SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 10366-2009

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

TIMOTHY JOHN SELLERS Respondent

Before:

Mr J N Barnecutt (in the chair)
Mr J Astle
Mr S Marquez

Date of Hearing: 19 April 2011

Appearances

Jayne Willetts, Solicitor Advocate, (Jayne Willetts & Co., Solicitors, Cornwall House, 31 Lionel Street, Birmingham, B3 1AP) for the Applicant.

The Respondent appeared and was represented by Jonathan Greensmith, Solicitor, (Russell Jones and Walker, 50-52 Chancery Lane, London WC2A 1HL).

JUDGMENT

Allegations

1. The allegation against the Respondent was that he:

1.1. Withdrew money from client account other than as permitted by Rule 22 of the Solicitors Accounts Rules 1998 ("SAR 1998") in respect of which dishonesty was alleged.

Documents

2. The Tribunal reviewed all the documents submitted by the Applicant and the Respondent, which included:

Applicant:

- Rule 5 Statement dated 29 October 2009 with exhibit;
- Additional bundle of documents handed in on 19 April 2011;
- Statement of James Gordon Tollemache Halliday dated 14 December 2010;
- Official copy of Register of Title No. HD89060 handed in on 19 April 2011;
- Applicant's schedule of costs dated 14 April 2011.

Respondent:

- Witness statement of the Respondent;
- Second witness statement of the Respondent dated 18 April 2011;
- Bundle of testimonials handed in on 19 April 2011.

Factual Background

3. The Respondent was born in 1958 and admitted as a solicitor in 1983. At the relevant time he was the managing partner with Foreman Law Solicitors ("the firm") of Hitchin, Herts.

4. On 23 January 2009 a partner (JH) of the firm wrote to the Solicitors Regulation Authority ("SRA") to report alleged misconduct on the part of the Respondent. In the letter JH explained that the firm maintained a suspense account in which miscellaneous monies belonging to clients were retained awaiting allocation to specific client ledgers. JH stated that the Respondent had on two occasions misused the miscellaneous monies client account ledger by arranging to make payments from it. The partners of the firm had no knowledge of this. In the letter he stated "We cannot understand what caused TS to behave as he did. Our firm is on a sound financial footing with a current office account balance of approximately £500,000..." On 22 October 2008 the Respondent had arranged for the transfer of the sum of £6,710.50 from the miscellaneous client suspense account to the account of another firm of solicitors. The money was used to settle a negligence claim being made

against the Respondent. The Respondent requested the transfer by signing a "Chaps Payment form". This document was both the instruction to, and authorisation for, the firm's accounts clerk to telegraphically transfer the money to the account of the solicitors who were representing the claimant. The Respondent had not informed his partners of the claim.

5. On 29 December 2008 the Respondent had signed a "client cheque request form" instructing the accounts clerk to draw a cheque in the sum of £500. As before the withdrawal was to be made from the miscellaneous client suspense account. The monies were paid to a proposed tenant (the tenant) of a client of the firm. The tenant had lodged with the firm a rent deposit in the sum of £500. The transaction did not proceed and the tenant required repayment of his deposit. There were insufficient monies on the landlord client's ledger because the money had been used towards settlement of a firm's invoice for that landlord client.

6. The withdrawals were discovered on 9 January 2009 while the Respondent was away on annual leave. The firm replaced the money on 12 January 2009 in order to remedy the loss. When the Respondent returned from leave he was interviewed by the partners of the firm and admitted his misconduct. He was expelled from the firm effective as from 23 January 2009.

7. The SRA wrote to the Respondent on 25 March 2009 requesting an explanation. The Respondent replied by letter dated 14 April 2009. He admitted the misuse of client funds. In particular he stated: "I fully accept that the two instances referred to constituted the misuse of client funds and were entirely my responsibility and no other partner of the firm or any other employee or third party should or could be implicated in any way with what happened".

