knew nothing of the existence of the cheque until it was raised with her out of the blue in an interview with Mr Esney in June 2017, more than six years after it had been written. That was the obvious explanation for the lack of evidence relating to allegation 1.1 and the circumstances in which the cheque came to be written. There was undue focus by the Tribunal on an alleged lack of explanation provided by Ms Martin, when the Tribunal should instead have been focused on the shortcomings in the evidence in support of the SRA's case. Moreover, it was unsurprising that Ms Martin had been unclear and to some extent inconsistent in answers in circumstances where she was put under pressure to provide an explanation despite saying she did not recollect the alleged event. Her responses were heavily caveated by that fact, but this was entirely ignored by the Tribunal.

57. We do not accept this submission. We start by noting that the Tribunal expressly acknowledged that the burden of proof was on the SRA to prove its case and that the criminal standard of proof applied; Ms Martin simply had to raise a doubt and was not bound to prove that she did not commit the alleged acts: see paragraph 10.53. The Tribunal also acknowledged in the same paragraph, that great care had to be taken *"to*

avoid starting from limited physical evidence (or its absence) and assuming (without sufficient evidence) any deliberate failure or act" on the part of Ms Martin. We do not accept Ms Newbegin's submission that, having set out that approach so clearly and carefully, the Tribunal simply failed to apply it and, instead, impermissibly required Ms Martin to prove a negative.

58. In our judgment, at paragraphs 10.54 and 10.55 the Tribunal followed the approach it had identified. Having earlier set out its findings on the SRA's evidence, it addressed the case advanced on Ms Martin's behalf – the various explanations given by her for how and why a personal cheque came to be written and paid into her account – in order to determine whether she had raised a doubt. That did not involve any reversal of the burden of proof. Since it was not disputed that the cheque was paid into Ms Martin's account, the absence of any alternative explanation as to how that came to happen inevitably assisted the Tribunal in determining whether the cheque was paid in by or with the knowledge of Ms Martin.

59. Ms Martin's case before the Tribunal was that she had no knowledge whatever of the existence of the cheque until confronted with it by Mr Esney in June 2017. To be plausible, that required the Tribunal to accept that the cheque was written, paid into Ms Martin's account, and the money spent soon afterwards without Ms Martin having any knowledge of any of those separate events. In circumstances where there was no reason for Ms X to make a cheque payable to Ms Martin on account of work needed at Foxmead, it seems to us that the Tribunal was entitled to consider it inconceivable that anyone at the Firm would invite Ms X to write a cheque payable to Ms Martin and then pay it into her personal account, whether with her knowledge or direction, but even less likely without it. Such a request would, as the Tribunal observed, have been plainly improper.

60. As to the suggestion that Ms X may have written the cheque on the basis of a misunderstanding or for some reason of her own, again it seems to us that the Tribunal was entitled to regard it as implausible that this would have been done and the cheque handed to somebody else at the Firm who then paid the money into the personal account of Ms Martin without any reference to her. It was legitimate for the Tribunal to consider the plausibility of competing explanations for the events it was charged with determining and to regard as a plainly relevant consideration, the absence of a plausible explanation as to how the cheque came to be paid into Ms Martin's account. The Tribunal's approach in this regard involved no error.

61. More generally, we consider that the Tribunal was entitled to scrutinise the different accounts given by Ms Martin about her recollection or not of the cheque, and that there was no unfairness in the way the Tribunal did that. For example, it is clear from Ms Martin's initial written response (presumably written at a time of her choosing and when she was not under any obvious pressure to respond) to the allegations concerning the cheque that she professed to have some recollection. Although she explained that she could not recall receiving or cashing the cheque, she said that "*to the best of my recollection… the cheque was made out to me personally because the money was owed to me personally*". Subsequently, having made some enquiries of the Nationwide, she said that she had been told that the cheque was processed but never cleared because it had the wrong sort code and was therefore returned to the paying bank. When presented with evidence that the cheque had cleared in her account, she accepted that was so but maintained that she could not recall receiving or cashing such a cheque. In Ms Martin's

