

The Solicitors Regulation Authority's appeal against the sanction of suspension from practice for three years imposed by the Tribunal was allowed by Lord Justice Pitchford and Mr. Justice Foskett on 9 October 2012. The sanction of suspension was quashed and substituted with an order striking the Respondent Millard Decal Spence off the Roll of Solicitors.

No. 10115-2008

IN THE MATTER OF MILLARD DECAL SPENCE and
[RESPONDENT 2], solicitors

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr J N Barnecutt (in the chair)
Mr J R C Clitheroe
Mr J Jackson

Date of Hearing: 5th October 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 Jonathan Richard Goodwin, Solicitor Advocate, of 17E Telford Court, Dunkirk Lea, Chester Gates, Chester, CH1 6LT on 20th October 2008 that Millard Decal Spence solicitor of Handsworth, Birmingham, West Midlands, and *[Respondent 2]* solicitor of Birmingham, solicitors, might be required to answer the allegations contained in the statement which accompanied the application and that such Order might be made as the Tribunal should think right.

The allegations against the Respondents were that:-

1. They made representations to employees of the SRA and the Law Society that were misleading. In all the circumstances the Respondents conduct was dishonest, and in the alternative reckless.

2. They carried on practice whilst uncertified contrary to Rule 20 of the Solicitors Code of Conduct 2007 ("SCC").
3. [Withdrawn against the Second Respondent]. The First Respondent failed to reply to correspondence from the SRA and/or failed to co-operate with the SRA.

Further allegations against the First Respondent only were that:-

4. He failed to keep accounts properly written up in accordance with Rule 32 of the Solicitors Accounts Rules 1998 (hereinafter referred to as the 1998 Rules).
5. He carried on practice whilst uninsured, contrary to Rules 4, 5, 7, 10 and 16 of the Solicitors Indemnity Insurance Rules 2007 ("SIIR").
6. He failed to pay the Assigned Risk Pool payment of £10,395.00 contrary to Rule 10.12 of the SIIR.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London EC4M 7NS on 5th October 2009 when Jonathan Goodwin appeared as the Applicant, and both Respondents appeared in person.

The evidence before the Tribunal included admissions from the First Respondent to allegations 1 (but not the allegation of dishonesty), 2, 3, 4, 5 and 6 and admissions from the Second Respondent in relation to allegation 1 (but not the allegation of dishonesty). The evidence before the Tribunal also included references in relation to the First Respondent.

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

The Tribunal Order that the Respondent, Millard Decal Spence of Handsworth, Birmingham, West Midlands, solicitor, be suspended from practice as a solicitor for the period of three years to commence on the 5th day of October 2009 and it further Order that he do pay a contribution towards the costs of and incidental to this application and enquiry fixed in the sum of £8,400.00.

The Tribunal Order that the Respondent, [*Respondent 2*] of Birmingham, solicitor, be suspended from practice as a solicitor for the period of four months to commence on the 5th day of October 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 £3,600.00.

At the beginning of the hearing the Applicant requested leave to withdraw allegation 3 against the Second Respondent. The Tribunal granted leave for allegation 3 to be withdrawn against the Second Respondent.

The facts are set out in paragraphs 1 to 17 hereunder:-

1. The First Respondent, Millard Decal Spence, born in 1962, was admitted as a solicitor on 1st June 2000.

2. The Second Respondent, [*Respondent 2*], born in 1975, was admitted as a solicitor on 4th January 2005.
3. At all relevant times the First Respondent carried on practice on his own account under the style of Soho Law Solicitors, from offices at 107 Soho Hill, Hockley, Birmingham, B19 1AY. The Second Respondent was employed as an Assistant Solicitor at the above mentioned practice.

