



Neutral Citation Number: [2021] EWHC 2271 (Admin)

Case No: CO/4320/2019

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

ON APPEAL FROM THE SOLICITORS DISCIPLINARY TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 August 2021

Before :

THE HONOURABLE MR JUSTICE MURRAY

Between :

ROBERT JOHN METCALFE

Appellant

- and -

**SOLICITORS REGULATION AUTHORITY
LIMITED**

Respondent

Mr Martin Budworth (instructed by **Dallas & Richardson Solicitors LLP**) for the **Appellant**
Mr Rory Mulchrone (instructed by **Capsticks LLP**) for the **Respondent**

Hearing date: 19 January 2021

Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE MURRAY

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down are deemed to be 10:30 am on 10 August 2021.

Mr Justice Murray :

1. This is an appeal by the appellant, Mr Robert John Metcalfe, under section 49(1) of the Solicitors Act 1974 against an order of the Solicitors Disciplinary Tribunal (“the SDT”) dated 20 September 2019 (“the Order”) striking him off the roll of solicitors and making a costs order against him. The Order was made after a hearing by the SDT on 16-20 September 2019 of an application dated 29 April 2019 by the Solicitors Regulation Authority (“the SRA”) pursuant to Rule 5(1) of the Solicitors (Disciplinary Proceedings) Rules 2007 SI 2007/3588 (“the 2007 Rules”).
2. At all relevant times, including at the hearing of this appeal, the SRA formed part of the Law Society. The functions of the SRA have since, on or about 17 June 2021, been assumed by a separate legal entity, Solicitors Regulation Authority Limited, a company limited by guarantee (company registration number 12608059). This includes the SRA’s role as respondent to this appeal.
3. By this appeal, Mr Metcalfe seeks to challenge two findings of dishonesty against him made by the SDT, as set out in the judgment of the SDT handed down on 14 October 2019 (“the Judgment”), which sets out the SDT’s reasons for making the Order.
4. In summary, Mr Metcalfe appeals against the Order on three grounds, namely, that:
 - i) the SDT was wrong to make any findings of dishonesty against him;
 - ii) in any event, the sanction of striking-off was disproportionate and too severe; and
 - iii) in exercising its discretion to award costs to the SRA, the SDT exceeded the ambit within which reasonable disagreement is possible.
5. Mr Metcalfe was born in 1971 and was admitted to the roll of solicitors on 15 September 2000 after completing his training at Hill Dickinson LLP, during which he had undertaken a six-month seat in the Commercial and Conveyancing Department. Upon qualification, he worked at BLM in Liverpool, then The Price Partnership, and then Hampson Hughes Solicitors.
6. In April 2013, Mr Metcalfe left Hampson Hughes Solicitors to set up his own practice as a sole principal under the style of RMJ Solicitors (612988) (“the Firm”). At the relevant times, the Firm’s offices were at Horton House, Exchange Flags, Liverpool L2 3PF. Mr Metcalfe specialised in the following areas: (i) residential landlord and tenant; (ii) general litigation; and (iii) personal injury.

The allegations

7. At the hearing before the SDT, Mr Metcalfe faced twelve allegations, set out in a statement made by the SRA pursuant to Rule 5(2) of the 2007 Rules (“the Rule 5 Statement”).
8. The SRA alleged that, during the period commencing on or about April 2014 to March 2017 (“the Relevant Period”), he had committed various breaches of the SRA Principles 2011 (“the 2011 Principles”) and the SRA Accounts Rules 2011 (“the 2011

Accounts Rules”), as well as a breach of Rule 8.5 of the SRA Authorisation Rules 2011. These allegations were numbered 1.1 to 1.10.

9. At the conclusion of the hearing, the SDT found that:
 - i) allegations 1.1, 1.3, 1.4, 1.5, 1.6 (in part), 1.9 and 1.10 were proved beyond reasonable doubt;
 - ii) allegations 1.2, allegation 1.6 (in part), allegation 1.7 and allegation 1.8 were not proved and were therefore dismissed.
10. Allegation 1.1 was that, during the Relevant Period, Mr Metcalfe acted, or purported to act, in relation to a number of investment schemes, loans or other transactions (“the Loan and Investment Scheme transactions”), which were dubious, risky or bore the hallmarks of early release pension scams, and by doing so breached any or all of Principles 2, 4, 6 and 10 of the 2011 Principles.
11. Allegation 1.3 was that, during the Relevant Period, Mr Metcalfe acted in relation to, and/or facilitated through client account, the back-to-back sale and purchase of shares in a Gibraltar-based company named Priority Solutions Limited (“the Back-to-Back Share Sale transactions”) in circumstances where such transactions were dubious, risky or bore the hallmarks of fraudulent financial arrangements, and by doing so breached any or all of Rules 14.5 and 29.2 of the 2011 Accounts Rules and any or all of Principles 2, 4, 6 and 10 of the 2011 Principles.
12. Allegations 2 and 3 of the Rule 5 Statement made it clear that allegations 1.1 and 1.3 were advanced on the basis that Mr Metcalfe’s conduct was dishonest or, alternatively, reckless. Dishonesty or, alternatively, recklessness was alleged in each case as an aggravating feature of Mr Metcalfe’s misconduct, rather than as an essential ingredient in proving either of those allegations.
13. The SDT found that not only had allegation 1.1 and allegation 1.3 been proved beyond reasonable doubt, but also that allegation 2 had been proved beyond reasonable doubt, namely, that Mr Metcalfe’s conduct had been dishonest in each case. Given its findings of dishonesty, the SDT did not consider it necessary to determine allegation 3, namely, whether Mr Metcalfe’s conduct had been reckless in either case.
14. On his first ground of appeal, Mr Metcalfe contests only the findings of dishonesty on allegation 2 in relation to each of allegations 1.1 and 1.3. He does not contest the underlying findings that allegations 1.1 and 1.3 had been proved beyond reasonable doubt.
15. In the Judgment, the names of various companies and individuals involved in the factual background to this matter were anonymised in accordance with the normal practice of the SDT. There is, however, no need to do so on appeal. See, for example, *Solicitors Regulation Authority v Sheikh* [2020] EWHC 3062 (Admin) (Davis LJ).

Background

16. According to Mr Metcalfe's witness statement dated 27 August 2019 provided for the hearing before the SDT, in February/March 2016 the Firm's personal injury department was comprised of Mr Metcalfe and four employees. About that time, Mr Metcalfe found out that two of his fee-earners were setting up a firm in competition with him and would take with them his two remaining personal injury fee-earners. When he discovered their plan, he made all four of them leave the Firm immediately. This, however, left him in the position of having lost overnight all of his personal injury fee-earners. At about the same time, his accounts consultant also left the Firm, leaving the Firm's financial accounting records in disorder. Mr Metcalfe then employed another individual to put the accounting records in order, but that apparently did not happen.
17. Further background is set out in some detail in the Judgment at paragraphs 7-11. For present purposes, I make the following summary.
18. On 20 January 2017, the SRA commenced an investigation of the Firm. On 17 February 2017, Ms Lindsey Barrowclough, Investigation Officer – Forensic Investigations for the SRA, issued her interim forensic investigation report. On 22 February 2017, the SRA disclosed to Mr Metcalfe a copy of a report recommending that there be an intervention in the Firm, so that he could make representations.
19. On 10 March 2017, the SRA decided to: (i) exercise its statutory powers to intervene in the Firm on the basis that there was reason to suspect dishonesty by Mr Metcalfe in connection with his practice as a solicitor; and (ii) refer Mr Metcalfe's conduct to the SDT. Shacklocks Solicitors LLP ("Shacklocks") was appointed to act as the SRA's agent in respect of the intervention.
20. On 14 March 2017, Shacklocks carried out the intervention.
21. On 29 June 2017, Ms Barrowclough conducted an interview with Mr Metcalfe, following this with a number of written interrogatories.
22. On 8 March 2018, Ms Barrowclough issued her final Forensic Investigation Report ("the Final Report"), identifying various alleged breaches of the 2011 Principles, the 2011 Accounts Rules and the SRA Authorisation Rules 2011 and failures to achieve outcomes under the SRA Code of Conduct 2011.
23. On 29 April 2019, the SRA applied to the SDT under Rule 5(1) of the 2007 Rules that Mr Metcalfe be required to answer the allegations set out in the Rule 5 Statement. The SRA's case was set out in the Rule 5 Statement, to which were exhibited a number of supporting documents, including Ms Barrowclough's interim report and the Final Report.
24. Mr Metcalfe provided an Answer to the Rule 5 Statement, which is undated ("the Rule 5 Answer"). He also provided his witness statement dated 27 August 2019.
25. The hearing before the SDT took place, as already noted, on 16-20 September 2021 before a panel of three members of the SDT, one lay member and two solicitor members. Mr Metcalfe was represented at the hearing by Mr Martin Budworth, of

counsel, who represents him on this appeal. The SRA was represented by Mr Rory Mulchrone, of counsel, who is employed by the SRA's solicitors, Capsticks LLP. Mr Mulchrone prepared the Rule 5 Statement. He represents the SRA on this appeal.

26. By the time of the hearing before the SDT in September 2019, Mr Metcalfe no longer held a current practising certificate but remained on the roll of solicitors as a non-practising solicitor.

2011 Principles

27. The applicable 2011 Principles, which were mandatory and applied to all solicitors, their employees, and other relevant persons, were:
- i) Principle 2: “You must ... act with integrity”;
 - ii) Principle 4: “You must ... act in the best interests of each client”;
 - iii) Principle 6: “You must ... behave in a way that maintains the trust the public places in you and in the provision of legal services”; and
 - iv) Principle 10: “You must ... protect client money and assets”.
28. The meaning and scope of Principles 2 and 6 have been considered in various authorities, including *Wingate v Solicitors Regulation Authority* [2018] EWCA Civ 366, 1 WLR 3969 (CA) at [95]-[103] (regarding Principle 2) and at [104]-[106] (regarding Principle 6) (Rupert Jackson LJ).

