No. 10078-2008

IN THE MATTER OF HARILAL SUSANTHA FERNANDO
and PURANTHARAN RAJOO, solicitors

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr A H B Holmes (in the chair)
Mr D Glass
Mrs S Gordon

Date of Hearing: 28th May 2009

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of the Solicitors Regulation Authority ("SRA") by Iain George Miller of Bevan Brittan LLP, Fleet Place House, 2 Fleet Place, Holborn Viaduct, London, EC4M 7RF, on 19th August 2008 that Mr Harilal Susantha Fernando of Fernando & Co Solicitors, 15 Trinity Road, Tooting Bec, London SW17 7SD, solicitor, and Purantharan Rajoo of Raj Bhandari Solicitors, 38 Park Street, Mayfair, London, W1K 2JF, solicitor, might be required to answer the allegations contained in the statement that accompanied the application together with the further allegation against Harilal Susantha Fernando alone contained in a supplementary statement dated 9th April 2009 and that such Order might be made as the Tribunal should think right.

The allegations as against both Respondents were that:-

1. They had failed to maintain proper books of account contrary to Rule 32 of the Solicitors' Accounts Rules 1998 ("SARs"), in that:-

   (a) As at April 2006 the books of account had not been written up since 31st October 2005 contrary to Rule 32 (7) of the SARs.

   (b) The books of account had been written up in single entry rather than double entry form contrary to Rule 32 of the SARs.

   (c) They had failed to appropriately record dealings with office monies contrary to Rules 32(1)(c) and 32(4) of the SARs.

(d) Ledgers had not always been appropriately headed with the client name and description of the matter, in breach of Rule 32(1) of the SARs.

2. That contrary to the Solicitors Practice Rules 1990 ("SPRs") Rule 1(a), (c) and (d) they had charged clients as a disbursement:-

(a) Telegraphic transfer fees in excess of the sums charged to their firm by the banks for such fees.

(b) Arbitrary sums for "incidentals, postage etc" and "admin charges" without proper justification as to how such costs could have actually been incurred.

In the case of Mr Rajoo only, that he had charged clients as a disbursement:-

(c) a separate charge in respect of acting for the lender and/or completing the Stamp Duty Land Tax Form in a transaction.

3. The further allegations against Mr Rajoo alone were that:-

(a) he had failed to transfer out of client account money paid in full or part settlement of his bill within the appropriate time following delivery of that bill, and/or he had retained non-client monies in client account in breach of Rule 15(2) and 19(3) of the SARs;

(b) contrary to Rule 1(c) of the SPRs and/or Rule 6(3) of the SPRs he had failed to disclose material facts to mortgagee clients; and

(c) he had fabricated a letter dated 19th April 2006, and a corresponding entry in the firm's outgoing post journal, in order to mislead the Law Society's Forensic Investigator that he had fully complied with his duties to mortgagee clients, in breach of Rule 1(a) and (d) of the SPRs.

4. The further allegations against Mr Fernando alone were that:-

(a) He had withdrawn client money from a client account without either obtaining written instructions from the client to do so, or confirming himself in writing the client's oral instructions to do so, in breach of Rule 22(1) of the SARs.

(b) He had failed to comply with the Solicitors' Costs Information and Client Care Code 1999 (as amended) in breach of Rule 15 of the SPRs.

5. The further allegation made against Mr Fernando on behalf of the Solicitors Regulation Authority was that he had failed to respond to correspondence from the SRA contrary to Rule 20.03 of the Solicitors Code of Conduct 2007.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London, EC4M 7NS, on 28th May 2009 when Iain George Miller appeared as the Applicant. Mr Fernando neither appeared nor was he represented. Mr Rajoo was represented by Mr Giles of Counsel.

The evidence before the Tribunal included some admissions from Mr Rajoo together with his witness statement of 26th May 2009.

At the conclusion of the hearing the Tribunal made the following Orders:-

The Tribunal Orders that the Respondent, HARILAL SUSANTHA FERNANDO of Fernando & Co Solicitors, 15 Trinity Road, Tooting Bec, London, SW17 7SD, solicitor, be suspended from practice as a solicitor for an indefinite period to commence on the 28th day of May 2009 and it further Orders that he do pay a contribution towards the costs of and incidental to this application and enquiry fixed in the sum of £10,714.00.

