

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 10971-2012

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

TIMOTHY JAMES PENNY

Respondent

Before:

Mr D. Green (in the chair)

Mr J. C. Chesterton

Mrs L. Barnett

Date of Hearing: 8th October 2012

Appearances

James Moreton, solicitor, of Field Fisher Waterhouse LLP, 35 Vine Street, London EC3N 2AA for the Applicant.

The Respondent was not present or represented.

JUDGMENT

Allegations

1. The allegations against the Respondent were:
 - 1.1 That by his actions, he compromised or impaired or acted in a way which was likely to compromise or impair his integrity, contrary to Rule 1.02 of the Solicitors' Code of Conduct 2007 ("the Code");
 - 1.2 That he failed to act in a client's best interests or to provide a good standard of service to his client, contrary to Rules 1.04 and 1.05 of the Code;
 - 1.3 That he behaved in a way that was likely to diminish the trust the public places in him as a solicitor and in the legal profession, in breach of Rule 1.06 of the Code;
2. The case was put against the Respondent that with regard to allegations 1.1 and 1.3 he was dishonest. Dishonesty was not an essential ingredient of the allegations and it was open to the Tribunal to find any or all of the allegations proved without any element of dishonesty.

Documents

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

Applicant:

- Application dated 13 April 2012
- Rule 5 Statement, with exhibit "JCM/1" dated 13 April 2012
- Copy email to Respondent dated 5 October 2012
- Case report Law Society v Waddingham and others [2012] EWHC 1519 (Admin)

Respondent:

- Copy email to Applicant dated 5 October 2012

Preliminary Matter (1)

4. The Tribunal noted that the Respondent was not present and considered as a preliminary issue whether the case should proceed in the Respondent's absence.
5. The Application and Rule 5 Statement in this matter had been issued and served on the Respondent by the Tribunal during April 2012. The Applicant had served notices under the Civil Evidence Act on the Respondent on 26 April 2012. Although there had been no formal response to the Tribunal there was no indication that the proceedings had not been served. Further, the Tribunal noted the Respondent's email timed at 11.57am on 5 October in which he made admissions and the Applicant's response timed at 13.43 on 5 October which referred in the subject line to the date of

this hearing. The Applicant had on 27 September 2012 sent to the Respondent a copy of SRA v Davis & McGlinchey [2011] EWHC 232 (Admin).

6. The Tribunal was satisfied that the Respondent had been properly served with the proceedings and notice of hearing. He had responded to the allegations but had not expressed any intention to attend the hearing. In all of the circumstances the Tribunal was satisfied that it was appropriate and in the interests of justice for the hearing to proceed in the Respondent's absence.

Preliminary Matter (2) – Burden and standard of proof/legal tests

7. The burden of proving the allegations rested on the Applicant. In considering the allegations, the Tribunal would apply the highest standard of proof.
8. In relation to the dishonesty allegations, the Tribunal would apply the test for dishonesty set out in Twinsectra v Yardley and others [2002] UKHL 12. In accordance with the principles in Bryant and Bench v The Law Society [2007] EWHC 3043 (Admin), the Tribunal could consider character evidence in determining the dishonesty allegations. However, no testimonials as to character had been submitted by the Respondent.
9. For the avoidance of doubt, the Tribunal stated that it was independent of the SRA and the Law Society.

Factual Background

10. The Respondent was born in 1977 and was admitted to the Roll of Solicitors in 2004. His name remained on the Roll at the date of the hearing.
11. At all material times the Respondent was employed as an assistant solicitor by Clarke Kiernan Solicitors at 2-4 Bradford Street, Tonbridge, Kent TN9 1DU ("the Firm") in the Firm's prison law department.
12. On 9 August 2011 Catherine McCarthy ("Ms McCarthy"), a partner in the Firm, wrote to the SRA providing information concerning the Respondent's conduct. Ms McCarthy subsequently produced a witness statement, with exhibits, dated 2 April 2012 which was relied on by the Applicant and which dealt with the facts underlying the allegations.
13. In or about March 2009 the Firm was instructed by Mr SC in respect of matters concerning his recall to prison. The matter was dealt with by the Respondent. The Firm's records showed that the matter was concluded and the file closed in November 2009.
14. On 18 July 2011 Ms McCarthy was contacted by Mr SC's partner, Miss DE, who had that day attended the Firm on Mr SC's behalf and had met the Respondent. Miss DE said that Mr SC was a client of the Firm.
15. Miss DE informed Ms McCarthy that the Respondent had wanted to make arrangements with Miss DE for £16,500 to be transferred to Mr SC. The Respondent