Allegation 1 (First Respondent)

4. On 14th February 2008 an Investigation Officer (“IO”) attended at the Respondent’s office. A Report dated 16th April 2008 was prepared, a copy of which was before the Tribunal.
5. On 14th February 2008, the IO contacted the First Respondent by telephone. The First Respondent represented that he was at home arranging a loan due to cash flow issues. However, documentary evidence subsequently obtained by the IO, indicated that the First Respondent had in fact been representing a client in Birmingham Magistrates Court.
6. Documentation revealed that the following took place on 14th February 2008.
 - * An attendance note with the First Respondent’s initials in a box marked ‘attender’ stated inter alia, ‘perusal of file and preparation for today’s hearing’.
 - * A Criminal Case Synopsis Sheet had written on it ‘client pleads guilty to FSB’ and included an eight point check list, four of the eight points being dated 14th February 2008.
 - * A disbursement sheet detailing the First Respondent as the payee and fee earner detailed that on the 14th February 2008 he had travelled to Birmingham Magistrates Court.
7. Consequently, given the First Respondent was at Birmingham Magistrates Court representing a client on the 14th February 2008, his representation to the IO that he had been at home on the 14th February 2008 was misleading and untrue.
8. The First Respondent indicated on his Practising Certificate Renewal Form for the practice year 2007/2008 (form RF1) that Soho Law Solicitors had in place Indemnity Insurance for the indemnity year 2007/2008 which was provided by Zurich Professional Ltd. In fact no such policy was in force and Soho Law Solicitors had not obtained indemnity insurance.
9. On 13th February 2008 the First Respondent advised a caseworker employed by the SRA that a Ms Mary Toussaint of Toussaint Solicitors had been dealing with all live client matters. However, the IO spoke with Ms Toussaint who indicated that she had not been involved with the practice in any way.

10. On 29th February 2008 the First Respondent advised the caseworker that he now had indemnity insurance in place and would fax a copy of his policy to the SRA. No such fax was received. The First Respondent did not obtain indemnity insurance for the year 2007/2008 until 3rd April 2008.

Allegation 1 (Second Respondent)

11. On 18th March 2008 the Second Respondent informed the IO that Ms Mary Toussaint from Toussaint Solicitors had been in attendance with him at Birmingham Magistrates Court on 5th February 2008, and had also acted as an agent for the practice and been involved in other client matters that he had worked on.
12. On 31st March 2008 the IO spoke to Ms Toussaint and asked if at any point she had acted as an agent for Soho Solicitors. Ms Toussaint said that she had not. Ms Toussaint also confirmed that she had not attended Birmingham Magistrates Court on 5th February 2008, as suggested by the Second Respondent.

Allegation 2

13. The First and Second Respondents' practising certificates for the practice year 2006/2007 were terminated by the Law Society on 12th December 2007. Both Respondents continued to practice as solicitors until practising certificates were issued on 15th February 2008 in relation to the practice year 2007/2008. In relation to the First Respondent, his practising uncertificated was aggravated by the fact that he was instructed on several occasions by the SRA that he could not practice.

Allegation 3

14. The First Respondent failed to respond to telephone calls made by the IO on 26th and 27th March 2008, and failed to respond to a letter dated 8th April 2008 sent by the IO by recorded delivery, requesting the First Respondent to contact him urgently. He also failed to respond to a number of other letters sent to him by the SRA.

Allegation 4 (First Respondent only)

15. The Report prepared by the IO demonstrated that the First Respondent had failed to comply with the Solicitors Accounts Rules. Books of account were not properly written up to show the firm's dealing with office money and client matter files open since 24th November 2007 were not detailed in the firm's open client matter list and no client ledgers were provided for these new matters.

Allegation 5 (First Respondent only)

16. The Indemnity Insurance Policy in respect of Soho Law Solicitors expired on 30th September 2007. Relevant Indemnity Insurance was not obtained via the Assigned Risks Pool until 3rd April 2008. Throughout that period the First

Respondent was without Indemnity Insurance and yet continued to practice as Soho Law Solicitors.

Allegation 6 (First Respondent only)

17. The SRA was notified by the Manager of the Assigned Risks Pool that the payment to the ARP due in the sum of £10,395.00 had not been paid. On 16th July 2008, Soho Law Solicitors was intervened.