8. By way of explanation in respect of the first withdrawal, the Respondent stated in his letter to the SRA dated 14 April 2009 inter alia that:

> "...the pressure to preserve the office account balance became all-consuming..."
>
> and
>
> "...instead of issuing a credit note and making a payment from the Foreman Laws office account (which would have been the correct procedure) I made the payment from the miscellaneous client ledger referred to in JH's letter". He continued "I felt a deep embarrassment about the allegation of negligence and the fact that the refund had to be made to the client. I was also acutely aware that any unforeseen expenditure from the office account would impact upon further decisions which would have to be taken about further redundancies".

9. In relation to the second withdrawal, the Respondent stated in his letter to the SRA dated 14 April 2009:

> "...I decided to make the payment from the miscellaneous client account with the intention to transfer the balance from office account when I returned to work following vacation."

10. In a letter dated 21 May 2009 to the SRA the Respondent also stated "the particular miscellaneous client account is one that has accumulated small unallocated funds from many client accounts over many years and therefore no single client was ever likely to be aware of or have objection to the removal of funds".

Witnesses

11. James Gordon Tollemache Halliday gave sworn evidence. He confirmed his statement dated 14 December 2010. He had been a partner in the firm from 1978 until the end of March 2010 when he retired to become a consultant. He was senior partner at the relevant time. Mr Halliday testified that the firm had a well established management structure inherited from its former senior partner in which the Respondent led on business and administrative matters. Before the financial crisis the firm had consisted of around 50 people reduced by about 15 during a redundancy programme. The firm was involved in property development related work and its clients were very badly hit in the financial crisis by April 2008. It had been agreed that serious measures were needed to reduce the firm's costs even to the extent of cancelling the office cleaning contract. While the Respondent as managing partner led on redundancy three other partners were also involved. In recognition of his taking on the managing partner role the Respondent's billing hours and targets had been significantly reduced. Mr Halliday rejected suggestions that the Respondent had operated in a cocoon, rather that there was a mutually supportive culture in the firm in which the Respondent participated. All partners had been very upset by the need for redundancies. Mr Halliday agreed that the office manager had been made redundant in July 2008 and that the IT manager had left some time later and that their tasks had been redistributed. As he had said in his witness statement he could not comment on the Respondent's state of mind at the relevant time but he found it hard to accept that the Respondent had felt the firm was in financial difficulty or had the potential to be so. He agreed that the partners had considered the financial issues serious enough to embark on a programme of cost reductions, however office account had remained healthy. It was in credit at 31 October 2008 in the sum of £349,464.53 and by 31 December 2008 there was £586,419.24 in office account. This was more than enough to pay the two amounts which the Respondent had taken from the clients' suspense account as well as to pay the tax bill. Mr Halliday was not a financial expert at the firm and could not explain why the balance sheet as at 31 March 2009 showed cash and bank balances at £39,428. The tax bill when paid had been something over £104,000 and Mr Halliday could not recall having been concerned about the firm's ability to pay it. The firm had never had to call on its overdraft and had been able to manage the retirement of various partners both planned and otherwise. In respect of the bank loan which the Respondent said he had taken out, in order to fund the acquisition of his share in the partnership, Mr Halliday stated that the money had never been received by the firm.

12. The Respondent gave sworn evidence. He testified that the departure of the former senior partner had left something of a vacuum and that he, the Respondent, was the only partner with management experience. When he took over the managing partner role he had no information to rely on as the former senior partner had taken all the management files with him. His assistant had also left. The Respondent had had to find out about the firm's systems. Regarding the firm's financial position after April 2008 he feared that the firm would disintegrate. He relied on minutes of partnership meetings to show that fee income was going down dramatically and expenditure was

not falling at the same rate. He particularly quoted the minutes of the partners' meeting of 2 December 2008 to show the seriousness of the situation. The budget needed to be revised and it had been decided to surrender the lease of part of the firm's premises. The amount of his management work increased and he also took on a lot of mundane tasks like collecting the post following the redundancy of the receptionist. He had had to take the lead at the meeting at which individual members of staff were advised that they were being made redundant. He had felt swamped. There was dissension among the partners as some did not wish to call on the overdraft facility and he was very concerned about office account in the light of the impending tax payment. He believed that he had had an email from the accountants advising him that the tax liability was expected to be in the region of £350,000 - £400,000 but he had no access to the firm's papers in order to prove this.