was said to have advised either Mr SC or Miss DE that the money had been received in settlement of a claim for compensation. Ms McCarthy explained to Miss DE that she thought it was not the type of matter which would be conducted by the Respondent. Ms McCarthy checked the Firm's records but could find no indication the Firm was acting for Mr SC in such a matter.

16. On 19 July 2011 Ms McCarthy raised the matter with the Respondent. The Respondent informed Ms McCarthy that Mr SC was detained in prison and that he was represented by more than one firm. He said that Miss DE was confused and had attended the wrong firm of solicitors. Ms McCarthy accepted this explanation and asked the Respondent to confirm the position in writing to Mr SC. A letter from the Respondent to Mr SC dated 19 July 2011 confirmed that the Firm was not acting for him in connection with a claim against the Home Office.
17. On 25 July 2011 Ms McCarthy received a telephone call from Mr SC expressing concern about the content of the Respondent's letter of 19 July 2011. Mr SC told Ms McCarthy he was certain that the Respondent was acting for him in a civil compensation claim against the Home Office.
18. Later on 25 July 2011 Ms McCarthy spoke to the Respondent who told Ms McCarthy that he had led Mr SC to believe he had taken proceedings in the High Court for damages for unlawful detention. The Respondent stated that he considered his actions to be unprofessional. Ms McCarthy confirmed the conversation to the respondent in an email to the Respondent timed at 10.56am.
19. In a further telephone conversation with Ms McCarthy on 25 July Mr SC told her he had possession of a document from the Court which would show that the Respondent had been acting for him and that he would receive a settlement of his claim.
20. Miss DE provided Ms McCarthy with a copy of a letter addressed to the Firm, apparently dated 29 April 2011 from the Criminal Appeal Office of the Royal Courts of Justice. The letter, headed "Home Office v SC" read:

"I write further to the above and confirm the recent ruling of the court in this matter.
SC has made an application that his recall process was delayed unduly by the parole Board. The application was such that the length of the delay was wholly unjust and caused [Mr SC] unnecessary suffering.

Upon consideration of the facts it was found in [Mr SC's] favour and as a result the Home Office were ordered to pay £16,500 in compensation. The Home Office were ordered to pay this by the 2nd June 2011. Upon hearing representations by the Home Office, it was left open to them to make a further application for an extension of time if they were unable to meet this deadline".
21. Ms McCarthy conducted an investigation of the Firm's records. The only matter in which the Firm had a record of acting for Mr SC was that which had been concluded in November 2009. Ms McCarthy was unable to find any documentation which may have related to a claim for compensation by Mr SC.