formal response to the allegations (dated 12 December 2017) she again referred to her "*recollection [that the cheque] must have been a refund the various sums I have given to [Ms X] or other people on her behalf in order to assist her personally at the outset of the administration when there was no money in the estate until probate was granted.…*". In the circumstances, we do not accept that absence of recollection was the only viable explanation for the lack of evidence relating to allegation 1.1 and the circumstances in which the cheque came to be written. Nor was there any undue focus by the Tribunal on the lack of explanation provided by Ms Martin. Instead, we consider that the Tribunal was entitled to consider that the change in her accounts over time affected her credibility and to find Ms Martin's evidence in response to these allegations "*hesitant, evasive and lacking credibility*" (paragraph 10.51). In the light of the authorities to which we have previously referred, whether we or a different tribunal would have reached the same conclusion is nothing to the point.

IV Erroneous reliance on findings on allegation 1.2 to uphold allegation 1.1

62. Ms Newbegin criticised paragraph 10.52 of the judgment where the Tribunal found Ms Martin's account of the *"plainly incorrect information"* provided to her by the Nationwide as neither credible nor capable of being believed, and considered that those statements were made "*to fit the available information and her perception of her immediate interests before being abandoned when it was clear they were unsustainable*." She submitted that, in doing so, the Tribunal unfairly relied upon assertions made by the SRA in respect of allegation 1.2 that were not relevant to, or relied upon in respect of, allegation 1.1. Furthermore, she submitted that the Tribunal's view of the facts in relation to allegation 1.2 was mistaken and this further undermines its findings on allegation 1.1.

63. We cannot see any error by the Tribunal in this regard. The Tribunal did not impermissibly rely upon a *finding* of guilt in relation to allegation 1.2 when determining whether Ms Martin was guilty of the conduct alleged in allegation 1.1. Instead, and in circumstances where there was undoubtedly a close connection between the two allegations and evidence on each was directly relevant to the other, the Tribunal considered all relevant *evidence* on each allegation before reaching its conclusions. The Tribunal was entitled to consider the evidence overall: inasmuch as it related to both allegations 1.1 and 1.2, the Tribunal was entitled to consider it, and to deploy its assessment of that evidence, in both contexts. If (as the Tribunal ultimately concluded) Ms Martin had contrived a false account "*to obscure her own conduct in relation to the Cheque*", we fail to see how that can be challenged as irrelevant to the assessment of Ms Martin's evidence and her case.

64. Moreover, we do not accept that the Tribunal misunderstood the issue and the nature of the dispute in relation to allegation 1.2. The Tribunal set out the basis of allegation 1.2 as including that Ms Martin made a false or misleading representation that "*a sort code corresponding to the bank account referred to in allegation 1.1 was not and never had been hers, or words to that effect*". The evidence relied upon to prove this allegation was summarised by the Tribunal at paragraph 11.1 and included an email dated 15 June 2017 in which Ms Martin stated that the relevant account number belonged to her but that the sort code on the cheque next to the account number "*does not and never has belonged to me*". Later, in an email dated 23 June Ms Martin confirmed when asked expressly about the sort code and account number into which the cheque was paid, that the account number was hers but the sort code was not. She continued, "*To the best of*

my knowledge and belief and having discussed the matter with Nationwide they have confirmed to me that I have never had such an account." Although at paragraph 10.52 the Tribunal summarised the position without differentiating between the account number and the sort code, its summary mirrored that statement and we have no reason to conclude that there was any misunderstanding or factual error made by the Tribunal in this regard.

V Serious procedural errors/failings

65. In her original grounds and in a supplemental skeleton argument (to which the SRA objected) Ms Newbegin relied on serious procedural errors/delays in the SRA's investigation of the allegations which, she submitted, denied Ms Martin the opportunity to defend herself fully. Although the SRA received a photocopy of the cheque on 15 August 2016, the SRA did not disclose its existence to Ms Martin until 13 June 2017. In that period, she contended that the SRA failed to follow all reasonable lines of enquiry available (in line with the decision in *R(McCarthy) v The Visitors to the Inns of Court* [2015] EWCA Civ 12) to establish who might have asked for and received the cheque and who might have paid it in to Ms Martin's Nationwide account. Because (albeit not known at the time) Nationwide have a policy of retaining documents for six years only, and the six year period elapsed on 4 January 2017, Nationwide had ceased to hold a copy of the cheque or paying-in slip with the result that Ms Martin was unable to obtain a copy of the paying in-slip at all. This meant that she was at a substantial and unfair disadvantage and there was an inequality of arms.

