SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 10672-2010

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

SIMON JOHN HOLBORN Respondent

Before:

Mr K W Duncan (in the chair)
Ms A. Banks
Mrs S. Gordon

Date of Hearing: 23rd May 2011

Appearances

Katrina Elizabeth Wingfield, solicitor of Penningtons LLP, Abacus House, 33 Gutter Lane, London, EC2V 8AR for the Applicant.

The Respondent did not appear and was not represented.

JUDGMENT

Allegations

1. The allegations against the Respondent were:

1.1 That he had acted in breach of the Solicitors Accounts Rules ("SAR") in particular:

(a) Rule 7(1) - failure to remedy breaches promptly;

(b) Rule 19 note (x) - round sum withdrawals on account of costs;

(c) Rule 22(1) - improper withdrawals from client account;

(d) Rule 32(1) - accounting records not properly written up;

(e) Rule 32(7) - inadequate reconciliation.

1.2 That he had acted in breach of Rule 1.02 in that he failed to disclose that he had been the subject of a County Court Judgment when completing a proposal for Professional Indemnity Insurance ("PII") cover.

1.3 That he had acted in breach of Rule 1.06 in that he had failed to comply with a decision of inadequate professional service dated 15 February 2010;

1.4 That he had acted in breach of Rule 20.05 in that he had failed to cooperate with the SRA promptly;

1.5 That he had acted in breach of Rule 1.06 in that he had failed to comply with a decision of inadequate professional service dated 24 May 2010;

1.6 That he had acted in breach of Rule 20.05 in that he had failed to cooperate with the SRA promptly;

1.7 That he had acted in breach of Rule 10.05 in that he had failed to fulfil an undertaking within a reasonable time.

1.8 He had acted in breach of SAR in particular Rules 24 and 25 - payment of interest;

1.9 He had acted in breach of Rule 10.01 of the Solicitors Code of Conduct ("the Code") in that he used his position to take an unfair advantage of a client;

1.10 He had acted in breach of Rule 20.05 of the Code in that he had failed to cooperate with the Legal Complaints Service and/or the SRA;

1.11 He had acted in breach of Rule 1.06 of the Code in that he had failed to comply with a formal decision of an Adjudicator dated 13 October 2010 in respect of Mr S;

1.12 He had acted in breach of Rules 22 and 19 of the SAR in that he had failed to account to clients for monies paid by them to his firm;

1.13 He had acted in breach of Rule 1.06 of the Code in that he had failed to comply with a formal decision of an Adjudicator dated 10 December 2010 in respect of Mr C.

2. It was alleged that in relation to allegations 1.1 and 1.2 the Respondent had acted dishonestly or in the alternative recklessly. It was alleged that in relation to allegations 1.9 and 1.12 the Respondent had acted dishonestly although it was not necessary to prove dishonesty to prove the allegations.

3. The Applicant also sought directions from the Tribunal under paragraph 5 of Schedule 1(A) of the Solicitors Act 1974 (as amended) that the decisions of inadequate professional service dated 15 February, 24 May, 13 October and 10 December 2010 made in respect of complaints by Mr U, Ms T, Mr S and Mr C respectively be treated for the purposes of enforcement as if they were contained in Orders of the High Court. The Respondent admitted the facts of all the allegations but denied dishonesty.

Documents

4. The Tribunal reviewed all the documents submitted by the Applicant and the Respondents, which included:

Applicant:

- Rule 5 Statement dated 26 November 2010 with Exhibits;
- Rule 7 Statement dated 14 April 2011 with Exhibits;
- Copy Sole Practitioner Indemnity Insurance Proposal Form completed but unsigned and undated;
- SRA internal email dated 23 November 2009;
- Internal SRA email recording results of search for Country Court Judgments in respect of the Respondent;
- Schedule of Costs dated 17 May 2011.

Respondents:

- Response to allegations unsigned and undated;
- Respondent's response dated 13 May 2011;
- Opening submissions on behalf of the Applicant dated 20 May 2011 with Respondent's unsigned and undated comments added;
- Application to adjourn dated 21 May 2011.

Preliminary Matter

5. The case against the Respondent was scheduled for a substantive hearing today. On 16 May 2011 the Respondent had sent an email to the Tribunal office applying for an adjournment of the substantive hearing for three months because he was moving from his own house to rented accommodation and progressing his bankruptcy. He stated that he did not have sufficient funds or time to attend to the issues necessary to this matter and that he was not in possession of funds to enable him to attend at the London hearing. His health had been affected as a result of the matter and the issues surrounding the closure of the practice. The Chairman of the Tribunal considered his

application and was minded to grant it notwithstanding that the Applicant wished to proceed, but only provided that the Respondent first sent a written undertaking to the Tribunal that pending the conclusion of the proceedings before it, the Respondent would not use the title "solicitor" and would not do any work in or for a law practice. It was also pointed to the Respondent that this adjournment for three months must be regarded as final and that he would be expected to make arrangements to appear at the adjourned hearing irrespective of any difficulties that might arise in the sale of his property. The Respondent expressly stated in his application email that he believed that the public would not be affected by allowing the present situation to continue for three months. When advised of the Chairman's decision, the Respondent emailed further to the Tribunal on 19 May including:

> "I have always been open that I have been carrying on working as a lawyer, albeit not a solicitor since last year, despite the breaches. I will continue to be open about any relevant activities.."

