

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 11046-2012

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

ANDREW JOHN CRESSWELL

Respondent

Before:

Mr A. N. Spooner (in the chair)

Mr R. Nicholas

Mrs L. Barnett

Date of Hearing:

15 October 2013 & 3 December 2013

Appearances

Mr Robin Havard, solicitor of Morgan Cole LLP, Bradley Court, Park Place, Cardiff, CF10 3DR for the Applicant.

The Respondent attended and was not represented.

JUDGMENT

Allegations

1. The allegations against the Respondent were that:
 - 1.1 He failed to keep his accounting records properly written up to show his dealings with client monies in breach of Rule 29.1 of the SRA Accounts Rules 2011;
 - 1.2 He made improper withdrawals from client account in breach of Rule 22 of the Solicitors Accounts Rules 1998 (“SAR 1998”). Dishonesty was alleged in relation to this allegation but it was not necessary to prove dishonesty for the allegation to be made out;
 - 1.3 He failed to deliver Accountant’s Reports for Cresswell & Co Solicitors for the periods ending 31 May 2010, 30 November 2010, 31 May 2011 and 30 November 2011 in breach of section 34 of the Solicitors Act 1974 and of Rule 35 of the Solicitors Accounts Rules 1998;
 - 1.4 He failed to pay insurance premiums due to the Assigned Risks Pool for the year 2011/2012 in breach of Rule 16.2 of the SRA Indemnity Insurance Rules 2011;
 - 1.5 He failed to account for client monies in breach of Principles 2, 4, 6 and 10 of the SRA Principles 2011;
 - 1.6 In respect of allegation 1.5 it was alleged that the Respondent acted dishonestly although it was not necessary to prove dishonesty to prove the allegation itself.

Documents

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

Applicant

- Application dated 22 August 2012;
- Rule 5 Statement and exhibit “JBW1” dated 22 August 2012;
- Rule 7 Statement dated 5 April 2013;
- Process Server’s witness statement dated 30 November 2012;
- Note on Service and service bundle;
- Email to Mr Havard dated 15 October 2013;
- Witness Statement of Mr Michael Robin Havard dated 27th November 2013;
- Schedule of Costs and updated Schedule of Costs.

Respondent

- Email correspondence dated 2 December 2013 and bundle of documents – various dates.

Factual Background

3. The Respondent was admitted as a solicitor on 1 July 1987. He no longer held a practising certificate which had been suspended due to his having been made bankrupt as at 26 April 2012. The Respondent formerly practised on his own account at Cresswell & Co in Chiswick, London (“the firm”).
4. An inspection was commenced at the firm on 9 December 2011. A Forensic Investigation Report (“FI Report”) was prepared as a result of the inspection dated 18 January 2012.
5. The Respondent held a bank account with Barclays Bank which he alone could operate and he also held office accounts with Barclays and Halifax.

Allegation 1.1

6. The Investigation Officer (“IO”) identified that the client account balance listing produced to her by the Respondent on an Excel spread sheet was inaccurate. The listing purported to show total client liabilities of £169,690.05 as at 30 November 2011. The client ledger balances alone totalled £150,986.91. The total of £169,690.05 corresponded exactly with the amount held in the client bank account as at 30 November 2011.
7. The total figure for the client account balance listing should have been £472,520.47, indicating a shortage on client account of £302,830.42.

Allegation 1.2

8. The IO examined three client files which represented three of the largest client balances. The IO established that in relation to the three files which were conveyancing matters there should have been significant sums held on client account for the clients in question, in total £282,686. The total held in client account for the three clients was £169,690.05 as at 30 November 2011 and the minimum shortage on client account was £112,995.95.
9. The IO also identified that the minimum cash shortage was caused in part by six unallocated round sum transfers totalling £53,645 from client to office account.
10. The Applicant alleged that the Respondent had also made two payments from client to office account in the amounts of £10,000 and £24,900 respectively.
11. The Respondent had stated that the six unidentified transfers would have been for costs due to the firm. The Respondent was asked to provide bills, client ledgers and client files relating to the unidentified transfers but failed to do so at the time or subsequently.
12. It was alleged that the Respondent had acted dishonestly in improperly withdrawing monies from client account other than in accordance with Rule 22 (1) of the SAR 1998.

Allegation 1.3

13. The Respondent had failed to submit Accountant's Reports to the Applicant since May 2010. There were conditions on the Respondent's practising certificate for the year 2009/2010 that he should deliver half yearly Accountant's Reports. These remained outstanding.

Allegation 1.4

14. The Respondent had failed to pay his indemnity insurance premium to the Assigned Risks Pool ("ARP") of £22,306.60 for the year 2011/2012 and the run off cover of £44,613.20. The total sum of £66,919.80 remained outstanding.