13. Having regard to the first of the two transactions in which the Respondent admitted having used money from the miscellaneous clients' suspense account, this had involved a complex title. It had transpired that part of the land which the purchasers wanted had not been included in the transaction. The Respondent was concerned at the threat of being reported to the SRA because of the extra work this would involve. On the day that the letter about the alleged negligence had been received the firm had made payment to another of his clients, who had made a claim against the firm, having taken an economic decision to dispose of that claim for the good of the practice. He had felt that in dealing with this second claim he was acting in exactly the same way. His explanation for the time lapse between receipt of the claim letter and the date of his making payment was that he had been discussing with another of the solicitors involved in the transaction how the matter could be resolved. In respect of the email which the firm had sent him while he was on holiday, as he believed there had been no negligence he had replied that there was no need to tell the insurers. He felt that he had only been confirming that this was not a negligence claim. With hindsight he realised that he had been wrong about the transaction but he had felt that the problems that he was facing were paramount. He had not been functioning properly. He had intended to return the monies to the account when things improved. He had contemplated making the payment out of his own account but had been unable to do so because it would have involved using his personal partner's money. He had not told his partners about the claim because he regarded it as a non issue and there were so many issues all being dealt with at the same time. It would simply be another one for them to deal with and that there would be no point in telling them. His concerns about work had been completely dominating his life at that time. He did not consider that others would regard him as having been dishonest rather that he had committed a stupid act. Having regard to the second transaction in December, by then things had got worse, not better, financially. There had also been an office re-organisation, an additional redundancy and he had a backlog of his own fee earning work. The tenant had telephoned to say he was driving over to collect his money. The file was not the Respondent's and he panicked when he discovered that there was insufficient money to return the deposit. It was the last working day of the year. The Respondent had planned to make a transfer from office account on his return from holiday. He had acted in the heat of the moment and felt that he had been silly rather than dishonest. He agreed that there had been some of the tenant's money left in the client ledger which he had not used towards the payment and again he had not used office account because of his concerns about the need to restrict payments from office account.

Findings of Fact and Law

14. **Allegation 1.1. Withdrew money from client account other than as permitted by Rule 22 of the Solicitors Accounts Rules 1998 ("SAR 1998") in respect of which dishonesty was alleged.**

14.1 The Respondent had admitted breaching the SAR 1998 in respect of the two transactions which gave rise to the allegation. He denied dishonesty. It was submitted on behalf of the Applicant in respect of the two limbs of the test for dishonesty set out in the case of Twinsectra Ltd v Yardley and Others [2002] UKHL 12 that the objective test had been satisfied in that the Respondent admitted taking money from client funds without entitlement. As to the subjective test the Tribunal was reminded, having regard to the case Donkin v The Law Society [2007] EWHC 414 (Admin), that while testamentary evidence was relevant to the question of dishonesty it did not constitute a defence. On behalf of the Applicant in respect of the subjective limb of the test for dishonesty it was submitted as follows:

(1) The Respondent was an experienced solicitor at the date of his misconduct. He had a management role at his previous firm and had been the managing partner at this firm since 2006. The withdrawals occurred late in 2008. He was well acquainted with accounting processes and procedures and not a junior solicitor unfamiliar with the Accounts Rules.

(2) The Respondent had used monies from a miscellaneous client ledger for which only the managing partner received printouts showing withdrawals. Only the Respondent as managing partner, was aware of the balance. It was true that the withdrawals would have come to light eventually but because of the nature of the procedure this would have been delayed.

(3) The letter notifying the Respondent of the professional negligence claim against him was dated and received on 1 October 2008, the same day that another of the partners was sending a cheque in the amount of £3,500 to one of the Respondent's clients to settle a complaint regarding his conduct of their file. It was submitted that this coincidence of dates provided a possible motive for the Respondent's concealment of the second professional negligence claim.