The Tribunal Orders that the Respondent, PURANTHARAN, solicitor, be STRUCK OFF the Roll of Solicitors and it further Orders that he do pay a contribution towards the costs of and incidental to this application and enquiry fixed in the sum of £2,500.00.

The facts are set out in paragraphs 1 - 51 hereunder:-

1. Mr Fernando ("the First Respondent") born in 1937, was admitted as a solicitor in 1975. His name remained on the Roll.

2. Mr Rajoo ("the Second Respondent") born in 1968, was admitted in 2005. His name remained on the Roll (until 28th May 2009).

3. The First Respondent had practised alone from 1978 until February 2006 when he had been joined in partnership by the Second Respondent. They had practised under the style of Fernando & Co whose main practising address was 15 Trinity Road, Tooting Bec, London SW17 7SD.

4. The Second Respondent left Fernando & Co in August 2007 from which date he had practised as a partner at Raj Bhandari Solicitors, 38 Park Street, Mayfair, London, W1K 2JF.

5. An inspection of the Respondents' firm had been undertaken by Mr Sutherland and Mr Simpson on behalf of The Law Society's Forensic Investigation Unit comprising two visits on 4th April and 3rd May 2006 resulting in a report (the first FI Report) dated 26th June 2006. A further inspection of the Respondents' firm had been undertaken by Ms Yousif on behalf of The Law Society's Forensic Investigation Unit comprising visits on 25th September 2006 and 10th September 2007, resulting in another Report (the second FI Report) dated 19th September 2007.

6. The Forensic Investigators attending the firm on 4th April 2006 had been told that the books of account "had not been written up in full since 31st October 2005". They had also noted that the client monies held at the client account at Lloyds TSB operated by the First Respondent had been recorded in a handwritten cash book in single rather than double entry; and that the client monies held in the client account at NatWest operated by the Second Respondent had been similarly recorded in single entry format in handwritten client ledgers attached to each of the Second Respondent's files.

7. From a further visit, on 3rd May 2006, the Respondents had produced reconciliation statements and lists of balances for both the NatWest and Lloyds TSB accounts as at

31st March 2006. In respect of the Lloyds TSB account, the Forensic Investigators had stated that:-

> "The records revealed a large surplus when a comparison was made between monies held at the Bank and the total of the client balances, and upon enquiry, the Officers discovered that the list of balances was unreliable. A number of balances which should have been recorded on the list of liabilities were not recorded."

The First Respondent had later written to the Law Society on 8th May 2006 attaching "presumably" revised client balances and reconciliations, without supporting evidence and explaining that "our bookkeeper was abroad and this caused a slight problem which has now been overcome".

8. The concerns noted in the first FI Report had been raised with the Respondents on 13th July 2006 and by a further letter of 19th October 2006. The Respondents' reply of 7th August 2006 had explained that:-

   (a) The books had been written up to 31st March 2006 at the time of the inspection "albeit in manuscript" and that the usual practice had been to transfer the information to the computerised system (which had not been carried out at the time of inspection). A letter from Dean Sullivan Chartered Accountants had confirmed that from a limited examination on 4th August 2006, the books had been written up to 30th June 2006 on a monthly basis in respect of the Lloyds TSB account.

   (b) The client accounts had been continuously maintained in double entry format; the account with NatWest had been in the "early stages" of being organised, but the reconciliations had now been brought up to date (no evidence had been submitted).

   (c) The books of account had not been completely updated at the second inspection on 3rd May 2006 partly because of difficulties in getting the work carried out by the new bookkeeper and partly because the bank statement for April 2006 had not been received at that time (thus preventing reconciliations being drawn up).

   (d) The partners had not seen any discrepancies between the list of balances and monies held at the bank in respect of the Lloyds TSB account.

   (e) At the time of the letter of 7th August 2006 the accounts had been reconciled up to 31st July 2006 and client ledger balances, bank statements and reconciliations had been enclosed.

9. The Law Society had replied on 19th October 2006 requesting confirmation that the accounts in respect of both the NatWest and Lloyds TSB client accounts were now in double entry format and that reconciliations had been completed to September 2006. In response to the Respondent's comment at 8(d) above, the Law Society had also drawn the Respondent's attention to a particular discrepancy on the client ledger for K which indicated that a balance of £436,172.70 had been held at 31st March 2006; it had not been listed on the list of client balances.