The Respondent went on to question the need for the undertakings being sought.

6. On 19 May the Tribunal also received an email from Mr NK of On Demand Lawyers Ltd. Mr NK described himself as a director of that company and informed the Tribunal that it had retained the services the Respondent since autumn last year as an employment specialist. Mr NK stated that he was now aware that any strike off would prohibit the company from continuing to retain the Respondent as one of its legal team, that the Respondent was its employment law specialist and that losing him would have a significant commercial impact on the company. He stated that the Respondent had never represented himself to Mr NK or any client of the company as a solicitor. Mr NK sought to persuade the Tribunal not to proceed with the undertaking sought. The Chairman had then considered the Respondent's further representations and Mr NK's email. He determined that the Tribunal would consider the Respondent's application for an adjournment at the beginning of the substantive hearing. The Respondent was advised of this and also that if the application were refused, the Tribunal would proceed to determine the substantive case, if necessary in the Respondent's absence. The Respondent submitted a document entitled Application to Adjourn.

<u>The Applicant's Submissions in respect of the Respondent's Application to Adjourn</u>

7. On behalf of the Applicant the Tribunal was advised that the Respondent had not been in possession of a practising certificate since his last one expired at the end of October 2010. The usual procedure would then have included numerous reminders. The Respondent had not applied for a new certificate and at the conclusion of the process his practising certificate had been revoked on 27 April 2011. The Applicant strongly opposed the Respondent's application to adjourn. It was noted that he said that he was moving house this week. He had also said that he was going into an Individual Voluntary Arrangement ("IVA") with creditors or bankruptcy. He had been advising the Applicant of his intention to do this for about a year and still no definite date had been fixed.

The Respondent's Submissions in support of his Application to Adjourn.

8. These were set out in the various emails and the document already referred to. The latter included the information that he had worked as a consultant for two firms of solicitors over the "....last period from February 2010 and the Law Society were aware of this..."

9. The Tribunal carefully considered the points made by the Respondent and the submissions on behalf of the Applicant. The Tribunal noted the application for adjournment had been made very late in the day. It was the practice of the Tribunal to send the Tribunal's practice note on adjournments out when the original documents were sent and so the Respondent was aware of the factors which the Tribunal would take into account in arriving at a decision. The date of this substantive hearing had been fixed in early February taking into account the list of dates which the Respondent had indicated should be avoided on his form submitted for the pre-listing hearing. He had been sent notification by special delivery of the substantive hearing date on 8 February 2011 but had not collected the letter from the Post Office. Immediately on its return by the GPO on 8 March 2011 to the Tribunal further notification of the date had been sent by ordinary first class post. This letter had not been returned undelivered. The Respondent's main ground for seeking an adjournment was that his means did not permit him to purchase a ticket to London. The inability of the Respondent to attend for financial reasons was not one which would generally be regarded as providing justification for an adjournment. In any event his claim of impecuniosity was not supported by the fact of an IVA or bankruptcy and he was clearly working. His decision to move house this week was under his own control. The Tribunal had sought to accommodate the Respondent in offering an adjournment based on undertakings notwithstanding the Applicant's objections. From his response it had become apparent that he was working as a solicitor for an organisation which provided a network of solicitors working from home notwithstanding that he had not applied to renew his practising certificate following its expiry. Without in any way pre-judging the issues in the substantive matter the Tribunal was concerned for the protection of the public and had noted the Applicant's strong opposition in the light of this latest information to the adjournment being granted. It appeared to the Tribunal that the Respondent had deliberately absented himself from the hearing. Having taken all these factors into account the Tribunal decided not to grant the application for an adjournment. Further, the Tribunal was satisfied that the Respondent had been properly served under Rule 10 of the Solicitors (Disciplinary Proceedings) Rules 2007 with notice of the hearing date and it determined that it would exercise its powers under Rule 16(2) and hear and determine the application notwithstanding that the Respondent had failed to attend in person and was not represented at the hearing.

Factual Background

10. The Respondent, born in 1960, was admitted as a solicitor in 1992. His name remained on the Roll of Solicitors.

11. At all material times the Respondent practised on his own account under the style of Holborn & Co Solicitors ("the firm") of Hull, North Humberside. The practice of Holborn & Co was closed on 19 February 2010.

Forensic Investigation

12. An inspection of the books of account and other documents was commenced at the offices of the firm on 12 November 2009 by Mr James Lewis, Investigation Officer, who was accompanied at various times by Mr Clive Howland, Senior Investigator. Mr Lewis's Report was dated 11 January 2010.

13. The firm undertook conveyancing and employment tribunal litigation work and employed two unadmitted staff and a part-time bookkeeper.

