SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11383-2015

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ADRIAN CLIVE HARLING Respondent

Before:

Mr E. Nally (in the chair)
Mr K. W. Duncan
Mr M. C. Baughan

Date of Hearing: 29 October 2015

Appearances

Daniel Purcell, solicitor of Capsticks Solicitors of 1 St George's Road, Wimbledon, London, SW19 4DR for the Applicant.

The Respondent appeared and was represented by Jayne Willetts, solicitor of Jayne Willetts & Co Solicitors, The Barn, Woodman Lane, Clent, Worcestershire, DY9 9PX.

JUDGMENT

Allegations

1. The allegation against the Respondent was that:

1.1 On various dates between 18 January 2012 and 15 April 2013, the Respondent made statements to a client concerning litigation which he was retained to conduct on behalf of that client which were untrue and misleading which he knew to be untrue and misleading and thereby breached:-

(a) Principle 2 of the SRA Principles 2011
(b) Principle 4 of the SRA Principles 2011
(c) Principle 5 of the SRA Principles 2011 and
(d) Principle 6 of the SRA Principles 2011.

It was further alleged that the Respondent had acted dishonestly.

The Respondent admitted the allegation including dishonesty.

Documents

2. The Tribunal reviewed all the documents submitted by the Applicant and the Respondent which included:

Applicant:

- Application dated 1 May 2015 together with attached Rule 5 Statement and all exhibits
- Statement of Costs dated 23 October 2015

Respondent:

- Answer of Respondent dated 24 June 2015
- Statement of Adrian Clive Harling (the Respondent) dated 26 October 2015
- Letter dated 23 October 2015 from Painters Solicitors
- Respondent's Bundle of documents

Factual Background

3. The Respondent was born in December 1961 and admitted to the Roll of Solicitors on 1 July 1987.

4. At all material times the Respondent was a partner at Painters Solicitors, 29 Church Street, Kidderminster, Worcestershire, DY10 2AU ("the firm").

5. On 10 January 2014, an Investigator employed by the Legal Ombudsman ("LeO") made a report to the SRA pursuant to section 143 of the Legal Services Act 2007 in relation to the Respondent's conduct. The report stated as follows:

> "The firm were instructed to deal with a land dispute between [Mr B] and his neighbour [Mr D]. [Mr B] instructed the firm to take the case to court. The documents show that the firm told [Mr B] that his case had been heard at court and listed for a further hearing. However this was not the case and the case was never listed at court."

6. Attached to the report from LeO were a number of documents including emails which had passed between the Respondent and Mr B between 18 January 2012 and 23 April 2013 concerning steps which the Respondent was purportedly taking to arrange the listing of the hearing in relation to a claim by Mr B against Mr D, and/or confirming the date upon which that claim was to be heard.

7. On 18 January 2012 Mr B emailed the Respondent in connection with the claim and asked:

> "And the date is?"

The Respondent replied the following day:

> "As yet not disclosed, but in my absence yesterday had message to call listing on Friday! Speak Friday pm, nearly there…."

8. On 12 March 2012, Mr B emailed the Respondent to ask:

> "Any news?"

The Respondent replied:

> "Not yet, I missed a couple of calls yesterday, due to the funeral. I am trying to make contact, but keep swapping etc."

9. On 26 March 2012 Mr B emailed the Respondent asking amongst other things:

> "….Any news yet?"

The Respondent replied the following day:

> "... On court we are liaising with a few dates, I note there is soon a free appointment in Early May, A very old case in which I am involved has settled, I am hoping to grab that date I am just finalising the final agreed order, and will seize that day……"

10. On 16 May 2012, Mr B emailed the Respondent asking again:

> "Any date yet? surely when they bumped the last date they had a diary this is getting stupid 5 years next month and only two weeks left this month……"

The Respondent replied on the same day:

> "I am told, I will be given a date tomorrow, Hoorah!!!!!!"

11. On 18 May 2012, Mr B emailed the Respondent as follows:

> "As you promised yesterday, the DATE is?"

The Respondent replied:

> "The fault is with me, I have been with clients all afternoon and have had 3 missed calls from Listing! i will have to return them on Monday."

12. On 1 June 2012, Mr B emailed the Respondent and wrote:

> "So Adrian
> Getting late in the day do we have a date or not?"

The Respondent sent two emails in response indicating he had been chasing the court and they had called his secretary who had not left a message for him.

13. On 8 June 2012, Mr B emailed the Respondent again asking:

> "So yet another week goes by. AND THE COURT DATE IS?"

The Respondent replied:

> "[Mr B], please rest assured you will be the first to know, I know it is listed but not the exact date."