66. Ms Newbegin submitted that the paying-in slip was an important document that should have been obtained by the SRA. When confronted with the cheque allegation, Ms Martin denied any knowledge of the cheque. The paying-in slip might well have indicated who did in fact pay it in, and if that was somebody other than her, it would have been vanishingly unlikely that she had procured it in the first place. That other person could have been interviewed and asked about the circumstances in which the cheque came to be written. This might well have exonerated Ms Martin, but the SRA's delay meant that this potential avenue of enquiry was not available to her.

67. In addition, the passage of time meant that critical evidence, such as Ms Martin's Outlook diary, that might well have shown that Ms Martin was not in the office at the time that Ms X allegedly came to the office to write out the cheque (a time which could be ascertained by the visitors' book which Ms Martin's lawyers had specifically requested disclosure of), no longer existed.

68. In addition to submitting that the fact that the Tribunal dismissed the abuse application and there is no appeal against that finding so that Ms Martin is not entitled to pursue this ground of appeal, Mr Wheeler submitted that, on a proper analysis of *McCarthy*, it does not support the proposition for which it was advanced. It was, instead, concerned with disclosure of an unused witness statement and not with whether a regulator is under a duty to an individual to follow all reasonable lines of enquiry. Nor does it support any broad equivalence between criminal and regulatory proceedings. In any event, the question whether a regulator is under a duty to follow all reasonable lines of enquiry was considered in *R (Johnson) v Professional Conduct Committee of the Nursing and Midwifery Council* [2008] EWHC 885 at [61 to 69] where Beatson J rejected an analogy between criminal and regulatory proceedings in this context and held that there is no general duty to investigate all reasonable lines of enquiry as had been contended. In any

event, Mr Wheeler submitted that, on the facts and in the specific circumstances of this case, there was neither unfairness causing prejudice, nor was any duty even arguably breached.

69. We do not accept Ms Newbegin's submissions on this ground, whilst nonetheless rejecting Mr Wheeler's first argument: the fact that the Tribunal rejected the abuse application and that decision has not been appealed does not disentitle Ms Martin from pursuing this point. It is for this court to assess whether the effect of the delay and any procedural failings lead to the conclusion that she did not have a fair hearing of the disciplinary allegations. There may be no difference in the answer we reach to that given by the Tribunal in response to the abuse application, but the question is nonetheless one for us to determine ourselves.

70. Moreover, we consider it unnecessary for the purposes of determining this ground of appeal to resolve the question whether or not there is a duty on a regulator in proceedings of this kind, owed to a registrant, to pursue all reasonable lines of enquiry or to determine when such a duty arises. There is no doubt (as Mr Wheeler agreed) that the SRA have a duty to act fairly in prosecuting allegations of disciplinary misconduct, and if the SRA have the ability to obtain relevant, material evidence, fairness quite obviously demands that they should do what is reasonable in order to do so. Ultimately, it seems to us that the real question is whether the proceedings as a whole are fair, and that requires consideration of (at least) the particular context, the nature of the missing evidence and whether or not there was sufficient credible evidence apart from what is said to have been missing, to support the conclusions reached. But, in any event, even if Ms Newbegin is correct in relation to the duty on the SRA for which she contended, we do not consider that this ground is made out on the facts.

71. So far as the paying-in slip is concerned, the critical period is a short one, from August 2016 to January 2017 though it is fair to say, as Mr Wheeler did, that it is not suggested that anybody knew that at the time and in particular there is no suggestion that the SRA knew relevant documents would no longer be retained from January 2017. Further, this is plainly not a case where the evidence was lost by the SRA itself. Moreover, it is clear that the point concerning the paying-in slip did not have any significance until a considerable time later. Thus, when in June 2017 Ms Martin was confronted with the cheque allegation, her response was that she could not recollect receiving or cashing the cheque. She did not at that stage suggest that the cheque might have been paid into her account without her knowledge, by someone else. It was not until December 2017, six months after the allegation was first raised with her, that it was suggested somebody else might have paid the cheque into her account and it was only in 2019 that her solicitors followed this up by seeking a copy of the slip itself. Furthermore, as Mr Wheeler submitted, the paying-in slip was far from being a critical document on the Tribunal's findings. At paragraph 10.56 the Tribunal found that the cheque was either paid in by Ms Martin herself or alternatively she knew that it had been paid in on her behalf. The Tribunal decided as it did on either scenario.