14. The Respondent was the only authorised signatory to the client and office bank accounts.

Allegation 1.1

15. The books of account were not in compliance with the Solicitors Accounts Rules ("SAR") in that:

    (a) numerous round sum transfers in lieu of proper costs transfers had been made from client bank account to the Respondent's personal bank account;

    (b) round sum transfers in lieu of proper costs transfers had been made from client to office bank account;

    (c) practice expenses including staff wages had been paid from client bank account;

    (d) the books of account were not up to date.

    As a consequence it was not possible to establish whether there were sufficient funds held in client account to meet client liabilities as at 31 October 2009. Mr Lewis was able to establish certain minimum liabilities as a result of which he established a minimum cash shortage of £12,798.43.

16. At a meeting on 14 December 2009 the Respondent agreed that cash shortage and indicated that that would be rectified before Christmas. At the date of the Report no evidence had been received to show this had been done. In an email to the SRA dated 1 February 2010 the Respondent said:

    "....

    The shortfall has been repaid back in two ways:

    1. Profit costs from over 30 conveyancing transactions were retained to the value of £8,193...;

    2. A further sum of £4,638.30 was transferred from savings account on 31.12.2009."

    The transfers referred to paragraph 16 a - c totalled £105,664.42.

17. Mr Lewis and Mr Howland examined the client bank account statements and those of the Respondent's personal bank account between the period 1 April to 31 October 2009. A schedule to the Report showed 64 round sum transfers totalling £43,800 in sums ranging from £250 to £3,000 had been made during the seven month period which equated to average quarterly transfers from the firm's client bank account of nearly £19,000. Mr Howland noted the personal bank account balances at the end of each day on which round sum transfers occurred. On 17 occasions between 1 April and 31 October 2009 round sum transfers made to the Respondent's personal bank account enabled payments to be made which would otherwise would have caused the account to exceed its overdraft limit. An example of payments from the personal bank account where one such transfer was made occurred as follows. On 30 June 2009 there was an opening balance of £2,787.46 overdrawn. On that same day there was a transfer from client bank account of £2,500 reducing the overdraft to £287.46. On that day and the following day a total of nine payments were made leaving a closing balance on 1 July 2009 of £2,859.86 overdrawn.

18. At the meeting on 14 December 2009 these transfers were discussed. That meeting was recorded and a transcript appended to the Report. The Respondent accepted that the transfers were in breach of SAR but explained that he saw the money in client account as being costs owed to the business. He accepted that his tally of what costs were owed to the firm was "not that accurate". He denied that he was sidestepping his office account because it was up to its overdraft limited but said that "I was just side stepping it because I thought it was permissible". He accepted that the timing of the transfers coincided with payments due to go out of his personal account. He said:

> "My view was always that I had the money in. It comes to the end of the month and it has to be transferred but one thing's for certain, no matter what comes of this investigation, if it wasn't my money I wouldn't have transferred it and if that had of meant I didn't pay me mortgage or it meant I didn't pay anything off then so be it [sic]."

The Respondent indicated that his reporting accountant had not raised the issue with him.

19. Between 1 April and 31 October 2009, 41 round sum transfers totalling £11,970 had been made from client to office bank account. They varied between £20 and £1,600. On 17 November 2009 the Respondent indicated that he believed his bank had made some round sum transfers without his authority and produced a schedule for the period 31 March 2008 to 5 October 2009 totalling £18,185.

20. An examination of the two schedules showed that some transfers were on both schedules, others were not. The bank was requested to comment on the issue of authority and on 1 December 2009 the Respondent provided an email from his bank. This indicated that the client account was not designated as such in the bank's records and that the funds were transferred to meet cheques, standing orders and direct debits which would have otherwise been returned unpaid.

21. The bank statements described the account as "Mr Simon J Holborn t/a Holborn & Co Clients Account" and a letter from the bank dated 13 May 2004 described the account as a client account and stated that no further client accounts were held by the firm.

22. An examination of the client bank account statements and client account cash book showed a number of payments made from client bank account for practice expenditure totalling £49,894.42 between 1 April and 31 October 2009. Payments included staff salaries, practice finance and professional indemnity insurance.

23. A total of £105,664.42 had been drawn from client account in round sum transfers and to meet practice expenses between 1 April and 31 October 2009 i.e. seven months which Mr Lewis roughly annualised at about £180,000. According to VAT returns the firm's quarterly income between 1 December 2008 and 31 August 2009 totalled £48,775. Mr Lewis noted that the total value of sales for the six month period from 1 March to 31 August 2009 was £31,504. The Respondent had estimated his income for the purposes of his professional indemnity insurance at £90,000 for 2009 and the following 12 months. (Gross fees for earlier years had been given as follows; 2006-£88,000; 2007-£89,000, 2008-£90,000). When asked about the disparity, the Respondent indicated "it was naivety not intention".