14. On 14 January 2013, Mr B emailed the Respondent asking:

> "So how did we get on with listings?……
> So the same old question court date is?"

The Respondent replied the following day:

> "…. I have asked for a date and chasing"

15. On 5 February 2013, after Mr B had contacted him again about the failure of Mr D's solicitor to answer correspondence, the Respondent sent an email to Mr B stating:

> "I will try and speak direct to him today," (referring to Mr D's solicitor) "if I can,
> Listing as well"

16. On 5 April 2013, Mr B emailed the Respondent stating:

> "…. So another week goes by, and the court date is? or what is happening no call yet."

The Respondent replied:

> "I am in the office today so will be chasing!
> I'll call later."

17. On 15 April 2013 Mr B emailed the Respondent stating:

> "so another day goes by, week, month year. Guess what? still no date….
> so judge said earliest date in the next Severn [sic] days, is that from last Wednesday?"

The Respondent replied:

> "They are not making it any better for themselves, their actions will not help them with the court. Date soon!"

18. The series of emails culminated in an email from Mr B to the Respondent on 23 April 2013 in which Mr B stated he had made direct contact with Kidderminster County Court and Worcester County Court and had spoken to "….. [L] at listings…." to ascertain the current position with respect to the listing of his claim against Mr D. Mr B stated he had been informed that the case was not currently listed and had not been listed in either May or December 2012 either.

19. On 10 June 2014 the SRA wrote to the Respondent regarding the matter. The Respondent replied on 26 June 2014 accepting that proceedings had not been issued in the case contrary to Mr B's request and that:

> "It was always hoped that initially through correspondence and then with the intervention of both parties having instructed solicitors that with a little willingness on the side of both parties that this matter could be resolved. It would obviously need some acquiescence by both parties. Litigation would have inevitably have meant that there was a victor and a loser. The outcome could not have been predicted and this would not have helped the relationship between two neighbours who, until one of them moved away, would still have a certain amount of antagonism between them. It is more likely than not that a Court would have possibly found against [Mr B] or at least have been critical of the Proceedings.
>
> Mr Harling had real concerns regarding the issue of Proceedings in this matter…. Proceedings for matters relating to issues between neighbours are never encouraged and in fact are actively discouraged by the Courts to the effect that substantial costs orders, or no orders for costs, are made and all parties gain no real benefit from the Proceedings….
>
> …….
>
> I therefore accept wholeheartedly that I have breached my professional obligations to act with integrity; act in the best interests of each client; to provide a proper standard of service to my clients and to behave in a way that

maintains the trust the public places in us and in the provision of legal services.

For reasons which I do find difficult to set out other than in the above I genuinely believe that in not issuing Proceedings I was serving [Mr B]'s best interests. Proceedings would not have been an appropriate way to resolve a case of this sort for the reasons referred to above. I should not however have misled [Mr B] I should have simply advised him not to issue Proceedings and advised him of the potential consequences."

Witnesses

20. The following witnesses gave evidence:

- The Respondent, Adrian Clive Harling
- Charles David Hobbs

Findings of Fact and Law

21. The Tribunal had carefully considered all the documents provided and the submissions of both parties. The Applicant was required to prove the allegation 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.

22. **Allegation 1.1: On various dates between 18 January 2012 and 15 April 2013, the Respondent made statements to a client concerning litigation which he was retained to conduct on behalf of that client which were untrue and misleading, which he knew to be untrue and misleading and thereby breached:-**

(e) Principle 2 of the SRA Principles 2011
(f) Principle 4 of the SRA Principles 2011
(g) Principle 5 of the SRA Principles 2011 and
(h) Principle 6 of the SRA Principles 2011.

It was further alleged that the Respondent had acted dishonestly.

22.1 The Respondent admitted the allegation including the allegation of dishonesty. The Tribunal having considered the various documents provided noted the Respondent had made a number of admissions in his letter to the SRA dated 26 June 2014. In particular, the Respondent accepted he had breached his duty to act with integrity, to act in the best interests of each client, to provide a proper standard of service and to behave in a way that maintains the trust the public placed in him and in the provision of legal services.

22.2 The Tribunal had been referred to the case of Twinsectra Ltd v Yardley & Others [2002] UKHL 12 which set out the test to be applied when considering the issue of dishonesty. Firstly, the Tribunal had to consider whether the Respondent's conduct

was dishonest by the ordinary standards of reasonable and honest people. Secondly, the Tribunal had to consider whether the Respondent himself realised that by those standards his conduct was dishonest.