The Submissions of the Applicant

18. The Applicant confirmed that, save for the allegation of dishonesty, all the allegations were admitted by the First Respondent. In relation to the Second Respondent, he admitted allegation 1, but not the allegation of dishonesty, and he denied allegation 2, on the basis that he was not aware he had practised uncertified.
19. The Tribunal were referred to the case of *Twinsectra Limited v Yardley and Others* [2002] UKHL 12 for the test of dishonesty. The Tribunal had to consider whether an honest, ordinary and reasonable member of the public would take the view that the Respondents' conduct had been dishonest and further, whether the Respondents themselves were aware that by those same standards they had acted dishonestly. The First Respondent had accepted that he had attended the Birmingham Magistrates Court and it was submitted that by informing the IO that he had been at home arranging a loan due to cash flow issues, he had misled the IO. The Applicant submitted that it was incumbent on solicitors to operate at all times in an open and transparent manner and to assist the SRA with their enquiries.
20. The Applicant also submitted that the First Respondent acted dishonestly in relation to completing his application for renewal of his practising certificate by indicating that his practice had indemnity insurance when it had not. The First Respondent had submitted that this was an oversight but the Applicant submitted that the First Respondent knew what he had done was wrong. The First Respondent had told the IO that he had sent his professional indemnity insurance proposal form a little late during a postal strike. The First Respondent had confirmed that at the time he completed the form he did not have the policy number so did not fill it in and that he probably contacted Zurich and that the form had been completed in good faith. The Applicant submitted that the First Respondent knew he did not have professional indemnity insurance and had signed a declaration that was untrue.
21. The First Respondent advised the IO that another solicitor, M Toussaint had been dealing with all live client matters, however the Tribunal were referred to a witness statement from M Toussaint confirming that she had not been involved with the practice of Soho Law Solicitors and did not undertake any work for the firm. The Applicant submitted that the First Respondent's statement to the IO was misleading, untrue and dishonest.

22. In relation to allegation 2 which was denied by the Second Respondent, on the basis that he claimed he did not know he practised uncertified, the Tribunal were referred to a conversation between the IO and the Second Respondent dated 18th March 2008 when the Second Respondent stated “for [a] period we had no licence”. The Applicant submitted that the Second Respondent clearly knew he did not have a practising certificate and it was his responsibility to ensure all regulatory requirements were attended to. The Second Respondent’s position was further aggravated as the First Respondent had told the IO that the Second Respondent was aware of the cash flow difficulties and lack of practising certificates.
23. The Applicant submitted that practising without professional indemnity insurance was a serious matter and potentially exposed clients to risks.

The Oral Evidence of Mr Shields

24. Mr Shields took the oath and confirmed his full name and that he was the investigation officer whose report was before the Tribunal. Mr Shields confirmed that the First Respondent had told him on 14th February 2008 that he had been very busy at home arranging a loan due to cash flow issues at the practice and that Ms Toussaint of Toussaint Solicitors had been supervising the practice that day. Mr Shields confirmed that he did not have an absolute recollection of the conversation and accepted that the First Respondent’s attendance note dated 14th February 2008 indicated a start time of 9.30 am for his attendance at Court.

The Oral Evidence of Mary Toussaint

25. Mary Margaret Toussaint was sworn in and confirmed her name, address and that her statement dated 15th June 2009 before the Tribunal was true.
26. On cross examination Ms Toussaint confirmed that the First Respondent had spoken to her in around February 2008 and told her that the SRA may contact her and asked her to support what the First Respondent had said to the SRA in that he had told them Ms Toussaint had been supervising his practice. The First Respondent had contacted Ms Toussaint after the event and was asking her to endorse what he had said. Ms Toussaint confirmed that as a fellow practitioner she had wanted to try and assist but having discussed the matter with the First Respondent could not assist him. The First Respondent had asked her to “back me up”. He had asked her to lie.
27. Ms Toussaint confirmed that she had not supervised the practice and having received more information about the involvement of the SRA, she felt she was not in a position to help the First Respondent as she did not wish to place herself in an adverse position. Ms Toussaint confirmed that the First Respondent did not at any stage ask her to supervise and look after client files at Soho Law Solicitors.