10. On 24th October 2006 the Respondents had confirmed that the accounts were in double entry format and that reconciliations had been completed to September 2006. In respect of the K matter, the Law Society was informed that the previous list of client balances provided to the Forensic Investigator had been an older, incorrect version printed out and provided in error. The "correct" version was sent.

11. Subsequently, a further Forensic Investigator, Miss Yousif had attended at the firm in September 2006 and again in September 2007. She had inspected each set of books of account as at 31st August 2006 and 31st July 2007 and had noted that:-

    (a) Dealings with office money had not been appropriately recorded by entries on the office side of client ledgers.

    (b) Entries made on the client side of the client ledgers had not been clearly identified by adequate description, so that funds belonging to lender and purchaser clients sharing the same ledger could not be clearly identified and the ledgers had not always been appropriately headed with the client name and description of the matter.

12. The Forensic Investigator had specifically identified two client files, relating to Dr A and Mr M which had contained no office side entries and in relation to which inadequate descriptions had been posted in respect of the incoming and outgoing payments on the client side of the ledger.

13. The matters identified in the second FI Report had been raised with the Respondents on 3rd October 2007. The Response of 19th October 2007 had stated that:-

    (a) The fact that dealings with office money had not been recorded on the office side of the ledger had been an "oversight" and no client had suffered because of the omission.

    (b) The lack of adequate descriptions in relation to client money paid in had been due to the difficulties of the new bookkeeper in reading the handwriting on cheque stubs and paying in books, but that there had been no confusion and no client had suffered any loss.

    (c) The First Respondent's client ledgers had had the client name and had been numbered "according to the alphabet"; the Second Respondent's client ledgers had included the name and reference number of the file.

    (d) In relation to Dr A's file, the problem had been an "oversight".

    (e) In relation to Mr M's file, the problem had been "an oversight by the new bookkeeper which we had failed to notice and has now been rectified".

14. Allegation 1 was put on the basis that the Respondents had failed to maintain proper books of account contrary to Rule 32 of the SARs for the reasons listed above, and in particular, in that:-

(a) As at April 2006 the books of account had not been written up since 31st October 2005 contrary to Rule 32(7) of the SARs.

(b) The books of account had been written up in single entry rather than double entry form contrary to Rule 32 of the SARs.

(c) They had failed to appropriately record dealings with office monies contrary to Rules 32(1)(c) and 32(4) of the SARs.

(d) Ledgers had not always been appropriately headed with the client name and description of the matter, in breach of Rule 32(1) of the SARs.

(e) They had failed to compare properly the listing of all balances shown by the client ledger accounts of the liabilities to clients with the balance on the client cash account and to prepare an accurate reconciliation statement showing the cause of any difference, in breach of Rule 32(7) of the SARs.

Allegation 2 (a) – (c)

15. Upon reviewing client files belonging to both the First Respondent and the Second Respondent, the Forensic Investigator had determined that the sum claimed on completion statements for telegraphic transfer fees had exceeded the amount that the firm's office bank account had been charged for such fees. The review had also revealed that the information in the Second Respondent's client care letters as to charges had been incorrect. There had been no client care letters on the First Respondent's files.

16. A review of the First Respondent's office bank statements had revealed that he was being charged £12.50 for each telegraphic transfer made. The sum charged to the client however had been £30.00. A full list of the telegraphic transfer charges made by the First Respondent to his clients from 1st March 2006 – 31st August 2006, with a comparison of the actual cost to the First Respondent had shown a discrepancy of £183.50 in the First Respondent's favour.

17. The First Respondent's invoices had shown the fees as disbursements and on completion statements as a "bank charge".

18. A review of the Second Respondent's separate office bank statements had shown that he had been actually charged £23.00 by NatWest for each telegraphic transfer. The charge passed on to clients as a "disbursement" had been either £30 or £35. A full list of the telegraphic transfer charges made by the Second Respondent to his clients from 1st March 2006 to 31st August 2006, with a comparison of the actual cost had shown a discrepancy of £557.00 in the Second Respondent's favour.