Allegations 1.5 and 1.6

15. The Respondent acted for a client in connection with the sale of a property being a hotel for £5,000,000.
16. The transaction exchanged on 19 March 2012 with completion fixed for 28 March 2012. On 20 March 2012 the deposit of £500,000 had been received by the firm and on 28 March 2012 the balance of purchase monies had been received in the sum of £4,500,000 into the firm's client bank account. After the necessary deductions, a balance of £40,000 should have been held on behalf of the client.
17. Estate Agents fees of £40,000 were alleged not to have been paid by the Respondent but he had redeemed a legal charge on 28 March 2012 and the client ledger showed a transfer from client to office account for the Respondent's own costs in the sum of £33,600. This was disputed by the Respondent.
18. In failing to make payment to the Estate Agent but having redeemed the legal charge and transferred monies to office account in relation to his own costs it was alleged that the Respondent had acted dishonestly.
19. On 29 March 2012 the balance on the firm's client account amounted to £18,085.09 and it was alleged that the difference between the amount on client account and the sum of £40,000 must have been utilised elsewhere.
20. On 29 March 2012 the Applicant intervened in the Respondent's firm and took control of the client bank account. At the date of the intervention the balance on the client bank account was £18,085.09 and there was a shortfall on the client account.
21. On 26 March 2012 a decision was made to intervene in the Respondent's firm and to refer his conduct to the Tribunal.

Witnesses

22. Ms Sarah Taylor the IO and the Respondent gave evidence.

Ms Taylor

23. Ms Taylor confirmed the truth of her FI Report dated 18 January 2012. She confirmed that there were no amendments or alterations to her report.

Findings of Fact and Law

24. 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.
25. The allegations against the Respondent were that:

Allegation 1.1 He failed to keep his accounting records properly written up to show his dealings with client monies in breach of Rule 29.1 of the SRA Accounts Rules 2011;

Allegation 1.2 He made improper withdrawals from client account in breach of Rule 22 of the Solicitors Accounts Rules 1998 ("SAR 1998"). Dishonesty was alleged in relation to this allegation but it was not necessary to prove dishonesty for the allegation to be made out;

Allegation 1.3 He failed to deliver Accountant's Reports for Cresswell & Co Solicitors for the periods ending 31 May 2010, 30 November 2010, 31 May 2011 and 30 November 2011 in breach of section 34 of the Solicitors Act 1974 and of Rule 35 of the Solicitors Accounts Rules 1998;

Allegation 1.4 He failed to pay insurance premiums due to the Assigned Risks Pool for the year 2011/2012 in breach of Rule 16.2 of the SRA Indemnity Insurance Rules 2011;

Allegation 1.5 He failed to account for client monies in breach of Principles 2, 4, 6 and 10 of the SRA Principles 2011;

Allegation 1.6 In respect of allegation 1.5 it was alleged that the Respondent acted dishonestly although it was not necessary to prove dishonesty to prove the allegation itself.

Submissions on behalf of the Applicant

- 25.1 Mr Havard told the Tribunal that there was very little issue with the facts of the case. He said that the Respondent had indicated that he admitted allegations 1.1 to 1.4 as detailed in the Rule 5 Statement. In relation to the Rule 7 Statement it appeared that allegation 1.5 was admitted although the Respondent had a point of detail with regard to where the monies in question had been at the time of the intervention.
- 25.2 The Respondent confirmed that in relation to allegation 1.2, he admitted the dishonesty allegation on the basis of the test as set out in Twinsectra Limited v Yardley and Others [2002] UKHL 12. He initially said that allegation 1.4 was denied

but subsequently he admitted allegation 1.4 as he had been confused with regard to the allegation relating to the ARP and not market insurance.

- 25.3 The Respondent told the Tribunal that he also had a point of detail regarding allegations 1.5 and 1.6 as detailed in the Rule 7 Statement.
- 25.4 Mr Havard referred the Tribunal to the Rule 5 Statement upon which he relied. He said that the Respondent had been the sole principal of the firm and it had been his responsibility to ensure compliance with the SAR 1998 and from 6 October 2011 the SRA Accounts Rules 2011, by himself and all others working within the firm.
- 25.5 The Respondent had held a client account with Barclays Bank which he alone could operate and office accounts with Barclays and Halifax. Mr Havard referred the Tribunal to the FI Report, which stated:

“ ...

9. ...Mr Cresswell also stated that his office bank account was also used as his personal bank account”.

Allegation 1.1

- 25.6 Mr Havard referred the Tribunal to the Client Account Balance Listing for 30 November 2011. This purportedly showed the total client monies as being held by the firm in the sum of £169,690.05. Mr Havard said that the IO had added up all of the totals on each of the four pages of the Listing which totalled £472,520.47 and not £169,690.05. He said that by deducting the total client liabilities [£472,520.47] from the client account balance [169,690.05], this indicated a shortage on client account of £302,830.42.
- 25.7 Mr Havard referred to the FI Report in relation to the Client Account Balance Listing, which stated:

“ ...

4. ...Mr Cresswell could not give Miss Taylor [the IO] an explanation as to the difference on the client matter listing...”

Allegation 1.2

- 25.8 Mr Havard submitted that there was some overlap between allegation 1.1 and allegation 1.2 by the Respondent’s failure to keep his accounting records properly written up. Mr Havard said that the IO had concentrated on three client files as it was not practicable for her to have checked each individual client balance. She had requested the three client files which represented three of the largest client balances. Mr Havard referred to the FI report which stated:

“ ...

11. ...However in respect of the following three client matters alone, Miss Taylor was able to determine that the following amounts should have been held in the firm’s client bank account as at 30 November 2011.