2011 Accounts Rules

29. The applicable provisions of the 2011 Accounts Rules are:
- i) Rule 14.5, which provides:

“You must not provide banking facilities through a client account. Payments into, and transfers or withdrawals from, a client account must be in respect of instructions relating to an underlying transaction (and the funds arising therefrom) or to a service forming part of your normal regulated activities.”
 - ii) Rule 29.2, which provides:

“All dealings with client money must be appropriately recorded:

 - (a) in a client cash account or in a record of sums transferred from one client ledger account to another; and
 - (b) on the client side of a separate client ledger account for each client (or other person, or trust).

No other entries may be made in these records.”

30. The proper construction of Rule 14.5 has been considered in *Patel v Solicitors Regulation Authority* [2012] EWHC 3373 (Admin) [18] (Cranston J) and *Fuglers LLP v Solicitors Regulation Authority* [2014] EWHC 179 (Admin) [39]-[42] (Popplewell J).

SRA warning notices

31. The SRA, in its case against Mr Metcalfe before the SDT, relied on the fact that the SRA had, since at least April 2009, issued a number of notices warning members of the solicitors’ profession against involvement in dubious investment schemes or transactions bearing hallmarks of fraudulent financial arrangements, particularly those involving use of a solicitor’s or firm’s client account. The bundle for this appeal included the following examples of such SRA notices:

- i) “Fraudulent financial arrangements” dated April 2009;
- ii) “High-yield investment fraud” dated 10 September 2013;
- iii) “Improper use of client account as a banking facility” dated 18 December 2014; and
- iv) “Investment schemes and client account” dated 21 September 2016.

32. Two of these were issued before the Relevant Period, and two during the Relevant Period. Mr Mulchrone set out in his skeleton argument seven excerpts from these warning notices. The flavour of these is conveyed by the following two excerpts:

- i) from the April 2009 warning notice:

“If you do not understand the documents or a transaction in which you are involved, you must ask questions to satisfy yourself that it is proper for you to act. Why have you been approached? Do you have any expertise in this area of law? If you are not wholly satisfied as to the propriety of the transaction, you must refuse to act.”

- ii) from the 10 September 2013 warning notice:

“... Practitioners must not become involved in schemes that appear dubious or bear the hallmarks of possible fraud.

...

It is your duty to ensure you do not become involved in potentially fraudulent financial arrangements. Failure to observe warnings from the SRA could lead to disciplinary action or criminal prosecution. Attempts to limit your involvement, particularly by a purportedly ‘limited retainer’ are ineffective in protecting you if you simply should not become involved.”

33. I note that the SRA warning notice issued on 21 September 2016 says the following at paragraphs 9 and 10:

“9. We first warned about high-yield investment frauds or banking instrument frauds in October 1997 and our warning card is quoted in *Constantinides v The Law Society* [[2006] EWHC 725 (Admin)] Our latest warning was issued on 10 September 2013

10. We have also warned for many years about the improper use of client accounts. One of our warning cards was discussed in detail in *Attorney General for Zambia v Meer Care Desai* [[2008] EWCA Civ 1007] Our latest warning on this subject is dated 18 December 2014”

34. This shows that guidance by the SRA (and, before the SRA’s formation, by The Law Society in its own name) on these sorts of issues pre-dates April 2009.

FCA warning about early release pension scams

35. The SRA also drew the SDT’s attention to a warning published by the Financial Conduct Authority (“FCA”) about early release pension scams, the text of which was set out in quotation in paragraph 20.5 of the Judgment. At paragraph 20.6 of the Judgment, the SDT recorded Mr Mulchrone’s admission that this FCA warning was not available during the Relevant Period together with his submission that it set out in clear terms some of the hallmarks of early release pension scams. The FCA warning about early release pension scams was first published on 10 August 2017.

The SRA’s evidence as to allegation 1.1

36. The SRA’s evidence as to allegation 1.1 is summarised in the Rule 5 Statement at paragraph 14, which cross-refers to section G.1 of the Final Report. The evidence was said to show the following:

- i) Following the SRA’s intervention, 18 client files were identified by Shacklocks on which the Firm had been instructed to act in respect of the Loan and Investment Scheme transactions, which involved clients taking out loans with a company named Shawhill Limited (each loan with a term of 5 years, according to Mr Metcalfe’s evidence) and then, after various deductions had been made, either investing these loan funds in or lending them to a company named Sandymoor Consultancy Limited (“Sandymoor”), a broker firm based in Malta but trading from Wirral, to be deployed into student property and other investment schemes, for example, a “Vaccicure Pharmaceutical investment”.
- ii) Some of the loans to Sandymoor were taken over by a company named Bright Limited, who then lent the funds to a company named Mederco Block A Limited.

- iii) Ms Barrowclough was of the view that the Loan and Investment Scheme transactions were connected with the early release and transfer of the relevant clients' pension funds into the retirement benefits plan of a company named "Optimum".
- iv) According to the evidence on the files, large deductions were made from the loan funds in respect of up front interest (20% of the loan value, payable to "Platinum Credit Services", which, according to Mr Metcalfe's response during his interview with Ms Barrowclough, was an entity connected with Shawhill Limited authorised to collect interest on its behalf), payments of fees to various introducing agents (ranging from 12% to 22% of the total loan value) and a fee of 5% of the value of the loan payable to the Firm in respect of its costs.
- v) The files contained no evidence of the loan documentation or any documentation relating to the subsequent investments. Apart from the original client care letters and terms of business, there was no evidence that the Firm had provided any advice to its clients in respect of the Loan and Investment Scheme transactions and, indeed, the Firm's terms of business specifically excluded the provision of any advice. The client files did not contain any attendance notes.
- vi) Ms Barrowclough contacted three of the clients. All three made statements to the effect that they had never heard of the Firm, prior to being notified by Shacklocks of the existence of a client file in their name and had never instructed the Firm in any matters. They had no knowledge of taking out a loan with Shawhill Limited or of making an investment with or through Sandymoor.
- vii) All three clients stated that they had either received an unsolicited telephone call or had made enquiries relating to the transfer of their pension. All three had transferred their pensions around the time shown on the client files found at the Firm and said that they had transferred their pensions to a company named "Optimum", based in Skelmersdale.
- viii) According to Ms Barrowclough's research, there was a company named Optimum Financial Solutions Limited ("OFSL") based at the White Moss Investment Centre in Skelmersdale, recorded on the FCA Register as authorised by the Financial Conduct Authority. A copy of the FCA Register entry for OFSL was annexed to the Final Report.
- ix) Two of the clients contacted stated that they received lump sum payments from their pension schemes. Both were under the age of 55. A third client stated that he was due to receive a lump sum from his pension; however, this was never paid and all attempts to chase the agent as to the whereabouts of the monies had been unsuccessful.

The SRA's evidence as to allegation 1.3

37. The SRA's evidence as to allegation 1.3 is summarised in the Rule 5 Statement at paragraph 42, with a cross-reference at paragraph 43 to section G.4 of the Final Report. The evidence was said to show the following:

- i) The Firm acted for a small number of clients on the Back-to-Back Share Sale transactions, which involved the simultaneous purchase and sale of the beneficial interest in shares in Priority Solutions Limited.
- ii) Ms Barrowclough reviewed three of the files and her analysis of two of those files was set out in some detail in section G.4 of the Final Report.
- iii) The Firm acted for the clients under a general power of attorney. None of the client files contained a client care letter, evidence of instructions from the client, or any other communications with the client. The Firm's instructions were provided to it by Mr Gary Quillan, whom Mr Metcalfe described in the Rule 5 Answer as his best friend.
- iv) The shares were purchased and sold on the same day (21 December 2015 for the two client files discussed in section G.4 of the Final Report), having been purchased for a lower price than for which they were then sold. All shares were purchased from Mr Quillan at an undervalue and sold to a client, who then immediately sold the shares at a profit to a pension scheme named Silvertree Investments Pension Scheme ("Silvertree"). A payment was then made to the client, representing the difference between the purchase price paid by the client and the sale price of the share to Silvertree after a deduction had been made.
- v) There were no individual client account ledgers for the separate Back-to-Back Share Sale transactions. Instead, the payments that were made to the clients were posted to the client account ledger for Capital Bridging Finance Solutions Limited ("CBFSL").
- vi) In his response dated 15 August 2017 to questions sent to him by Ms Barrowclough regarding one of the client files, Mr Metcalfe said that the posting of these payments to the ledger for CBFSL "may have been an accounting error". In that response, he also said, among other things, that he did not know why there was no client care letter on the file for any of the Back-to-Back Share Sale transactions and that he had not met any of the clients in person.
- vii) Ms Barrowclough was unable to identify any monies having been received from the clients relating to the purchase of the shares or any monies having been paid by Silvertree in respect of their purchase of the shares.

The hearing before the SDT and the Judgment

38. As already noted, the hearing before the SDT took place on 16-20 September 2019 before a panel of the SDT comprised of two solicitor members and a lay member. Originally, two of the clients in relation to the Loan and Investment Scheme

transactions were to have given oral evidence at the hearing. One witness withdrew unexpectedly the day before the hearing commenced. The other witness was due to give evidence on the afternoon of the second day of the hearing, but due to technical difficulties she was unable to give evidence then. The SDT directed that her evidence be given the following morning, however she was not available then.