24. An examination of the client account reconciliations from September 2008 to October 2009 showed the following:

- no list of matter balances (client liabilities) as at any reconciliation date was seen.
- no list of unpresented cheques or receipts as at any reconciliation date was seen.
- reconciliations for the periods from September 2008 to July 2009 showed comparisons between client liabilities and client monies held but it was not evident where the figures for client liabilities had been derived from in each case.
- reconciliations for the periods from August to October 2009 showed no comparisons between client liabilities and client monies held.

Whilst the reconciliations showed comparisons between client liabilities and client monies, it was not evident where the figures came from.

25. On 12 November 2009 the Respondent provided a handwritten list of client liabilities which totalled £9,245.93 whereas the balance on client account was £9,246.36 as at 31 October 2009. According to the firm's SAGE accounts system there were client liabilities not included on the Respondent's list and some of the balances differed from those on the list. The Respondent acknowledged that his reconciliations were inadequate but stated his accountants had not drawn this to his attention. At the meeting on 14 December 2009 he stated that at the start of the investigation he believed that the reconciliations complied with the SAR but now recognised that his reconciliations were "totally insufficient".

26. The firm's Accountant's Report for the year ending 11 January 2009 was unqualified despite evidence being available during the relevant period of round sum transfers to the Respondent's personal bank account.

Allegation 1.2

27. The Respondent provided a copy of his PII proposal form. His PII certificate referred to it having been dated 24 August 2009. On the copy proposal form he had indicated that he had no civil judgments against him despite having a judgment against him on 7 March 2009 in the sum of £933. There were two further judgments in October 2009 in the sums if £9,168 and £8,412. The Respondent confirmed he should have disclosed the first of these judgments and that he would do so within 14 days.

28. A caseworker forwarded a copy of the FI Report to the Respondent under cover of a letter dated 26 January 2010. The Respondent replied by email dated 1 February 2010 indicating that steps had been taken to replace the shortfall, that new accountants had been appointed and that he was in talks to close his firm/enter a merger. On 4 February 2010 the Respondent emailed indicating he had taken the decision to close the firm.

Allegation 1.3 and 1.4; Complaints re Mr U

29. Mr U instructed the Respondent in relation to a personal injury claim in 2003. Agreement was not reached with insurers as to quantum, although the insurers acknowledged primary liability. Consequently, proceedings were issued. Those proceedings were struck out on 31 May 2007 but reinstated on application by the Respondent's firm in January 2008. The firm failed to comply with directions and the claim was finally struck out on 15 April 2008 and Mr U was ordered to pay the defendant's costs, assessed at £2,152 together with further costs of £419.20.

30. Mr U then complained to the Legal Complaints Service ("LCS") about the service he had received from the Respondent's firm, in particular about failures to keep him updated and failures to respond to correspondence, delays in dealing with the claim, failure to comply with court directions and a failure to deal with his complaint.

31. An adjudicator made formal findings of inadequate professional service ("IPS") in a decision dated 15 February 2010. The adjudicator directed that the Respondent's firm pay to Mr U by way of compensation, the sum of £5,269.58 made up as to £2,000 general compensation and £3,269.58 by way of costs to be paid within seven days and also directed that the firm were not permitted to claim costs as against its former client.

32. The Respondent wrote by email to the caseworker at the SRA on 18 February 2010 indicating that he was closing his practice the following day and would be entering an IVA.

33. The Respondent failed to comply with the adjudicator's decision and the matter was referred to the SRA. The SRA wrote to the Respondent at his residential address on 3 June 2010 and then on 25 June 2010 as no reply had been received. No reply was received and the Respondent was informed on 8 July 2010 that the matter would be referred to an adjudicator. An email response was received from the Respondent dated 15 July 2010 in which he appeared to accept the adjudicator's decision. The matter was referred for adjudication. On 2 August 2010 the adjudicator referred the

Respondent's conduct to the Tribunal in relation to his failure to comply with the IPS decision and the failure to cooperate with the SRA.

Allegation 1.5 and 1.6: Complaint re Ms T

34. Ms T instructed the Respondent in connection with an employment dispute in around March 2008. The case was settled and Ms T's understanding was that the settlement would provide her with £20,000 and that the respondents to the claim would also pay her costs. Only £2,000 was however paid towards her costs and the Respondent submitted a bill for a total of £3,450 inclusive of VAT and deducted the balance of £1,450 from the damages. Ms T complained that she had been given inadequate cost information, either at the outset of the matter or as it progressed. In addition Ms T complained about a delay of approximately six weeks in forwarding the damages to her, a delay in obtaining her instructions and a failure to deal with her complaint.

35. On 24 May 2010 an adjudicator directed that the Respondent pay compensation totalling £530.19 and that he limit his firm's costs to £2,000 inclusive of VAT and to refund the sum of £1,450. These directions to be complied with within seven days, and in the event that they were not the matter was to be referred to the SRA.

36. The Respondent failed to comply with the directions within the relevant time period or at all. On 2 August 2010 the SRA wrote to the Respondent. A further letter was sent on 2 September 2010. The Respondent emailed the caseworker on 10 September 2010 indicating that the matter was being dealt with by his insurers and apologising for the delay.