Mr W – S/O 164 T Road, Chiswick	£133,116.00
Mr C – S/O 45 R Road, Chiswick	93,350.00
Mr & Mrs H – S/O 13 G Road, London	56,220.00
Minimum Liabilities	282, 686.00
Cash held in client bank account at 30 November 2011	169,690.05
Minimum shortage	£112,995.95”

25.9 Mr Havard said that the minimum shortage of those three matters amounted to £112,995.95. He exemplified the matter of Mr W in relation to whom the firm had acted on his sale transaction. He said that a review of the client matter file showed that a completion statement undated detailed the sale price of the property to have been £1,350,000. A 10% deposit had been received by the firm on 14 November 2011 from the purchaser’s solicitors. On the same date the firm had taken their costs relating to the matter totalling £1,884. Mr Havard said that as at 30 November 2011 the firm should have held £133,116 [£135,000 - £1,884] on behalf of their client in the firm’s client bank account and as listed in the client matter listing but that it was clear from the money held at the bank and on the three client matters in question, there was a cash shortage of £112,995.95.

25.10 In relation to the cause of the minimum cash shortage Mr Havard referred the Tribunal to the FI Report, which stated:

“ ...

18. At the final meeting on 16 January 2012, Miss Taylor asked Mr Cresswell if he agreed with the existence of the minimum cash shortage of £112,995.95 as at 30 November 2011. He stated, “On the figures presented to me, yes.” Miss Taylor asked Mr Cresswell if he could replace the minimum cash shortage. He replied, “No.”

25.11 Mr Havard said that the minimum cash shortage had been caused in part by unallocated round sum transfers made by the Respondent. He referred the Tribunal to a copy of the Respondent’s client account bank statement and four debit entries dated 22 December 2009 in the amounts of £3,335, £4,600, £5,175 and £5,635. He also referred to the client suspense ledger which showed the four debits on the same date. He said that these sums were transferred by the Respondent from the client account to the office account and he referred the Tribunal to a copy of the Barclays Bank office account statement which showed receipt in of the four round sums on 22 December 2009.

- 25.12 Mr Havard said that there was then a further round sum transfer in the sum of £10,000 into the Respondent's Halifax account on 27 July 2011. He referred the Tribunal to the client suspense ledger which showed the debit entry of £10,000 from that ledger as "Client to Office tfr [transfer] – unidentified (awaiti...(sic) 10,000.00".
- 25.13 Mr Havard said that a further round sum transfer had been made by the Respondent on 7 September 2011 in the sum of £24,900 and he referred the Tribunal to a copy Barclays Bank client account statement which showed on that date an entry which stated "To Client to Office...A Cresswell" in the sum of £24,900. The client suspense ledger stated "07/09/2011 ...Suspense Client to Office tfr – unidentified (awaiti...(sic)...24,900.00".
- 25.14 Initially the Respondent had explained that the monies were due to the firm for costs. Mr Havard said that the IO had asked for evidence of that in the form of bills or client ledgers but no evidence had been produced by the Respondent at the material time or since. Mr Havard referred to the FI Report which stated:
- “ ...
25. ...From a review of the office bank statement on 5 September 2011, the account was overdrawn by £85.44 (Mr Cresswell does not have an overdraft facility). The overdraft was cleared when the amount of £24,900 was transferred. At the date of this report Mr Cresswell has not informed Miss Taylor what the payment was for...”.
- 25.15 Mr Havard said that the IO's enquiries continued into 2012 regarding the round sums but that as at the date of the FI Report and since there had been no documentary evidence produced by the Respondent that supported that the round sums were in any way justified as work having been undertaken for clients. He said that at the material time the office bank account had been overdrawn and two days later the £24,900 had been transferred into the office account.
- 25.16 Mr Havard said that the Respondent had admitted allegation 1.2 and that he had made improper withdrawals and in doing so had acted dishonestly. Mr Havard told the Tribunal that the Applicant's case was that the Respondent had misappropriated client monies for his own benefit. He referred the Tribunal to the combined test in Twinsectra and that the objective and subjective tests were met with regard to the Respondent's conduct which was dishonest.

Allegation 1.3

- 25.17 Mr Havard submitted that the Respondent's failure to file his accountant's reports for the periods ending 31 May 2010, 30 November 2010, 31 May 2011 and 30 November 2011 was linked to his conduct regarding his accounts. The Respondent had a condition on his practising certificate for the year 2009/2010 which required him to deliver half yearly accountant's reports.
- 25.18 Mr Havard said that the Respondent had failed to deliver the outstanding accountant's reports on time or at all and they remained outstanding. He submitted that the cash shortage would have been detected had the Respondent filed his accountant's reports

but he acknowledged that that could only be inferred from the Respondent's failure to file the reports.

Allegation 1.4

25.19 Mr Havard told the Tribunal that the Respondent had failed to pay his indemnity insurance premium due to the ARP in the sum of £22,306.60 for the year 2011/2012 and the run off cover of £44,613.20, totalling £66,919.80 which remained outstanding.

25.20 Mr Havard referred the Tribunal to an email from Capita for the ARP to the Applicant dated 1 August 2012, which stated:

“Dear Mark

Please be advised that at present we have received no payments from the firm and the unpaid premium balances are as follows

Premium (incl IPT) £22,306.60

Run off Premium (incl IPT) £44,613.20

Total due (incl IPT) £66,919.80

We have lodged our proof of debt with the trustee of Deloitte's”.

