# SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11385-2015

**BETWEEN:**

SOLICITORS REGULATION AUTHORITY Applicant

and

DAVID MICHAEL MERRICK Respondent

---

Before:

Mr A. N. Spooner (in the chair)
Mr R. Hegarty
Mr S. Howe

Date of Hearing: 16 February 2016

---

**Appearances**

David Barton, Solicitor Advocate of Flagstones, High Halden Road, Biddenden, Ashford, Kent, TN27 8JG, for the Applicant.

The Respondent did not appear and was not represented.

---

# JUDGMENT

---

**Allegations**

1. The Allegations against the Respondent made on behalf of the Applicant were as follows;

1.1 In breach of all or any of Rules 1.02, 1.03 and 1.06 of the Solicitors Code of Conduct 2007 ("SCC 2007") he created a bill dated 25 July 2011 in the matter of Miss MC and charged her for work that had not been done;

1.2 In breach of either or both of Principles 2 and 6 of the SRA Principles 2011 ("the Principles") he created a bill in the matter of Miss MC dated 20 March 2012 and charged her for work that had not been done;

1.3 In breach of either or both of Principles 2 and 6 of the Principles he created a bill in the matter of Miss MC dated 31 July 2012 and attempted to obtain payment from client account of £594.62 being fees for work done whereas the work had not been done and no fees were due;

1.4 In breach of all or any of Rules 1.02, 1.03 and 1.06 of the SCC 2007 he created a bill dated 22 February 2011 in the matter of B Deceased and charged for work that had not been done;

1.5 In breach of all or any of Rules 1.02, 1.03 and 1.06 of the SCC 2007 he created a bill dated 11 August 2011 in the matter of Mr and Mrs W and charged for work that had not been done;

1.6 In breach of Rule 19 (2) of the Solicitors Accounts Rules 1998 ("SAR 1998") and, after 5 October 2011, Rule 17.2 of the SRA Accounts Rules 2011 ("SAR 2011") he failed to deliver bills or written notification of costs in the matters of Miss MC, B Deceased and Mr and Mrs W;

1.7 In breach of Rule 22 (1) of SAR 1998 and, after 5 October 2011, Rule 20.1 SAR 2011 he withdrew money from client account in circumstances other than permitted by either of the said Rules in each or all of the following aspects;

a) 22 February 2011 withdrew £6,444.59 from the B deceased ledger purportedly in respect of fees that were not properly due;
b) 25 July 2011 withdrew £1,348.90 from the Miss MC ledger purportedly in respect of fees that were not properly due;
c) 11 August 2011 withdrew £1,250.32 from the Mr and Mrs W ledger purportedly in respect of fees that were not properly due;
d) 20 March 2012 withdrew £907.20 from the Miss MC ledger purportedly in respect of fees that were not properly due.

2. All allegations were put as ones of dishonesty although for the avoidance of doubt it was not necessary to establish dishonesty to substantiate all or any of them.

**Documents**

3. The Tribunal considered all the documents including;

Applicant

- Application and Rule 5 statement with exhibit DEB/1 dated 29 April 2015;
- Cost Schedule dated 8 February 2016.

Respondent

- Answer to Rule 5 statement dated 8 June 2015;
- Letters from Richard Nelson LLP ("RN") to the Tribunal dated 7 July 2015, 12 January 2016 and 13 January 2016.

**Preliminary Matters**

The Absence of the Respondent

4. The letters from RN stated that although they had been instructed by the Respondent to correspond with the Applicant and the Tribunal, they were not instructed to appear at any hearings. The letter of 7 July 2015 stated "I should mention that it is not the intention of the Respondent to file any further evidence, whether medical or factual. He does not intend to attend at the final hearing in person nor to instruct me to appear on his behalf." This position was maintained in the letter of 12 January 2016 which stated "As you are aware neither the Respondent nor any representative will attend at the hearing which is scheduled for 16 February 2016". This was also confirmed in the letter of 13 January 2016.

