SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 10948-2012

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ANDREW KENNEDY HORSEY Respondent

Before:

Mr R. Nicholas (in the chair)
Mr A. N. Spooner
Mrs V. Murray-Chandra

Date of Hearing: 6th December 2012

Appearances

Margaret Bromley, solicitor of Bevan Brittan LLP, Kings Orchard, 1 Queen Street, Bristol, BS2 0HQ for the Applicant.

The Respondent appeared and represented himself.

JUDGMENT

Allegations

1. The allegations made against the Respondent, Andrew Kennedy Horsey, on behalf of the Solicitors Regulation Authority ("SRA") were that:

1.1 He withdrew money from the client account in breach of Rule 22(1) of the Solicitors Account Rules ("SAR");

1.2 Contrary to Rule 1 of the Solicitors Practice Rules 1990 ("SPR") and in respect of actions after 1 July 2007 contrary to Rule 1 of the Solicitors Code of Conduct 2007 ("the Code") he failed to act with integrity, he failed to act in the best interests of clients, he behaved in a way that was likely to compromise or impair his good repute and the good repute of the solicitors' profession and/or he behaved in a way that was likely to diminish the trust the public places in him or the profession by virtue of:

1.2.1 his misuse of client money;

1.2.2 his failure to inform his partners of the judgment against the firm in the matter of HC;

1.2.3 his suggestion that the HC matter had something to do with Ian MacFarlane.

1.3 Allegations 1.1 and 1.2 were put on the basis that the Respondent was dishonest or reckless but it was not necessary to prove dishonesty or recklessness for the allegations to be made out.

1.4 He failed to respond promptly, substantively and/or at all to correspondence from the SRA in breach of Rule 20.03 of the Code.

Preliminary Matter – Burden and standard of proof

2. For the avoidance of any doubt, the Tribunal stated it is independent of the SRA. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Documents

3. The Tribunal reviewed all of the documents submitted by the parties which included:

Applicant:

- Application dated 6 March 2012;
- Rule 5 Statement with exhibit "MEB1" dated 6 March 2012;
- Statements of costs dated 31 July 2012 and 5 December 2012;
- Extract from Land Registry re Respondent's property.

Respondent:

- Response to allegations dated 10 June 2012, with exhibit.

Factual Background

4. The Respondent was born in 1946 and was admitted to the Roll of Solicitors in 1971. His name remained on the Roll at the date of the hearing but the Respondent did not hold a Practising Certificate.

5. The Respondent practised in partnership under the style of Traill and Co ("the Firm") from 1997 to 26 January 2007 at Greyhound House, Market Place, Blandford Forum, Dorset DT11 7EB ("the Blandford Forum office"). The Firm also had branch offices under the name Brennard Wilson at 1 Market Place, Sturminster Newton, Dorset DT10 1AR ("the Sturminster Newton office") and under the name Weatheralls at 168 Station Road, West Moors, Ferndown, Bournemouth, Dorset BH22 0JB ("the Ferndown office").

6. The Respondent was employed by the Firm after ceasing to be a partner until his dismissal on or about 7 September 2010. The Firm closed on 30 September 2010.

7. In or about 2001, whilst the Respondent was a partner in the Firm, the Respondent was instructed by Ms HC in an employment claim. Mr Goodbody and Mr Wilkins were partners in the Firm at the relevant time.

8. In or about December 2002 Ms HC terminated her retainer with the Respondent as she was dissatisfied with the way the Respondent had handled her claim. Ms HC instructed another firm, Clarke and Co, to bring professional negligence proceedings against the Firm. Clarke and Co closed by mid-2010 but the former principal had been contacted and had provided documents and correspondence to the SRA concerning Ms HC's matter. A number of those documents had been added to the Rule 5 bundle and a Civil Evidence Act Notice had been served by the Applicant in August 2012.

9. Proceedings were issued by Clarke and Co on behalf of Ms HC in or about March 2004 and were served under cover of a letter dated 31 March 2004. The Particulars of Claim were served under cover of a letter dated 16 April 2004. Judgment in default of defence was entered on 13 January 2005. The amount of the judgment was confirmed in a letter from Clarke and Co on or about 29 March 2005 which stated that the damages for negligence were £41,067.65, interest to the date of judgment was £5,474.32, costs to judgment were £12,079.38 being a total of £58,621.35, together with interest on the judgment totalling £862.10, bringing the total due to 29 March 2005 to £60,070.95.