39. The SDT heard submissions about whether arrangements could be made for a witness summons in relation to the first witness and whether the second witness could be interposed when she was available, concluded that the hearing should continue without these witnesses giving oral evidence. The SDT would have regard to their witness statements but would ascribe little weight to the statement of the first witness, who had withdrawn the day before the hearing. As the second witness, who remained willing to give evidence, the SDT would ascribe some weight to her statement.
40. The SDT recorded that it had reviewed all the documents submitted by the parties, including: the SRA's Notice of Application dated 29 April 2019; the Rule 5 Statement; the Rule 5 Answer; Mr Metcalfe's witness statement dated 29 August 2019; the SRA's schedule of costs dated 5 September 2019; and testimonials submitted on Mr Metcalfe's behalf. Ms Barrowclough and Mr Metcalfe each gave oral evidence.
41. The SDT acknowledged that the SRA was required to prove each allegation beyond reasonable doubt. As for dishonesty, it noted at paragraph 15 of the Judgment that the test for dishonesty was that set out in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 (SC) [74]:

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

42. At paragraph 16 of the Judgment, the SDT said:

“16. When considering dishonesty the Tribunal firstly established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held. It then considered whether that conduct was honest or dishonest by the standards of

ordinary decent people. When considering dishonesty, the Tribunal had regard to the references supplied on the Respondent's behalf.”

43. At paragraph 17 of the Judgment, the SDT said:

“17. The test for integrity was that set out in *Wingate and Evans v SRA and SRA v Malins* [2018] EWCA Civ 366, as per Jackson LJ:

‘Integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members ... [Professionals] are required to live up to their own professional standards ... Integrity connotes adherence to the ethical standards of one's own profession.’ ”

Allegation 1.1

44. In relation to allegation 1.1, the SDT summarised the SRA's case and submissions at paragraphs 20.1-20.13 of the Judgment, and Mr Metcalfe's response at paragraphs 20.14-20.22. It set out its findings on allegation 1.1 at paragraphs 20.23-20.34, which, in summary, were as follows:

- i) Although the SDT had decided to attach limited weight to the witness statements from the two clients for the Loan and Investment Scheme transactions, in light of their not having given oral evidence, it was clear that each had been contacted about releasing funds from their pensions. Mr Metcalfe was not able to dispute this. He said that he had no reason to be aware that the Loan and Investment Scheme transactions were potentially an early pension release scam. The SDT was of the view that if he had spoken to any of the clients for these transactions, he might have ascertained this.
- ii) Mr Metcalfe had confirmed in his evidence that all of his client instructions for the Loan and Investment Scheme transactions were relayed to him by Sandymoor, and that he had drafted letters of instruction to himself based on information received from Sandymoor, which had obtained his clients' signatures for him. He ought to have been “extremely concerned” that all of his clients' instructions had come to him via Sandymoor, where Sandymoor was the ultimate beneficiary of the funds transferred. There was no evidence on the client files that Sandymoor was authorised to act as agent for any client.
- iii) Mr Metcalfe could and should have been in direct contact with his clients. His conduct demonstrated that he considered Sandymoor to be his client and that he had no regard for the interests of his actual clients.
- iv) It was clear that Mr Metcalfe's only function in the transaction for each client was to process the paperwork and to receive and distribute funds. There was no necessity for a solicitor to be involved for these purposes. His involvement

was to lend credibility to the transaction. The SDT found that Mr Metcalfe's explanation as to the actual legal work he undertook on each transaction to be vague and unsatisfactory.

- v) The SDT found "extremely troubling" the fact that Mr Metcalfe appeared to have no concern that he did not have copies of any of the loan or investment documents for the Loan and Investment Scheme transactions and that all of the information he had was provided to him by Sandymoor, the "ultimate beneficiary" of the funds generated.
- vi) The SDT found "extremely concerning" that Mr Metcalfe provided no advice to his clients in respect of the Loan and Investment Scheme transactions and that, on the instruction of Sandymoor, his client care letter specifically excluded his providing any advice to each client. Mr Metcalfe should have been concerned about this, which was a "very clear" indicator as to the possibly fraudulent nature of the transactions.
- vii) The SDT noted that, in relation to the question of why his own fee was so high, Mr Metcalfe, in his evidence, gave the explanation that this was a new area of work for the Firm and that he did not know whether the percentage charged was too high or too low. Mr Metcalfe noted that each client had signed a document on which the fee was plainly stated.
- viii) The SDT found that Mr Metcalfe should have been concerned about the large upfront deductions from the loan proceeds, which were unusual and were clear and obvious "red flags" that should have put Mr Metcalfe on notice of the dubious nature of the transactions. It was "highly unusual" for a loan to require all interest on the loan to be paid upfront, particularly over a term of five years, which was the term of the loans according to the evidence of Mr Metcalfe.
- ix) In relation to the 2011 Principles, the SDT found beyond reasonable doubt that:
 - a) in taking his instructions solely from Sandymoor, failing to scrutinise the underlying documents, failing to make direct contact with his clients, and failing to inquire into the appropriateness of the transactions, Mr Metcalfe had failed to act in his clients' best interest and failed to protect client monies and assets in breach of Principles 4 and 10;
 - b) in paying client monies on the instructions of the payee without express consent from the clients and acting on behalf of his clients on the express condition that he would provide no advice, Mr Metcalfe's conduct plainly failed to maintain the trust the public placed in him and in the provision of legal services in breach of Principle 6; and
 - c) in allowing himself and the Firm to become involved in transactions that were clearly dubious and in taking instructions and conducting the matter in the way Mr Metcalfe had, Mr Metcalfe had failed to act with integrity in breach of Principle 2.

As I have already noted, there is no appeal against these conclusions.

45. The SDT went on at paragraphs 20.35-20.36 of the Judgment to conclude that Mr Metcalfe had, in effect, been “paid large amounts of money for doing very little work” and “had deliberately closed his eyes and ears, and had deliberately not asked questions, lest he learned something he would rather not know” and that ordinary and decent people would consider such conduct to be dishonest. The SDT thus found beyond reasonable doubt that Mr Metcalfe’s conduct had been dishonest.

Allegation 1.3

46. During his submissions to the SDT on allegation 1.3, Mr Mulchrone drew the SDT’s attention to the following passage from *Patel v Solicitors Regulation Authority* [2012] EWHC 3373 (Admin) [18] (Cranston J):

“18. ... [R]ule 14.5 [of the 2011 Accounts Rules] is a crystallization of the principle established in *Wood and Burdett* [a decision of the SDT handed down on 23 December 2003 (No 8669/2002)]. ... The first sentence of the rule contains the prohibition on the use of a client account to provide banking facilities. Use of the term ‘instructions’ in the next sentence of the rule implies professional instructions, in other words instructions relating to the accepted professional services of solicitors. The term is being used in rules concerned with the work of solicitors and takes its meaning from that context. Thus the import of the first limb of the second sentence of rule 14.5 is that movements on a client account must be in respect of instructions relating to an underlying transaction which is part of the accepted professional services of solicitors. In shorthand the instructions must relate to an underlying legal transaction. The other limb of that second sentence requires that movements on a client account must be in respect of instructions related to a service forming part of the normal regulated activities of solicitors. ...”

47. Mr Mulchrone submitted to the SDT that none of the movements on the Firm’s client account in relation to the Back-to-Back Share Sale transactions were in respect of instructions related to an underlying transaction that was part of the accepted professional services of solicitors. In other words, he submitted, the instructions did not relate to an underlying legal transaction, nor were any of the movements on client account in respect of instructions related to a service forming part of the normal regulated activities of solicitors. Mr Metcalfe had therefore breached Rule 14.5 of the 2011 Accounts Rules. Furthermore, by failing to record all dealings with client money appropriately, Mr Metcalfe also breached Rule 29.2 of the 2011 Accounts Rules.
48. In response to these points, Mr Budworth submitted that Mr Quillan and each client were entitled to instruct Mr Metcalfe in relation to the Back-to-Back Share Sale transactions, and he was entitled to undertake the work. Mr Metcalfe was performing

a legitimate advisory function in assessing that the documentation drawn up was effective to achieve the purpose of the documentation and in taking steps to process the transactions. Mr Metcalfe was subject to no overarching requirement to take responsibility for and advise on the commercial merits of the scheme. Mr Metcalfe had provided professional services and therefore the monies paid into the Firm's client account were not paid in breach of Rule 14.5 of the 2011 Accounts Rules.

49. In relation to allegation 1.3, the SDT summarised the SRA's case and submissions at paragraphs 22.1-22.9 of the Judgment and Mr Metcalfe's response at paragraphs 22.10-22.13. It set out its findings on allegation 1.3 at paragraphs 22.14-22.20, which in summary were as follows:
- i) There was no legitimate reason for the use of a power of attorney in the transaction. Mr Metcalfe's explanation that it was necessary to facilitate the transaction in case the client was unable to sign the documents was rejected on the basis that the power of attorney and all other documents, including the transfer and sale documents, were signed on the same day.
 - ii) The SDT rejected Mr Budworth's submissions in relation to *Patel v SRA*. While it was correct that there was no requirement in that case for advice to be given, the professional services provided had to relate to an underlying legal transaction. In this case, there was no underlying legal transaction, and therefore the monies paid into the Firm's client account were paid in breach of Rule 14.5.
 - iii) The SDT accepted that it was not for a solicitor to enquire as to the prudence of a transaction when instructed to act, however the solicitor should satisfy himself that it was proper to act in all the circumstances. Mr Metcalfe had failed to do this. That failure was culpable where the transaction appeared on its face to be dubious or bore the hallmarks of fraudulent financial arrangements.
 - iv) In relation to one client and transaction given as an example in the section G.4 of the Final Report, Mr Quillan and the client were known to each other. Mr Quillan sold his shares at an undervalue/discount to the client for immediate onward sale to Silvertree. An entirely unnecessary power of attorney was drafted, the purpose of which Mr Metcalfe did not know. There was no independent valuation of the shares, the actual value of which was unknown. Taking all these matters together, the transaction was dubious and bore the hallmarks of fraud.
 - v) In relation to the 2011 Principles, the SDT found beyond reasonable doubt that:
 - a) in allowing his clients to become involved in a dubious transaction, Mr Metcalfe had failed to act in their best interests in breach of Principle 4 and had failed to protect their monies and assets in breach of Principle 10;

- b) in engaging in such conduct, Mr Metcalfe failed to maintain the trust the public placed in Mr Metcalfe and the provision of legal services in breach of Principle 6;
- c) in facilitating transactions that were dubious and bore the hallmarks of fraudulent financial arrangements, Mr Metcalfe had fallen below the standards expected of him by the public and by members of the profession, demonstrating a failure to act with integrity in breach of Principle 2; and
- d) in acting where there was no underlying legal transaction and having failed appropriately to record his dealings with client money, Mr Metcalfe had breach Rules 14.5 and 29.2 of the 2011 Accounts Rules.