22. On 25 July 2011 the Respondent admitted to Ms McCarthy that the letter which purported to be from the Criminal Appeal Office was not a real document, but a forgery. The Respondent confirmed that no claim for compensation had been filed on behalf of Mr SC and there was no award for compensation.
23. Ms McCarthy prepared a statement of allegations for the purpose of an internal disciplinary hearing which was arranged to be held on 29 July 2011. Ms McCarthy's notes of the hearing showed that the Respondent did not dispute the content of the statement of allegation. The Respondent explained that he had originally advised Mr SC that a claim for compensation should be pursued after the client's release from prison. Mr SC was said to have agreed with that advice but when released from prison communicated with the Respondent believing that the claim was being pursued when the Respondent had not done anything.
24. The Respondent had described Mr SC as a difficult and forceful individual. The Respondent stated that he found it difficult to inform Mr SC that he had not advanced the matter and had instead fed him with information about the purported claim. Mr SC was said to have demanded to see something in writing. Following the disciplinary hearing Ms McCarthy wrote to the Respondent to inform him that he was dismissed on the grounds of gross misconduct and notified him that any appeal should be notified by close of business on 1 August 2011. The Respondent did not appeal against his dismissal.
25. On 29 July 2011 Ms McCarthy attended HMP Belmarsh to discuss matters with Mr SC. Ms McCarthy recorded Mr SC as being very shocked on hearing that a claim for compensation had not been advanced and the compensation money did not exist. Mr SC told Ms McCarthy that the Respondent had visited him in prison on three occasions in order to discuss the claim, the last visit having taken place on 11 July 2011. Mr SC told Ms McCarthy that after his release from prison he had, at the Respondent's request, attended the Firm's offices to sign an application for Legal Aid. Mr SC was under the impression that the Respondent had instructed counsel in the matter. Mr SC told Ms McCarthy that the only document the Respondent had given to him for retention was the letter purporting to be from the Criminal Appeal Office dated 29 April 2011. However, Mr SC recalled the Respondent having shown him another letter from the Court which he said was slightly different to the letter of 29 April 2011.
26. On 19 August 2011 the SRA wrote to the Respondent requesting his response to these matters. The Respondent failed to respond to this letter or to subsequent correspondence from the SRA.
27. On 16 November 2011 an authorised officer of the SRA decided to refer the Respondent's conduct to the Tribunal.
28. By letter dated 21 February 2012 the Criminal Appeal Office confirmed that the letter of 29 April 2011 did not originate from that office and that the Court of Appeal Criminal Division would not have made a ruling in respect of the matter described in the letter.

Witnesses

29. Catherine McCarthy, partner in Clarke Kiernan solicitors of 2-4 Tonbridge Street, Tonbridge, Kent gave evidence for the Applicant and confirmed her statement dated 2 April 2012.

Findings of Fact and Law

30. **Allegation 1.1: That by his actions, he compromised or impaired or acted in a way which was likely to compromise or impair his integrity, contrary to Rule 1.02 of the Solicitors' Code of Conduct 2007 ("the Code")**

30.1 This allegation was admitted by the Respondent.

30.2 The Respondent had misled Mr SC into believing a claim for compensation had been made and, indeed, that the claim had succeeded, when no such claim had been commenced. Further, the Respondent had made misleading statements to his employer. He had produced a forged document, the purported letter of 29 April 2011, which conveyed false information. In all of these respects, the Respondent's actions had compromised and impaired his integrity.

30.3 The Tribunal was satisfied on the admission and on the evidence that this allegation had been proved to the highest standard.

31. **Allegation 1.2: That he failed to act in a client's best interests or to provide a good standard of service to his client, contrary to Rules 1.04 and 1.05 of the Code**

31.1 This allegation was admitted by the Respondent.

31.2 The Respondent had misled his client, Mr SC, into believing a claim for compensation had been made and had been successful. His client had been shocked to learn that no claim had been made and had been upset that his partner, Miss DE, had been put to inconvenience in attending the Firm's office to collect money which did not exist. Further, it had been suggested that Miss DE had taken out a loan in the expectation that £16,500 would shortly be received. Even if this latter matter were discounted, it was clear to the Tribunal that misleading a client must involve failing to act in the best interests of the client and failing to provide a good standard of service.

31.3 The Tribunal was satisfied on the admission and on the evidence that this allegation had been proved to the highest standard.

32. **Allegation 1.3: That he behaved in a way that was likely to diminish the trust the public places in him as a solicitor and in the legal profession, in breach of Rule 1.06 of the Code.**

32.1 This allegation was admitted by the Respondent.

32.2 In misleading a client and his employer and in particular in providing a forged document to Mr SC, the Respondent had clearly acted in a way which would diminish the trust the public would place in the Respondent and in the profession.

32.3 The Tribunal was satisfied on the admission and on the evidence that this allegation had been proved to the highest standard.

