

# SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 11175-2013

**BETWEEN:**

SOLICITORS REGULATION AUTHORITY

Applicant

and

GARY DONALD SMITH

Respondent

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Before:

Mr A. G. Gibson (in the chair)

Mr R. Woolfe

Mrs L. Barnett

Date of Hearing: 29 January 2014

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**Appearances**

Mr Andrew Bullock, Senior Legal Advisor, employed by the Solicitors Regulation Authority at The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant.

The Respondent did not appear and was not represented.

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**JUDGMENT**

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## **Allegations**

1. The allegations against the Respondent, Gary Donald Smith, were that:-
  - 1.1 He misled his clients as to the steps which he had taken to progress their litigation claims in breach of Rules 1.02 and/or 1.04 and/or 1.05 and/or 1.06 of the Solicitors' Code of Conduct 2007 (the "Code") and in breach of Principles 2 and/or 4 and/or 5 and/or 6 of the SRA Principles 2011 (the "Principles") and failed to achieve O(1.2), O(1.5), O(1.12), O(1.16), O(3.4) of the Outcomes 2011 (the "Outcomes").
  - 1.2 He altered a letter from the other solicitors before sending it to the client so that the client believed that her professional negligence claim was progressing, whereas no proceedings had at any time been instigated before the limitation period, in breach of Rules 1.02 and/or 1.04 and/or 1.05 and/or 1.06 of the Code and in breach of Principles 2 and/or 4 and/or 5 and/or 6 of the Principles and failed to achieve Outcomes O(1.2), O(1.5), O(1.12), O(1.16) and O(3.4).
  - 1.3 He filed the altered letter referred to in paragraph 1.2 above on the client file and placed the true and full version of the letter in his desk drawers so as to mislead any person from his employer reviewing his file into believing that the altered letter represented the current state of affairs on that client matter, in breach of Rules 1.02 and/or 1.04 and/or 1.05 and/or 1.06 of the Code and in breach of Principles 2 and/or 4 and/or 5 and/or 6 of the Principles and failed to achieve Outcomes O(1.2), O(1.5), O(1.12), O(1.16) and O(3.4).
  - 1.4 He made unauthorised payments out of office account on seven client matters totalling £32,652.20 without informing his employer, to meet the clients' purported agreed damages or the defendants' costs once such cases had been struck out by the court or to make a payment to the client following the acceptance of a Part 36 offer, in breach of Rules 1.02 and/or 1.06 of the Code and in breach of Principles 2 and/or 6 of the Principles and failed to achieve Outcomes O(1.16) and O(3.4).

In relation to the allegations 1.1-1.4 it was further alleged that the Respondent acted dishonestly. However dishonesty was not a necessary ingredient of any of those allegations.

## **Documents**

2. The Tribunal reviewed all the documents submitted by the parties, which included:

Applicant:

- Application dated 7 August 2013;
- Rule 5 Statement dated 7 August 2013, together with Exhibit PL1;
- Schedule of Costs of the Applicant dated 15 January 2014.

Respondent:

- None.

### **Preliminary Matter**

3. Mr Bullock told the Tribunal that the Respondent had admitted all of the allegations and was content that the matter should proceed in his absence. Mr Bullock therefore asked the Tribunal to conduct the hearing in the absence of the Respondent.

### **The Tribunal's Decision on the Preliminary Matter**

4. The Tribunal had given careful consideration to all of the documents before it and to what Mr Bullock had said to it regarding the Respondent's admissions and his non-attendance at the hearing. The Tribunal had applied the principles laid down in R v Hayward, Jones and Purvis [2001] EWCA Crim 168 and had determined that the Respondent was aware of the proceedings and had voluntarily absented himself. In those circumstances the Tribunal would proceed to hear the matter in the absence of the Respondent.