As I have already noted, there is no appeal against these conclusions.

- 50. The SDT went on at paragraphs 22.21-22.22 of the Judgment to conclude that Mr Metcalfe had turned a blind eye to the dubious nature of the transaction and had deliberately not asked questions lest he learned something he would rather not know. Ordinary and decent people would consider that, in turning a blind eye and facilitating transactions that bore the clear hallmarks of fraudulent financial arrangements, Mr Metcalfe's conduct had been dishonest. The SDT thus found beyond reasonable doubt that Mr Metcalfe's conduct had been dishonest.
- 51. As already noted, the SDT also found that allegations 1.4, 1.5, 1.6 (in part), 1.9 and 1.10 were proved beyond reasonable doubt. None of those conclusions is challenged on this appeal.

Mitigation and sanction

- 52. At paragraph 30 of the Judgment, the SDT noted that there were no previous disciplinary matters recorded against Mr Metcalfe. At paragraphs 31-35, the SDT noted Mr Budworth's submissions in mitigation and on sanction, which were:
 - i) The SDT's Guidance Note on Sanctions (December 2018) at paragraph 52 made it clear that an allegation of dishonesty did not always necessarily lead to the sanction of striking off the roll of solicitors. This was a rare case where there was a finding of dishonesty involving no adverse effect on a client. There had been no client complaint on the matters found proved.
 - ii) Mr Metcalfe had not misled the SRA, nor had he attempted to conceal his conduct. He had cooperated fully and taken a measured approach to both the investigation and the proceedings.
 - iii) The proven matters had been brief and related to a handful of transactions in an otherwise lengthy and unblemished career.
 - iv) Mr Metcalfe had not deliberately and/or intentionally withheld any information from the SRA notwithstanding that he was under immense pressure and emotional stress as a result of the proceedings. He had followed

the SRA Code of Conduct to the best of his ability with a genuine belief at all times that he was acting in his clients' best interests.

- v) The SRA's intervention had already had a catastrophic effect on Mr Metcalfe both mentally and financially.
- vi) Mr Metcalfe had hit a significant crisis in the running of his practice with the sudden departure of four key fee-earners and failings in his accounts department. The matters with which the allegations were concerned had occurred during that period.
- vii) The testimonials provided to the SDT spoke to Mr Metcalfe's honesty and integrity.
- viii) It was not necessary in this case to strike Mr Metcalfe from the roll of solicitors in order to protect the public and maintain the reputation of the profession. An appropriate sanction in this case would be to impose restrictions on his ability to practise together with a financial penalty.
- ix) The intervention had been wholly chastening, and there was no risk of repetition of his conduct.

53. The SDT set out its conclusions on the question of sanction at paragraphs 36-43 of the Judgment. These were:

- i) The SDT had regard to the Guidance Note on Sanctions (December 2018). It reminded itself that the SDT's overriding objective, when considering sanction, was the need to maintain public confidence in the integrity of the solicitors' profession. In determining sanction, it was the SDT's role to assess the seriousness of the proven misconduct and to impose a sanction that was fair and proportionate in all the circumstances.
- ii) Mr Metcalfe had engaged in the proven misconduct for financial gain. He sought to replace the income he had lost with the departure of his personal injury fee-earners with another income stream. His actions were planned and considered. He was directly, wholly, and solely responsible for his conduct. Although this was a new area of practice, he was experienced enough to know what information he should have sought from his clients and that, in all the circumstances, he should have verified their instructions.
- iii) Mr Metcalfe's conduct had caused harm to the reputation of the profession.
- iv) Mr Metcalfe's conduct was aggravated by his proven dishonesty, which he knew was in material breach of his obligation to protect the public and to maintain public confidence in the reputation of the profession.
- v) Mr Metcalfe's conduct was deliberate and repeated over a period of time, in relation to separate types of transaction in circumstances where he turned a blind eye to the clear and obvious hallmarks of fraud. He had been evasive in his interview and written answers during the investigation. His position that he

had little recollection of Sandymoor or the Loan and Investment Scheme transactions was not credible.

- vi) In mitigation, Mr Metcalfe had a previously unblemished career and had made some, albeit limited, admissions from the outset.
- vii) Mr Metcalfe's conduct was "a complete departure from the standards of integrity, probity and trustworthiness expected of him as a solicitor". The SDT had considered lesser sanctions such as making no order, a reprimand, a fine, and restrictions on his practice, but none of these would reflect the seriousness of his misconduct. Even suspension was not an adequate sanction. The protection of the public and the reputation of the profession required that he be struck off the roll of solicitors.
- viii) In relation to the mitigation concern the impact on Mr Metcalfe of the SRA's intervention and the medical evidence advanced on his behalf, the SDT had regard to relevant case law, including the decision of the Divisional Court in *Solicitors Regulation Authority v James* [2018] EWHC 3058 (Admin), [2018] 4 WLR 163 where Flaux LJ said at [113]:

"113. ... [I]n my judgment, pressure of work or extreme working conditions whilst obviously relevant, by way of mitigation, to the assessment which the SDT has to make in determining the appropriate sanction, cannot either alone or in conjunction with stress or depression, amount to exceptional circumstances. Pressure of work or of working conditions cannot ever justify dishonesty by a solicitor"

- ix) The SDT did not consider that the mitigation advanced on behalf of Mr Metcalfe demonstrated any exceptional circumstances. Accordingly, the appropriate and proportionate sanction was to strike Mr Metcalfe from the roll of solicitors.

Costs

54. At paragraphs 44-47 of the Judgment, the SDT set out its conclusions on costs. It noted Mr Mulchrone's submissions that:
- i) the time spent by Ms Barrowclough preparing her interim report and the Final Report was reasonable and should not be reduced;
 - ii) whilst some of the allegations had not been proved, all of the allegations were reasonably brought and certified by the SDT as showing a case to answer;
 - iii) although there were some difficulties with the SRA's witnesses at the beginning of the hearing, these were not matters over which the SRA had control and therefore its costs should not be reduced on that account; and

- iv) it was accepted by the SRA that the SDT might decide to make some reduction in costs for non-proven matters, but any such reduction should not be substantial.
55. The SDT also noted Mr Budworth's submissions on costs, which, in summary, were:
- i) an entire hearing day had been lost due to the non-availability of the SRA's witnesses and in the failed attempt to set up a video-link for one of the witnesses;
 - ii) the time claimed by Ms Barrowclough for the preparation of her reports was excessive; and
 - iii) the time claimed by Capsticks LLP for the preparation of the Rule 5 Statement and the witness statements was excessive.
56. The SDT concluded that the SRA's internal costs were both reasonable and proportionate and should not be reduced. It also concluded that a small reduction in costs should be made for the allegations found not to be proved. The time taken on the unproven matters was, however, minimal, and a reduction in costs of £1,500 plus VAT was appropriate. The SDT therefore ordered that Mr Metcalfe pay costs to the SRA in the sum of £30,573.50.

The legal framework for the appeal

57. This is an appeal under section 49(1) of the Solicitors Act 1974. It proceeds by way of review unless the court considers that it would be in the interests of justice to hold a re-hearing: CPR r 52.21(1). The appeal will only be allowed if the court concludes that the Order was wrong: CPR r 52.21(3). This means that the court must conclude that the SDT, in reaching its decision to make the Order, made a material error of law or fact or erred in the exercise of its discretion outside the generous ambit within which reasonable disagreement is possible.
58. The proper approach of the High Court to an appeal from the SDT was succinctly summarised by Maddison J in *The Law Society v Waddingham* [2012] EWHC 1519 (Admin) [46]:
- “46. ... In essence, when considering an appeal from a Solicitors Disciplinary Tribunal this court should accord considerable respect to the findings of and penalties imposed by the Tribunal, it being an expert and informed body; but as to the Tribunal's findings, this court is entitled to substitute its own view in an appropriate case, and it is also entitled to interfere with the Tribunal sentencing decision if it was clearly inappropriate. (See e.g. *Bolton v. The Law Society* [1994] 1 WLR 512, 516 G-H, *per* Sir Thomas Bingham M.R.; *Otchere v. The Law Society* [2008] EWHC (Admin.) 2233 at paragraph 18 *per* Lloyd Jones J.; and *Salsbury v. The Law society* [2008] EWCA Civ 1285 at paragraph 30, *per* Jackson L.J.”