19. The Forensic Investigator had further noted from her review of the files that both the First and the Second Respondent had been claiming seemingly arbitrary sums in respect of "incidentals", postage etc. and "admin charges" without evidence of any proper justification. Again, the information in the Second Respondent's client care letters as to charges had been incorrect.

20. The First Respondent's completion statements and invoices had revealed a charge under the heading "incidentals, postage etc." which was shown as a disbursement. That charge had varied between files from £30 to £100. A full list of such charges showed a total of £1,050 in respect of the period from 3rd March 2006 to 18th August 2006. The First Respondent had stated that the firm had been making such a charge for years.

21. The Second Respondent's files had revealed a similar charge, again shown on invoices and client care letters as a disbursement, in respect of "admin charges", typically ranging from £50 to £175. For the six months ending 31st August 2006, the total of these charges had been £3,949.02.

22. The Forensic Investigator also noted that the Second Respondent had charged separately for acting for the lender on a transaction or for completing the Stamp Duty Land Tax Form and that this had often, but not always, been noted as a disbursement on the invoice.

23. The Second Respondent had initially declined to comment on the noting of the separate charge as a disbursement. However, both the First Respondent and the Second Respondent had subsequently agreed that those charges had not been disbursements and that they would amend their client care letters, completion statements and invoices accordingly.

24. The Respondents had later written to the SRA on 19th October 2007. In respect of the First Respondent's files, it had been stated that most transactions had required two telegraphic transfers and therefore the amount charged (£30.00) had not been excessive; that there had been a standing charge to the bank of £80.00 per month and that the clients had been aware that the firm had charged for the facility and therefore there had been no "secret profit". In addition, the Respondents had denied that the transfer fees had been listed as disbursements in completion statements, although "rarely" they had been so listed on invoices due to the Respondents' belief that they had been legitimate expenses paid to the bank.

25. In relation to the "admin charges", the Respondents had submitted that those fees had arisen as the firm's fees had not taken into account overheads and that they had varied according to the work done. The clients had been familiar with, and had been informed of, costs.

26. The allegation was put on the basis that:-

    (a) The Respondents had each been making an improper profit by charging clients as a "bank charge" and disbursement telegraphic transfer fees in excess of the sums charged to them by their respective banks.

    (b) The Respondents had each charged arbitrary sums for "incidentals, postage etc." or "admin charges" without proper justification as to how such sums had been actually incurred and thus had wrongly recorded them as disbursements.

    (c) The Second Respondent had wrongly charged clients as a disbursement separate charges in respect of acting for the lender in a transaction and/or

completing the Stamp Duty Land Tax Form; and that conduct had amounted to a breach of Rule 1(a)(c) and (d) of the SPRs.

Allegation 3 (a)

27. The allegation was made against the Second Respondent alone. During her inspection of 10th September 2007, the Forensic Investigator had identified a file relating to a client named Mr M. There were three ledgers in respect of the client showing a balance outstanding on the client account of £109.38.

28. The Forensic Investigator had raised this with the firm's administrative assistant, Mr Lingham, during the inspection, who had explained that the money related to the VAT element of the bill delivered to the client. He had further explained that:-

> "...it is Mr Rajoo's practice to transfer only the net amount of bills delivered from client to office account and to leave the VAT element of bills on client account until the quarterly VAT return is completed".

29. The matter had been raised with the Respondents in letters from the Law Society dated 3rd October 2007. Their response, dated 19th October 2007 had stated that:-

> "the only office money relating to the delivered bills held in the client account was the VAT monies. Mr Rajoo for some reason had transferred the net amount to the office account leaving VAT element of bills in the client account until the quarterly VAT return was completed. However we can now confirm that the above practice has ceased and VAT is promptly transferred to the office account. This was done with immediately [sic] after the forensic visit..."

30. The allegation was put on the basis that the Second Respondent's custom of retaining the VAT element of delivered bills on the client account until the quarterly VAT return had been completed (which appeared to have been his standard practice until October 2007) had been in breach of:-

(a) Rule 15(2) of the SARs, which requires that only client money be held on client account.

(b) Rule 19(3) of the SARs, which states that money earmarked for costs becomes office money on the delivery of a bill and must be transferred out of client account within 14 days thereafter.