Allegation 1.7: Complaint by TW

37. On 16 June TW a company wrote to the SRA complaining that the Respondent had failed to comply with an undertaking given on 22 January 2010 to discharge existing charges on the sale of a property in Hull. Completion had taken place on 22 January 2010. By letter of 6 August 2010 TW confirmed that one of the two charges referred to in the undertaking had been discharged but the charge in favour of Y Bank remained. The property had been resold and the buyers were experiencing difficulties in registering their title.

Allegations 1.8 - 1.11: Complaint by Mr S

38. The Respondent had acted for Mr S in relation to an employment mater relating to a claim against his former employers, L Solicitors, for unfair dismissal.

39. By letter dated 23 September 2008 the Respondent informed Mr S that his costs were "likely to be in the region of or between £2,000 (plus VAT)". Mr S also signed a copy of an agreement entitled "Contingency "No win no fee" agreement". This document stated that the firm was acting on a no win no fee basis.

40. There was a copy of a further costs update letter to Mr S on the Respondent's file dated 10 December 2009 (which post-dated completion of the matter). It indicated that the total costs incurred to date were £2,350 inclusive of VAT. This letter advised Mr S that the current estimate of likely costs had risen to between £2,500-£6,000.

41. A settlement was reached with L Solicitors by way of a Compromise Agreement, prior to proceedings at a formal hearing at an Employment Tribunal. It was signed by Mr S's former employers on 24 October 2008 and provided for:

    (i) payment of £18,684 to Mr S;

    (ii) transfer of ownership of the firm's car to Mr S, free of financial encumbrance; and

    (iii) payment of up to a maximum of £1,000 plus VAT as a contribution towards Mr S's legal fees upon presentation of an invoice from his solicitors.

42. It was Mr S's belief that the full settlement monies were sent by telegraphic transfer to the firm's bank account on 31 October 2008.

43. The funds were not forwarded to Mr S and AJ Solicitors advised the SRA that "it was approximately four and a half weeks after the receipt of the settlement monies that the sum of £8,109 was collected by [Mr S]". This sum was considerably less than the settlement amount agreed with L Solicitors.

44. No invoice or statement of account was provided to Mr S with the balance of the settlement monies.

45. Mr S subsequently instructed AJ Solicitors, who wrote to the Respondent on 15 February 2010 and raised a number of questions in relation to costs information given to Mr S. They asked whether the costs update letter of 10 December 2009 had ever been sent to Mr S. The Respondent did not respond to this letter and AJ Solicitors then wrote to the SRA on 30 April 2010.

46. The LCS wrote to the Respondent on 22 July 2010 with a deadline for response by 5 August 2010.

47. On 6 August 2010 the LCS sent a further letter asking for a response from the Respondent by 13 August 2010.

48. On 13 August an email was received from the Respondent requesting a further 14 days to reply. This was agreed to but no response was received from the Respondent.

49. On 6 September 2010 the LCS wrote to the Respondent indicating that as no response had been received, this matter would be referred to the SRA.

50. On 13 October by 2010 an adjudicator awarded Mr S a total sum of £1,000 by way of compensation in respect of non financial considerations. In addition the firm was directed to waive all their costs in this matter, to refund to Mr S any money held on account and provide him with a detailed breakdown of the way in which the refund had been calculated.

51. No money had been paid by the Respondent to Mr S.

52. On 14 October 2010 the Respondent had notice of the adjudicator's decision. The Respondent responded by email. He denied all the allegations and indicated that Mr S

had agreed that the Respondent "would act on his behalf on a no win no fee basis" and "that the fee would be one third of sums recovered plus VAT". The Respondent stated that Mr S "was given full and proper advice throughout" and indicated he felt the "reference was being brought as a personal attack or as a way to gain compensation".

53. The SRA wrote to the Respondent on 8 November 2010 raising conduct issues and again on 24 November 2010 asking for a response. No response was received.

Allegations 1.12 and 1.13 Complaint re: Mr C and others

54. Initially on 6 October 2009 and then on 7 July 2010 Mr C complained to the LCS on behalf of himself and his colleagues regarding a number of concerns about the service they had received from the Respondent in connection with an employment issue. In particular Mr C complained about delay, a failure to keep him updated and a failure to account.

55. Mr C and 26 of his colleagues made complaint that they had each paid to the Respondent the sum of £50 for a "fighting fund". A total of 52 clients had instructed the Respondent in relation to this particular matter and it would appear from a cash book that each had paid £50. A copy of the Respondent's ledger showed a total of £2,530. In response to correspondence from the caseworker the Respondent "agreed" that he had failed to account for the monies provide by his clients.

56. The caseworker obtained some documents including email exchanges between the Respondent and Mr C from Mr C himself, and also a copy of the client file from the Respondent pursuant to a s.44B Notice. The caseworker sought explanations from the Respondent and on 23 November 2010 sent a recommendation letter to the Respondent. The matter was considered by an adjudicator who made findings of inadequate professional service in relation to the service to Mr C on 10 December 2010 and directed that the Respondent refund Mr C's £50 and pay him compensation in the sum of £500. The Respondent had not complied with that decision.