10. On 29 March 2005 a payment of £60,070.95 was made from the Firm's client bank account to Clarke and Co in settlement of the judgment debt. The chitty authorising the CHAPs payment was signed by "AKH", the Respondent's initials. The sum of £60,070.95 was posted as a debit to the client ledger for a matter relating to Mr Ian MacFarlane. The narrative on the entry read "Clarke/Co – C" (Ms HC's name). There was no apparent connection between Ms HC and Mr MacFarlane.

11. Mr MacFarlane had previously been a partner at the Firm but in August 2004 was arrested in relation to fraud offences against both HMRC and the Land Registry. In or about May 2005 Mr MacFarlane was convicted. HMRC and the Land Registry sought to recover monies due to them from the sale of properties owned by Mr MacFarlane. The Respondent dealt with the recovery of money from sales of properties and payments to HMRC and the Land Registry.

12. By 2010 the MacFarlane recovery matter was still on-going. Mr MacFarlane had served his prison sentence and sought the return of money which was due to him. Mr Goodbody reviewed the MacFarlane files and ledgers to ascertain how matters were progressing. Mr Goodbody noted the payment of £60,070.95 which had been paid from the MacFarlane ledger to Clarke and Co on 29 March 2005. The payment was queried with the Respondent as there was no obvious link between the Ms HC matter and the MacFarlane matter. Mr Goodbody's witness statement stated that the Respondent had told him that he (the Respondent) thought the payment was compensation for a property deal MacFarlane had done with Ms HC in which he had overcharged her. Mr MacFarlane informed MrGoodbody that he did not know of any reason why the payment had been made.

13. Mr Goodbody arranged to obtain a copy of the Ms HC file from Clarke and Co. This took some time as Clarke and Co had closed. On obtaining the file, Mr Goodbody noted the judgment against the Firm for professional negligence. It was the SRA's case that the partners, Mr Goodbody and Mr Wilkins, were previously unaware of the judgment; the Respondent's case was that Mr Goodbody had been aware of the matter at the relevant time.

14. Mr Goodbody notified Mr Wilkins of his discovery and they arranged a meeting with the Respondent on 6 September 2010 to ask him why money from the MacFarlane recovery account had been used to pay the judgment debt due to Ms HC. At that meeting the Respondent was noted to have stated that the matter, "had Ian MacFarlane's fingerprints all over it" and that the matter had originated with Ian (MacFarlane). The Respondent stated in the course of that meeting that he had discussed the payment with the partners and that he had offered to "square things up" with Mr MacFarlane. A formal disciplinary meeting took place on 7 September. The meeting followed a script, with responses being noted by Mr Wilkins. Amongst other matters, the Respondent told Mr Wilkins and Mr Goodbody that he did not recall seeing anything about Ms HC's negligence claim until the default judgment. He further stated, "We made the decision" and "I thought we were all working together". The Respondent was dismissed.

15. The Firm notified its professional indemnity insurers, who in due course replaced the cash shortage on client account. On 9 December 2010 Mr Goodbody and Mr Wilkins wrote to the Legal Ombudsman to report the Respondent's suspected misconduct and the matter was passed to the SRA.

16. On 10 March 2011 the SRA wrote to the Respondent asking him to provide comments in relation to the allegation that he withdrew money in the sum of £60,070.95 from the client account to pay for a judgment debt against the Firm in breach of Rule22(1) of the SAR. The Respondent did not respond and on 7 April 2011 the SRA wrote

again, reminding the Respondent of his obligation to co-operate with the SRA. No response was received.

17. On 17 June 2011 an authorised officer of the SRA decided to refer the conduct of the Respondent to the Tribunal and on 27 June 2011 the SRA notified the Respondent of that decision.

Witnesses

18. Christopher John Wilkins, former partner in the Firm, gave evidence for the Applicant including confirming the truth of his witness statement dated 9 February 2012 included in exhibit "MEB1" and was cross-examined by the Respondent.

19. Robert Marcus Goodbody, former partner in the Firm, gave evidence for the Applicant including confirming the truth of his witness statement dated 4 March 2012 included in exhibit "MEB1" and was cross-examined by the Respondent.