(4) The letter before action referred to in (3) above was dated 1 October 2008. The payment of the claim had not been made until 22 October 2008 nearly three weeks later. In his witness statement the Respondent had said that he panicked but this was not a momentary act. He had had time to consider how best to deal with the claim and to hide it from his partners.

(5) There were two aspects to the Respondent's concealment: He concealed it from his partners and he did not notify the firm's insurers.

(6) While the Respondent was on holiday in January 2009 his partners discovered the letter before action of 1 October 2008 and emailed him to enquire as to the background. The Respondent then had an opportunity to give an explanation and to advise them that he had made payment in settlement of the claim but his response only dealt with the transfer of the land in question as resolving

the claim and it was submitted that this was not the response of a solicitor who regarded what he had done as honest.

(7) In respect of the second transaction it was clear from the client ledger that something had gone amiss. It was not alleged that the Respondent had been involved in the transfer of the tenant's money but it was clear that a mistake had been made which needed to be put right. The correct conduct would have been to make it good from office account. Instead the Respondent chose to use client account monies to correct the mistake.

(8) Finally regarding the subjective test it was submitted that the Tribunal should note that the Respondent had not just made one withdrawal from client account but two, two months apart. It was submitted that there might have been sympathy with one withdrawal but two showed a course of conduct and but for the Respondent's departure on holiday his misconduct would have remained undiscovered until the accounts had been audited or further financial checks carried out. The Respondent had sought to justify his actions by relation to the financial situation of his former practice and concerns that it was not possible to make payment of these two amounts out of office account. It was submitted that the evidence of Mr Halliday rebutted this claim.

14.2 On behalf of the Respondent, the Tribunal was referred to the testamentary evidence submitted on his behalf and to his explanation of his actions, particularly the pressure which had been placed on him to perform in difficult economic times and the pressures of carrying out a difficult redundancy process and streamlining the practice. Having regard to information about the miscellaneous client suspense ledger, this was available to all partners. The Respondent had only seen it on a couple of occasions and heard reference to it by the firm's accountant. In respect of the letter before action in the conveyancing transaction it was submitted that the Respondent did not actively conceal what he had done, he simply dealt with the matter in the same way as the firm had dealt with a previous claim. He did not believe that the claim constituted a negligence claim and so there was no need to notify the insurers. In respect of the email enquiry from the firm he was on holiday and had answered the specific point raised. He had no opportunity to explain further on his return. The Respondent had not embarked on a course of conduct but had felt that he was under enormous pressure and was acting for the best in difficult circumstances. He had always accepted that what he did was a breach of the SAR 1998 and he had not been in his correct state of mind. It was submitted that it had not been proved to the higher standard that the Respondent's actions had been dishonest beyond reasonable doubt.

14.3 The Tribunal carefully considered the submissions on behalf of the Applicant and the Respondent, had considered the evidence and had heard Mr Halliday and the Respondent. The Respondent had admitted breaches of the SAR 1998 and the Tribunal found these to have been proved. The Tribunal had then considered the question of dishonesty. It was clear that the Respondent's actions in taking monies from the miscellaneous client suspense ledger were dishonest by the standards of the objective test in the case of Twinsectra. He was not entitled to the money and as an experienced solicitor he was well aware of this. Having regard to the subjective test the Tribunal had noted the eight points made in the submissions on behalf of the Applicant and the submissions made on behalf of the Respondent in reply. The Tribunal had taken into account the case of Donkin v The Law Society [2007] EWHC