5. The Tribunal considered whether it was in the interests of justice to proceed in the Respondent's absence pursuant to Rule 16(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR"). The Respondent was aware of the date of the hearing and SDPR Rule 16(2) was therefore engaged. The Respondent had made clear throughout the proceedings that he had no intention of appearing or being represented at the hearing. He did not challenge any part of the Applicant's case and did not wish to make any representations as to sanction. The Tribunal was satisfied that he had voluntarily absented himself from proceedings, indeed he had invited the Tribunal to proceed in his absence. The Tribunal found there was no disadvantage to the Respondent in doing so. The Respondent did challenge the anticipated level of costs to be sought by the Applicant. This had been done clearly and articulately in the letter from RN dated 13 January 2016 and the Tribunal therefore was fully aware of the Respondent's position on costs. The Tribunal found that it was in the interests of justice that the matter should proceed in the absence of the Respondent.

**Factual Background**

6. The Respondent was born in 1955 and was admitted as a solicitor on 15 June 1981. His name remained on the Roll of solicitors at the time of the hearing. At all material times he practised in partnership at Crosse and Crosse Solicitors of 13-15 Southernhay West, Exeter, Devon, EX1 1PL ("the Firm"). On or about 5 December 2013 he was suspended by the Firm and had not practised there since.

7. On 16 July 2014, Sarah Bartlett, an Investigation Officer employed by the SRA ("the FIO"), commenced an inspection of the Firm's books of account and other

documents. The Forensic Investigation Report ("the FIR") was dated 17 November 2014.

Allegation 1.1

8. The FIO inspected the client file ledgers relating to Miss MC. It was apparent from the ledger that Miss MC had been a client of the firm since at least November 1989 when the ledger had been created. By February 2001 the firm held a balance of £2,309.18. During the years that followed the sum retained was credited with interest so that by 31 December 2009 the credit balance on deposit was £2,846.20.

9. The FIO found three bills on the matter file. These were dated 25 July 2011 - £1,348.90, 20 March 2012 - £907.20 and 31 July 2012 - £594.62. The Respondent had prepared each of them. The first two bills were posted to Miss MC's ledger and both were paid from funds held for her. The bill dated 31 July 2012 was not posted to the ledger because the Firm's cashiers raised concerns about its justification.

10. The first bill was preceded by an entry in the time recording ledger on 22 July 2011 using the narrative "unrecorded time mainly from 2008" and the bill purported to charge for work between February 2008 and November 2008. The work was described on the bill as "Receiving your instructions regarding a UK and Dutch Will. Attendance upon you and contact with the Dutch Notaries. Time involved not less than 8 hours 42 minutes". On 28 February 2008 Miss MC had written to the Firm indicating that she required services in relation to the drafting of a new Will. On 5 March 2008 Mrs T-S, an assistant solicitor with the firm, replied and advised Miss MC that as she lived in Holland she may be better served with a new Will prepared by Dutch lawyers. The client accepted that advice and on 5 September 2008 she wrote to Mrs T-S sending her a copy of the Dutch will that had been prepared. The file inspected by the FIO contained attendance notes dated 27 March, 10 April and 3 April 2008 which recorded three telephone conversations of modest duration. The FIO inspected the time-recording ledger and found it contained no entries for any work done in 2008.

Allegation 1.2

11. The second bill was preceded by an entry in the time recording ledger on 20 November 2011 of "Tel calls – 15, Letrs [sic] – 7, p/p – 20". The total time attributed to these activities was 4 hours and 12 minutes. The bill narrative was "For work between July 2011 and March 2012…Partners [sic] time not less than 4 hours 12 minutes". In 2012 the Accounts Manager at the Firm wrote to Miss MC informing her that there was a residue of money owed to her. Miss MC replied to this letter stating "I have not been in touch with Crosse and Crosse since 2008 because I have not needed to have any legal matters attended to since then…". The FIO inspected the time-recording ledger and found it contained no entries for any work done for this period.