20. The Respondent, Andrew Kennedy Horsey, gave evidence on his own behalf including confirming the truth of his Response dated 10 June 2012 and was cross-examined by Ms Bromley for the Applicant.

Findings of Fact and Law

21. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

22. **Allegation 1.1: He withdrew money from the client account in breach of Rule 22(1) of the Solicitors Account Rules ("SAR")**

22.1 This allegation was denied by the Respondent.

22.2 There was no dispute on the evidence concerning the fact of the transfer of £60,070.95 from the client ledger relating to recovery of monies in the MacFarlane matter to Clarke and Co in settlement of the judgment obtained by Ms HC. Indeed, it was accepted that the transfer had been authorised by the Respondent. The Tribunal accepted the evidence of Mr Goodbody and Mr Wilkins to the effect that a transfer of this amount in relation to the MacFarlane recovery ledger would not have appeared unusual to the accounts staff. The authority of two senior staff members would be required before the transfer would be carried out but where a transaction appeared routine all that was expected was that there would be a check that cleared funds were available. The Respondent worked at the Blandford Forum office, which was where the Firm's accounts staff were based, whilst Mr Wilkins was based at the Sturminster Newton office.

22.3 The Respondent's defence was that at the time of the transfer he had believed it was a legitimate transfer. Under cross examination, the Respondent told the Tribunal that the Firm had had a claim for costs against the MacFarlane ledger and so was able to use some of the funds on that ledger to pay the judgment debt. The Respondent had

further given evidence, including in his witness statement, to the effect that he had discussed the judgment with Mr Goodbody and the latter had agreed that the transfer could be made.

22.4 The Tribunal did not accept that contention, for reasons set out more fully below. Even if the Respondent had agreed with a partner that the transfer of over £60,000 could be made from a client ledger/the client bank account to pay a judgment debt, that could not be a defence in any event as all the partners in the Firm were responsible for compliance with the SAR; the Respondent had been a partner at the relevant time. Further, there was no evidence on the client ledger or otherwise that the Firm had been entitled to costs of over £60,000 from the MacFarlane ledger. In particular, no bill for that amount had been posted. There was no connection between the matters of HC and MacFarlane and there was no justification within the SAR for such a transfer. There was no permission from MacFarlane or anyone else entitled to those monies to use the funds to pay Ms HC's judgment.

22.5 It was clear to the Tribunal, and proved beyond any reasonable doubt, that the withdrawal of over £60,000 from the ledger relating to the MacFarlane matter to pay a judgment against the Firm was made in breach of Rule 22 of the SAR. The allegation had been proved to the required standard.

23. **Allegation 1.2: Contrary to Rule 1 of the Solicitors Practice Rules 1990 ("SPR") and in respect of actions after 1 July 2007 contrary to Rule 1 of the Solicitors Code of Conduct 2007 ("the Code") he failed to act with integrity, he failed to act in the best interests of clients, he behaved in a way that was likely to compromise or impair his good repute and the good repute of the solicitors' profession and/or he behaved in a way that was likely to diminish the trust the public places in him or the profession by virtue of:**

1.2.1 his misuse of client money

23.1 This allegation was denied by the Respondent.

23.2 The Tribunal considered all of the evidence presented. It considered whether there had been misuse of client money and went on to consider whether any such misuse amounted to any of the breaches of Rule 1 SPR and/or the Code as alleged.

23.3 The fact of the transfer was undisputed, and the Tribunal had been satisfied that the transfer was in breach of Rule 22 SAR. However, the circumstances had to be considered in full.