59. The proper approach of an appellate court to appeals from a professional disciplinary tribunal, with specific reference to appeals from the SDT, is considered and set out in more detail in *Solicitors Regulation Authority v Day* [2018] EWHC 2726 (Admin) [61]-[78] and *Martin v Solicitors Regulation Authority* [2020] EWHC 3525 (Admin) [27]-[33], each of which is a decision of the Divisional Court. *SRA v Day* was an appeal by the SRA against the dismissal of all allegations of breach of professional conduct rules brought by the SRA against three solicitors. *Martin v SRA* was an appeal by a solicitor against findings of serious misconduct, including dishonesty, and the sanction of striking-off. I have had regard to the relevant principles. It is not necessary for me to set them out in full here.
60. One point, however, worth noting specifically, given the submissions made on Mr Metcalfe's behalf, is that the SDT was required to apply the criminal standard of proof, namely, beyond reasonable doubt, to each allegation pursued by the SRA against Mr Metcalfe, including to any finding of dishonesty: *Law Society v Waddingham* at [54]; *SRA v Day* at [75]. I have already noted at [41] that the SDT acknowledged in the Judgment that the SRA was required to prove each allegation beyond reasonable doubt.
61. At the hearing, Mr Budworth drew my attention to *Yerolemou v The Law Society* [2008] EWHC 682 (Admin), a decision of the Divisional Court on a substantive appeal from the SDT under section 49(1)(a) of the Solicitors Act 1974 by a solicitor who had been struck off the roll of solicitors for persistent delays in complying with solicitor's undertakings. In that case, Lloyd Jones J set out at [5] the principles relevant to an appeal from the SDT by reference to the judgment of Sir Thomas Bingham MR in the well-known case of *Bolton v The Law Society* [1994] 1 WLR 512 (cited in the quotation from *Law Society v Waddingham* set out at [58] above).
62. Lloyd Jones J then made clear in *Yerolemou v Law Society* at [6] that the general approach taken by Sir Thomas Bingham MR in *Bolton v Law Society* was not disturbed or qualified by the Human Rights Act 1998 as to the relevant principles. The 1998 Act did, however, affect the general approach of the court to an appeal of this kind. He demonstrated this by reference to the decision of the Divisional Court in *Nahal v The Law Society* [2003] EWHC 2186 (Admin) at [31]-[33], which in turn discussed the decision of the Divisional Court in *Langford v The Law Society* [2002] EWHC 2802 (Admin).
63. *Langford v Law Society* was an appeal by a solicitor against the SDT's decision to strike him off the roll of solicitors for breach of client money rules, misapplication and misappropriation of client monies, and failure to maintain proper accounts.
64. In *Langford v The Law Society* [2002] EWHC 2802 (Admin) at [14]-[15], Rose LJ said:
- “14. ... in dealing with an appeal of this kind, a greater flexibility is now appropriate than was suggested in *Bolton* which was decided before the coming in to force of the Human Rights Act.

...

... In *MacMahon v The Council of the Law Society of Scotland*, Lord Gill (Lord Justice Clerk), giving the opinion of the court, having referred to [*Ghosh v General Medical Council* [2001] 1 WLR 1915 (PC)] and [*Preiss v General Dental Council* [2001] 1 WLR 1926 (PC)], said:

‘... we must now apply a less rigorous test. We should simply look at the tribunal’s decision in the light of the whole circumstances of the case, always having due respect for the expertise of the tribunal and giving to their decision such weight as we should think appropriate.’

Then at paragraph 16 he went on:

‘Nevertheless, in following this approach we think that it is good sense to keep in view the obvious reasons that have been repeated over the years for according respect to the views of specialists tribunals in appeals of this kind ...’

15. For my part, I approach determination of this appeal in accordance with the tests there indicated.”

The Grounds of Appeal

65. I briefly summarised Mr Metcalfe’s grounds of appeal at [4] above. In more detail, his first ground of appeal (“Ground 1”) is that the SDT erred in making findings of dishonesty in relation to allegations 1.1 and 1.3 by either failing to apply the correct standard of proof, namely, the criminal standard, or by wrongly concluding that the evidence was capable of supporting a finding of dishonesty to the criminal standard. The Grounds of Appeal set out three sub-grounds that are, for the most part, submissions in support of Ground 1. I will deal with the sub-grounds when I set out and then analyse below the submissions and issues raised by Ground 1.
66. Mr Metcalfe’s second ground of appeal (“Ground 2”) is that, whether or not Ground 1 succeeds, in all the circumstances the sanction of striking-off from the roll of solicitors imposed on Mr Metcalfe was disproportionate to the fault found by the SDT and too severe.
67. Mr Metcalfe’s third ground of appeal (“Ground 3”) concerns the costs order made by the SDT. Mr Metcalfe appeals on the basis that, in awarding the SRA “virtually all” of its costs, the SDT erred in the exercise of its discretion outside the generous ambit within which reasonable disagreement is possible, having failed to take account of various matters.

Ground 1: the SDT was wrong to make findings of dishonesty in relation to allegations 1.1 and 1.3

Submissions

68. Mr Budworth submitted that the facts found by the SDT in relation to each of allegations 1.1 and 1.3 were not capable of supporting a finding that Mr Metcalfe had acted dishonestly in relation to either matter.
69. In relation to allegation 1.1, Mr Budworth submitted that the following were relevant considerations to which the SDT failed to have proper regard:
 - i) No proper particulars of dishonesty had been set out in the Rule 5 Statement.
 - ii) The SRA did not seek to prove, nor did the SDT find, that the Loan and Investment Scheme transactions or the Back-to-Back Share Sale transactions were in any way fraudulent. In this regard, it is relevant that none of the clients involved in the Loan and Investment Scheme transactions made any complaint or alleged that the relevant transaction was a fraud.
 - iii) The fact that both the Loan and Investment Scheme transactions and the Back-to-Back Share Sale transactions involved execution-only work did not mean that Mr Metcalfe was not providing a professional service to each relevant client. The SDT case of *Solicitors Regulation Authority v Wilson-Smith* (SDT 8772/2003), relied on by the SRA during its submissions, involved markedly different facts.
 - iv) There was nothing on the face of what was presented to Mr Metcalfe by Sandymoor to alert him to the fact that the Loan and Investment Scheme transactions involved the use of the relevant client's pension monies. The SDT acknowledged this at paragraph 20.35.1 of the Judgment but did not give that factor sufficient weight. In any event, the FCA warning about early pension release scams referred to by the SRA during its submissions post-dated the Relevant Period, as the SRA acknowledged and the SDT noted in the Judgment.
 - v) Relevant files were removed from Mr Metcalfe's control during the intervention in March 2017, materially affecting his ability to identify exculpatory documentation.
70. Mr Metcalfe submitted that the fact that neither client approached by Ms Barrowclough in relation to the Loan and Investment Scheme transactions recalled having heard of RMJ Solicitors showed no more than that the clients were inattentive to, or simply failed to recall, the documents that they had signed, one of which was a retainer letter from and confirmation of instructions to the Firm, together with terms and conditions. The retainer letter made clear that the client was instructing the Firm to review and assess the documentation for the loan from Shawhill Limited to the client and the transfer of those loan proceeds to Sandymoor for investment.

71. Mr Budworth noted that Mr Metcalfe acknowledged that he had not been in direct contact with the clients that were contacted by Ms Barrowclough but submitted that Mr Metcalfe had no reason not to take at face value the signed documentation with which he was presented for each client, which included the signed retainer letters in which his instructions were set out. Those instructions were clear and complete and enabled him to do what was needed, namely, to review and assess whether the documentation properly gave effect to the loan to the client from Shawhill Limited and the transfer of the loan proceeds to Sandymoor as a loan or for investment, as well as to effect the payment of fees and interest.
72. Mr Budworth submitted that none of the SRA warning notices relied on by the SRA and referred to by the SDT in the Judgment was relevant to the Loan and Investment Scheme transactions or the Back-to-Back Share Sale transactions. None of the “warning signs” listed in the April 2009 warning notice applied to the transactions. Mr Metcalfe had no reason to think that either arrangement was a “high-yield investment scheme” of the type referred to in the 10 September 2013 warning notice.
73. Mr Budworth submitted that it was notable that neither of the two clients contacted by Ms Barrowclough in relation to the Loan and Investment Scheme transactions made any complaint about the transaction into which they had entered to the SRA, the FCA or any other body.
74. Mr Budworth submitted that, while the SDT may have considered that Mr Metcalfe’s involvement in the Loan and Investment Scheme transactions and the Back-to-Back Share Sale transactions was “grubby work”, there was nothing on the facts found by the SDT that enabled it to reach a conclusion beyond reasonable doubt that Mr Metcalfe was guilty of dishonesty in relation to any of the transactions.
75. Mr Budworth submitted that the fact that Mr Metcalfe was doing execution-only work for his clients and not providing legal advice to them did not support a finding of dishonesty. There is no rule that prohibits a solicitor, by agreement with his client, from limiting the scope of his instructions to execution-only work. It was not necessary, in other words, that Mr Metcalfe should provide legal advice to his clients in order for the services provided to be legal services.
76. Mr Budworth submitted that the concerns raised by the SDT regarding the significant upfront costs to the clients, including a 20% upfront interest payment for the full term of the loan, the payment to the introducers, and Mr Metcalfe’s fee of 5%, suggesting that these were unusual and/or too high, did not support a finding of dishonesty. It is well-established, he submitted, that a solicitor has no general duty to advise a client on the prudence of a transaction the client proposes to enter into, nor were there any special circumstances arising in this case that could give rise to such a duty.
77. Mr Budworth submitted that the SDT did not correctly apply the test for dishonesty set out in *Ivey v Genting Casinos*. It failed properly to apply the first step, namely, to ascertain the actual (subjective) state of Mr Metcalfe’s knowledge or belief as to the facts and then, at the second step, to explain why his conduct was dishonest applying the (objective) standards of ordinary decent people. The SDT’s reasoning on dishonesty was inadequate. It was speculative to suggest that if Mr Metcalfe had spoken directly to his clients, they would have given him information that would have alerted him to the possibility of a scam. The SDT drew an inference of dishonesty

from its finding that Mr Metcalfe “deliberately” did not ask questions of his clients, but, Mr Budworth submitted, the SDT could not, on that basis, reach a conclusion to the criminal standard that Mr Metcalfe was dishonest.