### **Factual Background**

5. The Respondent was born on 15 December 1975 and was admitted as a solicitor on 15 November 2001 and his name remained on the Roll of Solicitors.
6. At all material times the Respondent was employed as an Associate with Macks Solicitors ("Macks") of 4 Woodlands Road, Middlesbrough, Cleveland, TS1 3BE.
7. On 5 April 2012, while the Respondent was away from the office on annual leave, a letter was received by Macks from a defendant's solicitors with an application for the claim to be struck out due to a delay in the service of court proceedings. In respect of another matter, a letter was received from the defendant's solicitors chasing up payment of an adverse costs order.
8. The Respondent was asked to discuss these two matters with Mr NM, the Managing Director of Macks, upon his return to the office on 10 April 2012. In the meeting on that date another case was identified from the Respondent's client matter listing where payments had been made to the client directly from Macks' office account. During this meeting the Respondent resigned with immediate effect.
9. Following the Respondent's departure, his files were immediately reallocated and reviewed by senior personal injury solicitors at Macks.
10. On 13 April 2012 Mr DG, a director of Macks, wrote to the Applicant reporting concerns about the conduct of the Respondent. Following preliminary investigations by Macks, Mr DG reported to the Applicant in an email of 20 April 2012 that they had found instances where office funds had been used by the Respondent without authority and also where the Respondent had misrepresented facts to his clients regarding progress of their matters.
11. In an email of 27 April 2012 to the Applicant, Mr DG attached a spreadsheet detailing six client matters where the Respondent had made unauthorised payments out of office account totalling £29,752.20 without informing his employer. This was to meet the clients' purported agreed damages in respect of three client matters, the

defendants' costs once such claims had been struck out by the court in relation to two client matters of sisters both called H and to make a payment to a client following the acceptance of a Part 36 offer.

12. In a letter of 12 June 2012 to the Applicant, Mr DG provided further information regarding the six matters set out in the spreadsheet attached to his earlier email of 27 April 2012. He also detailed another client matter of a Mr G, in which £2,900 was paid out of office account to the client without authorisation.
13. In a letter of 13 September 2012 to the Applicant, Mr NM enclosed a schedule of 26 client matters which were notified to Macks' insurers as a result of the Respondent's conduct. The schedule did not include the Mr G matter or the two matters of H, as formal notifications were not submitted to Macks' insurers about these three client matters. Mr NM also enclosed with his letter copy emails passing between the Respondent and a Ms EH, together with a copy of a letter from the firm WB LLP dated 3 August 2010 and an altered copy of that letter.

### Three Exemplified Transactions

#### Ms EH

14. Ms EH instructed Macks in about July 2008 and the Respondent was the fee earner at all material times. Ms EH resided and continued to reside in Canada. The matter involved a professional negligence claim against Ms EH's previous firm of solicitors, IM LLP, who had acted for Ms EH in her personal injury claim.
15. The client file contained a letter of claim dated 29 January 2010 to IM LLP and this was acknowledged by letter by IM LLP on 5 May 2010 and by their solicitors WB LLP on 6 May 2010. These two letters were found in a file in one of the Respondent's desk drawers and both acknowledgement letters referred to the letter of claim dated 29 January 2010 being received by IM LLP on 23 April 2010. However, the professional negligence proceedings should have been issued against IM LLP by 11 March 2010 if they were not to be time-barred. There was no evidence on the file that the proceedings were issued before that date.
16. WB LLP's substantive response to the letter of claim was contained in a letter from them to Macks dated 3 August 2010; it commented on the merits of Ms EH's claim. The original of this letter was found in the Respondent's desk drawers following his resignation on 10 April 2012. However a different version of the letter was found on the client file. This version was undated and certain paragraphs had been removed. The removed summary section stated that IM LLP denied that they were in breach of their duty of care and that the claim in professional negligence was time-barred. Other paragraphs, relating to the expiration of the limitation period, Macks' conflict of interest and the making of a security for costs application should Ms EH decide to issue proceedings, had also been removed and the letter had been renumbered in places to reflect these alterations.
17. Ms EH confirmed in an email to the Applicant of the 8 March 2013 that she had received the altered version of the letter from the Respondent.

18. Ms EH also produced to the Applicant a copy of a letter from Macks to WB LLP dated 3 March 2011 which was in response to WB LLP's letter of 3 August 2010. The letter stated that "We also confirm that protective proceedings in this matter have been issued and invite your proposals". On the last page of the letter it stated that "We would suggest that were you to take a sensible view of this claim in its generality, the matter may be capable of resolution without the need for service of proceedings". Ms EH confirmed in her email to the Applicant of 8 March 2013 that she was told by the Respondent that this letter had been sent to WB LLP; there was however no trace of the letter in draft form or of the file copy on the client matter file or on Macks' case management system, and there was no evidence that such a letter had been sent to WB LLP. There was no evidence of reply to the letter from WB LLP on the client file.
19. It was apparent from the emails passing between the Respondent and the client after 3 August 2010 that the client remained unaware of the contents of the true and full version of WB LLP's letter of 3 August 2010. The Respondent continued to correspond with the client, stating that he had been in communication with Counsel, the Defendant's solicitors and the court when this was not the case. In those emails, sent in the period between 15 February 2010 and 4 April 2012, the Respondent informed Ms EH that:
  - 19.1 he would lodge an application for "pre-action disclosure" at the court if he did not obtain a response to the letter of claim;
  - 19.2 he had spoken to Counsel about the exchange rate relating to the loss on the currency rate and that Counsel had suggested that he agree an exchange rate figure with the Defendants;
  - 19.3 he had spoken to WB LLP regarding the current exchange rate and the firm had informed him that they were discussing it with Counsel and should be able to get back to him shortly. Further, that he had informed the court of the position and that the parties had agreed to extend the period for filing the Schedule of Loss;
  - 19.4 WB LLP had left a message confirming their agreement to Macks' proposal on the conversion rate having taken Counsel's advice. They had telephoned the court and agreed an extension of time for service of the Schedule of Loss;
  - 19.5 he had not heard from Counsel regarding the Schedule of Loss and WB LLP had agreed an extension of time and later that he was still waiting to hear from Counsel regarding the Schedule of Loss and had agreed a final extension of time;
  - 19.6 he had spoken to WB LLP and notified the court regarding the extension and they had been granted a further week;
  - 19.7 Counsel was delayed and later that Counsel was on a train;
  - 19.8 the relevant documents had been forwarded to Counsel and the time for serving the Schedule of Loss had been extended by consent;