72. Ms Martin was not at any disadvantage in approaching individuals about the circumstances in which the cheque might have been paid in on her behalf, particularly given the limited number of people she identified as having access to her personal account details at the Nationwide. Two individuals had access to these details: Gina Smith, in the accounts department, and Ms Martin's secretary, Claire Rennef, who was responsible for recording the fees that Ms Martin received as a notary. There was,

unsurprisingly, a clear and important protocol in relation to receipt of cheques at the Firm for Ms Martin in respect of her notary work, maintained by Ms Rennef. This was done because Ms Martin needed to know what cheques had been received in order to produce accounts and tax returns. Claire Rennef liaised with accounts in order to complete the protocol. Both Ms Smith and Ms Rennef were approached by Ms Martin's solicitors. Gina Smith agreed to be interviewed while Claire Rennef did not. Neither Ms Smith nor Ms Rennef was called to give evidence but there was no bar to Ms Martin calling evidence from these individuals and no inequality of arms.

73. So far as the complaint about the Outlook diary is concerned, we are satisfied that this diary was never available to the SRA. The Firm's explanation for its absence when challenged, was that it had been lost when the Firm migrated its data to new servers in November 2012 (assuming it had not been deleted earlier by Ms Martin). Accordingly the diary was lost long before the cheque came to light and not as a consequence of any failings or delay by the SRA.

74. In any event and notwithstanding the absence of the paying-in slip or the Outlook diary, there was sufficient credible evidence in this case apart from the asserted missing evidence (as we have identified above). Accordingly, and having regard to the factual context, the mere passage of four and a half months, when regrettably little or nothing was done to advance the investigation, does not render these proceedings unfair or lead to the conclusion that the Tribunal's findings on allegation 1.1 are wrong or unjust.

Allegation 1.2

75. There are two grounds of appeal challenging the finding that allegation 1.2 was proved. First it is said that the findings in respect of this allegation were inconsistent. Secondly, it is said that there was no evidential basis for the Tribunal's finding that Ms Martin had not been given incorrect information by Nationwide. The Tribunal's conclusions in that regard were wrong or unjust as a result of a serious procedural irregularity.

76. As to the first ground, Ms Newbegin contended that there is an inconsistency between the Tribunal's findings at paragraph 11.7 and those set out at paragraph 11.14. The Tribunal found at paragraph 11.7 that it *"may be the case"* that the Nationwide gave Ms Martin incorrect information. However, at paragraph 11.14 the Tribunal found it *"wholly implausible"* that an employee of Nationwide would have done so and at paragraph 11.15 the Tribunal went further, finding that the Nationwide could not conceivably have provided Ms Martin with the incorrect information that she said she received from them. She submitted that this showed that, having initially and correctly accepted that Nationwide might have given Ms Martin incorrect information, the Tribunal then inexplicably and wrongly decided that Nationwide could not possibly have done so. She submitted that this inconsistency wholly undermines the Tribunal's findings in respect of allegation 1.2.

77. We can address this point quite shortly. We agree with Mr Wheeler that there is no inconsistency here. It is clear that paragraph 11.7 reflects the preliminary conclusions reached by the Tribunal at the close of the SRA's case when a submission of no case to answer was made. At that point, the Tribunal had not heard evidence from Ms Martin. The Tribunal was aware of Ms Martin's case that an employee of Nationwide had told her something which was "*blatantly incorrect*". Nonetheless, and despite it being "*inherently somewhat unlikely*", the Tribunal concluded that this raised issues requiring

an answer but, because it had yet to hear Ms Martin's evidence, the view that the Tribunal expressed at that stage was necessarily provisional. By contrast, paragraph 11.14 deals with the Tribunal's reasons for finding allegation 1.2 proven, having heard Ms Martin's evidence and submissions on her behalf. Having done so, the Tribunal concluded that the evidence given was not credible, and Ms Martin's account was "*wholly implausible".* We are clear that, for this reason, there is not the inconsistency which was suggested.