23.4 In this situation, the breach of Rule 22 SAR amounted to a misuse of client money. There was some lack of clarity about who the client was in this situation. The ledger from which the money had been withdrawn was entitled "Traill &Co Solicitors; ICM Recoveries" such that it appeared at first glance that the client was the Firm. The Tribunal was not satisfied that the Firm was or could be the client in this situation. Whilst the precise mechanism for recovery of monies was unclear – it appeared, for example, that another firm had been involved in carrying out all the necessary conveyancing – it was clear that the Firm was not entitled to the contents of client account. The monies in the account were obtained in order to make payments to

HMRC and/or the Land Registry, and the ledger showed a number of such payments being made. It had been suggested in the course of the hearing that the partners of the Firm would be liable to make good any shortfall in the monies due to the HMRC and/or the Land Registry. The Respondent had also suggested that the Firm had some sort of lien over the contents of the account. Those assertions had not been established but were a possibility. In any event, the Tribunal found that the monies in the account were held for the benefit of HMRC and/or the Land Registry and that any balance remaining after paying those liabilities would be due to Mr MacFarlane. The Tribunal was satisfied that there was a trust of some sort in relation to the account. Whilst the partners of the Firm might avoid the risk of being pursued for any shortfall by assisting in the recovery of monies for the HMRC and/or Land Registry, there was no possibility that the Firm was entitled to any of the monies in the account unless it was able, properly, to render bills for the work done. There was no suggestion that the Firm would have been entitled to costs in the region of £60,000 at the time of the transfer in March 2005. Whatever the true identity of the client it was undoubtedly the case that client money had been misused as it had been used to pay a judgment in an unrelated matter.

23.5 The Respondent had sought to persuade the Tribunal that he and Mr Goodbody had agreed to the misuse of client funds. This had been put to Mr Goodbody, who had denied any such agreement and had denied knowing anything about the HC matter until 2010. The Respondent's response at paragraph 11 had stated:

> "Following a review of the situation by Mr Goodbody and the Respondent on 29th March 2005 it was jointly decided that it would be in the best interests of the firm at that time for the firm to settle the judgment. It was considered that accumulated "recovery" funds in relation to the MacFarlane affair could be applied against this being party partly monies on account of HMRC repayments due and partly on account of related accrued and accruing costs..."

23.6 The Tribunal had the benefit of seeing both the Respondent and Mr Goodbody give evidence. The Tribunal noted that the Respondent's cross examination had not been as vigorous as might have been expected, although he had put relevant questions to the witness and the Tribunal noted that the two had been colleagues for a considerable period. The Tribunal considered that Mr Goodbody was the more reliable witness where facts were disputed. The Tribunal was impressed, for example, with the efforts Mr Goodbody had made to trace Clarke and Co to find out about the transfer/the HC matter, including driving to the area where that firm had been based. Such actions were not consistent with the Respondent's assertion that Mr Goodbody had known all about the HC matter and had been involved in the decision to make the improper transfer. Further, Mr Goodbody's account was supported by that of Mr Wilkins who had attended the meetings with the Respondent in early September 2010 and had noted the Respondent's assertions but had not noted any agreement by Mr Goodbody to those assertions. The Tribunal found Mr Wilkins' evidence to be clear and credible.

23.7 The Tribunal found that the Respondent had acted without authority of either his partners or the authority of any clients. He had used a substantial amount of client money for no permissible reason.

23.8 The Tribunal noted that the misuse of client funds occurred in March 2005 at which point the SPR applied. The Tribunal was satisfied that the Respondent was in breach of Rule 1 of the SPR in that he had failed to act with integrity and had behaved in a way which was likely to impair or compromise his good repute and that of the profession. The Tribunal was uncertain as to the correct identity of the client in this instance, so could not be satisfied beyond reasonable doubt that the Respondent's actions amounted to failing to act in the best interests of clients.

24. **Allegation 1.2: Contrary to Rule 1 of the Solicitors Practice Rules 1990 ("SPR") and in respect of actions after 1 July 2007 contrary to Rule 1 of the Solicitors Code of Conduct 2007 ("the Code") he failed to act with integrity, he failed to act in the best interests of clients, he behaved in a way that was likely to compromise or impair his good repute and the good repute of the solicitors' profession and/or he behaved in a way that was likely to diminish the trust the public places in him or the profession by virtue of:**

1.2.2 his failure to inform his partners of the judgment against the firm in the matter of HC.

24.1 This allegation was denied by the Respondent.

24.2 The Tribunal considered carefully whether the Respondent had failed to inform his partners of the judgment against the Firm in the matter of HC. The Respondent's evidence under cross examination was that on receiving notification of the potential claim, the matter had been passed to another solicitor in the Firm, a Mr S and that Mr S would have notified the Firm's insurers of the claim. The Respondent had further stated that he did not see the file after the matter was passed to Mr S. Elsewhere in his evidence, the Respondent had told the Tribunal that in March 2005 he and Mr Goodbody had had a discussion and had decided to transfer funds from the MacFarlane recovery account to pay the judgment. Mr Goodbody had consistently denied that he had been aware of the judgment until he obtained the files from Clarke and Co during 2010.