22.3 Having considered the various documents before it, the Tribunal was satisfied that the Respondent's conduct in making various statements to a client concerning litigation which were untrue and misleading, when he knew them to be untrue and misleading, would be considered dishonest by the ordinary standards of reasonable and honest people. Furthermore, in light of the period of time over which those statements were made, the number of statements made and the nature of those statements made, the Tribunal was satisfied that the Respondent knew that by those standards his conduct was dishonest, indeed it was inconceivable that he could not have known. He was concealing the true position from the client by leading the client to believe his case was being progressed through the court process when it clearly was not.

22.4 Accordingly, the Tribunal found the allegation proved to the requisite standard beyond all reasonable doubt, including the allegation of dishonesty, both on the Respondent's admissions and on the documents before it.

Previous Disciplinary Matters

23. None.

Mitigation

24. Ms Willetts, on behalf of the Respondent, submitted this was a case which fell into the residual category of exceptional circumstances referred to in the case of SRA v Sharma [2010] EWHC 2022 (Admin), and that accordingly it would be disproportionate to remove the Respondent from the Roll of Solicitors.

25. The Tribunal heard evidence from the Respondent. He had been practising as a solicitor for a period of 28 years and had an unblemished record. He provided the Tribunal with details of the background to the case involving Mr B which concerned a neighbour boundary dispute. The Respondent stated he had written to the client on 26 February 2008 advising the client about the difficulties with these types of cases. This had subsequently been repeated to the client. An expert had been instructed but the client was not happy with the expert report or the fact that the evidence was not in his favour.

26. The Respondent stated that over the next year or so the need for his intervention in Mr B's case ebbed and flowed until there was eventually an assault between the parties and the police were called. The police did not take any action and had they done so, the Respondent stated he would not have needed to be involved. However, the client wished to take matters further and the Respondent wrote to Mr B's neighbours on 23 August 2011 with details of Mr B's claim. The Respondent then became involved with issues concerning the expert report, witnesses and the client's position, and spent some time trying to collate all the evidence with a view to bringing the parties together.

27. The Respondent stated he had been working in the background to resolve the case when Mr B's emails started in 2012. As the evidence was not in Mr B's favour, the Respondent had been working on this. On 12 June 2012, the Respondent wrote to Mr B's neighbours suggesting mediation and urged the client to consider this as well. By 18 October 2012, Mr B's neighbours had instructed solicitors who agreed to mediation but also made a number of counter allegations of harassment against Mr B. There were further disputes between the parties and the case did not seem to be progressing. Eventually, the solicitors instructed by the other side were no longer acting and the Respondent had to correspond once again with the neighbours direct.

28. The Respondent stated that his suggestions of court listing in his emails to Mr B were during the period that the neighbours had stopped instructing their solicitors. When Mr B eventually found out the true position in April 2013, the Respondent stated he did call him and went to see him to explain to him that the Respondent had acted in Mr B's interests and not for any personal gain. The Respondent had offered to issue proceedings if Mr B still wanted to pursue these but Mr B decided to instruct other solicitors.

29. The Respondent stated that evidentially litigation was never the way to resolve this case and he had been worried about the financial implications of the dispute on the client. He had been trying to protect the client and had been recommending mediation throughout. As a result of the complaint to LeO the Respondent stated his firm had paid £1,000 to Mr B for poor service.

30. During the material time, the Respondent stated he had initially been in charge of the Dispute Resolution Department at his firm and then became Managing Partner in 2008. This had been a "promotional poisoned chalice" as the Respondent was required to take over running the firm and turn it around. There were two offices doing mixed work and the Respondent was responsible for putting into place various improvements as there were financial difficulties and no financial reporting structure. In addition to this, the Respondent was still dealing with his own caseload and targets which he could not relinquish as the cash flow required his fee income, particularly as he was one of the top earners at the firm. The Respondent spent his days and evenings working but did not take time off due to stress as partners were not allowed to be stressed. The Respondent stated he was extremely sorry and considerably embarrassed by his conduct.

31. On cross-examination, the Respondent confirmed that although he had not recorded the work he had been doing between December 2011 and June 2012, the client had been involved throughout as the work involved site visits. He accepted he had not written to Mr B to inform him that the Respondent was not litigating as the Respondent considered this was not in Mr B's interests. The Respondent accepted he had misled Mr B and that he had created an impression of actions being taken which were not. He had wanted to resolve the case in a way that avoided the risk of litigation and he had genuinely believed resolution had to be through mediation.

32. On questioning from the Tribunal panel, the Respondent stated that when he had been crafting the emails to Mr B during January 2012 to April 2013, he had been trying to "divert" the client to the mediation process as litigation would have been horrendously expensive and risky for the client. However, when things did not go the

client's way, the client became difficult and the Respondent's view was that if the Respondent had advised Mr B to walk away from the dispute, this would have created more problems between the parties.