Witnesses

57. Mr Clive Howland, Senior Investigation Officer employed by the SRA affirmed. He confirmed the contents of the Forensic Investigation Report dated 11 January 2010. The witness had taken a particular oversight of the investigation because Mr Lewis was due to leave the SRA two weeks after it concluded. He could therefore vouch for its integrity. He had also been present at the final interview. He had prepared Appendices 2 and 3 to the Forensic Investigation Report. These were schedules of the round sum transfers to the Respondent's personal bank account and from client to office bank account respectively. The witness regarded the transfers from client to personal bank account as particularly unusual features. With respect to the interview which the witness and Mr Lewis had conducted with the Respondent on 14 December 2009, and the Respondent's expression of shock that the round sum transfers outstripped monies that he believed he was owed in costs which were held in client bank account, the witness agreed that in the transcript of the interview the Respondent did seem to be surprised by the results of the analysis which the witness had carried out. The witness pointed out however that within 24 hours of his being on site at the

firm he had obtain that assessment of the figures and for the Respondent not to have had a similar feel for the amounts involved would be surprising. The Respondent had appeared to be cooperative but declared ignorance of things which as an investigator the witness felt the Respondent should have known.

58. In respect of the Respondent's Professional Indemnity Insurance Proposal Form, the witness had led on that part of the investigation and also the calculation of VAT related figures. He had found it relatively straightforward to pull off the various figures which indicted the lowest income that the firm would generate for the period March to August 2009 to be in the region of £30,000 which was inconsistent with the figure for the whole year given in the PII form of £90,000. The witness explained that the copy unsigned and undated PII form in the Applicant's papers had been provided by the Respondent. As to the various County Court Judgments against the Respondent, one of which was the subject of allegation 1.2, the witness confirmed that the SRA had carried out a search which had disclosed details of the various judgments.

59. With respect to the statement in the Respondent's "Response to allegations" document that he did not believe the Respondent had acted dishonestly, the witness confirmed that he had no record of such a conversation and that it was wholly inconsistent in the way in which he worked. He would have been prepared to respond to questions from solicitors which were commonly asked about how serious the breaches were. He might well have talked about features that would be reasonable and those which would tend towards a finding of dishonesty but it was not his practice ever to give his own verdict about dishonesty.

Findings of Fact and Law

60. **Allegation 1.1: That he had acted in breach of the Solicitors Accounts Rules ("SAR") in particular:**
    (a) Rule 7(1) - failure to remedy breaches promptly;
    (b) Rule 19 note (x) - round sum withdrawals on account of costs;
    (c) Rule 22(1) - improper withdrawals from client account;
    (d) Rule 32(1) - accounting records not properly written up;
    (e) Rule 32(7) - inadequate reconciliation.

60.1 The Respondent had admitted all the facts of this allegation but disputed that he had been dishonest. It was submitted on behalf of the Applicant that the Respondent's accounts were in an appalling state. The Tribunal was reminded that he had admitted making a number of round sum transfers in lieu of proper transfers to both his own and the office bank account. He had paid practice expenses including staff salaries from client bank account. His approach to account reconciliation and record keeping was wholly inadequate.

60.2 It was submitted on behalf of the Applicant in respect of the two limbed test for dishonesty as set out in the case of Twinsectra Ltd v Yardley and Others [2002] UKHL 12 that the Respondent was clearly someone who was in some financial difficulties and using his client account to prop up his business and personal spending in a way that he knew he should not have and it was submitted that dishonesty had been made out. His response statement had no statement of truth in it and his latest

statement responding to the Applicant's opening submissions was neither signed nor bore a statement of truth. His dishonesty, it was submitted, was clear from his use of client account to top up his personal bank account when payments such as direct debits were due and/or when his overdraft limit was about to be reached.

60.3 In his response to the allegations, whilst admitting accountability for errors and mistakes, the Respondent stated that he was shocked and horrified when he learnt of his mistakes. He emphasised that he had repaid the shortfall. He stated that he had had a conversation with the senior investigator "on the stairs of the Pavilion (my then offices) he told me that he did not believe that I had acted dishonestly ..." In respect of the dishonesty allegation the Respondent had said that in his response that he always believed that the way that he was running the practice was acceptable, although he could now see that this view was wrong. He emphasised that his accountant had never indicated to him that he was carrying out anything but a proper practice. He was genuinely unaware that the transactions he carried were not permitted, although he accepted that the Rules were clear regarding round sum transfers.