78. Mr Budworth submitted that it appeared that the SDT, rather than making a principled determination on sufficient evidence to the proper standard of proof that Mr Metcalfe had been dishonest in relation to the circumstances of allegations 1.1 and 1.3, had simply made a value judgment.
79. Finally, Mr Budworth submitted that Mr Metcalfe accepted that he had breached Principle 2, but a failure to act with integrity does not amount to dishonesty.
80. Mr Mulchrone began his submissions by reminding the court of the proper approach of this court to an appeal from the SDT.
81. In relation to Mr Budworth’s submission that the SDT had failed to apply the criminal standard of proof, Mr Mulchrone submitted that it is clear throughout the Judgment that the SDT bore in mind and applied the criminal standard. He submitted that Mr Metcalfe’s real complaint was that the SDT should not have found dishonesty proved to that standard on the evidence before it, including Mr Metcalfe’s own evidence. The appeal, therefore, is essentially a challenge to the SDT’s primary findings of fact in relation to allegations 1.1 and 1.3 that Mr Metcalfe’s conduct was dishonest.
82. Mr Mulchrone reminded the court of the principles applicable to an appellate court’s approach to primary findings of fact and inferences made by the lower court. As noted at [57]-[59] above, I have had regard to the relevant authorities and principles, including the case of *Martin v SRA*, referred to by Mr Mulchrone in his submissions.
83. On the basis of the relevant principles, Mr Mulchrone submitted, Mr Metcalfe was required to satisfy the court that the SDT’s findings of dishonesty in relation to allegations 1.1 and 1.3 had no basis in the evidence, or disclosed a demonstrable misunderstanding of relevant evidence, or disclosed a demonstrable failure to consider relevant evidence, or were otherwise findings that no reasonable division of the SDT could have reached. In other words, Mr Metcalfe needed to show that the dishonesty findings of the SDT were perverse, which is a very high standard.
84. Mr Mulchrone submitted that the fact that there were no client complaints about the Loan and Investment Scheme transactions is incapable of supporting the conclusion that the SDT reached a perverse conclusion. The SDT taken that fact into account but did not consider that it gave rise to a reasonable doubt.
85. Mr Mulchrone submitted that Mr Budworth’s point that the SDT should have had regard to the fact that the clients approached by Ms Barrowclough in relation to the Loan and Investment Scheme transactions may simply have been “inattentive” to the documentation understated the SDT’s actual conclusion. The SDT did not make any finding that the clients’ signatures on the retainer letter were forged, nor did it need to. The SDT found dishonesty by Mr Metcalfe on the basis that he had “deliberately turned a blind eye” to the “clear and obvious ‘red flag’” indicators identified by the SDT “lest he learned something he would rather not know”.

86. Mr Mulchrone noted that, on his own case Mr Metcalfe did not have the loan agreements or the investment agreements involved in the Loan and Investment transactions. He never contacted his clients directly but simply relied on what he was told by Sandymoor, the ultimate recipient of the funds generated by the transactions. He was not, therefore, in a position to “review and assess that the documentation was effective” for any purpose. Furthermore, his own terms of business specifically excluded his giving advice regarding the transactions. Given that background, the SDT was entitled to conclude that there was no need for his involvement, save to lend the scheme a veneer of credibility.
87. Mr Mulchrone submitted that the fact that Mr Metcalfe carried out the limited instructions set out in the retainer letters he had drafted for the Loan and Investment transactions and the Back-to-Back Share Sale transactions provides no support for the submission that the SDT’s finding of dishonesty in relation to each was plainly wrong or perverse.
88. Mr Mulchrone submitted that it was not part of the SRA case to the SDT that a solicitor was required to act as a “general advisor” to its clients or owed a duty over and above the duty to act in the best interests of the client to advise on the prudence of any transactions. The SDT was concerned, he submitted, with the propriety, rather than prudence, of the transactions and concluded that Mr Metcalfe had deliberately turned a blind eye to that aspect.
89. Mr Mulchrone submitted that, contrary to Mr Budworth’s submissions, the Loan and Investment Scheme transactions and the Back-to-Back Share Sale Transactions bore a number of the hallmarks of dubious transactions, as set out in the SRA warning notices. The point was that Mr Metcalfe should have considered the characteristics of the transactions in which he was being asked to be involved, particularly given the very limited nature of the role he was being asked to undertake, and should have made appropriate further enquiries, including communicating directly with his prospective clients. The SDT took into account that he was not aware that the Loan and Investment Scheme transactions involved early release of his client’s pension funds.
90. Mr Mulchrone disputed Mr Budworth’s criticism of the SDT in relation to its application of the *Ivey v Genting Casinos* test. The SDT plainly did ascertain Mr Metcalfe’s state of mind, which it was able to do with the benefit of having seen and heard him give evidence and be cross-examined. The SDT was entitled to conclude that his deliberate participation in schemes that bore a number of hallmarks of dubious transactions, in circumstances where he had no direct contact with the clients concerned and took his instructions from a party that would benefit from the funds generated by the transactions, would be dishonest by the standards of ordinary decent people.
91. As for Mr Budworth’s distinguishing of the SDT case of *SRA v Wilson-Smith* from the facts of this case, Mr Mulchrone acknowledged that the facts were different. *SRA v Wilson-Smith*, however, had simply been cited by the SRA for the principles that are summarised at paragraph 20.9 of the Judgment. Contrary to Mr Budworth’s submission at paragraph 14.1 of his skeleton argument that *SRA v Wilson-Smith* did not establish the propositions set out in paragraph 20.9 of the Judgment, that paragraph set out the relevant principles virtually *verbatim* from the SDT’s decision in *SRA v Wilson-Smith* at paragraph 60. These were entirely uncontroversial principles

that had been reiterated by the SDT in a number of cases over the years, both before and after *SRA v Wilson-Smith*.

92. Mr Mulchrone disputed the submission made by Mr Budworth that Mr Metcalfe's defence was hampered by inability to identify relevant files following the intervention in March 2017. In relation to allegation 1.1, the SRA had produced the hard copy files recovered by Shacklocks in the intervention. In relation to allegation 1.3, the SRA's case was that Shacklocks had not recovered those files. Ms Barrowclough only knew about them from her earlier inspection and asked Mr Metcalfe about them in interview. He was not able to assist with their whereabouts other than to suggest that those files had gone to another firm prior to the intervention.
93. In relation to electronic documents, Mr Mulchrone noted that, in interview with Ms Barrowclough, Mr Metcalfe confirmed that the files relevant to allegation 1.1 would not have been on the Firm's "Proclaim" system, which was for personal injury matters. When cross-examined before the SDT, Mr Metcalfe could say no more than that he was not aware of any electronic documents relevant to allegation 1.1 or allegation 1.3 that might have been in the cloud. There might have been some, but he was not sure.
94. Mr Mulchrone noted that Mr Metcalfe made no attempt to compel disclosure by Shacklocks, his former clients, or any third parties, either before the SDT or before this court, nor was he able to say with any specificity what document or class of documents would demonstrate his innocence of dishonesty.

Analysis and conclusions

95. To a large extent, Mr Budworth has made to this court the arguments that he made to the SDT, when Mr Metcalfe's position was essentially that, although he may have made some mistakes, he had always acted with integrity. The more difficult starting point for Mr Metcalfe on this appeal is that he has not challenged and therefore must accept the SDT's findings that, in relation to allegations 1.1 and 1.3 he had breached Principles 2, 4, 6 and 10 of the 2011 Principles and, in relation to allegation 1.3, he had also breached Rules 14.5 and 29.2 of the 2011 Accounts Rules. In other words, he must now accept that in relation to each of these allegations he has failed to act with integrity, failed to act in the best interests of each client, failed to behave in a way that maintains the trust that the public places in a solicitor and in the provision of legal services, and failed to protect client money and assets.
96. I fully accept that those findings, without more, do not necessarily mean that Mr Metcalfe has been dishonest in relation to the Loan and Investment Scheme transactions and the Back-to-Back Share Sale transactions. But a number of the points raised by Mr Budworth on appeal, which may have been of relevance and assistance before the SDT when, for example, the issues of whether Mr Metcalfe had acted with integrity or in the best interests of his clients, remained to be determined, do not materially assist on this appeal in determining whether the SDT's findings of dishonesty in relation to allegations 1.1 and 1.3 are plainly wrong or perverse, which is the standard that he is required to meet.
97. As to the alleged failure by the Rule 5 Statement to set out "proper particulars" of dishonesty, I am satisfied that Mr Metcalfe was given proper notice of the particulars

of the case that he was required to meet based on the Rule 5 Statement. I note that it does not appear to have been part of Mr Metcalfe's case before the SDT that the SRA's case was improperly pleaded.