Allegation 1.3

12. The third bill would have charged £594.62, had it been posted and paid, and that sum was the balance remaining on deposit after the first two bills were paid. The bill

narrative was "For work between 20th March 2012 to date…Partners [sic] time not less than 3 hours 6 minutes". The FIO inspected the time-recording ledger and again found it contained no entries for any work done for this period.

Allegation 1.4

13. Mr B died on 9 June 2006 and the Firm acted in connection with the administration of the estate. A bill for £6,445.38 was raised on 22 February 2011 and paid on 23 February 2011 by way of a transfer from client account to office account of £6,444.59. This figure was equivalent to the residual balance at the time. The bill purported to charge for work done from March 2006 using the narrative "Time element of charges in dealing with the Estate from March 2006; Partner's time involved not less than 44 hours 24 minutes".

14. The FIO found other bills on the matter file which indicated that all the work for the period from March 2006 to February 2011 had already been billed and paid. The last such bill was dated 11 January 2011. The FIO found no evidence of any work done between 11 January 2011 and 22 February 2011.

Allegation 1.5

15. The Firm was instructed by Mr and Mrs W to advise on Wills and Inheritance Tax. A bill for £1,250.32 was raised dated 11 August 2011. The FIO identified letters dated 1 December 2000 and 15 November 2001 which showed the firm had billed for all its work to those dates. The time recording ledger showed work done in 2001-02 was written off and was, in any event, for no more than about an hour. There was no evidence of any work done to justify the bill. The ledger showed the posting of the bill and its payment by transfer from client account to office account on 12 August 2011 and its reversal on 17 April 2014. An email was sent from the Respondent's secretary dated 11 August 2011 to the Accounts Manager making an enquiry as to the residual balance. The email states "…have eventually found this file that has had money on it for yonks". It went on to state that the money was intended to have been taken by the Firm for work done some years ago. The ledger showed it had been there since January 2002. The email concluded "I have checked with DM…and he says fine we can take the money". The bill was drawn in that sum and cleared the client balance.

Allegation 1.6

16. The FIO found no evidence that any of the bills or written notification of costs referred to in Allegations 1.1-1.5 had been delivered to the clients or the paying parties or that they had otherwise been made aware of the charges and transfers of money.

Allegation 1.7

17. This Allegation reflected the four transfers of money between client and office account referred to in Allegations 1.1, 1.2, 1.4 and 1.5.

**Witnesses**

Sarah Bartlett

18. Ms Bartlett confirmed that she was the FIO and that the FIR was true to the best of her knowledge and belief. She had inspected the MC file and noted that it was thin. It was not possible to see how the time referred to in the bill narratives had been calculated. There were two attendance notes each showing two units of time recorded and that was the extent of the units recorded on that file.

**Findings of Fact and Law**

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

20. The Respondent had made an express admission to Allegation 1.3 including to acting dishonestly. In respect of the remaining matters he had no clear recollection due to the effects of a sailing accident which occurred subsequent to the material times. In the circumstances the Applicant was required to prove all the Allegations beyond reasonable doubt.

21. **Allegation 1.1; In breach of all or any of Rules 1.02, 1.03 and 1.06 of the SCC 2007 he created a bill dated 25 July 2011 in the matter of Miss MC and charged her for work that had not been done; Although dishonesty was alleged, it was not an essential ingredient of the Allegation.**

21.1 The Respondent did not challenge this Allegation. The Tribunal considered the attendance notes and time recording ledger. There was no basis for anything more than a very minor amount of work to be billed to the client account and certainly not in the sums specified. The Tribunal was satisfied that in doing so the Respondent had lacked integrity and had failed to maintain the trust placed in him and in the provision of legal services.