25.21. Mr Havard said that there had been no evidence from the Respondent that the premiums had been paid. Mr Havard relied upon the email dated 1 August 2012 and that the ARP premiums were still due and owing from the Respondent in that amount.

25.22 Mr Havard said that in relation to the FI Report, it had been sent to the Respondent on 30 January 2012 and he had been asked for his explanation of the matters raised. Although he had indicated that he would reply fully, no such reply had been forthcoming or received to date.

Allegations 1.5 and 1.6

25.23 Mr Havard referred the Tribunal to the Rule 7 Statement. He said that this related to a sale transaction in relation to which the Respondent had been instructed by his client HP Ltd. The transaction involved the sale of a hotel for £5,000,000.

25.24 Contracts were exchanged on 19 March 2012 and completion was fixed for 28 March 2012. Mr Havard said that the deposit of £500,000 was received into the firm's client account on 20 March 2012 and on 28 March 2012 the balance of the purchase monies of £4,500,000 was received into the client bank account.

25.26 Mr Havard referred the Tribunal to the Statement of Account regarding the hotel sale, which stated:

“ ...

2 Cresswell & Co's further fees and disbursements...	£10,800
3 Cresswell & Co's further interim fees in respect of the re-structuring and re-financing of HP UK Limited...	£22,800.00”

- 25.27 Mr Havard said that from the sale monies held in client account of £5,000,000 the deductions to have been made were estate agents' fees of £40,000, redemption of the legal charge with Anglo Irish in the sum of £4,926,400 and the Respondent's legal fees for the sale of the hotel and other legal work totalling £33,600.
- 25.28 Mr Havard referred the Tribunal to the client ledger for the hotel transaction which showed two transfers from the ledger on 28 March 2012 in the sums of £10,800 and £22,800 respectively. He said that following the intervention into the firm on 29 March 2012 it was discovered that the balance on client account was £18,085.09 yet the estate agents' fees for the hotel transaction had still not been paid and remained outstanding in the sum of £40,000. Mr Havard said that there was therefore a shortfall on client account. He told the Tribunal that the client had paid the estate agents' fees and had made a claim to the Compensation Fund and a grant had been made in September 2012 for £40,000 plus interest to cover the estate agents' fees.
- 25.29 Mr Havard submitted that the Respondent had failed to account for client monies as the monies should have been utilised to pay the disbursements namely the estate agents' fees. In so doing and having transferred monies to meet the firm's costs before paying the estate agents, he submitted that the Respondent had acted without integrity, had failed to act in his client's best interests, had diminished the trust of the public in him and in the profession and had failed to protect his client's money and assets.
- 25.30 Mr Havard submitted that by the Respondent having deliberately transferred £33,600 at a time when he knew that he was obliged to pay the estate agents' fees of £40,000 without there being adequate funds in client account to do so, the Respondent knew that what he had done was wrong and was dishonest.
- 25.31 In response to a question from the Tribunal Mr Havard said that the total loss was not known. He said that the Respondent was not able to restore the shortage.

Submissions of the Respondent

- 25.32 The Respondent confirmed that in relation to allegation 1.4 that was admitted and that he had been confused regarding the unpaid premium. He accepted that he had not paid the premium for the insurance year 2011/2012 or the run off cover. The Respondent confirmed that allegations 1.1 to 1.4 were therefore admitted.
- 25.33 In relation to the Rule 7 Statement and allegations 1.5 and 1.6 the Respondent told the Tribunal that the hotel transaction had been closely linked to the re-financing for the

client and the fees of the firm had also related to that and had been properly notified to the client, namely HP Limited.

- 25.34 The Respondent said that the estate agents' fees would have been reimbursed by the client who owed him fees for the re-financing work. He said that whilst on the face of it he could see why the allegations had been made they needed to be looked at taking into account the re-financing work and on that basis those allegations were denied.
- 25.35 Mr Havard said that even if work had been undertaken by the firm on the re-financing work, the fees had been transferred for the hotel transaction and not the re-financing work and once the transfers had been made for the Respondent's costs there was insufficient money to pay the estate agents' disbursement. He said that the Respondent must have known that and that was the basis of the dishonesty allegation [1.6].
- 25.36 The Respondent said that the transfer of costs totalling £33,600 as alleged was not accurate as the sum of £22,800 had not been transferred as payment of costs but on account of costs for the re-financing work and had been transferred to another file number for that client [matter number 5811]. The Respondent told the Tribunal that he denied allegation 1.5 as being inaccurate and thereby also denied allegation 1.6.
- 25.37 The Respondent then chose to make his submissions on oath. He submitted that there was a discrete point with regard to the Rule 7 Statement and paragraph 12 thereof which stated:
- “ ...
12. The client ledger...identifies a transfer from client account to office account for the Respondent's costs in two tranches - £10,800 and £22,800 – a total of £33,600 as also shown on the completion statement...However the bank statement for client account...shows an actual transfer from client account to office account of only £8,000 on 28 March 2012”.
- 25.38 The Respondent told the Tribunal that the transfer of £22,800 from the hotel transaction ledger to the re-financing ledger for the same client had been a notional transfer which had been referred to in the invoice and on the Statement of Account and was to have been met by the client separately. He said that that sum had not therefore been taken for costs but on account of costs. It had only been the £10,800 transfer which had been a client to office transfer for costs of the firm.
- 25.39 In cross examination Mr Havard referred the Respondent to the Statement of Account. The Respondent confirmed that the £10,800 was in relation to the firm's costs on the sale of the hotel alone. He acknowledged that the £22,800 was referred to as the firm's fees on the re-financing. He agreed that both sums had been transferred on 28 March 2012 but that the latter had been transferred to matter number 5811 “o/a costs” being on account of costs. He told the Tribunal that at that point the estate agents' fees had not been physically owed. He maintained that on 28 March 2012 the £22,800 had only been notionally allocated to a different file/ledger for the same client.