98. Mr Budworth criticises the SDT for reaching its conclusions, and purporting to do so to the criminal standard, on the basis of various inferences. As is regularly demonstrated in the criminal courts, however, a case based on inferences can, nonetheless, be a powerful one. The fact that a tribunal relies on inference does not mean that the criminal standard of proof cannot be satisfied.
99. I reject Mr Budworth's suggestion that the SDT needed to find the Loan and Investment Scheme transactions and the Back-to-Back Share Sale transactions to be fraudulent before concluding that Mr Metcalfe had been dishonest in his conduct in relation to those transactions. It was enough that the transactions bore clear and obvious hallmarks of fraud and that Mr Metcalfe had deliberately turned a blind eye to those hallmarks.
100. In my view, the SDT clearly and sufficiently identified what it considered to be the relevant dubious aspects and hallmarks of fraud in relation to the Loan and Investment Scheme transactions and the Back-to-Back Share Sale Transactions. It was not necessary that either type of transaction fell squarely within any of the SRA warning notices referred to by the SRA. The warning notices were intended to raise awareness and remind members of the profession of the need for caution. The warning signs described in the notices were given as examples. Furthermore, the general statements in the warning notices that I have highlighted at [32] were clearly relevant to the facts of allegations 1.1 and 1.3. In any event, the SDT did not place specific reliance on the warning notices in reaching any of its determinations. They were simply part of the background.
101. The SDT accepted that Mr Metcalfe had no reason to know that the Loan and Investment Scheme transactions involved the release of relevant clients' pension monies, but it was open to the SDT to conclude on the evidence before it that he deliberately turned a blind eye, asked no questions of his clients, and undertook no enquiries to establish the true nature of the schemes.
102. The SDT accepted that Mr Metcalfe was not obliged to advise his clients as to the prudence of the transactions. But it was his role to advise his clients as to the nature of the transactions generally (for example, as to the effectiveness of the documents to achieve their purported purposes), which he could not do given that he had no access to the underlying documents and therefore had no real knowledge of the nature of the transactions. He relied exclusively on what he was told by Sandymoor, the ultimate recipient of the funds generated by the transactions.
103. It was open to the SDT to conclude that Mr Metcalfe had turned a blind eye and failed to undertake any adequate inquiries as to the nature of the Loan and Investment Scheme transactions because such an arrangement was to his financial benefit. That conclusion cannot be said to be perverse or plainly wrong.
104. There is no substance, in my view, in Mr Budworth's submission that the SDT failed correctly to apply the test for dishonesty set out in *Ivey v Genting Casinos*. Having had Mr Metcalfe's written and oral evidence, including the benefit of cross-

examination of Mr Metcalfe, the SDT was in a position to ascertain the actual state of Mr Metcalfe's knowledge or belief as to the facts of the Loan and Investment Scheme transactions.

105. It is, of course, not certain that if Mr Metcalfe had spoken with his clients, he would have discovered that the transactions involved the early release of the clients' pensions. However, it was open to the SDT to conclude that if had he questioned his clients properly and diligently, it is likely that he would have discovered the early pension release aspect. More importantly for purposes of the test of dishonesty, it was open to the SDT to conclude that Mr Metcalfe's decision not to speak to his clients about the transactions was deliberate, motivated by a desire to avoid learning something that he would rather not know. Having concluded that, it was open to the SDT to conclude that ordinary decent people would consider such conduct to be dishonest and, therefore, to conclude to the criminal standard that Mr Metcalfe's conduct had been dishonest.
106. That, in my view, disposes of ground 1 of this appeal.
107. Dealing, briefly, with some of Mr Budworth's other points in relation to ground 1:
 - i) The SDT did not decide (nor did the SRA submit) that a solicitor is prohibited from doing "execution-only" work. The SRA relied on *SRA v Wilson-Smith* only for the uncontroversial principles that are accurately summarised at paragraph 20.9 of the Judgment. In any event, those principles are more relevant to the SDT's findings in relation to allegations 1.1 and 1.3 that are not challenged on this appeal than they are to the findings of dishonesty.
 - ii) Although the burden was, of course, on the SRA to establish to the criminal standard that Mr Metcalfe's conduct was dishonest, Mr Metcalfe, having raised the issue of the files that were removed from his control due to the intervention in March 2017, needed to articulate what documents or class of documents that were allegedly removed from his control would have been relevant to the question of the honesty of his conduct in relation to allegations 1.1 and 1.3. This he failed to do. I noted at [92]-[94] above Mr Mulchrone's submissions on this point.
 - iii) Mr Budworth during his reply at the hearing took me to the transcript of Mr Metcalfe's evidence before the SDT on the morning of 19 September 2019, where, during re-examination, Mr Metcalfe gave evidence about his interview with Ms Barrowclough and the paperless documents that were in the Proclaim system, making some complaint about Shacklocks having been uncooperative and the SRA not having undertaken to obtain relevant documents in the cloud through Shacklocks. Mr Budworth acknowledged that it was not appropriate to speculate about what relevant documents there might have been but submitted nonetheless that this factor was relevant as part of the "building blocks" of the SDT's conclusion as to dishonesty.
 - iv) All of this evidence was, of course, before the SDT. It was for the SDT to assess. The SDT was in a far better position than this court to determine whether Mr Metcalfe would have suffered any unfairness on that ground. As I have already noted, Mr Mulchrone gave reasons during his submissions why

this point does not materially assist Mr Metcalfe. There is nothing in this that raises a material doubt regarding the SDT's findings of dishonesty against Mr Metcalfe in relation to allegations 1.1 and 1.3.

- v) Mr Metcalfe's case on dishonesty is not assisted by the submissions that he diligently carried out the very limited instructions that he drafted in the retainer letters, which he had prepared on the instructions of Sandymoor in relation to allegation 1.1 and Mr Quillan in relation to allegation 1.3. As the SDT noted in relation to allegation 1.1, Mr Metcalfe was "paid large amounts of money for doing very little work". It could, it seems, have made the same remark in relation to allegation 1.3.

108. For the foregoing reasons, Mr Metcalfe's appeal on ground 1 is dismissed.

Ground 2: in any event, the sanction of striking-off was disproportionate and too severe

Submissions

109. Mr Budworth submitted that, even in a case where the SDT has found that a solicitor has been dishonest, it does not necessarily follow that the proportionate sanction is striking-off. He referred to the judgment of the Divisional Court in *Solicitors Regulation Authority v Sharma* [2010] EWHC 2022 (Admin), where Coulson J said at [13]:

"It seems to me, ... looking at the authorities in the round, that the following impartial points of principle can be identified: (a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll That is the normal and necessary penalty in cases of dishonesty (b) There will be a small residual category where striking off will [be] a disproportionate sentence in all the circumstances (c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary ..., or [over] a lengthy period of time ...; whether it was a benefit to the solicitor ..., and whether it had an adverse effect on others."

110. Mr Budworth submitted that this was a case falling within the small residual category where striking-off is disproportionate, having regard to the limited nature, scope and extent of dishonesty, Mr Metcalfe's limited benefit from the dishonesty, and the limited extent of the adverse effect on others.

111. Mr Budworth gave *Solicitors Regulation Authority v Imran* [2015] EWHC 2572 (Admin) as an example of a case where the SDT had suspended a solicitor, rather than striking him off the roll of solicitors, after making findings of dishonesty against him, and the Administrative Court dismissed the SRA's appeal under section 49(1)(b) that the sanction of suspension was excessively lenient.

112. Mr Budworth reminded the court that matters of punishment are for criminal sanction and civil financial penalty. The role of a professional regulator in imposing a sanction is two-fold, namely:

- i) to take steps to prevent repetition of the transgression by the professional, if such a risk exists; and
 - ii) to protect the profession's reputation and the public's confidence in it.
113. Mr Budworth also referred to the observation of Collins J in *Giele v General Medical Council* [2005] EWHC 2143 (Admin), [2006] 1 WLR 942 at [29], where he said:
- “... in considering the maintenance of confidence [of the public in the medical profession], the existence of a public interest in not ending the career of a competent doctor will play a part.”
114. Mr Budworth submitted that the same observation applies in this context. He submitted that the proper purposes of the jurisdiction to sanction would be met by the imposition of restrictions on Mr Metcalfe's practice, whether alone or together with a fine or reprimand, for example, a prohibition on his acting as a sole practitioner, holding client monies.
115. As I have already noted at [61], at the hearing Mr Budworth drew my attention to *Yerolemou v Law Society*, which highlights the principles that I have summarised at [61]-[64]. *Yerolemou v Law Society* was a case in which a solicitor was found by the SDT to have persistently neglected the interests of his client and persistently failed to respond to reminders, both from the client and, in turn, from the Law Society. He was not alleged to have been dishonest. Mr Yerolemou admitted his failings, and the SDT struck him off the roll of solicitors. On appeal against that sanction, the Divisional Court concluded that the solicitor's breaches were not so serious as to require striking-off, quashed the order for striking-off, and substituted an order of suspension for two years.
116. Mr Budworth submitted that in imposing the sanction of striking-off from the roll of solicitors, the SDT failed to take proper account of the following matters:
- i) no client made any complaint about any of the transactions involved in allegations 1.1 and 1.3;
 - ii) Mr Metcalfe made various straightforward admissions promptly, engaged properly and conscientiously with this process, and co-operated throughout;
 - iii) at worst Mr Metcalfe simply became overwhelmed to a degree by the pressure of running the Firm, exacerbated by the departure of members of his personal injury department and the consequent financial pressure;
 - iv) an unreliable accounts clerk gave Mr Metcalfe false assurances about his financial record-keeping being in order (which is relevant, in particular, to the finding in relation to allegation 1.3 that Mr Metcalfe breached Rule 29.2 of the 2011 Accounts Rules);
 - v) Mr Metcalfe suffered “certified serious mental stress”, which affected his ability to maintain full regulatory compliance consistently on all fronts;

- vi) Mr Metcalfe was and is contrite, such that the public is not at risk of a repetition of his misconduct, the intervention having been such a chastening ordeal; and
 - vii) there was strong personal mitigation in (a) Mr Metcalfe's witness statement, (b) the supporting witness statements (character references) dated 28 May 2019 from Mr Steven Lynch and dated 17 June 2019 from Mr Andrew Williams, both solicitors, which were provided to the SDT and which confirm his longstanding positive contribution to the work of the profession in his local area, and (c) the statement from Mr Metcalfe's treating doctor dated 21 June 2017, which was provided before his interview by Ms Barrowclough on 29 June 2017.
117. In light of the foregoing, Mr Budworth submitted, this is a clear case falling within the residual category of cases of professional dishonesty referred to by Coulson J in *SRA v Sharma* where striking-off is disproportionate and a lesser sanction would suffice to meet the purposes of sanction by a professional regulator.
118. In response, Mr Mulchrone reminded the court of the observation of Lloyd Jones J in *SRA v Sharma* at [13], the relevant part of which I have quoted at [109] above, that the "normal and necessary penalty" following a finding of dishonesty by the SDT against a solicitor is to strike him off the roll of solicitors. In order to succeed on this ground of appeal, Mr Metcalfe needed to show that the SDT's decision to impose that sanction on him was wrong: CPR r 52.21(3).
119. Mr Mulchrone referred to *Salsbury v Law Society* [2009] 1 WLR 1286 (CA), where Jackson LJ said at [30] that:
- "... the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere."
120. Mr Mulchrone noted that no error of law is alleged against the SDT in respect of Ground 2. In order to show that the sanction imposed by the SDT on Mr Metcalfe was wrong, he submitted, it was necessary for Mr Metcalfe to satisfy the court that the sanction was "clearly inappropriate". Mr Mulchrone did not dispute Mr Budworth's summary of the relevant principles as set out in *Bolton v Law Society* at 518-519 and *SRA v Sharma* at [13], save to say that the "exceptional circumstances", referred to in *SRA v Sharma*, in which the SDT should not impose the sanction of striking-off following a finding of dishonesty, must in some way relate to the dishonesty, as made clear by the Divisional Court in *SRA v James* at [101].
121. In *SRA v James* the Divisional Court considered three cases where the SDT had made findings of dishonesty against a solicitor but went on to find that there were exceptional circumstances, principally on mental health and pressure of work

grounds, justifying a lesser sanction than striking-off. In all three cases, the SDT imposed a suspension order, that was itself suspended subject to compliance with a restriction order. In each case, the Divisional Court quashed that sanction and imposed the sanction of striking-off.