Allegations 3(b) and 3(c)

31. The allegations were made against the Second Respondent alone. On 3rd May 2006, the Forensic Investigators had reviewed three of the Second Respondent's files relating to the purchase of flats in Bingley, West Yorkshire. In all three cases, the Second Respondent had acted for the purchaser and also for the lender, Kensington Mortgages. In all cases, the purchasers had acquired the properties at a 20% discount.

32. The Forensic Investigators had been concerned that there had been no evidence on the file to suggest that the Second Respondent had informed the mortgagee of the

discount as required by the Council of Mortgage Lenders Handbook paragraph 6.3.1 and Practice Rule 6(3) and they had raised this point with him. The Second Respondent had then left the room to check his computer and had returned with a copy letter dated 19th April 2006 addressed to Kensington Mortgages stating:-

> "...we write to inform that the Seller has agreed to given [sic] discount in the purchase price of the above matter to our clients if contracts could be exchanged within the date set by the Seller".

33. The Second Respondent had been asked why the letter had not been on the file to which he had replied that he had forgotten. He had been asked if the mortgagee had responded and he had replied "No".

34. The Second Respondent had been asked to access the letter on his computer. He had done so and the computerised records had shown that the letter had in fact been created on 3rd May 2006 at 12:22:54 pm. The Second Respondent had initially denied that the letter had been created the same day and had referred to the firm's outgoing post journal, which had recorded three letters sent by DX to Kensington Mortgages on 19th April 2006.

35. The Forensic Investigator had challenged the Second Respondent again and the Second Respondent had insisted again that the letter had been created on 19th April. Mr Sutherland had then said "Who do we believe, you or the computer?" At which point the Second Respondent had closed the interview room door and had said "I must admit I created it today". The Second Respondent had also admitted writing in the post book, adding "I have no intention of doing any malpractice whatsoever. This just came to my mind and I just did it". He had admitted that he had created the letter and had written in the post book after the Forensic Investigators had asked for the files and that Kensington Mortgages had not been told of the discounts. Mr Sutherland had continued by asking whether the letter had been "designed to mislead the Law Society Investigators" to which the Second Respondent had replied "Well, yes, but I had no intentions to any malpractice whatsoever".

36. The issue had been raised with the Respondents in the Law Society's letter of 13th July 2006. In the Respondents' reply of 7th August 2006, they had stated:-

> "...it is very much regretted. Having realised his mistake, he most certainly panicked and very foolishly due to his inexperience tried to cover up the lapse. He is very sorry that he behaved in this manner. I would however ask you to kindly consider the fact that he was man enough to immediately admit to you that he did try to cover up his mistake. I can confirm that there was no intention whatsoever on his part to mislead you in anyway... Mr Rajoo made an innocent mistake due to an oversight with no element of dishonesty whatsoever in his failure to send the letter to Kensington Mortgages. His first reaction was to hide his error rather than seek a constructive solution to it...Mr Rajoo deeply regrets and sincerely apologises that it happened..."

37. Allegation 3(b) was put on the basis that the Second Respondent had failed to inform Kensington Mortgages of the discounts offered on all three files and therefore had failed to disclose material facts to mortgagee clients.

38. Allegation 3(c) was put on the basis that on 3rd May 2006 the Second Respondent had fabricated a letter dated 19th April 2006 and a corresponding entry in the firm's outgoing post journal with the intention of misleading the Law Society's Forensic Investigators. Whilst dishonesty was not an essential part of the allegation, it was nonetheless alleged that the Second Respondent's actions amounted to conscious impropriety or dishonesty.

Allegation 4(a)

39. Allegations 4(a) and 4(b) were made against the First Respondent alone. The Forensic Investigator had reviewed one of the First Respondent's files relating to a client named Dr A. The First Respondent had acted for Dr A in relation to the purchase of a medical practice which was to be entirely funded by a loan of £390,000.

40. The client ledger showed three separate deposits on the same day of £250,000, £50,000 and £390,000. The last was presumed to represent the loan finance although there was no description of source relating to any of the three on the ledger itself. Subsequently, there was a payment out of £300,000 shown on the client ledger "TO MOTHER". The Forensic Investigator had noted that the file had not contained any written instructions or file notes in relation to the receipt or payment of the £300,000.

41. The Forensic Investigator had raised this with the First Respondent on 12th September 2007 and had been told that:-

> "Dr A's brother, had sent the firm the additional £300,000 to assist in the purchase, as at that time the loan finance had not been received and there was pressure on completion. When the loan finance was received, the firm was instructed by the brother to pay the £300,000 received from him to his mother".