25.40 In relation to what was held on the client account at the material time [£18,085.09] the Respondent said that he had not known what was held on client account at that time. He said that he had not known that the estate agents' fees could not have been paid once the monies had been moved but that he had expected to be paid by the client immediately but the firm had then been intervened the following day. He accepted that there was no evidence of a further payment having been due imminently from the client but said that once the intervention had happened he had been frozen out of the bank accounts.

The Tribunal's Findings

25.41 The Tribunal had listened carefully to the submissions on behalf of the Applicant and by the Respondent.

25.42 The Tribunal found allegations 1.1, 1.2, 1.3 and 1.4 proved on the facts and on the documents. It noted that the Respondent had admitted those allegations including in relation to allegation 1.2 that he had been dishonest.

25.43 In relation to allegations 1.1 and 1.2 the Tribunal was satisfied that the Respondent had failed to keep his accounting records properly written up. This was evident by the inaccurate Client Account Balance Listing and that as at 30 November 2011 the total client liabilities figure was wrong. Further that the total figure should have been £472,520.47 and not £160,690.05 as stated, indicating that there was a shortage on the firm's client account of £302,830.42.

25.44 The Tribunal accepted the evidence of the IO that in relation to the three conveyancing client matters examined by her, whilst there should have been a total of £282,686 held in client account for the three matters there was in fact only £169,690.05 held on client account in total as at 30 November 2011 and thus a minimum shortage on client account of £112,995.95.

25.45 There were further round sum transfers identified by the IO which the Tribunal noted had contributed to the minimum cash shortage on client account and two further payments made by the Respondent from client to office account in July and September 2011 in the sums of £10,000 and £24,900 respectively. The Tribunal noted that the Respondent had admitted allegation 1.2 but had previously indicated to the IO that these sums had been transferred to meet the firm's costs yet no evidence of that had ever been produced by the Respondent.

25.46 The Tribunal was satisfied on the combined test in Twinsectra that in relation to allegation 1.2 the Respondent was dishonest; by the ordinary standards of reasonable and honest people his conduct was dishonest in making the transfers and he knew that by those standards he was dishonest.

25.47 In relation to allegation 1.3, the Respondent had failed to file accountant's reports for four periods. The Tribunal was satisfied that his failure to do so had, at least in part, been to ensure that the accounting issues were not identified.

- 25.48 The Tribunal found that the Respondent had also failed to pay his premium to the ARP for the insurance year 2011/2012 and his run off cover, totalling £66,919.80 and that this remained outstanding.
- 25.49 In relation to allegations 1.5 and 1.6, the Tribunal heard initially that these were admitted by the Respondent but he had then changed his position and denied these allegations and his focus had been primarily on paragraph 12 of the Rule 7 Statement. This was not known until the hearing as the Respondent had not engaged up to that point; he had not served any witness statement or corresponded in relation to the case against him or produced any documentation in support of his submissions. The Tribunal allowed his change of position given the particular circumstances of the case and the Respondent gave evidence on oath in relation to allegations 1.5 and 1.6.
- 25.50 Allegation 1.5 was that the Respondent had failed to account for client monies and in doing so acted without integrity, failed to act in the best interests of his client, failed to behave in a way which maintained the trust the public placed in him and in the profession and failed to protect client money and assets.
- 25.51 The Applicant's case was that although the Respondent knew that the estate agents' fees of £40,000 were to be paid he had transferred the two sums of £10,800 and £22,800 from client to office account in respect of the firm's costs and in so doing failed to pay the estate agents' fees which were due to be paid on completion on 28 March 2012 from the balance of client monies held in the firm's client account.
- 25.52 A further complication was that on 29 March 2012 the firm was intervened and its bank accounts frozen. The estate agents' fees were not paid by the Respondent.
- 25.53 The Applicant's case was that in failing to pay the estate agents' fees and at the same time having transferred monies from client to office account in respect of his own costs the Respondent acted dishonestly and must have known that in acting in that way in transferring the monies there would be insufficient monies to pay the estate agents' fees.
- 25.54 The Tribunal noted that in evidence the Respondent had stated that with regard to the £22,800 shown on the ledger as "Tfd [transferred] to 5811 H [client] – o/a costs" this had been a notional allocation of monies to that matter file and that these fees were to be met by a separate payment by the client to the Respondent's firm.
- 25.55 In cross examination the Respondent said, inter alia, that the estate agents' fees were not due and while there had not been sufficient funds to pay the estate agents' fees he was expecting to receive monies from the client but the intervention of the firm and freezing of the firm's accounts had prevented that happening.
- 25.56 The Tribunal noted that the Respondent had given evidence on oath and taking all of these points into account it found on the basis of the combined test in Twinssectra with regard to allegation 1.6, that the objective element was proved such that by the ordinary standards of honest and reasonable people what the Respondent had done was dishonest but it did not find the subjective element proved as there was a doubt in the Tribunal's mind that the Respondent knew what he was doing was dishonest on the basis of his evidence that monies were due to be received imminently from the

client which would have paid the estate agents' fees. Due to the intervention that did not happen.