24.3 The Tribunal found the evidence of Mr Goodbody and Mr Wilkins more consistent and credible than that of the Respondent. Mr Wilkins had not made any detailed notes in September 2010 concerning the Respondent's assertion, recorded in writing to the Firm in a letter of 8 September 2010, that there had been a meeting on 29 March 2005 at which the transfer of funds had been discussed; the Tribunal accepted the notes were not verbatim, but represented a reasonable note of what had been discussed. Again, the Tribunal found it compelling that Mr Goodbody had made considerable efforts to investigate the payment; he would not have needed to do so had he been aware of the judgment.

24.4 In contrast, the Respondent's evidence on this point was inconsistent. He had told Mr Goodbody and Mr Wilkins in the meeting on 7 September 2010 that he did not recall seeing anything until the default judgment arrived, but had told the Tribunal in oral evidence that when he received notification of the claim the file had been passed to Mr S. It was highly unusual to find a situation where no other partners had been told about the potential claim when the letter of claim arrived and that none of the partners

had reported the matter to insurers, which should happen routinely in the event of any notification.

24.5 The Tribunal noted the correspondence from Clarke and Co. It noted that almost all items were addressed to or marked for the attention of the Respondent and were addressed to the Blandford Forum office. The Tribunal noted some evidence to the effect that the Respondent was usually amongst those who dealt with opening post at that office. The Respondent had cross examined Mr Wilkins in particular about post opening arrangements. In the light of all the evidence heard and read, the Tribunal found it highly likely that the Respondent received and opened most if not all of the correspondence from Clarke and Co, including the correspondence after notification of the potential claim in September 2003. The Tribunal did not accept that all of this post would have been passed to Mr S without the Respondent or another partner asking about the matter or at least checking if insurers had been notified; on the Respondent's own evidence, he had assumed there had been notification but it appeared he had not checked this.

24.6 After considering all of the evidence carefully, the Tribunal concluded that the Respondent had failed to notify his partners of a potential claim and had then failed to notify them of the default judgment. The judgment was not paid until Clarke and Co threatened to serve statutory demands on the partners of the Firm. The Tribunal noted the references in correspondence and attendance notes from Clarke and Co to telephone discussions between Mr Clarke and the Respondent including on 17 January, 23 February and 9 March 2005. In the last of these, it appeared that the Respondent had told Mr Clarke that service of statutory demands would be accepted by post. There was no other possible interpretation of events other than that the Respondent had been aware of the claim by Ms HC and had failed to disclose it to his partners. Further, and of relevance to this allegation, he had failed to notify them of the judgment. The Tribunal could not accept the Respondent's evidence concerning the alleged meeting with Mr Goodbody on 29 March 2005.

24.7 In failing to inform his partners of the judgment against the Firm, the Respondent had failed to act with integrity and had behaved in a way which was likely to impair or compromise his good repute or that of the profession, contrary to Rule 1 SPR. Again, as the Tribunal had some doubt about the identity of the Firm's client at the relevant time it could not be satisfied that the part of the allegation relating to failure to act in the best interests of clients had been proved to the required standard. In all other respects, the allegation had been proved.

25. **Contrary to Rule 1 of the Solicitors Practice Rules 1990 ("SPR") and in respect of actions after 1 July 2007 contrary to Rule 1 of the Solicitors Code of Conduct 2007 ("the Code") he failed to act with integrity, he failed to act in the best interests of clients, he behaved in a way that was likely to compromise or impair his good repute and the good repute of the solicitors' profession and/or he behaved in a way that was likely to diminish the trust the public places in him or the profession by virtue of:**

1.2.3 his suggestion that the HC matter had something to do with Ian MacFarlane.

25.1 This allegation was denied by the Respondent.

25.2 The Respondent contended that he had believed at the relevant time that the matters of HC and MacFarlane were linked in some way. He now accepted that there was no such link.