42. The First Respondent had agreed that the file had not contained any written instructions or file notes in relation to the extra £300,000 but had said that "he saw this as how the family transacted their business and that he had known them as clients of the firm for 15 - 20 years".

43. The matter had been raised again with the First Respondent on 3rd October 2007 and he had responded on 24th October 2007. The First Respondent had explained that Dr A's family had been his clients since 1985; that most of the instructions relating to the purchase had been taken by telephone and that the rest of Dr A's family had also been in "constant contact" with him to ensure that the transaction completed on time. He had further explained that the sum of £300,000 had been provided by Dr A's eldest brother who was a multi-millionaire and "has never given Mr Fernando written instructions".

44. A copy of a handwritten telephone note had been provided with the First Respondent's letter of 19th October 2007. It was dated 29th June, marked "from H" and stated the names of a Dr and Mrs A, together with account details and "£300,000". It was unclear whether it related to the payment in or out, although as the First Respondent stated in his accompanying letter that the instructions to pay out had been received from Dr A's brother, it seemed likely to relate to the payment in.

45. The First Respondent had further explained in his letter that the loan monies had not reached his account by the stipulated completion time and that the monies provided by Dr A's brother had therefore been used to complete the purchase at 1.30pm. The loan monies had then been received at 1.50pm the same day.

46. Allegation 4(a) was put on the basis that:-

(a) The sum of £300,000 paid in by Dr A's brother was "money held or received for a client" and was therefore client money within the definition provided by Rule 13 of the SARs.

(b) Under Rule 22(1)(e) of the SARs client money could be withdrawn from a client account on the client's instructions, provided that those instructions were provided or subsequently confirmed in writing.

(c) The instruction to pay out the £300,000 had been received orally from Dr A's brother. There had been no instructions from the actual client on this matter (Dr A) and therefore the money had been withdrawn in breach of Rule 22(1)(e).

(d) In addition, the instruction to withdraw the £300,000 from the client account had not been received by, or confirmed to, the client in writing and therefore the withdrawal had been in breach of Rule 22(1)(e) of the SARs.

Allegation 4(b)

47. The allegation was made against the First Respondent alone. The Forensic Investigator had reviewed at least two of the First Respondent's files, in respect of Mr R and Dr A. Mr R's file had contained no client care letter or other written notification of costs. Dr A's file had contained an initial letter, but again no costs information had been provided in writing to the client.

48. This had been raised with the First Respondent during the visit on 10th October 2006, to which he had responded that "until three months previously, he had not sent any client care letters to his clients, he said he had informed clients of costs orally".

49. The issue had been raised again in the SRA's letter of 3rd October 2007, to which the Respondents had replied on 19th October 2007, stating that:-

> "Most of Mr Fernando's clients have been with Mr Fernando from 1978 and they consider him to their [sic] family solicitor and are very familiar with Mr Fernando's client care and costs. Whereas with the new clients Mr Fernando has always issued client care letters with estimate of costs".

50. Allegation 4(b) was put on the basis that:-

(a) Rule 15 of the SPRs required solicitors to provide information about costs and other matters "in accordance with the Solicitors Costs Information and Client Care Code made from time to time..."

(b) Paragraph 4 of the Solicitors Costs Information and Client Care Code 1999 (as amended) required a solicitor to give the client, inter alia "the best information possible about the likely overall costs..."

(c) Paragraph 3 further required that all information provided orally "should be confirmed in writing to the client as soon as possible."

(d) The First Respondent, in not providing a written notification of costs to clients prior to (by his own admission) July 2007 had therefore failed to comply with the Solicitors Costs Information and Client Care Code 1999 and as such had breached Rule 15 of the SPRs.

51. Allegation 5

This allegation related to an investigation of a complaint by a client of the First Respondent, Mrs M. After initial correspondence with the First Respondent, the caseworker had raised allegations with him on 15th July 2008. On 29th July 2008 the First Respondent had said that he would retrieve his file from storage. No further response had been received from the First Respondent in relation to the matter. The allegation was that by failing to properly respond to correspondence from the SRA, the First Respondent had inhibited the proper investigation of the matter.