- 25.57 The Tribunal was satisfied so that it was sure that allegation 1.5 was proved on the facts and on the documents but it did not find allegation 1.6 proved.

Previous Disciplinary Matters

26. The Respondent had previously appeared before the Tribunal on 11 October 2011. The Tribunal had found the allegations proved against the Respondent and ordered him to pay a fine of £5,000 and costs of £6,000.

Mitigation

27. The Respondent apologised to the Tribunal and said that he had been at a very low point in his life at the material time. He referred to the previous proceedings before the Tribunal and that he had been pursued for non-compliance with an Adjudicator's award. He said that the firm had been owed a significant sum in a litigation matter in relation to which he should have ceased acting for the client at an earlier stage and the firm's fees had as a result been disproportionate.
28. The Respondent told the Tribunal that this had caused the firm financial damage and he had been unable to meet the Adjudicator's award. His professional indemnity insurers had become aware of the previous Tribunal proceedings and had refused subsequently to insure him and he had had to enter the ARP which together with the huge downturn in the market had led to him experiencing extreme financial pressure.
29. The Respondent said that he had then been threatened with bankruptcy petitions by a creditor and HM Revenue and Customs. He said that bankruptcy proceedings had subsequently been issued against him by his landlord and he was made bankrupt in April 2012. He had also gone through a divorce and had had to sell his matrimonial home in 2010 and financially matters had got out of hand.
30. The Respondent said that he was disappointed in himself and everything that had followed.

Sanction

31. The Tribunal had regard to its Guidance Note on Sanctions.
32. Before announcing the Tribunal's decision as to sanction, the Chairman noted for the record that whilst he had sat as Chairman in the previous proceedings against the Respondent before the Tribunal in October 2011, he had not recalled this until the point at which he had been handed the previous Findings. He stated that this had had no influence upon nor had it affected in any way the findings made in this case.
33. The Tribunal was satisfied that these were very serious allegations which it had found proved save for allegation 1.6. In relation to allegation 1.2 the Respondent had admitted dishonesty. The Respondent had been found to have made improper withdrawal of client monies and losses had been suffered by clients. The Respondent

had failed to account for client monies and had also failed to keep his accounting records properly written up; compliance with the SAR 1998 and the SRA Accounts Rules 2011 was mandatory and the means by which the regulator sought to ensure that client funds were protected. In not complying with these Rules the Respondent had prevented that happening and his actions had been deliberate.

34. In all the circumstances the Tribunal considered that the only appropriate sanction was the ultimate sanction and it ordered that the Respondent be struck off the Roll of Solicitors.

Costs

35. Mr Havard referred the Tribunal to the Applicant's Schedule of Costs and asked the Tribunal to order costs in the sum of £25,001.49. He said that the Respondent had not provided any financial documentation and he asked that any order for costs not be deferred. He acknowledged that there had been previous solicitors instructed on behalf of the Applicant but he said that he had sought to ensure that there was no duplication.
36. The Respondent said that he had not received the Schedule of Costs until the substantive hearing and that he had previously made representations as to the costs in April 2013. He confirmed that he had no schedule of assets or liabilities which he could produce but that he was still subject to the bankruptcy and was still in discussions with the Trustee. He said that on that basis any discussion with regard to costs was academic.
37. Mr Havard referred the Tribunal to the case of Solicitors Regulation Authority v Davis and McGlinchey [2011] EWHC 232 (Admin) upon which he relied and that the Respondent had had a number of reminders and invitations to produce details of his financial circumstances but had failed to do so.
38. In relation to the bankruptcy Mr Havard said that although the Respondent stated he was still subject to the bankruptcy, he was made bankrupt in April 2012 and one would have expected it to have been automatically discharged after 12 months.
39. The Respondent re-took the oath and gave evidence regarding his finances. He said that he had been made bankrupt in April 2012 and that he had attended his first interview with the Trustee/Insolvency Practitioner and completed documentation. He had then heard from Deloitte a few months later and in March 2013 he had met with them to discuss the bankruptcy. He said that he had been asked in summer 2013 for documents regarding his divorce which he had provided and had heard nothing since.
40. In response to a question from the Tribunal the Respondent said that he had seen nothing with regard to the costs of the intervention. He confirmed that he had no finances currently and that he had relied upon friends and family to stay with them.
41. In cross examination the Respondent said that the Bankruptcy Petition had been issued by his landlord. He told the Tribunal that he owned no property and his only property had been the former matrimonial home which had been sold. He said that he

had no income and was not employable. He was receiving benefits and occasional gifts of money from his family.