78. As to the second ground, Ms Newbegin submitted that the Tribunal misunderstood the factual position at paragraph 11.15 and ignored the fact that Ms Martin informed Mr Esney that the account number he had referred to was correct and it was simply the sort code that was not hers. A similar mistake was made at paragraph 11.16 where the Tribunal misunderstood Ms Martin's position, namely that she had been told by Nationwide (correctly or incorrectly) that the cheque had been returned and was not contending that this is what had actually happened. Moreover, the Tribunal failed to take account of the fact that Ms Martin and her solicitors spoke to different people at Nationwide, and even her solicitor, Mr Habel of Leigh Day, had difficulties in finding out what had happened in relation to the change in sort codes adopted by Nationwide. In addition, the SRA had taken no steps to investigate what Ms Martin might have been told by someone at a local branch being asked about events over six years earlier. In consequence, there was no evidence whatever to support the SRA's case that Ms Martin knowingly gave false or misleading information to the SRA regarding her conversations with the Nationwide. Instead and in error, the Tribunal effectively reversed the burden of proof, requiring Ms Martin to bear the burden of proving her case and to provide an explanation as to why she would have been told something so demonstrably false by an employee of Nationwide. Finally, as before, it is said that the Tribunal wrongly relied upon findings in relation to allegation 1.1 in order to support the findings made in relation to allegation 1.2.

79. In addressing these contentions, it is important to have clearly in mind the substance of allegation 1.2. The allegation was one of misleading Mr Esney in making two statements; it was specific. It concerned the statements undoubtedly made by Ms Martin to Mr Esney in correspondence on 15 and 23 June 2017 that (i) the sort code corresponding to the account into which the cheque was paid was not and never had been hers; and (ii) that Nationwide told her that the cheque had been returned unpaid. There was no dispute in fact that Ms Martin's account did have the sort code in question at the relevant time and that the cheque had been honoured and not returned, so that both statements were indisputably incorrect. The critical question for the Tribunal was whether Ms Martin knew that one or both statements was false and/or misleading but made them nevertheless in the course of a regulatory investigation.

80. In reaching its conclusions on this issue, the Tribunal found Ms Martin to be an unreliable historian whose account was rejected, and considered it wholly implausible that an employee of Nationwide would make statements that were fundamentally inaccurate and at the same time, simple to check and debunk. We agree with Mr Wheeler that there was evidence available to the Tribunal to support those conclusions.

81. We have set out the material correspondence between Ms Martin and Mr Esney at paragraphs 12-15 above. In summary, in an email dated 14 June 2017, Ms Martin wrote that she had "*stopped using Nationwide actively in 2011 and moved to another bank, which is being used by me since then on a regular basis*". As the Tribunal observed,

this was not correct as the statements for the account post-dating 2011 demonstrated. By email dated 15 June 2017, Ms Martin acknowledged that the account number marked on the cheque as the payee account belonged to her but asserted that the sort code "*does not and has never belonged to me*". She said the sort code of 070116 was "*my main account where my salary was being paid into until sometime in 2011*". Ms Martin subsequently changed her position to say that the cheque had never in fact cleared and was not paid into her account at all. Ms Martin told Mr Esney in an email dated 23 June 2017 that Nationwide had told her that they "*…had no records that they could refer to…*" but that they were, "*…saying that the cheque was rejected…*" and that "*…everything strongly indicates that the cheque not only it was not paid to me, or was given to me at all…*". Likewise on 26 June 2017, by which time she had obtained the bank statements, Ms Martin wrote, "*I understand from my conversation with Nationwide that they cannot explain why the amount was only credited and not reversed, since the cheque copy you provided me appears to have been returned to RBS uncleared, as the details were incorrect*".