The Submissions of the Applicant

52. The Applicant explained that the First Respondent had not participated in the proceedings and had retired and lived abroad. Although there was proof of service of the original Rule 5 Statement and of the Notices to Admit there was some doubt as to the service of the Supplementary Statement. The Applicant explained that the later Statement contained the least serious allegation against the First Respondent, reflecting as it did that the First Respondent had given up practice and retired abroad and was not responding to the SRA. The Applicant applied to withdraw the allegation from the Tribunal and to be allowed to let it lie on the file. The Tribunal agreed to the Applicant's request and stated that it was satisfied as to service and that the application should proceed on the basis of the Rule 5 Statement against both Respondents. The Applicant referred to the partial admissions of the Second Respondent in his witness statement of 26th May 2009 and stated that he would proceed against the First Respondent as if all allegations against him had been denied.

53. The Applicant took the Tribunal through the allegations together with the supporting facts, partial admissions and relevant documentation. He submitted that there were two aspects to the case: allegations that related to lax, old fashioned and sharp practices of the firm; and a very serious allegation against the Second Respondent involving dishonesty.

54. Dealing with allegation 3(c) against the Second Respondent alone, the Applicant explained that there was no dispute as to the facts that the question for the Tribunal was whether the Tribunal could be sure that the Second Respondent had both acted dishonestly by the standards of reasonable and honest people and known at the time that by those same standards he was acting dishonestly. The Applicant submitted that lying to his regulator during the course of an investigation in order to cover up his own shortcomings fell well short of the probity expected of a solicitor and officer of

the court. Initially the Second Respondent had denied, but later he had admitted, that he had created a letter while the Investigators were at the firm.

55. The Applicant explained that while there was no issue as to the amount of the costs of £13,214, there was an issue as to their apportionment.

Submissions on behalf of the Respondent

56. Mr Giles told the Tribunal that the Second Respondent took the proceedings extremely seriously. While the First Respondent had retired, the Second Respondent had dealt with the proceedings in a professional manner throughout. He explained that the Second Respondent had the utmost respect for the profession and claimed to be an honest and decent man. Counsel gave the Tribunal details of the Second Respondent's professional history. He stressed that he had only recently qualified, in November 2005, and that his training had not been of a good standard in that he had not been set an example of how to practise properly within the professional Rules. In his anxiety to progress his career, the Second Respondent had accepted a position as a partner which with the benefit of hindsight he realised that he should not have accepted. The Second Respondent had believed that the First Respondent had been a successful solicitor and he had trusted him. Unfortunately, the First Respondent had not been such a good example for the Second Respondent as he had been old fashioned, set in his ways and not in compliance with modern practices. While admitting his own lapses, the Second Respondent had not been aware of any financial loss to any clients of the firm. As a partner however the Second Respondent accepted he was liable, but Mr Giles stressed that the Second Respondent had been very much the junior partner and at the time of the inspection had only been a partner for a couple of months. For example, in relation to allegation 3(a), while the Second Respondent accepted the allegation, his actions had been due simply to a lack of knowledge in that he had acted in the way that he had been taught as a trainee.

57. Turning to allegation 3(c), the fabrication of a letter, Counsel accepted the test for dishonesty as being that formulated in Twinsectra. However, he referred the Tribunal to the Second Respondent's witness statement containing his response to that allegation. Counsel submitted that, although today the Second Respondent could see that his action was dishonest and wrong, the Tribunal had to determine what the Second Respondent had believed at the time. Counsel reminded the Tribunal that at the time the Second Respondent had just qualified, had recently been made a partner and had been under enormous strain. In fact his dreams had come true after years of work and sacrifice and then, out of the blue, the Inspectors had arrived and appeared to be finding fault. When the Inspectors returned in May 2006, the Second Respondent had been concerned that there was another failing on his part. This was because he had had no previous experience of discounted transactions and had failed to inform the lenders. He had created the letter in a rush. It had clearly been lacking in detail. Counsel submitted that the Tribunal could not be sure that the Second Respondent had been aware that he was acting dishonestly when he was in a panic produced by stress. Counsel further submitted that the creation of the letter had not been a premeditated action. It had been idiotic and stupid beyond comprehension but it had been done with no thoughts of dishonesty. Counsel stressed that the Second Respondent had admitted his actions when confronted and in so doing had shown his true character.