- 19.9 he had spoken to Counsel who would provide a draft schedule of Loss and finalise it over the Easter Bank Holiday. In the meantime the court had granted a standard stay until 20 April 2012.
20. In fact there was no involvement of Counsel or the court during this period.
21. On 22 May 2012, Ms EH contacted Counsel allegedly instructed by Macks, who in response to her query confirmed that he had not been instructed by Macks in relation to the matter.

#### Mrs JC

22. Mrs JC's claim arose out of a road traffic accident on 13 July 2008. She suffered injuries to her neck and back and psychological injuries, including post-traumatic stress disorder as a result of the accident. Mrs JC instructed Macks in around July 2008 and the Respondent was the fee earner at all material times. Liability for the accident was admitted by the Defendant's insurers.
23. The Respondent issued court proceedings in the matter on 4 July 2011. He made a Part 36 Offer in the sum of £14,324.26 on 5 July 2010 to the Defendant's insurers which was accepted on 26 October 2011. The Respondent did not inform Mrs JC that the Part 36 Offer had been accepted and that her claim had been settled. Following the acceptance of the Part 36 Offer, Mrs JC continued to receive psychiatric treatment until about March 2012. As the cost of the treatment after the acceptance of the Part 36 Offer was not recoverable from the Defendant, Macks settled the fees for this further treatment.
24. The Respondent made an unauthorised withdrawal out of office account and sent a client cheque in the sum of £7,500 to Mrs JC in or around 24 December 2011. The client matter ledger recorded the withdrawal from office account as "loan to client awaiting compensation".

#### Mr TC

25. On 26 February 2007 Mr TC was on holiday in Tenerife and whilst going up an open staircase he fell and suffered injury. He instructed Macks in around March 2007 and the Respondent was the fee earner at all material times.
26. There was no pre-litigation correspondence on the file. Proceedings were issued on 26 February 2010 and served. The First Defendant served a Defence denying liability. No Defence or Acknowledgement of Service was served by the Second Defendant. The Respondent filed an Allocation Questionnaire on behalf of Mr TC, but the Court did not issue directions. There was no evidence on the file that any further progress was made with the court proceedings.
27. On 17 August 2011, Mr TC sent an email to Macks stating that "on 15 July 2011 Gary Smith says "he is waiting for a call from their solicitors to make me an offer to resolve the claim, maybe next week as the parties solicitor is on holiday. Will ring me next week if any news of settlement has been reached"". There was no evidence on the client file that the Respondent was waiting for a call from the Defendant's

solicitors for them to make an offer to settle the claim. There was in fact nothing on the file showing that the Defendant's solicitors had intimated any willingness to enter into negotiations with a view to settling the claim. The client file included a telephone note dated 3 October 2011 recording a telephone conversation between the Respondent and Mr TC. The note stated "GS would be minded to put forward settlement proposals in respect of the claim as a whole in an attempt to encourage the Defs to bring matters to a conclusion. The Defs had put forward a valuation for general damages of £6,500".