42. The Respondent confirmed that it was his evidence that he was still subject to the Bankruptcy Order.
43. In relation to the Schedule of Costs the Respondent told the Tribunal that he questioned the Enquiry Agents' costs as he had always been contactable at the address he had given although he had occasionally been staying in Wales to help his family. He denied having evaded service and stated that documents had been sent to an old address being the former matrimonial home at which he had not lived since 2010.
44. Mr Havard told the Tribunal that there had been a history of problems in serving documents on the Respondent to the extent that an application had had to be made to the Tribunal for an order for deemed service at various addresses. He submitted that it was inaccurate for the Respondent to suggest that he did not understand why documents had had to be sent to various addresses.
45. Following the Tribunal having retired to consider its decision, Mr Havard notified the Tribunal that there appeared to be some discrepancy regarding whether the Respondent remained a bankrupt or whether his bankruptcy had been discharged automatically. Mr Havard referred the Tribunal to an email dated 15 October 2013 from his colleague which he had just received and which stated:

“Dear Robin

I have telephoned the London A Insolvency Service to make enquiries about the bankruptcy of Mr Cresswell.

I spoke with Tracey Barker, an Insolvency Examiner at 15.25 today. She is not the person responsible for the case (that is Davinda Sehmi...), but Mrs Sehmi was not available.

Mrs Barker advised that Mr Cresswell's bankruptcy under High Court of Justice Court Number 734 of 2012 declared Mr Cresswell bankrupt on 26 April 2012, and that her system states he was discharged on 26 April 2013.

I have asked whether I can obtain written confirmation and was advised that I will need to speak with Mrs Sehmi for that...”

46. Mr Havard said that ordinarily a person was automatically discharged from bankruptcy after 12 months and that until the Respondent had indicated that he was not discharged, Mr Havard had not been aware of that possibility. He said that the account obtained by his colleague and emailed to him appeared to conflict with the Respondent's evidence on that. He said that one of the benefits of referring a Respondent to Davis and McGlinchey was so that they would provide full details of their finances.
47. The Respondent said that as recently as 3-5 weeks previously he had been in contact with Deloitte who had asked him to provide a copy of the Consent Order from his

divorce proceedings. He thought that they were still deliberating over that and might be suspicious regarding his assets but he had not been notified of any discharge from his bankruptcy and he confirmed that he did not have any bank accounts.

48. Mr Havard said that on behalf of the Applicant he had an obligation to seek as favourable an order as possible with regard to costs and that this was an unsatisfactory situation because the Respondent had not produced any financial information. He submitted that it was not possible to be certain at this time in relation to the Respondent's evidence as to his finances or the bankruptcy despite the onus being on the Respondent to produce evidence of his finances which he had singularly failed to do.
49. The Tribunal had listened carefully to both parties' submissions on costs and had taken into account the further developments regarding the Respondent's bankruptcy upon which further information had only come to light during the final stages of the hearing. In order to ensure complete fairness to both parties with regard to the costs and to enable the Applicant to make further enquiries and the Respondent to produce evidence of his means and any documentation in support, the Tribunal ordered that the issue of costs be adjourned to the first available date after 14 days. The Tribunal also directed the parties to file and serve witness statements as to the issue of the Respondent's bankruptcy and financial matters generally together with any supporting financial documentation to be filed not less than 7 days prior to the resumed hearing date.
50. At the resumed hearing on the question of costs on 3 December 2013 Mr Havard referred the Tribunal to his updated Schedule of Costs which showed a slightly lower total figure than previously as he had been able to confirm estimates. The total costs claimed by the Applicant amounted to £25,021.22 which Mr Havard submitted was reasonable.
51. He addressed points raised by the Respondent in an email he had sent to Mr Havard and the Tribunal dated 2 December 2013 and in relation to which the Respondent disputed certain of the costs claimed by the Applicant:
 - 51.1 Mr Havard said that in relation to the costs of Ms Willetts who had previously had conduct of the matter on behalf of the Applicant, that her costs included a breakdown which justified the work done by her. The Respondent stated in his email that the time spent by Ms Willetts was unjustified and there was an insufficient breakdown which was refuted by Mr Havard. He submitted that it was a question for the Tribunal as to whether it considered her costs to be reasonable;
 - 51.2 In relation to the costs of the Enquiry Agent the Respondent's view was that these costs were not sustainable. Mr Havard said that an order had been made for deemed service and that a reason for that had been the return of documents sent to the Respondent including by the document exchange so that steps had to be taken to ensure effective service upon him. Mr Havard referred the Tribunal to the Note on Service he had previously prepared and that although documents had been sent to the Respondent at 34 W Road in Chiswick they had been returned to the Tribunal. He submitted that it had been wholly justifiable to instruct the Enquiry Agent;