25.3 The Tribunal was satisfied by the evidence of Mr Wilkins and the contemporaneous notes he had made, together with the evidence of Mr Goodbody, that the Respondent had indeed asserted there was a link between HC and MacFarlane. In particular at the meeting on 6 September 2010 the Respondent had stated that the HC matter "originated" with MacFarlane.

25.4 Even if the Respondent had believed there was a link, the assertion had been made without any qualification, in circumstances where the only purpose of such an assertion was to make it appear that the transfer on 29 March 2005 had been legitimate. In all of the circumstances, and taking into account all relevant evidence, the Tribunal was satisfied beyond all reasonable doubt that in making the assertion the Respondent's behaviour had lacked integrity and was likely to diminish the trust the public placed in him or the profession, contrary to Rule 1 of the Code. For reasons already set out above, the Tribunal was not satisfied that the part of the allegation relating to failing to act in the best interests of clients had been made out.

26. **Allegation 1.3: Allegations 1.1 and 1.2 were put on the basis that the Respondent was dishonest or reckless but it was not necessary to prove dishonesty or recklessness for the allegations to be made out.**

26.1 This allegation was denied by the Respondent.

26.2 The Tribunal noted that the test to be applied, in relation to the facts and matters set out under allegations 1.1 and 1.2 above was that set out in Twinsectra v Yardley and others [2002] UKHL 12 ("Twinsectra").

26.3 The Respondent's motivations for his actions were unclear. There was no direct financial benefit to him in misusing client money, failing to inform his partners of the judgment and suggesting that the HC matter was in some way connected to MacFarlane. However, the Respondent would avoid the professional embarrassment of disclosing to his partners that he had been negligent in the HC matter. Had the Respondent disclosed the matter, it was likely that insurers would have handled the case; the Tribunal noted that the insurers had been prepared to replace the shortage on client account caused by the misuse of funds from the MacFarlane recovery account. The Respondent had had a dishonest partner, MacFarlane, whose recovery account appeared to be available for use. Indeed, the misuse of that account was not discovered for about 5 years. The Respondent had put off disclosure of the HC judgment to his partners, including by arranging to pay it from funds on a file of which he had conduct.

26.4 Putting aside any issues of motivation, the Tribunal considered first whether the first, objective limb of the Twinsectra test had been met. The Tribunal determined that it was proved beyond reasonable doubt that in: a) misusing client money in excess of £60,000; b) failing to inform his partners of a negligence claim and judgment; and c)

misleadingly suggesting a link between HC and MacFarlane the Respondent had been dishonest by the standards of reasonable and honest people.

26.5 In considering whether the subjective part of the Twinsectra test had been met to the required standard, the Tribunal considered whether there were any medical or cognitive problems which could have explained the Respondent's conduct. No medical evidence had been produced and nor had there been anything in the Respondent's behaviour during the proceedings which case doubt on his mental capacity.

26.6 The Tribunal accepted that it was not always easy to prove dishonesty to the required standard on the basis of the Twinsectra test. However, in this instance, taking into account all of the evidence read and heard, the Tribunal had no doubt that the Respondent knew at the relevant times that: misusing client money by transferring over £60,000 from client account to satisfy a judgment in an unrelated matter; failing to inform his partners of the material fact of a claim against the Firm, where this could impact on the Firm's insurance premium; and misleading his partners when they investigate the matter was dishonest by the standards of reasonable and honest people. Accordingly, the Tribunal was satisfied beyond reasonable doubt that the allegation of dishonesty in relation to the matters dealt with at allegations 1.1 and 1.2 had been proved.

27. **Allegation 1.4: He failed to respond promptly, substantively and/or at all to correspondence from the SRA in breach of Rule 20.03 of the Code.**

27.1 This allegation was denied by the Respondent.

27.2 The Respondent had told the Tribunal that he may not have received the letters as he had been in the course of moving house. In his Response document the Respondent had stated that there had been no intentional failure but he had moved house in the autumn of 2010 and it took a considerable time for mail forwarding to operate effectively. In oral evidence, the Respondent accepted that he had not moved house until about November 2011, some months after the letters were sent, but that his former home was largely packed up and he either did not receive or may have mislaid the letters.