82. In her witness statement prepared for the Tribunal hearing Ms Martin said, at paragraph 131, "*the Nationwide cashier I spoke to… told me the sort code on my account must have changed, but they were unable to say when that took place*…" At paragraph 132 she said "*I wrote to Mr Esney again and recounted to him what I had been told by the cashier I spoke to in my local Nationwide branch. From looking at the copy of the cheque Mr Esney had sent me, the cashier's view was that (i) the cheque was presented on 4 January 2011; (ii) it did not clear (into my account) because the wrong sort code was printed on the document we were looking at*;…". Neither of these accounts is evidence that Ms Martin was told by a Nationwide employee that she had never had an account with the sort code in question. At paragraphs 133 and 134 Ms Martin refers to having established with Nationwide that her sort code had in fact changed, and to her not having any reason not to believe the cashier, but she does not state in terms what the cashier had said. Again it is far from clear that, even on her own evidence, she was told that she had never had the sort code Mr Esney was asking about. The same lack of clarity emerged in Ms Martin's oral evidence. She described visiting the Hornchurch branch and being told that the sort code on her bank card was the sort code she had always had, but did not say that she was told that she had never had the sort code in question. In these circumstances, the Tribunal was entitled to conclude that it "*did not find [Ms M's] account of being provided with plainly incorrect information by Nationwide to be credible or capable of being believed";* that *"statements were made by [Ms M] to fit the available information and her perception of her immediate interests before being abandoned when it was clear they were unsustainable",* that her *"evidence lacked credibility and her account was not accepted";* and that her *"evolving explanations [were found] to be unreliable and to lack credibility".*

83. So far as Nationwide itself is concerned, it had access to the account records (including bank statements) and therefore to the true position relating both to the sort code and to the question whether the cheque was returned unpaid. Indeed, having said in her email of 15 June that she recognised the account number but not the sort code and in her email of 23 June 2017 that she was told that *"the cheque had not cleared as the wrong sort code was included"*, by 26 June 2017 when Ms Martin had obtained the necessary bank statements, they showed that the sort code was indeed hers and also showed a credit for the cheque of £4,700 which was never reversed. The Tribunal's conclusion that it was inherently unlikely that Ms Martin was told what she said she was told by Nationwide

was a rational response open on the evidence. Moreover, even once Ms Martin had the bank statements making the position clear, she suggested that there was an investigation being conducted by Nationwide as to whether the cheque was correctly cleared, asserting that *"they believe it was returned to the payer"*. That suggestion was implausible in the circumstances and given that there was no evidence of any investigation having been carried out.

84. It seems to us that the Tribunal was entitled to reject Ms Martin's evidence as lacking in credibility. Having done so, it was open to the Tribunal to draw the inference it did, namely that Nationwide did not provide the information which Ms Martin claimed was provided, and instead her account was *"contrived to obscure her own conduct in relation to the cheque"*. It inevitably followed that the Tribunal found allegation 1.2 to have been proved. There is no basis for concluding that the Tribunal misunderstood the factual basis of this allegation (as we have explained above). To the contrary, it is clear from the findings made that there was no misunderstanding. Nor did the Tribunal reverse the burden of proof. Moreover, for the reasons given above we can see nothing wrong in the Tribunal's reliance on evidence relevant to allegation 1.1 when upholding allegation 1.2 given their close connection and the overlapping evidence.

Ground 3: misconduct and dishonesty

85. No separate or independent basis of challenge to the Tribunal's decision is advanced by ground three which is simply consequential on grounds 1 and 2. Given the conclusions we have reached in relation to allegations 1.1 and 1.2 it follows that this ground also fails.

Ground 4: costs

86. We come lastly, to deal with the issue of costs. It was submitted by Ms Newbegin that this is a case in which the Tribunal should be regarded as having misdirected itself or where the Tribunal's costs decision has exceeded the general ambit within which a reasonable disagreement is possible: see per Waller LJ in *Law Society v Adcock* [2006] EWHC 3212 at [41].

87. It was Ms Newbegin's submission, specifically, that, since Ms Martin was successful in resisting seven of the nine allegations which were made against her by the SRA, so she should have been able to recover her costs of defending those allegations. The more so, since the SRA, it was suggested, prosecuted the case in a way which was shambolic (and prejudicial to Ms Martin).