33. **Allegation 2: The case was put against the Respondent that with regard to allegations 1.1 and 1.3 he was dishonest. Dishonesty was not an essential ingredient of the allegations and it was open to the Tribunal to find any or all of the allegations proved without any element of dishonesty.**

33.1 The Respondent's email to the Applicant on 5 October 2012 had contained admissions. In particular, it stated:

“I...would like to inform you that I have decided not to contest any of the disciplinary charges brought against me”

and elsewhere stated,

“I would be grateful if you would accept this email as my full admission of the disciplinary charges and if you could also accept in on behalf of the SRA”.

33.2 The Tribunal noted that Mr Moreton had, quite properly, replied to the email seeking confirmation whether or not the Respondent also admitted his conduct had been dishonest in relation to allegations 1.1 and 1.3. There had been no response to that email; indeed, the Tribunal allowed Mr Moreton to check his emails after the hearing began in case anything further had been heard from the Respondent.

33.3 Whilst it appeared that the Respondent had made admissions to the allegations, the Tribunal could not be sure that he had admitted the allegation of dishonesty, either in whole or in part, and so required the Applicant to seek to prove the allegation, as if no admission had been made.

33.4 The Tribunal had read the statement of Ms McCarthy and had had the benefit of hearing her in evidence. Her evidence on the facts was clear, consistent, balanced and wholly credible and the Tribunal had no hesitation in accepting her account of the facts. The Tribunal was minded to be cautious as to the accuracy of the information given by Mr SC to Ms McCarthy, but had no doubt that information was accurately reported and in any event Mr SC's statements to Ms McCarthy did not materially affect the facts principally relied on by the Applicant.

33.5 In response to a question from the Tribunal, Ms McCarthy had very fairly described the Respondent as very pleasant and well-liked by colleagues and clients. The Respondent's email of 5 October had referred to suffering stress in the latter stages of his employment at the Firm. Ms McCarthy told the Tribunal that the Respondent's wedding, which she believed was sometime shortly before July 2011 had caused an amount of stress. Ms McCarthy had been aware he was undergoing some personal stress but it had not appeared to affect his work.

33.6 The facts being undisputed and clearly proved, the Tribunal applied the test for dishonesty set out in Twinsectra v Yardley and others [2002] UKHL 12. The Tribunal further noted the decision in The Law Society v Waddingham and others [2012] EWHC 1519 (Admin), in particular paragraphs 58-60 in which there is some

discussion by Mr Justice Maddison of the process to be followed in considering whether dishonesty is proved to the highest i.e. the criminal standard.

33.7 There were three alleged dishonest acts or circumstances. The Tribunal found that in: (i) misleading Mr SC to believe he was acting on his behalf in a claim for compensation, when no such claim had been made; (ii) making false and misleading statements to Ms McCarthy when asked about Mr SC's matter; and (iii) providing Mr SC with a false document, purporting to be from a Court, which misled Mr SC to believe a successful claim for compensation had been made, the Respondent had been dishonest by the standards of reasonable and honest people. The Tribunal was satisfied to the highest standard that the Respondent's actions had been dishonest within the meaning of the first part of the Twinsectra test.

33.8 The Tribunal considered whether the Respondent knew that in the respects set out above his actions had been dishonest by the standards of reasonable and honest people. It noted that the Respondent had not given the Tribunal any explanation of this conduct, save for a reference to stress which was not supported by any medical or other evidence. Indeed, the Respondent's email of 5 October 2012 stated:

“...I was suffering with stress which goes some way to explaining my actions, but of course does not excuse my actions in any way”.

This suggested that the Respondent acknowledged he knew at the time that his actions were wrong. The Tribunal further noted that by the time of his disciplinary hearing at the Firm, on 29 July 2011, the Respondent had acknowledged that the letter from the Criminal Appeal Office was a forgery and that he had behaved in an unprofessional manner.

33.9 There was certainly no explanation by the Respondent for his actions which cast any, let alone any reasonable doubt, on whether the Respondent knew at the material time and later that his actions were dishonest. The Tribunal found, so that it was sure, that in making false and misleading statements to Mr SC and to his employer and in producing a forged document the Respondent knew that his actions were dishonest by the standards of reasonable and honest people. Accordingly, the Tribunal was satisfied beyond any reasonable doubt that both parts of the Twinsectra test had been proved. The allegation of dishonesty had been proved.