28. In a telephone note dated 14 May 2012, recording a telephone conversation between one of the directors of Macks and Mr TC, Mr TC stated that he had been told by the Respondent that an offer had been made by the Defendant and he had accepted the offer. Mr TC further stated that on or about 3 March 2012 he instructed the Respondent to accept the offer and settle the claim at £6,500 before he was due to go abroad for a few weeks. The Respondent confirmed that he would accept the offer and the cheque would be with Mr TC when he got back.
29. There was no communication with the Defendant or their solicitors and no evidence on the client file that an offer of £6,500 or any other sum had been made by or agreed by the Defendant and accepted by the Respondent on behalf of Mr TC. There was no evidence on the client file that the Defendant or their solicitors had put forward a valuation of general damages at £6,500 or that they were prepared to enter into negotiations with a view to settling the claim.

#### **Witnesses**

30. None

#### **Findings of Fact and Law**

31. The Tribunal had due regard to the Respondent's right 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.
32. **Allegation 1.1 He misled his clients as to the steps which he had taken to progress their litigation claims in breach of Rules 1.02 and/or 1.04 and/or 1.05 and/or 1.06 of the Solicitors' Code of Conduct 2007 (the "Code") and in breach of Principles 2 and/or 4 and/or 5 and/or 6 of the SRA Principles 2011 (the "Principles") and failed to achieve O(1.2), O(1.5), O(1.12), O(1.16), O(3.4) of the Outcomes 2011 (the "Outcomes").**

**Allegation 1.2 He altered a letter from the other solicitors before sending it to the client so that the client believed that her professional negligence claim was progressing, whereas no proceedings had at any time been instigated before the limitation period, in breach of Rules 1.02 and/or 1.04 and/or 1.05 and/or 1.06 of the Code and in breach of Principles 2 and/or 4 and/or 5 and/or 6 of the Principles and failed to achieve Outcomes O(1.2), O(1.5), O(1.12), O(1.16), O(3.4).**

**Allegation 1.3 He filed the altered letter referred to in paragraph 1.2 above on the client file and placed the true and full version of the letter in his desk drawers so as to mislead any person from his employer reviewing his file into believing that the altered letter represented the current state of affairs on the client matter, in breach of Rules 1.02 and/or 1.04 and/or 1.05 and/or 1.06 of the Code and in breach of Principles 2 and/or 4 and/or 5 and/or 6 of the Principles and failed to achieve Outcomes O(1.2), O(1.5), O(1.12), O(1.16), O(3.4).**

**Allegation 1.4 He made unauthorised payments out of office account on seven client matters totalling £32,652.20 without informing his employer, to meet the clients' purported agreed damages or the defendants' costs once such cases had been struck out by the court or to make a payment to the client following the acceptance of a Part 36 offer, in breach of Rules 1.02 and/or 1.06 of the Code and in breach of Principles 2 and/or 6 of the Principles and failed to achieve Outcomes O(1.16) and O(3.4).**

- 32.1 The Respondent admitted each of the allegations 1.1-1.4.
- 32.2 Mr Bullock told the Tribunal that at the time of the events in question the Respondent had been qualified for a period of nine years.
- 32.3 Mr Bullock then took the Tribunal through the salient details of the matter by reference to the relevant exhibits.
- 32.4 The Respondent's explanation for his actions was set out in the Rule 5 Statement and contained in the exhibit PL1. Mr NM had several telephone discussions with the Respondent immediately following his resignation from Macks. The Respondent admitted that what he had done was wrong and said that he "wasn't cut out to be a solicitor". The Respondent replied to a letter from the Applicant which alleged that the Respondent had misled seven clients as to the correct status of their claims stating:

"I understand the specific allegations against me – namely breaches of Rules 1.02, 1.04, 1.05 and 1.06 of the Solicitors Code of Conduct 2007 and Principles 2, 4, 5 and 6 of the SRA Code of Conduct 2011. Please note that I admit in full the allegations raised and that I do not intend to contest them. I would point out – for what it is worth – that throughout the period of those breaches I was under great deal of personal stress – further details of which can be provided if necessary. I did not intend to act dishonestly and certainly did not intend to benefit personally from any misconduct (and certainly I have not done so). I would also like to point out that no responsibility for the breaches rests with the firm here.

I am not currently working and wish to put it on record that I do not intend to seek to return to practice and therefore will not be contesting any steps taken to remove my name from the Roll. Given my circumstances you will appreciate I would like to have matters resolved with a minimum of involvement for all concerned".

- 32.5. By an email dated 3 September 2012, the Applicant encouraged the Respondent to provide as full a response as possible. It also invited him to provide more detailed



explanations or mitigation, including details of the personal stress he was under at the relevant time.