33. The Tribunal also heard evidence from Mr Charles Hobbs, who was a partner in the Respondent's firm. He had known the Respondent for about 20 years and confirmed the Respondent had been under a great deal of pressure for a significant period of time having taken over the role of Managing Partner very suddenly. Mr Hobbs confirmed the partners had not realised how hard the Respondent had worked for a long period of time and they had given him relatively little assistance, leaving him to get on with things. When these issues came to light, all the Respondent's files had been reviewed but no other matters had been identified to cause any concern. Mr Hobbs confirmed the partners at the firm continued to support the Respondent, who was still their Managing Partner.

34. Ms Willetts, on behalf of the Respondent, reminded the Tribunal that the Respondent had previously had an exemplary unblemished career. This had been an aberration on a single file relating to a boundary dispute, which was the type of case that was notoriously difficult to deal with. The Respondent had tried to advise the client and taken steps to build a case. He had not sent emails to conceal the fact that he was not doing any work on the case, in fact he had been working very hard on resolving it. His misconduct had been in the client's interests to divert the client from litigation.

35. Ms Willetts stated the Respondent had gained no personal benefit from sending the emails. He had engaged in two parallel tracks, one involving an enormous amount of work aimed at mediation, and a second irrational track concerning emails to divert the client. There had been no permanent damage to Mr B's case and indeed, all preparatory steps had been taken ready for litigation. The client had not suffered financially and his case had not been permanently disadvantaged.

36. Ms Willetts referred the Tribunal to the case of SRA v Tunstall 11289-2014 although she accepted the subjective test of dishonesty had not been proved in that case. She reminded the Tribunal that the Respondent had shouldered the burden of running his firm during the recession and his partners had relied upon him. This incident had been a one-off out of character aberration and whilst the Respondent appreciated the minimum likely sanction would interfere with his ability to practise, Ms Willetts submitted there were exceptional circumstances in this case. The Tribunal was also referred to the case of The Queen on the Application of The Solicitors Regulation Authority v Imran [2015] EWHC 2572 (Admin) in which Mr Justice Dove stated:

> "Of far greater weight would be the extent of the dishonesty and the impact of that dishonesty both on the character of the particular solicitor concerned but, most importantly, on the wider reputation of the profession and how it impinges on the public's perception of the profession as a whole."

37. Ms Willetts submitted an informed member of the public would understand that a degree of leniency could be exercised by the Tribunal in this case. The Respondent was not a risk to the public and he had the full support of his partners. Indeed the SRA had not considered him to be a risk to the public as he had been granted unconditional practising certificates. This had been unusual conduct where emails

were sent in a misguided attempt to protect the client, there had been a limited effect on the client with no financial prejudice or disadvantage to the client's case and the Respondent had gained no benefit. He also had a long exemplary record.

Sanction

38. The Tribunal had considered carefully the Respondent's evidence, submissions and statement together with the authorities it had been referred to. The Tribunal also took into account the character reference provided. The Tribunal referred to its Guidance Note on Sanctions when considering sanction.

39. The Tribunal firstly considered the aggravating factors in this case. The Respondent had acted dishonestly in a sustained and developing deception over a long period of time and on numerous occasions as evidenced by the various emails sent to his client. In view of this, the fact that the conduct involved a single file was not a significant factor. Furthermore, the Respondent's conduct was deliberate and did cause harm to the client as the client's case was not being progressed in accordance with his instructions, and could well have been prejudiced as a result. No mediation took place nor did the Respondent progress the client's case through litigation as instructed. The Tribunal rejected the Respondent's assertion that he was protecting his client, indeed, the Respondent's delay could have weakened the client's position.

40. In relation to the mitigating factors, the Tribunal took into account the Respondent's previously long unblemished record, his insight and the reference provided including the evidence of Mr Hobbs. The Tribunal also took into account the pressure the Respondent had been under at his firm, with both a heavy caseload and management responsibilities. He appeared to have a misplaced desire to protect his client and he did apologise to the client offering to rectify matters when the client became aware of the true position.

41. However, the Tribunal concluded this was a serious case at the gravest end of the spectrum. The Respondent had developed an email trail which involved him inventing telephone calls to and from the court which had never taken place, referring to adopting a vacated court date and he had created a story which was entirely dishonest and misleading to his client. The Respondent's emails became more elaborate and were further embellished as time went on. This was deeply unattractive from any solicitor, particularly one of the Respondent's seniority and standing.