Previous Disciplinary Matters

34. There were no previous disciplinary matters in which findings had been made against the Respondent.

Mitigation

35. The Respondent had admitted the basic allegations and the Tribunal noted that he had made some admissions to his employer by the time of his dismissal from the Firm. The Tribunal noted that in his email of 5 October 2012 the Respondent had admitted that his actions had brought the profession into disrepute. After his dismissal by the Firm he had been signed off work for some time with stress and depression. The Respondent had submitted that in the latter stages of his employment with the Firm he

had been suffering with stress and that this went some way to explaining his actions; he accepted that this did not excuse his actions. The Respondent had written that he was deeply ashamed of his actions, which he understood had undermined the good name of the legal profession, and that this was something he thought about every day. The Respondent submitted that his actions would affect his prospects of finding professional employment, but did not have any intention of returning to the legal profession. The Respondent accepted that difficulties in finding professional employment in future were a natural consequence of his actions.

Sanction

36. This was a sad case, in which the Respondent's actions and his dishonesty were inexplicable. He was of previous good character. The Respondent had derived no benefit from misleading Mr SC or his employer and it had taken some courage for him to admit the allegations. The Respondent had expressed remorse and shame. Ms McCarthy, to her credit, had spoken warmly of the Respondent and had told the Tribunal that prior to these events he had been well-liked by colleagues and clients.
37. Nevertheless, this was a case in which dishonesty had been proved to the highest standard. The Tribunal had found the Respondent to have been dishonest in three respects. All were grave, but in particular the production of a forged letter, purporting to be from the Criminal Appeal Office, was blatant, deliberate and undermined the integrity of the Respondent and the reputation of the profession.
38. The Tribunal had considered all of the circumstances. There were no exceptional circumstances which would mitigate against the imposition of the ultimate sanction. Following the finding of dishonesty, on the facts of this matter the only reasonable and proportionate sanction which could be imposed was a striking off order. Indeed, the breaches (even without dishonesty) were very serious as the Respondent's integrity had been compromised and the Tribunal would have had to consider making a striking off order even if it had not found dishonesty proved.

Costs

39. The Applicant applied for an order for costs against the Respondent in the sum of £5189.96 including VAT. It was noted that the costs schedule included estimates for the time to be spent at the hearing which were in excess of the time actually spent. It was explained that some costs had been incurred in instructing an enquiry agent to establish the Respondent's current address. The Applicant had sent to the Respondent a copy of SRA v Davis & McGlinchey [2011] EWHC 232 (Admin) and had drawn to the Respondent's attention the guidance within that case on the information to be provided to the Tribunal (where admissions are made) if a Respondent sought to argue that either no order for costs should be made or that it should be limited on the basis of that Respondent's means.
40. The Tribunal noted that in his email of 5 October 2012 the Respondent had stated that he was in employment and was earning approximately £325 per week. He had also stated that he had accrued a large number of debts which he was in the process of paying, but had given no details of either his assets or liabilities.

41. The Tribunal determined that the Respondent had given insufficient information concerning his means for this to have any effect on the issue of costs. The Tribunal noted that the SRA will habitually negotiate payment by instalments where a Respondent was unable to pay a costs award immediately. Further, the Tribunal noted that the Respondent had been able to secure some employment and he was a young man so this was not a case where the Tribunal's striking off order would deprive him of his livelihood. In addition, the level of costs was not particularly high.
42. The Tribunal carried out a summary assessment of the costs claimed. Whilst the rates charged were reasonable, the Tribunal considered that overall the time spent was slightly on the high side for a case which was not factually complex and which did not involve a large number of documents. For that reason, the Tribunal considered the appropriate and reasonable amount of costs to order the Respondent to pay was £4,800 including VAT.

Statement of Full Order

43. The Tribunal Ordered that the Respondent, Timothy James Penny, 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 £4,800.00 inclusive of VAT.

Dated this 12th day of November 2012

On behalf of the Tribunal

D. Green
Chairman