60.4 Having carefully considered the evidence and having heard the submissions on behalf of the Applicant, the evidence of the witness and the contents of the documents sent in by the Respondent, the Tribunal found all aspects of allegation 1.1 to have been proved. In respect of the allegation of dishonesty, the Tribunal found that the objective test in the case of Twinsectra was satisfied in respect of the monies which the Respondent had withdrawn from client account and placed improperly in either his own personal bank account or in office account. The Tribunal had noted that the Respondent had not taken any steps to hide what he was doing but considered that objectively what he had done was dishonest. He had used client account to keep his business and his personal life afloat. Having regard to the subjective test, the Tribunal had noted the particular features of the transfers which were repetitive and amounted to considerable sums. The Tribunal had noted the assertions contained in the Respondent's statements in respect of which no statement of truth had been completed. The Tribunal was however unconvinced by the Respondent's defence based on his lack of knowledge of the amounts being taken and that he was a poor businessman with poor accounting skills. The Tribunal had also noted the Respondent's financial astuteness in transferring just enough money from client account to keep within his overdraft. The Tribunal accepted the evidence of the Senior Investigator about the ease with which the true figures could be ascertained and took the view that it was clear to the Respondent that the monies that he was taking out of client account was substantially in excess of any work in progress that he might have billed. The Tribunal also accepted the witness's evidence that he had not advised the Respondent that the investigators considered that there was an absence of dishonesty. The Tribunal had also noted that before setting up on his own account the Respondent had been qualified for eight years and clearly knew very well that it was not acceptable to take money from client account. In all the circumstances the Tribunal found that there was an irresistible inference to be drawn that the Respondent knew that his taking of money from client account for his own purposes and for the purposes of supporting his practice was dishonest and accordingly dishonesty in respect of allegation 1.1 was found to be proved.

61. **Allegation 1.2: That he had acted in breach of Rule 1.02 in that he failed to disclose that he had been the subject of a County Court Judgment when completing a proposal for PII cover.**

61.1 The Applicant had admitted the facts of allegation 1.2 but denied that he had been dishonest or reckless. The Tribunal noted that he had not addressed the issue of the non-disclosure of the first County Court Judgment in his response but he again knew full well when he completed the form that the County Court Judgment existed and he knew that he would receive a benefit from not disclosing it to his insurers. It was submitted on behalf of the Applicant that there was an irresistible inference that the Respondent was behaving dishonestly when he failed to make the necessary disclosure on the form and the Tribunal agreed with this submission. It found this allegation to have been proved and that the Respondent's conduct in failing to disclose had been dishonest both objectively and in accordance with the subjective test.

62. **Allegation 1.3: That he had acted in breach of Rule 1.06 in that he had failed to comply with a decision of inadequate professional service dated 15 February 2010 (Complaint by Mr U)**

62.1. The Respondent had admitted this allegation and the Tribunal found it to have been proved.

63. **Allegation 1.4: That he had acted in breach of Rule 20.05 in that he had failed to cooperate with the SRA promptly (complaint by Mr U)**

63.1 The Respondent had admitted this allegation and the Tribunal found it to have been proved.

64. **Allegation 1.5: That he had acted in breach of Rule 1.06 in that he had failed to comply with a decision of inadequate professional service dated 24 May 2010 (complaint by Ms T)**

64.1 The Respondent had admitted this allegation and the Tribunal found it to have been proved.

65. **Allegation1.6: That he had acted in breach of Rule 20.05 in that he had failed to cooperate with the SRA promptly (complaint by Ms T)**

65.1 The Respondent had admitted this allegation and the Tribunal found it to have been proved.

66. **Allegation 1.7: That he had acted in breach of Rule 10.05 in that he had failed to fulfil an undertaking within a reasonable time (complaint by TW)**

66.1 The Respondent had admitted this allegation and the Tribunal found it to have been proved.

67. **Allegation 1.8: He had acted in breach of SAR in particular Rules 24 and 25 - payment of interest (complaint by Mr S)**

67.1 The Respondent had admitted this allegation and the Tribunal found it to have been proved.

68. **Allegation 1.9: He had acted in breach of Rule 10.01 of the Code in that he used his position to take an unfair advantage of a client (complaint by Mr S)**

68.1 It was submitted on behalf of the Applicant that the Respondent had claimed that this was a no win no fee arrangement under which he was entitled to one third of the damages and VAT but he had in fact taken more than that and the documentation did not support his version of events. The Applicant relied on the adjudicator's report. The Applicant alleged dishonesty in respect of this allegation.

68.2 In his comments on the opening submissions the Respondent took the view that he had acted in the client's interests but lacked the paperwork to back this up. He had stated inter alia:

> "He was a solicitors [sic] working with me at the time and had brought this matter as a result of a breakup in our working relationship. In hindsight all of our meeting and agreements ought to have been backed up with writing but at the time I took it on trust. I am accountable and at fault but not dishonest."

68.3 It was alleged that the Respondent had used his position to take unfair advantage of his client. Rule 10 stated:

> "You must not use your position to take unfair advantage of anyone either for your own benefit or for another person's benefit"

68.4 Having carefully considered the evidence and the Respondent's response, the Tribunal noted that there was some evidence that there had been a no win no fee agreement as the Respondent contended. There was a document signed by Mr S amongst the papers. While the Tribunal noted that the precise terms of the agreement between Mr S and the Respondent were disputed, it was not satisfied that on the objective test what the Respondent had done would be considered to have been dishonest. Rather the Tribunal considered that the situation was one of a dispute between a client and a solicitor. They were not satisfied either that there was any evidence that the Respondent himself considered that his conduct had been dishonest and accordingly they found this allegation not to have been proved insofar as dishonesty was concerned. The Respondent had however retained the monies which were due to the client and attributed their non-return to his financial difficulties. He had admitted that aspect of that allegation and the Tribunal found it to have been proved.