27.3 The Tribunal found beyond any reasonable doubt that the letters of 10 March and 7 April 2011 had been sent to the Respondent's address as it was at that time and that the Respondent had failed to respond. The Respondent's explanations concerning mail delivery and items being mislaid were not credible. Accordingly, the allegation had been proved to the required standard.

Previous Disciplinary Matters

28. There was one previous matter in which findings had been made against the Respondent, in matter number 6876/1995 heard on 25 July 1995. On that occasion the Tribunal had fined the Respondent £5,000 and ordered him to pay the costs of the proceedings.

Mitigation

29. In mitigation, the Respondent told the Tribunal that he had not acted on his own and that what he had done in transferring the sum of over £60,000 was a considered, joint decision made with one or more of his partners.

30. In relation to the 1995 disciplinary proceedings, the Respondent told the Tribunal that those matters had occurred some years ago and were unrelated. The Respondent had been sanctioned and took the view that this matter was in the past, although it would remain on his record.

31. The Respondent told the Tribunal that after the arrest of MacFarlane, the Firm had been in turmoil and a number of decisions had been made under pressure to keep the Firm afloat. The Respondent told the Tribunal that the decision to make the payment to settle the HC judgment had been made as part of the overall modus operandi to keep the Firm going and make sure that the staff retained confidence in the Firm. The Respondent had felt a sense of loyalty to the 25 or so members of staff whose livelihoods depended on the Firm.

32. The Respondent told the Tribunal he had no intention to return to work as a solicitor. In his situation, and being in his mid-sixties, the profession did not appear attractive and it was not possible for him to find employment. Due to health difficulties, working as a locum was not practicable.

Sanction

33. The Tribunal had regard to its Guidance Note on Sanctions (August 2012).

34. The Tribunal had found the Respondent to have been dishonest. There were no exceptional circumstances in the case. Having paid due regard to Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms the Tribunal was satisfied that the only reasonable and proportionate sanction in this case was to strike the Respondent off the Roll of Solicitors.

Costs

35. The Applicant sought an order for payment of costs and submitted a schedule of costs to date totalling £24,762.47. Ms Bromley asked the Tribunal summarily to assess the costs. The costs had increased due to the ineffective hearing in August 2012, which the Respondent had not attended. In particular, the costs of attendance of the witnesses had increased. The Respondent had not produced any written evidence of his income or assets. However, a Land Registry search showed that the Respondent had a property, registered in the joint names of himself and his wife, which had been purchased in November 2011 for £630,000.

36. The Respondent told the Tribunal that his income was now from state and private pension totalling about £1,000 per month. He told the Tribunal that the equity in his property was apportioned, with his share of the equity being about 15-20%. The Respondent told the Tribunal that he no longer had any other capital, as he had been living off capital for the last two years.

37. The Respondent told the Tribunal that he would like the costs of the proceedings to be assessed as he had not expected the costs of the proceedings to be so high.

38. The Tribunal noted that the costs of the proceedings had increased quite substantially from August 2012, at which point the costs schedule had totalled approximately £17,500. The Tribunal further noted that the Respondent sought an order for detailed assessment if costs were not agreed. The Respondent had not in the course of the hearing undertaken any negotiations concerning the amount of costs.

39. The Tribunal noted that the costs of carrying out a detailed assessment could substantially increase the Respondent's overall liability for costs. However, an order for detailed assessment would not preclude the parties from negotiating a suitable figure for costs and such negotiation would be preferable and less costly than undertaking detailed assessment.

40. The Tribunal did not consider this to be the sort of case in which it was necessary or proportionate to reduce the costs payable in the light of the Respondent's means. On his own submissions, the Respondent was entitled to something over £90,000 of equity in his home (assuming that the value had not fallen substantially in the period of one year since it was purchased) and had a modest income. Similarly, there was no need to delay the enforcement of costs once agreed or determined by detailed assessment. Accordingly, the Tribunal ordered the Respondent to pay the costs of the proceedings to be subject to detailed assessment if not agreed.

Statement of Full Order

41. The Tribunal Ordered that the Respondent, Andrew Kennedy Horsey, 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 to be subject to a detailed assessment unless agreed between the parties to include the costs of the Investigation Accountant of the Law Society.

Dated this 4th day of January 2013
On behalf of the Tribunal

R. Nicholas
Chairman