- 51.3 In relation to the suggestion of duplication of work Mr Havard said that he had sought to keep any duplication to a minimum and this had been taken into account when costs were calculated in relation to preparing to take over conduct of the proceedings.
- 51.4 In relation to time spent for drafting, Mr Havard said that 121 units included the Note on Service and the Rule 7 Statement and bundle, and preparation for the hearing on 9 May 2013 when the Respondent had made a last minute application for adjournment. He asked the Tribunal to read again the Memorandum of that hearing which gave a flavour of the difficulties of the last minute application by the Respondent.
52. The Respondent said that his comments regarding the costs claimed hinged on the lack of detail regarding the costs. He said that Ms Willetts' costs equated to approximately £1,000 per page and that the Rule 5 Statement that had only amounted to 5 pages was a "narrow re-statement of the underlying documents".
53. The Respondent indicated that he considered that it would be preferable for the costs to be sent for detailed assessment if the Tribunal agreed that there was insufficient detail in the Schedule of Costs.
54. Mr Havard said that it was a matter for the Respondent to seek detailed assessment albeit further costs would be incurred. He asked the Tribunal to order summary assessment of the costs in the usual way.
55. Mr Havard said that the Respondent had not filed any evidence of his means as directed to do so. He had not provided any supporting documentation in relation to his assets, income or outgoings. Mr Havard referred again to Davis and McGlinchey and referred the Tribunal to the Judgment of Mr Justice Mitting in which he stated:

"...

21. My judgment is that a sensible regulatory scheme can, possibly should, require the means of an individual against whom a costs order is proposed to be investigated when that issue is determined... If a solicitor wishes to contend that he is impecunious and cannot meet an order for costs, or that its size should be confined, it will be up to him to put before the Tribunal sufficient information to persuade the Tribunal that he lacks the means to meet an order for costs in the sum at which they would otherwise arrive...

22. It is not for me to lay down any procedure for the Tribunal to follow. Costs are in its discretion and it is for it to establish its own practice, but the following guidance may assist: where a solicitor admits the disciplinary charges brought against him, and who therefore anticipates the imposition of a sanction upon him, it should be incumbent upon him before the hearing to give advance notice to the SRA and to the Tribunal that he will contend either that no order for costs should be made against him, or that it should be limited in amount by reason of his own lack of means. He should also supply to the SRA and to the Tribunal, in advance of the hearing, the evidence upon which he relies to support that contention. In a case in which the solicitor disputes the

charges brought against him, it would be burdensome to impose an advance obligation upon him of providing information about his means.

23. Accordingly in such a case the issue of costs should be left until after the Tribunal has determined whether or not the charges against the solicitor are made out. Whether it does so before determining what, if any, other sanction to impose, or after doing so, is a matter for the Tribunal. In such circumstances once the Tribunal has found that the charges are proved, then the same obligations, as I have identified, will be imposed upon a solicitor arguing that he cannot meet an order for costs, or that one should be limited in amount".

56. Mr Havard submitted that it was clear from the Judgment in that case that the Respondent was required to produce evidence that he was not in a position to pay any costs ordered. He said that ordinarily a statement of means would be filed and the Respondent had been advised on more than one occasion to do so including by the Tribunal in its letter dated 24 October 2013. Mr Havard submitted that the Respondent had been given every opportunity to provide information to the Tribunal and to the Applicant with regard to his means but had failed to do so.
57. Mr Havard said that on the previous occasion before this Tribunal on 15 October 2013 the Respondent had believed that his Bankruptcy Order was still in place but that was not the case and Mr Havard referred the Tribunal to the documentation he had produced in that regard including his witness statement dated 27 November 2013.
58. Mr Havard invited the Tribunal to make an order for costs in favour of the Applicant without restriction to enable the Applicant to make its own enquiries with the Respondent as to his means. He said that in the event that the Respondent lacked means then a proper view could be taken by the Applicant but as matters stood, that was not presently possible.
59. The Respondent told the Tribunal that he had genuinely believed in October that his bankruptcy stood but he now acknowledged that the Bankruptcy Order had come to an end as of 26 April 2013. He said that he had been under a misapprehension. The Respondent told the Tribunal that nothing had changed from his perspective and the information provided in his Creditor's Report was the entirety of his situation in respect of his finances namely that he had no assets; his outgoings were his living expenses which he met out of his Job Seekers Allowance which was his only income. He agreed that he had not provided a schedule of means. In response to a question from the Tribunal, he confirmed that he had no interest in any property.
60. The Tribunal had listened carefully to the parties' representations on costs and had regard to Mr Havard's witness statement, the updated schedule of costs and the bundle of correspondence produced by the Respondent.
61. The Tribunal ordered detailed assessment of the costs having regard to the Respondent's concerns in relation to the level of detail in the Schedule of Costs.
62. The Tribunal was however concerned with regard to the lack of detail provided by the Respondent as to his means despite numerous opportunities to provide that detail to both the Applicant and the Tribunal. No documentary evidence had been provided by

the Respondent as to his income, outgoings or assets per Davis and McGlinchey which the Respondent had been made aware of by both the Applicant and the Tribunal.

63. The Respondent had not in the Tribunal's view resolved the uncertainty regarding his means and on that basis and to enable the Applicant to make its own enquiries as to the Respondent's ability to pay costs, the Tribunal was satisfied that an immediate costs order was the appropriate order to make subject to detailed assessment.

Statement of Full Order

64. The Tribunal ORDERED that the Respondent, Andrew John Cresswell, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that the case be listed for a further hearing as to costs on the first open date after 14 days.
65. The Respondent having been struck off by Order of the Tribunal dated 15th October 2013 the Tribunal further Ordered that the costs incidental to the application and enquiry be subject to a detailed assessment and having been so assessed those costs be paid by the Respondent.

Dated this 23rd day of December 2013
On behalf of the Tribunal

A. N. Spooner
Chairman