69. **Allegation 1.10: He had acted in breach of Rule 20.05 of the Code in that he had failed to cooperate with the Legal Complaints Service and/or the SRA (complaint re Mr S)**

69.1 The Respondent had admitted this allegation and the Tribunal found it to have been proved.

70. A**llegation 1.11: He had acted in breach of Rule 1.06 of the Code in that he had failed to comply with a formal decision of an Adjudicator dated 13 October 2010 in respect of Mr S.**

70.1 The Respondent had admitted this allegation and the Tribunal found it to have been proved.

71. **Allegation 1.12: He had acted in breach of Rules 22 and 19 of the SAR in that he had failed to account to clients for monies paid by them to his firm. (complaint re Mr C)**

71.1 It was alleged in respect of this allegation that the Respondent had acted dishonestly.

71.2 The Tribunal noted that the Respondent had agreed that he had failed to account for the monies paid to him. It was clearly wrong for the Respondent to have held on to Mr C and his fellow clients' money. The Respondent had admitted the facts of the allegation but denied dishonesty. The Tribunal noted that in an email of 14 October 2010 concerning Mr C's complaint, the Respondent had stated, "I think the issue here would be simply settled if the money was refunded". He went on to say that he would pass the matter on to his insurers and mentioned his financial difficulties. The Tribunal did not find that there was any evidence of dishonesty in this case and accordingly while it found the allegation itself to have been proved, it did not find dishonesty had been proved to the standard required in the case of Twinsectra or at all.

72. **Allegation 1.13: He had acted in breach of Rule 1.06 of the Code in that he had failed to comply with a formal decision of an Adjudicator dated 10 December 2010 in respect of Mr C.**

72.1 The Respondent admitted this allegation and the Tribunal found it to have been proved.

Previous Disciplinary Matters

73. None.

Mitigation

74. The Tribunal had carefully noted the Respondent's document marked 'response' and dated 13 May 2011, his comments on the opening submissions in an unsigned and undated document and his further response to the opening submissions. His mitigation consisting mainly of references to his financial difficulties and submissions that what he had done was mistaken, his repayment of the shortfall, his attempts to recover monies taken by his bank from client account when they worked on the basis that it was not in fact a client account which transactions had taken place he said without his knowledge and consent; his closure of his practice, his loss of home and his commitment not to be in charge of the operation of client account monies in future. He also made a commitment to re-educate himself in respect of his professional obligations, in the one document that was signed and dated.

Sanction

75. The Tribunal had carefully considered the Respondent's submissions but it had found him to have been dishonest in respect of taking monies from client account in order to prop up his practice and his personal life. He had also sought to deceive his professional indemnity insurer for his personal benefit. The scale of the Respondent's misconduct was considerable and even in the absence of dishonesty the Tribunal would have found having regard to the range and seriousness of the allegations that for the protection of the public and to maintain the reputation of the profession, it would be necessary to Order him to be Struck Off the Roll of Solicitors. The fact that he had been found to have been dishonest in respect of two of the allegations confirmed the Tribunal in its view and accordingly it Ordered that the Respondent should be Struck Off the Roll of Solicitors.

Costs

76. The Applicant's representative explained that a Schedule of Costs had been served on the Respondent. The hearing had taken somewhat less time than had been expected and some deduction would need to be made from the amount claimed of £27,244.07, which included the costs of the investigation. The Respondent had not made any comments about the particulars of the costs save to say that he wished to have the opportunity to make submissions. It was submitted on behalf of the Applicant that the Respondent appeared to be working and although he had made repeated references to entering an IVA or going bankrupt, nothing had happened over the last year and there was no real evidence of financial difficulty. The Tribunal carefully considered the Costs Schedule. The Respondent had been given the opportunity to make comments but had not taken it up. The Tribunal considered that it had adequate information about his means to make a determination. He was clearly working and had done so for some time. He was also selling his house. The Tribunal assessed the costs in the fixed sum inclusive of the investigation of £23,000.

Statement of Full Order

77. The Tribunal Ordered that the Respondent, Simon John Holborn, 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 £23,000.00.

The Tribunal further Ordered that, pursuant to Paragraph 5 of Schedule 1(A) of the Solicitors Act 1974 (as amended), the decisions of inadequate professional service dated 15 February, 24 May, 13 October and 10 December 2010 made in respect of complaints by Mr U., Ms T., Mr S. and Mr C. respectively be treated for the purposes of enforcement as if they were contained in Orders of the High Court.

Dated this 16th day of June 2011
On behalf of the Tribunal

K W Duncan
Chairman