58. Counsel reminded the Tribunal that the events had taken place over three years before. In the meantime the Second Respondent had continued to work as a solicitor with limitations on his practising certificate to undergo training relating to the SARs and client care. The Second Respondent had complied with those limitations and was working as a non-salaried and non-equity partner in a new practice in the East End. He was not currently making any money. Counsel submitted that the Tribunal had options other than strike off or suspension even if it found dishonesty and that not to exercise those other options would be unnecessarily oppressive given that the Second Respondent had continued to practise.

59. Counsel submitted that the Second Respondent was basically an honest man who had lapsed under pressure three years previously but who was now more experienced and more conscious of the demands of modern practice. He submitted further that a strike off or suspension was unnecessary from the point of view of public protection or of public confidence. He stressed that as there were varying levels of culpability so there were varying degrees of dishonesty.

The Findings of the Tribunal

60. Having considered all the evidence including the submissions of both the Applicant and of Counsel for the Respondent, the Tribunal was satisfied, so that it was sure, that all the allegations as pleaded had been proved against the appropriate Respondent. That was, as renumbered in the findings, allegations 1(a) 2(d) and 2(a) and (b) as against both Respondents and allegations 2(c) 3(a) and 2(c) as against the Second Respondent only and allegations 4(a) and (b) as against the First Respondent only. Allegation 5 being allowed to lie on the file. Moreover, the Tribunal was satisfied, so that it was sure, that the Second Respondent had acted dishonestly in fabricating a letter dated 19th April 2006 and in making a corresponding entry in the firm's outgoing post journal on 3rd May 2006 with the intention of misleading the Forensic Investigators. The Tribunal was satisfied that he had been dishonest by the standards of honest and reasonable people and that at the time of his actions the Second Respondent had known that by those same standards he was acting dishonestly. Moreover, the Tribunal had been extremely concerned by the unacceptable "sharp" practices relating to disbursements in that such practices had contained elements of hidden profit.

61. Counsel addressed the Tribunal in mitigation giving details of the personal and professional circumstances of the Second Respondent including his visa restrictions. Counsel stressed that the case was unusual, involving a momentary lapse of an essentially honest and trustworthy individual. As to costs, Counsel reminded the Tribunal that the partnership had been in existence for many years before the Second Respondent had joined and that the bulk of the costs should therefore be borne by the First Respondent. He submitted that a joint and several liability Order would not be appropriate in the particular circumstances.

62. Addressing the Tribunal on a point of law, the Applicant referred to the recent decision of the Court of Appeal in the case of Salsbury.

63. Counsel stressed that he had not been referring to low level dishonesty but to momentarily unpremeditated dishonesty that had not amounted to a course of conduct in an individual who had owned up at the time.

The Decision of the Tribunal as to Penalty and Costs

64. Having considered the helpful submissions of the advocates as to penalty and costs, the Tribunal Ordered that the Second Respondent be struck off the Roll and that the First Respondent be suspended for an indefinite period.

65. As to the Second Respondent, while the Tribunal accepted that his dishonest actions of fabricating a letter and of making a corresponding entry in the firm's outgoing post book had taken place when the Second Respondent was undergoing a stressful visit from the Law Society's Forensic Investigators, it was extremely concerned that those dishonest actions had culminated in a solicitor lying to his regulator. The Tribunal noted that it was essential that solicitors always dealt with their profession's regulator in an open and honest fashion. The Tribunal took an extremely serious view of lying to the regulator. Moreover, the Tribunal could not be satisfied that if once again he was put under stress, the Second Respondent might not act in a similar way.

66. Turning to the First Respondent, the Tribunal was concerned that he had failed to engage in the proceedings. It considered that suspension was necessary to ensure that the First Respondent did not practise again without first demonstrating that he was fully aware of the relevant and current procedures under the Solicitors Accounts Rules and the Solicitors Practice Rules.

67. As to costs, the Tribunal was satisfied that given the relative positions of the two partners a joint and several costs Order was inappropriate. Accordingly the Tribunal Ordered that the First Respondent contribute £10,714.00 and the Second Respondent contribute £2,500 towards the costs of the proceedings.

Dated this 17th day of December 2009
On behalf of the Tribunal

A H B Holmes
Chairman