The Submissions of the First Respondent

The Oral Evidence of the First Respondent

28. The First Respondent took the oath and confirmed his full name and address. He indicated that he had been suffering problems in both his professional and personal life. At the time of the conduct alleged he had been engaged to be married but in January 2008 the relationship floundered. The First Respondent admitted that he took his eye off the ball and late that year had apologised to his staff for being an absentee boss. He had been physically at the practice but not mentally.
29. Soho Law Solicitors had come about as a result of the Respondent's acrimonious break up from AS Solicitors. When he had left that firm he took 4 members of staff with him and had felt a tremendous loyalty to those staff members as they stayed with him. When the firms parted, the First Respondent lost 95% of his client files, and matters were such that floorboards and doors were removed, a lot of nonsense was going on and he had been trying to protect his staff who were being threatened. There were financial issues due to the break up and the First Respondent's bank had been unable to extend overdraft facilities to him and he had effectively existed on monthly payments from the Legal Services Commission ("LSC"). Cash had been extremely limited and staff were paid when the LSC payments came through. For many months the First Respondent did not take any salary himself as he felt a duty of care towards his staff.
30. The First Respondent now realised that there were many options he could have taken, but at that time he saw himself in the heat of the battle and made decisions which, in the cold light of day, he now accepted could have been dealt with better. He was in an emotional whirlpool caught up in his private life which affected his professional life. He was trying to keep things together in a cash starved firm and the only way to increase the income was to increase the workload in order to obtain increased monthly payments from the LSC. He had been trying to breathe life into a firm, keep the clients happy, get the money in and deal with SRA regulatory issues.
31. The First Respondent accepted that he had made stupid decisions and that he had tried to stall the SRA in the hope that if the money came in, everything would be resolved and issues would be dealt with. He accepted that he had made mistakes and that he should have responded more promptly to the SRA but he had simply been trying to get money into the practice so that he could pay for professional indemnity insurance and practising certificate fees. He wanted to keep the firm going in order to pay the staff.
32. The First Respondent confirmed that all the allegations were accepted save the allegation of dishonesty. The Tribunal were referred to 2 references provided on behalf of the First Respondent. The First Respondent accepted that his actions had been deplorable and were simply taken to keep his practice running and build up the firm in an area where there was a need. He also confirmed that

ultimately when funds became available, practising certificates had been obtained and professional indemnity insurance had been taken with the Assigned Risks Pool. The First Respondent accepted that he had a duty to be open and transparent and not bring the profession into disrepute. He accepted that his actions had fallen below that standard but his intentions had been good.

33. On cross examination, the First Respondent accepted that he had taken a conscious decision to make misleading representations to the SRA. He had taken action to keep his firm going and failing to attend court would have been the death nail of his firm. He accepted that he had lied to the IO on the 14th February 2008 but his motivations had been good. The First Respondent accepted that it had been dishonest to tell the IO that Ms Toussaint was supervising his office when she clearly wasn't. He accepted it was untrue to say Ms Toussaint had been dealing with all live client matters and that he had not been practising. The First Respondent confirmed that when he advised the SRA on 29th February 2008 that his insurance was now in place, it had not been finalised and this statement was untrue and dishonest. However, his understanding had been that if there was no professional indemnity insurance in place, a firm automatically fell into the Assigned Risks Pool. The First Respondent accepted that he knew there was no insurance policy and therefore no insurance but he thought the practice had fallen automatically into the Assigned Risks Pool.
34. The First Respondent confirmed that he had contacted Ms Toussaint and explained that the SRA had been in touch with him. He asked her to confirm to the SRA that she had supervised his practice. The First Respondent had asked Ms Toussaint to supervise his firm but she did not remember this. The First Respondent accepted that the contents of Ms Toussaint's witness statement were true. He had told the Second Respondent that he had spoken to Ms Toussaint and she was covering the firm for the interim period while there were no practising certificates in place. The Second Respondent, being an employee, had not disputed what he had been told by the First Respondent.
35. The First Respondent confirmed that he had attended court on the 14th February 2008 at 9.30 am and that the hearing would have concluded in the morning as the advocacy time given on his attendance note confirmed this.