122. Mr Mulchrone distinguished this case from *SRA v Imran*, where the SDT had found that the dishonesty was, in effect, a “moment of madness” by Mr Imran (*SRA v Imran* at [30]; see also, *SRA v James* at [109]). Mr Mulchrone noted that the SDT had found at paragraphs 37-39 of the Judgment that:
- i) Mr Metcalfe had been “motivated by financial gain”;
 - ii) his actions were “planned and considered”;
 - iii) he was “directly, wholly and solely responsible for his conduct”;
 - iv) his conduct was “deliberate, calculated and repeated” and “had occurred over a period of time”;
 - v) he had “turned a blind eye to the clear and obvious hallmarks of fraud” in the Investment and Loan Scheme transactions and the Back-to-Back Share Sale transactions;
 - vi) he had “been evasive in both the interview and his written answers”; and
 - vii) his “position in interview of having little recollection of [Sandymoor] or the transactions” was “incredible”.
123. These findings, Mr Mulchrone submitted, were profoundly serious. There was no proper basis for disturbing them.
124. Mr Mulchrone submitted that, although Mr Metcalfe relied on “certified serious mental stress” in mitigation, the only medical evidence before the SDT was the letter from his treating doctor dated 21 June 2017, which was provided before Mr Metcalfe’s interview by Ms Barrowclough on 29 June 2017. That letter made it clear that the serious mental stress being suffered by Mr Metcalfe was caused by the SRA’s intervention and the investigation. That letter post-dated the Relevant Period, during which the dishonest conduct occurred. There was no expert medical evidence before the SDT relating to the Relevant Period. In any event, *SRA v James* made it clear that mental stress and pressure of work alone would not amount to exceptional circumstances.
125. Mr Mulchrone submitted that the SDT had carefully noted Mr Metcalfe’s mitigation (at paragraphs 31-35 of the Judgment), had regard to its Guidance Note on Sanction (paragraph 36), and correctly applied the “bottom up” approach to sanction (paragraph 40). The SDT was entitled to conclude that Mr Metcalfe had failed to demonstrate that there were exceptional circumstances justifying a sanction other than striking-off.

Analysis and conclusion

126. I accept Mr Mulchrone’s submissions on Ground 2. In my view, it is not arguable that there were exceptional circumstances justifying a sanction other than striking-off, much less that the sanction of striking-off was clearly inappropriate. The SDT properly applied its Guidance Note on Sanctions, taking an appropriate “bottom up” approach, and fully justified the sanction of striking-off, by reference to the seriousness of Mr Metcalfe’s conduct, including his dishonesty as found in relation to allegations 1.1 and 1.3.

127. Accordingly, Mr Metcalfe’s appeal on Ground 2 is dismissed.

Ground 3: the SDT’s exercise of discretion in making the costs order exceeded the ambit within which reasonable disagreement is possible

Submissions

128. Mr Budworth submitted that, in exercising its discretion to award the SRA virtually all of its costs, the SDT exceeded the ambit within which reasonable disagreement is possible. He submitted that the SDT failed to take proper account of the following factors:

- i) the SRA was wholly unsuccessful in relation to allegations 1.2, 1.7 and 1.8;
- ii) a day and a half of hearing time was wasted by the SRA’s attempts to arrange video-link evidence from one of the clients involved in the Loan and Investment Scheme transactions, which waste was the result of the SRA’s prior failure to comply with the published guidance for arranging video evidence;
- iii) the SRA acted unreasonably in making and pursuing certain allegations, including:
 - a) making a wholly unsubstantiated allegation that witnesses had been told by Mr Metcalfe not to speak to the SRA;
 - b) making a wholly unsubstantiated allegation that the Firm’s bank account was misused to provide unregulated services, in relation to which the SRA never made a positive case or put the allegation to Mr Metcalfe; and
 - c) making the wholly unsubstantiated allegation that the Firm’s client files for the Loan and Investment Scheme transactions contained “bogus correspondence”, when neither of the two witnesses spoken to by Ms Barrowclough in relation to those transactions made any such claim;
- iv) the established principle that costs should not represent an additional penalty; and

- v) the excessive time claimed in the SRA's costs schedule, namely, 60.5 hours to prepare the interim investigation report and the Final Report, 50 hours of lawyer time to prepare the Rule 5 Statement and two short witness statements.
129. In response Mr Mulchrone noted that the SDT set out its reasons for its costs order at paragraphs 44 to 47 of the Judgment. It properly noted the submissions made on behalf of the SRA and on behalf of Mr Metcalfe. The SRA sought costs in the sum of £32,373.50, comprised of £10,173.50 for the SRA's internal costs and £18,500 plus VAT for the costs of Capsticks LLP. The SDT found, for reasons that were open to it having regard to the SRA's schedule of costs, that the SRA's internal costs of £10,173.50 "were both reasonable and proportionate". The SDT also found that "the time taken on the unproven matters was minimal" such that it was appropriate to apply a small reduction of £1,500 to the fixed fee claimed by Capsticks LLP for all the work it had done on the case.
130. Mr Mulchrone submitted that the SDT properly understood the submissions on costs made by Mr Budworth on Mr Metcalfe's behalf. The SDT had heard all of the evidence, including Mr Metcalfe's evidence, during the course of a hearing that lasted four days. The SDT was in the best position to make a proper assessment of the costs. None of the points put forward by Mr Budworth demonstrated that the SDT's decision fell outside the generous ambit of its discretion. It was not open to Mr Budworth simply to reargue points on costs argued before the SDT in the hope that this court might take a different view.
131. Mr Mulchrone disputed the suggestion that the SRA had been awarded "virtually all" of its costs. The total figure awarded by the SDT was 94.4% of the amount claimed by the SRA. Dealing with the points made by Mr Budworth, which I have summarised at [128], Mr Mulchrone made the following points:
- i) Contrary to Mr Budworth's submission, the SDT did apply a discount in recognition that some matters were unproven but concluded that only a modest reduction of £1,500 was necessary.
 - ii) The lost hearing time was caused by the unexpected late withdrawal of a witness and the SRA's reasonable and proper attempts to deal with this. While there were some technical difficulties in relation to another witness, as well as a serious health issue, referred to obliquely in the Judgment at paragraph 6.1 ("an unavoidable appointment"), it was clear that the SDT did not consider that the SRA was to blame for these difficulties. In any event, the hearing concluded within its allotted time. Costs were not increased by these difficulties.
 - iii) It was no part of the SRA's pleaded case as set out in the Rule 5 Statement that Mr Metcalfe had told witnesses not to speak to the SRA.
 - iv) It followed from the SDT's unchallenged findings in relation to allegations 1.3 and 1.4 that Mr Metcalfe had allowed the Firm's client account to be used improperly in breach of Rule 14.5 of the 2011 Accounts Rules. Those findings were not challenged on this appeal.

- v) In relation to the reference to “bogus correspondence”, it is undisputed that two witnesses in relation to the Loan and Investment Scheme transactions provided evidence that they had never heard of, much less instructed Mr Metcalfe or the Firm, and that they had not signed letters purporting to be from them.
132. As to the submission of Mr Budworth that costs should not be imposed as an additional penalty, Mr Mulchrone referred to the judgment of the Divisional Court in *Merrick v The Law Society* [2007] EWHC 2997 (Admin), where at [61]-[62] Gross J said:
- “61. First, 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 off 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.
62. Secondly, 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. In some cases, the order for suspension or striking him off will be sufficient punishment. In others, it may not be.”
133. Mr Mulchrone noted that Mr Metcalfe had not claimed before the SDT that he did not have the financial means to meet the costs order.
134. More generally, Mr Mulchrone submitted that none of the factors cited by Mr Budworth was sufficient, individually, or collectively, to establish that the SDT had exercised its discretion outside the generous ambit within which reasonable disagreement is possible.
135. Finally, Mr Mulchrone denied that the time claimed on the costs schedule was excessive.

Analysis and conclusion

136. None of Mr Budworth’s submissions in relation to the costs order made by the SDT comes close to persuading me that the SDT exercised its discretion to award costs outside the generous ambit within which reasonable disagreement is possible. The SDT had regard to the submissions made on behalf of Mr Metcalfe. There is no basis for me to disturb their assessment of what was reasonable, having regard to nature of the issues, the number of allegations, the amount of evidence, the length of the hearing, and all of the other factors that the SDT was in a better position to assess than this court.
137. Accordingly, Mr Metcalfe’s appeal on Ground 3 is dismissed.

Conclusion

138. The appeal is dismissed on all grounds.