88. In this respect, a number of matters were raised on Ms Martin's behalf concerning the disclosure which was given to her by the SRA. Reference was made specifically to the SRA's only partial compliance with a direction made by the Tribunal on 8 January 2019 that relevant files should be disclosed by 25 January 2019, as well as to suggested delays in the provision by the SRA to Ms Martin of documentation received from the Firm. It was pointed out, in particular, that it was not until Leigh Day wrote to the SRA on 25 July 2019 expressing concerns about disclosure omissions that Ms Martin was provided with appropriate disclosure. Even then, so it was submitted, disclosure continued to be provided as late as 24 October 2019, after the hearing had been postponed three times.

89. The submission was made that having to chase such disclosure added significantly to the time, and accordingly the costs, incurred by Ms Martin in dealing with the SRA's allegations.

90. In these respects, echoing the submission made before the Tribunal, Ms Newbegin sought to rely on *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233, specifically Laws LJ's reference to the regulator's case having been a *"shambles from start to finish"*.

91. The Tribunal dealt with this matter in its judgment at paragraphs 47 and 48. At paragraph 47 the Tribunal set out paragraph 71 of the SDT's Guidance Note on Sanctions, 6th edition (December 2018), which is in these terms:

*"*The starting point adopted by the Tribunal in considering whether costs should be awarded against the regulator (where that is the applicant in a particular case) is:

"In respect of costs, the exercise of its regulatory function placed the Law Society in a wholly different position from that of a party to ordinary civil litigation. Unless a complaint was improperly brought or, for example, had proceeded 'as a shambles from start to finish', when the Law Society was discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event (per Laws LJ, Baxendale-Walker v Law Society [2007] EWCA Civ 233).'"

92. The Tribunal went on at paragraph 48 to state as follows:

> *"*The fact that seven allegations had been found not proved, and the fact that reasonable disclosure requests had been made on behalf of the Respondent did not mean that the Applicant's conduct of the proceedings approached the threshold envisaged in Baxendale-Walker. The allegations were properly brought and a case to answer had been demonstrated when this had been challenged. The Tribunal had found the Respondent's version of events on allegations 1.1 and 1.2 lacked credibility and that she had dishonestly misled the Applicant. Persisting with her account, which the Tribunal had rejected, up to and during the hearing was conduct which had inevitably added to the costs incurred by both parties. Whilst a significant reduction in the Applicant's cost payable was appropriate in all the circumstances, the Tribunal did not consider that any award costs for the Respondent was appropriate."

93. This followed the Tribunal's recitation of paragraphs 69 and 70 of the same Sanctions Guidance in paragraph 45 of the judgment, as follows:

> *"*69. Where the respondent is partially successful in defending the allegations pursued by the applicant, in considering the respondent's liability for costs the tribunal will have regard to the following factors:
>
> - the reasonableness of the applicant in pursuing an allegation in which it was unsuccessful.
>
> - the manner in which the applicant pursued the allegation on which it was unsuccessful and its case generally.

- the reasonableness of the allegation, that is, was it reasonable for the applicant to pursue the allegation in all the circumstances.

- the extra costs in terms of preparation for trial, witness statements and documents and so on, taken up by pursuing the allegation upon which the applicant was unsuccessful.

- the extra Tribunal time taken in considering the unsuccessful allegation.

- the extent to which the allegation was inter-related in terms of evidence and argument with those allegations in respect of which the applicant was successful.

- the extra costs borne by the respondent in defending an allegation which was not found to be proved. …

  70. The Tribunal may award costs against a respondent even if it makes no finding of misconduct, 'if having regard to his conduct or to all the circumstances, or both, the Tribunal shall think fit' (Rule 18 of the Solicitors (Disciplinary Proceedings) Rules 2007)."

94. The Tribunal went on in paragraph 46 of the judgment to say this:

> *"*Seven of the nine allegations had failed, but the Respondent's unsuccessful application of their case to answer had taken an entire day and extended the hearing. Allegations 1.1 and 1.2 had required a significant amount of work and proportion of the hearing, and had been found proved. The failed allegations had been properly brought, raised serious issues and disclosed a case to answer. The delays to which Ms Newbegin referred and the fact that additional relevant disclosure had been requested and provided was relevant but did not wholly undermine the Applicant's application for costs or mean that the conduct in pursuing the unsuccessful allegations was unreasonable. In all the circumstances the Tribunal considered that a significant reduction of 50% of the costs claimed to reflect the fact that seven allegations had been found not proved was proportionate and fair in all the circumstances …"