The Submissions of the Second Respondent

The Oral Evidence of the Second Respondent

36. The Second Respondent took the oath and confirmed his full name and address. He had been working at AS Solicitors since 2004 and his practising certificate had been automatically renewed by the firm. As a result of this, he had not been aware that his practising certificate with Soho Law Solicitors had not been renewed.
37. On cross examination by the Applicant the Second Respondent confirmed that it was only in February 2008 that he became aware that he did not have a practising certificate. He had known that there were cash flow difficulties as he had not received his salary but he did not know about the problems regarding

professional indemnity insurance and practising certificates. The issue of practising certificates had never come up before and he had not known, prior to February 2008 that they had not been renewed.

38. Regarding allegation 1, the Second Respondent accepted that he had misled the SRA by advising them that Ms Toussaint had been in attendance with him at the Birmingham Magistrates Court on 5th February 2008. He accepted that this was untrue and he accepted that was dishonesty. He knew that Ms Toussaint had not attended Court with him or that she had acted as agent or that she had been involved in other client files. The only reason he had said this to the SRA was because he thought the First Respondent had agreed with Ms Toussaint that she would come in and supervise the practice.
39. The Second Respondent confirmed that he had always worked for the First Respondent since he had qualified and had never worked at any other firm.

The Tribunal's Decision

40. The Tribunal listened carefully to the evidence, the submissions of the parties and had considered all the documentary evidence provided.
41. Dealing firstly with the First Respondent, the Tribunal found all the allegations to have been substantiated, indeed they had been admitted save for the allegation of dishonesty.
42. The First Respondent had confirmed in his evidence that he had taken a conscious decision to make misleading representations to the SRA. He accepted that he had lied to the SRA and accepted that it was dishonest to tell the IO that Ms Toussaint was supervising his office when this was clearly not true. On that basis, the Tribunal were satisfied that both of the tests of dishonesty referred to in the case of *Twinsectra v Yardley* were satisfied and that the First Respondent had been dishonest.
43. In relation to the Second Respondent, the Tribunal found allegation 1 to have been substantiated, indeed save for the allegation of dishonesty, the Second Respondent had admitted allegation 1. On the question of dishonesty, the Second Respondent had accepted in his evidence that he knew Ms Toussaint had not been in attendance with him at the Birmingham Magistrates Court on 5th February 2008 and by telling the IO that she had, he had made a statement which he knew was untrue and that this was dishonest. He accepted that Ms Toussaint had not attended Court with him, that she had not acted as agent and that she had not been involved in other client matters. On that basis, the Tribunal were satisfied that the test of dishonesty referred to in *Twinsectra v Yardley* had been established and that the Second Respondent had been dishonest.
44. In relation to allegation 2, the Second Respondent had denied this allegation on the basis that he did not knowingly practise uncertificated. Whilst the Tribunal accepted his evidence that he had not knowingly practised uncertificated, it was clear that he had practised uncertificated and therefore this allegation was also substantiated.

The Mitigation of the First Respondent

45. The First Respondent asked the Tribunal to take into account the submissions made earlier and to consider the references provided. He had always wanted to be a lawyer since the age of 18 years and had done everything to allow himself to work as a lawyer. He had his own firm in the community where he grew up and whilst being a criminal lawyer was not a glamorous job, it was a vocation that he was passionate about and had done for the last 15/16 years. The First Respondent was not employed at the moment and had been awaiting resolution of these proceedings.

The Mitigation of the Second Respondent

46. The Second Respondent submitted that he had been in a dilemma. He was an employee of Soho Law Solicitors and if the firm survived, he would continue to have a job. Since the intervention had taken place, he had had difficulties obtaining employment. Whilst he had received job offers, they were all awaiting the outcome of today's hearing and the Second Respondent had suffered as a result of this. His wife was a student and he had 2 children. He was not working at the moment and if he was prevented from working in the future, it would be very difficult for his family to make ends meet. His parents had very high expectations of him and the disciplinary proceedings had affected them. The Second Respondent submitted that he had already been punished enough. A condition had been placed on his practising certificate allowing him to work in approved employment only and whilst he had been offered a position last year, the SRA would not approve the employment and he was unable to work.