- 32.6. The Applicant again wrote to the Respondent on 24 September 2012 detailing the 26 matters where it was alleged that the Respondent had misled clients. The Respondent responded on 10 October 2012, stating:

“I have read and understand the specific allegations raised against me and detailed in your letter of 24 September. I confirm that I do not intend to dispute the allegations and admit the fact that contrary to Rules 1.02, 1.04, 1.05 and 1.06 of the Code I had in fact misled clients as to the status of their claims. I also admit the specific allegations raised regarding the matter of Ms EH...

I have no defence to the allegations and cannot account for them with hindsight save to say that at the time I was under a considerable amount of personal stress which clouded my judgement over a prolonged period”.

- 32.7 The Tribunal found each of the allegations 1.1-1.4 against the Respondent to have been substantiated beyond a reasonable doubt on the facts and documents before it; indeed they had each been admitted by the Respondent.

**33. In relation to allegations 1.1-1.4 it was further alleged that the Respondent acted dishonestly. However dishonesty was not a necessary ingredient of any of those allegations**

- 33.1 The Tribunal noted that the Respondent had said that he had not intended to act dishonestly.

- 33.2 The test for dishonesty was the dual one set out in Twinsectra Ltd v Yardley and Others [2002] UKHL 12. In Mr Bullock’s submission the subjective element of Twinsectra was made out on three grounds. Firstly the alteration and subsequent concealment of the original letter from WB LLP in the case of Ms EH showed a degree of pre-meditation which indicated that the Respondent’s actions were not spontaneous. Secondly, there was ample evidence that the Respondent was taking steps to cover his tracks as illustrated by the lengthy exchange of emails with Ms EH and his misdescription of the withdrawal of £7,500 on Mr JC’s matter. In Mr Bullock’s submission the reason for that action was because the Respondent knew that it was wrong. Thirdly, his course of conduct on the 26 files in furtherance of which substantial sums were taken from his employer and paid to clients spoke for itself. It was inconceivable that the Respondent did not appreciate that what he was doing was wrong and in light of his admissions, which were to his credit, it was clear that he accepted that that was the case.

- 33.3 Mr Bullock went on to say that the consequences, should the Tribunal make a finding of dishonesty against the Respondent, were set out in the case of SRA v Sharma [2010] EWHC 2022 (Admin); that is where a solicitor had been found to have been dishonest, unless exceptional circumstances could be shown, then the normal consequence should be for that solicitor to be struck off.

- 33.4 The Tribunal had considered the objective test as set out in Twinsectra; that test was whether the Respondent's conduct was dishonest by the ordinary standards of reasonable and honest people. The Tribunal was satisfied so that it was sure that the Respondent's conduct in regard to the allegations was objectively dishonest. In deciding upon the subjective part of the test, as to whether the Respondent had himself realised that by those same standards his conduct was dishonest, the Tribunal had fully considered Mr Bullock's submissions and the Respondent's own explanation. The Tribunal concluded that the Respondent must have realised that his conduct was dishonest and it was clear that his actions to cover his tracks had been premeditated and had indeed required some considerable forethought, the chain of emails in the case of Ms EH being a good example.
- 33.5 The Tribunal accepted Mr Bullock's submissions and found that, despite the Respondent's assertion that he had not intended to act dishonestly, he had clearly done so. The Tribunal therefore found that in relation to these four allegations the Respondent had acted dishonestly and that this had been proved beyond reasonable doubt.

### **Previous Disciplinary Matters**

34. None.

### **Sanction**

35. The Tribunal referred to its Guidance Note on Sanctions when considering sanction.
36. The Tribunal had listened very carefully to Mr Bullock's submissions, and it had also paid close attention to all of the documentation that had been put before it, including the explanation of the Respondent.
37. The Tribunal had found four serious allegations to have been proved against the Respondent and had also found that he had been dishonest. The Respondent had tried to conceal his shortcomings and had misled clients; the fact that he had done so on so many client matters was in itself shocking, as was his abstraction of monies from office account. This was dishonesty of the highest order.
38. The Tribunal observed that the Respondent had said that he could not explain his actions save to say that he was under personal stress at the time but he had provided no evidence of that stress. The Tribunal had noted that the usual sanction in a case of dishonesty would be that of Strike Off (Sharma), save if exceptional circumstances could be shown. The Tribunal did not find any exceptional circumstances in this case and consequently determined that, for the protection of the public and maintenance of the reputation of the profession, the appropriate penalty was that the Respondent be Struck Off the Roll.

### **Costs**

39. Costs were agreed between the parties in the total sum of £2,500.

**Statement of Full Order**

40. The Tribunal Ordered that the Respondent, GARY DONALD SMITH, 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 £2,500.

Dated this 27<sup>th</sup> day of February 2014  
On behalf of the Tribunal

A. G. Gibson  
Chairman