95. Although not specifically mentioned by the Tribunal, it is also worth citing paragraph 73 of the Sanctions Guidance, which is in these terms:

> *"*The Tribunal must also take into account the decision of Broomhead v Solicitors Regulation Authority [2014] EWHC 2772 (Admin), in which Mr Justice Nicol stated as follows:
>
> "42. However, while the propriety of bringing charges is a good reason why the SRA should not have to pay the solicitor's costs, it does not follow that the solicitor who has successfully defended himself against those charges should have to pay the SRA's costs. Of course there may be something about the way the solicitor has conducted the proceedings or behaved in other ways which would justify a different conclusion. Even if the charges were properly brought it seems to me that in the normal case the SRA should have to shoulder its own costs where it has not been able to persuade the Tribunal that its case is made out. I do not see that this would constitute an unreasonable disincentive to take appropriate regulatory action.'"

96. It was Ms Newbegin's submission that the manner in which the SRA conducted its investigation against Ms Martin was shambolic, or alternatively that to award the SRA 50% of its costs in circumstances where seven of the nine allegations had failed and there had been significant delays in the investigation, including initial disclosure failures, was, as she put it, *"wrong, irrational and disproportionate"*. Accordingly, she submitted that the appropriate order should have been no order as to costs.

97. We do not agree with these submissions. It is apparent that the Tribunal had in mind the appropriate principles. The Tribunal was clear that the unproved allegations had been *"properly brought"* and that pursuit of those allegations was not *"unreasonable"*. The Tribunal was also clear that the criticism directed at the SRA concerning the approach adopted as regards disclosure was unwarranted. The decision reached that Ms Martin should pay 50% of the SRA's costs was a decision which appropriately took those principles into account.

98. As Mr Wheeler rightly submitted, it was plainly open to the Tribunal to decide as it did. The Tribunal was best placed to make the required costs assessment. It is not appropriate for an appellate court to upset that assessment in circumstances where it is apparent that there was no error in principle and it clearly cannot be suggested that the costs order was inappropriate. Put differently, this is not a case in which there was any error of principle or in which the Tribunal exceeded the generous ambit within which a reasonable disagreement is possible.

99. Although, in truth, a matter for the Tribunal rather than for us on an appeal such as this, we do not accept, in particular, that the SRA's approach to disclosure was shambolic. Indeed, without setting out the detail to which we have nonetheless had regard, we note that it was only relatively belatedly, in July 2019, Ms Martin having instructed new solicitors, Leigh Day, that any disclosure complaint was levelled at the SRA. The SRA then responded proactively to the various disclosure requests which were made.

100. It follows that this further aspect of the appeal cannot succeed.

101. We would add, essentially for completeness, that we reject any suggestion, however faintly made by Ms Newbegin, that, in a case where a solicitor is struck off (or suspended), there should be no order for costs made against the solicitor concerned. As was explained by Gross LJ in *Merrick v The Law Society* [2007] EWHC 72997 (Admin) at [61]:

> "… there can be no general rule that the SDT should not impose an order for costs in addition to an order of suspension or an order striking of a solicitor. Were it otherwise, the more serious the misconduct, the less likely that the Law Society could recoup the costs to which it had been put in dealing with it. That cannot be right."

102. As Gross LJ went on at [62] to explain, *"whether in any individual case it is appropriate to add an order for costs to an order suspending a solicitor from practice or striking him off must depend on the facts"*.

103. In the present case, it is not altogether apparent that any submission was made on Ms Martin's behalf to the effect that her personal situation justified no order for costs being made against her. In any event, we are satisfied that this is not a case, having regard to

its own facts, in which it can legitimately be suggested that the Tribunal reached a decision as to costs which was not appropriately open to it.

Conclusion

104. For the reasons set out above, we have concluded that Ms Martin's appeal fails and must be dismissed. We understand that this decision will be disappointing for Ms Martin, but our role as an appellate court when dealing with an appeal primarily based on challenges to factual findings is limited as we have explained above. Ms Martin can at least have the comfort of knowing that everything that could possibly have been said on her behalf was said by Ms Newbegin to whom we are particularly grateful.