Costs

47. The Applicant confirmed that costs had been agreed in the sum of £12,000 with both Respondents. They had also agreed that the First Respondent would contribute 70% towards the costs and the Second Respondent would contribute 30% towards the costs. Such liability would be several.

The Tribunal's Decision

48. The Tribunal had considered the submissions of the parties and had given serious consideration as to whether to impose the ultimate sanction. It was a very serious matter to deliberately mislead and lie to the regulatory body and any kind of dishonesty could not be tolerated. However, in this particular case, the Tribunal had found exceptional circumstances which had led the Tribunal to conclude that it was not necessary to strike the Respondents off the Roll.
49. In relation to the First Respondent, he was under considerable pressure at the time of the events, both personally and financially. He wanted his practice to survive, he was trying to protect the livelihood of his staff and the interests of his clients and the Tribunal noted that clients had not been placed at risk other than in regulatory matters such as lack of professional indemnity insurance and practising certificates. Whilst those pressures did not in any way excuse the First Respondent's conduct which he freely accepted was deplorable, they did

count in the balance when seeking to understand why the First Respondent acted as he did. He had not profited personally in any way and ultimately lost his practice. He was open and frank when giving his evidence and was clearly passionate about his career, his clients and his staff. He had told the Tribunal that he was a dedicated solicitor, dedicated to the law and the profession, and he clearly worked in a highly pressured area of law where remuneration was not always very high. The First Respondent worked in a difficult area of Birmingham, he had problems finding the money to meet insurance premiums, and pay the salaries of staff to whom he felt he owed considerable loyalty. The Tribunal had taken into account the two good references that confirmed he was dedicated to his profession in a deprived area providing a useful and much needed service to clients. The Tribunal also noted that the First Respondent was of previous good character, he had given evidence on oath and was frank and open accepting his own wrong doing.

50. In relation to the Second Respondent, the Tribunal noted that he was young, inexperienced and rather naïve particularly having only ever had one employer and being in a position where he was desperate to keep his job. However, these factors were still no excuse for misleading his professional body although the Tribunal considered that his inexperience did count in the balance when viewing the seriousness of the penalty. The Second Respondent was less culpable, being more junior and to some extent following the lead of the First Respondent. He was also of previous good character.
51. The Tribunal stressed that dishonesty could not be tolerated and both Respondents had effectively misled the regulator by making representations that they knew were not true. A regulator's job was to ensure that proper professional standards were met and maintained, and that there was no risk to clients in any form. It was imperative that solicitors were honest and forthright in their dealings with their regulator. Taking into account all the circumstances of the case the Tribunal considered that the appropriate sanction was to suspend the First Respondent for a period of three years and to suspend the Second Respondent for a period of four months.
52. The Tribunal Ordered costs to be paid as agreed in the sum of £12,000, being apportioned at £8,400 to be paid by the First Respondent and £3,600 to be paid by the Second Respondent.
53. The Tribunal made the following Orders:-

The Tribunal Ordered that the Respondent, Millard Decal Spence of Handsworth, Birmingham, West Midlands, solicitor, be suspended from practice as a solicitor for the period of three years to commence on the 5th day of October 2009 and it further Ordered that he do pay a contribution towards the costs of and incidental to this application and enquiry fixed in the sum of £8,400.00

The Tribunal Ordered that the Respondent, [*Respondent 2*] of Birmingham, solicitor, be suspended from practice as a solicitor for the period of four months to commence on the 5th day of October 2009 and it further Ordered that he do

pay a contribution towards the costs of and incidental to this application and enquiry fixed in the sum of £3,600.00.

Dated this 12th day of April 2010
On behalf of the Tribunal

J N Barnecutt
Chairman