414 (Admin) to which its attention had been drawn in respect of testamentary evidence as to the Respondent's good character. The Tribunal had not found the Respondent's case to be convincing. The Tribunal had particularly noted that in his evidence the Respondent had said that the problems the firm was facing were paramount to him. He had allowed his appreciation of the firm's situation to overrule honesty and integrity. The Tribunal did not consider that the Respondent's assessment of the firm's financial position was correct. It was not as serious as he had convinced himself it was. His actions were not just technical breaches of the SAR 1998 but actions intended to protect the firm and however well intentioned, the Respondent knew that he was using money to which he was not entitled. The Tribunal had noted the time which had elapsed between the first wrongful use of client money and the second transaction and that the Respondent had taken no steps to repay the money from the first transaction during that time. In respect of the first transaction the Tribunal was not convinced by the Respondent's protestations that he did not consider that the claim being made against him was one of negligence. If he had really considered that there was no negligence he might have been more cautious in paying monies to settle the claim. The Tribunal was not satisfied with the Respondent's explanation concerning his response to the email he received while on holiday. His obligation of honesty towards his partners went beyond merely answering questions asked. The Tribunal had noted that the Respondent had first considered making the payment for the first transaction out of his own money, had rejected that and then decided to use client money from a source that would not be quickly visible. Having regard to his motivation the Tribunal had noted that in his letter of 14 April 2009 to the SRA he admitted feeling a deep embarrassment about the allegation of negligence and the fact that the refund had to be made to the client. The Tribunal had also noted his comments in his letter of 21 May 2009 to the effect that no single client was ever likely to either be aware of or have objection to the removal of funds. The Tribunal had also noted the time lapse between the Respondent's receipt of the letter of claim dated 1 October and the date of his settling the claim. He had had plenty of opportunity to discuss the situation with his partners and advise his insurers both of which he was obliged to do. Instead he had concentrated in sorting out the conveyancing position and considering how to deal with the claim. The Tribunal considered that the second transaction compounded the first. Subjectively this had not been an honest decision. The Tribunal considered that the Respondent had found a source of available money and having used it once, decided to do so again. Taking together all these factors had led the Tribunal to decide that the subjective test of dishonesty was satisfied to the higher standard.

Previous Disciplinary Matters

15. None

Mitigation

16. It was submitted on behalf of the Respondent that this case fell into the small residual category of cases as set out in the case of Sharma where a finding of dishonesty should not lead to a decision to strike off. The monies which the Tribunal had found the Respondent dishonestly to have taken could not be attributed to any individual clients although they remained client money. The timing of the Respondent's expulsion from the firm meant that he had not had the opportunity to replace the funds as he had told the Tribunal he intended to do. The Respondent had felt under

tremendous pressure at the time of his actions. He had felt that the survival of the firm was in his hands and he had not made any personal gain in the usual sense, from his misconduct. As a result of his well meaning but misdirected attempts to safeguard the firm he had brought about his own financial ruin. The firm continued to benefit from capital which he had put into it and which had not been returned to him.

Sanction

17. The Tribunal considered that this was a very sad case where the Respondent, a former partner in the firm, had on two separate occasions made payment out of a miscellaneous client suspense ledger for payments which should properly have been made out of his firm's office account. Although the Tribunal had some sympathy for the undoubted pressures under which the Respondent was acting at the time, it had found that he acted dishonestly in making the payments, which he accepted were made in breach of the SAR 1998. The Tribunal found that such dishonesty did not fall within the exceptions referred to in the High Court decision in the case of Sharma. The Tribunal considered that as an experienced solicitor the Respondent knew that to make such payments out of client account was clearly wrong. The Tribunal also found that the Respondent's dishonesty was such as seriously to damage the good name and reputation of the solicitors' profession. Even if the Respondent had not deluded himself as to the degree of the firm's difficulties this was no justification for the dishonest actions which he took to safeguard it. Accordingly the Tribunal had decided that the Respondent should be struck off the Roll of Solicitors.

Costs

18. The Applicant sought costs in the amount of £12,524.89. The Tribunal considered the Respondent's second witness statement where he set out his financial position and what he described as his "hand to mouth existence" including the risk that his bank lender would pursue him for repayment of a professional loan. Without in any way criticising the Applicant's representative the Tribunal had looked at the costs schedule and considered that the amount relating to dealing with witness evidence was rather high and the schedule contained some overlap. Accordingly it awarded fixed costs in the sum of £11,500.00.

Statement of Full Order

19. The Tribunal Ordered that the Respondent, TIMOTHY JOHN SELLERS, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £11,500.00.

Dated this 13th day of May 2011
On behalf of the Tribunal

J N Barnecutt
Chairman