42. Whilst the Respondent claimed he was trying to "divert" the client's attention away from litigation, the Tribunal considered the Respondent should have frankly informed the client about his prospects of success rather than use a web of deception to avoid litigation. The truth of the matter was that the Respondent knew his client was becoming more irate by the delay, and the Respondent was deflecting the client away from his continued concerns about the progression of his case. The Tribunal did not consider this was a case which could be differentiated from other cases where there had been dishonesty associated with a lack of activity. The Respondent had been concealing the fact that he had not issued proceedings at all and that he was not actually doing what the client had instructed him to do.

43. Ms Willetts had referred the Tribunal to the case of the SRA v Sharma [2010] EWHC 2022 (Admin) in which Coulson J stated:

> "13. …. (a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see Bolton and Salisbury. This is the normal and necessary penalty in cases of dishonesty, see Bultitude. (b) There will be a small residual category where striking off will be the disproportionate sentence in all the circumstances, see Salisbury. (c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, such as Burrowes, or over a lengthy period of time, such as Bultitude; whether it was a benefit to the solicitor (Burrowes), and whether it had an adverse effect on others.
>
> …….
>
> 34. Their first finding was that "there was no harm to the public". I assume that by this the Tribunal meant that no client suffered financial loss. It seems to me that this is a very narrow way of looking at dishonesty, and wholly fails to recognise the wider issues involved. In my judgment there is harm to the public every time a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."

44. Although the Tribunal found the Respondent to be a candid witness, acknowledging his conduct, the Tribunal also found that his explanation for his behaviour was unconvincing. He had been given a number of opportunities to explain the true position to his client but did not do so until his client eventually found out directly from the court that proceedings had not been issued. The Tribunal could not reconcile the Respondent's assertion of acting in the client's interests with his approach to the actual nature of the emails he had been sending. The Tribunal did not consider the nature of the dishonesty in this case to be "unusual".

45. Furthermore this was not a case which fell into the residual category referred to in the case of SRA v Sharma. The Tribunal was satisfied that an informed member of the public would be horrified that a solicitor had sent a series of deliberately misleading and dishonest emails to his client, having failed to follow that client's instructions over a period of 15 months. This conduct went to the heart of the trust and confidence the public placed in a member of the solicitor's profession. Mr B had relied on the Respondent and had expected him to act as instructed. The Tribunal concluded there were no exceptional circumstances and the appropriate and proportionate sanction in this case was to strike the Respondent's name from the Roll of Solicitors. This was necessary in order to protect the public, maintain public confidence in the profession and uphold professional standards.

Costs

46. Mr Purcell, on behalf of the Applicant requested an Order for the Applicant's costs in the total sum of £3,327.55 which had been agreed by the Respondent. Mr Purcell provided the Tribunal with a Statement of Costs which contained a breakdown of

those costs. Mr Purcell confirmed that some reduction to the costs would need to be made as they included a claim for travelling to London by train and overnight accommodation, which had previously been anticipated by the person who was expected to present the case to the Tribunal. As Mr Purcell had dealt with the case, these disbursements had not been incurred. However, the Schedule had not included Mr Purcell's costs and claimed only two hours for the hearing which had clearly taken much longer.

47. Ms Willetts confirmed the Respondent had agreed costs in the sum of £3,327.55 or thereabouts, and that he did not wish to address the Tribunal on his financial position.

48. The Tribunal considered the Costs Schedule carefully and noted a reduction was required for the claim for travel and accommodation in the sum of £354.05. Accordingly, the Tribunal reduced the Applicant's costs to £2,973.50 and ordered the Respondent to pay this amount.

49. The Tribunal was mindful of the cases of William Arthur Merrick v The Law Society [2007] EWHC 2997 (Admin) and Frank Emilian D'Souza v The Law Society [2009] EWHC 2193 (Admin) in relation to the Respondent's ability to pay those costs. Although the Respondent's livelihood had been removed as a result of the Tribunal's Order, he had not made any submissions in relation to his ability to pay the Applicant's costs or submitted evidence of his means.

50. The Tribunal had regard for the case of SRA v Davis and McGlinchey [2011] EWHC 232 (Admin) in which Mr Justice Mitting had stated:

> "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."

51. In the absence of any information or evidence of the Respondent's current income, expenditure, capital or assets, the Tribunal did not consider this was a case where there should be any deferment of the costs Order, indeed the Respondent had not requested any such deferment.

Statement of Full Order

52. The Tribunal Ordered that the Respondent, ADRIAN CLIVE HARLING, 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 £2,973.50.

Dated this 14th day of December 2015
On behalf of the Tribunal

E. Nally
Chairman