21.2 The Applicant submitted that the Respondent's actions were dishonest according to the combined test laid down in Twinsectra v Yardley and others [2002] UKHL 12 which requires that the person has a) acted dishonestly by the ordinary standards of reasonable and honest people and b) knew that by those standards he was acting dishonestly and had done so knowingly. The Tribunal considered the objective test as set out in Twinsectra. There was no doubt that the generating of a bill that bore no relation to work done would be considered dishonest by the ordinary standards of reasonable and honest people.

21.3 The Tribunal considered the subjective test. The client had not required any work done in 2008 other than a small number of phone calls and a letter. The Tribunal found that the Respondent knew that the bill was issued on an entirely false basis and with the deliberate intention of clearing the balance in the client account for financial gain. The Tribunal was fully satisfied that his actions went well beyond recklessness, and that he knew he was acting dishonestly. Accordingly the combined test in

Twinsectra was met and the Tribunal found beyond reasonable doubt that the Respondent had acted dishonestly. This Allegation was therefore proved in full beyond reasonable doubt.

22. **Allegation 1.2; In breach of either or both of Principles 2 and 6 of the Principles he created a bill in the matter of Miss MC dated 20 March 2012 and charged her for work that had not been done; Although dishonesty was alleged, it was not an essential ingredient of the Allegation.**

22.1 The Respondent did not dispute that this bill was "fictional" in an email to his colleague dated 25 November 2013. The Tribunal found the letter from Miss MC sent to the Firm in 2012 to be significant. It was clear from this letter that there was no basis for any work to be billed to her account at this time. The Tribunal again applied the combined test in Twinsectra. The Tribunal found that the issuing of a bill when no work had in fact been done would clearly be regarded as dishonest by the ordinary standards of reasonable and honest people. The client had not required any legal advice since 2008. The Tribunal found that the Respondent knew that the bill he issued was done on an entirely false basis with the deliberate intention of clearing the balance in the client account for financial gain. The Tribunal was again satisfied that his actions went well beyond recklessness, and that he knew he was acting dishonestly. Accordingly the combined test in Twinsectra was met and the Tribunal found beyond reasonable doubt that the Respondent had lacked integrity, failed to maintain the public's trust and had acted dishonestly. This Allegation was therefore proved in full beyond reasonable doubt.

23. **Allegation 1.3; In breach of either or both of Principles 2 and 6 of the Principles he created a bill in the matter of Miss MC dated 31 July 2012 and attempted to obtain payment from client account of £594.62 being fees for work done whereas the work had not been done and no fees were due; Although dishonesty was alleged, it was not an essential ingredient of the Allegation.**

23.1 This Respondent admitted this Allegation including dishonesty. This Allegation followed the same pattern as Allegations 1.1 and 1.2. The Tribunal found this Allegation proved in full beyond reasonable doubt.

24. **Allegation 1.4; In breach of all or any of Rules 1.02, 1.03 and 1.06 of SCC 2007 he created a bill dated 22 February 2011 in the matter of B Deceased and charged for work that had not been done; Although dishonesty was alleged, it was not an essential ingredient of the Allegation.**

24.1 The Tribunal noted that a number of genuine bills had been issued on this matter which reflected the work done in connection with the administration of the estate. There was therefore no basis for this bill to have been generated. The Tribunal noted that it was in almost exactly the same sum as the balance of the client account at that time. This was the same method that the Respondent had employed in Allegations 1.1,1,2 and 1.3. The Tribunal considered the objective test as set out in Twinsectra. Again, there was no doubt that the generating of a bill that bore no relation to work done would be considered dishonest by the ordinary standards of reasonable and honest people. The Tribunal considered the subjective test. The Tribunal found that the Respondent knew that the bill was issued on a false basis and with the deliberate

intention of clearing the balance in the client account for financial gain. The Tribunal was entirely satisfied that his actions went well beyond recklessness, and that he knew he was acting dishonestly. Accordingly the combined test in Twinsectra was met and the Tribunal found beyond reasonable doubt that the Respondent had acted dishonestly. This Allegation was proved in full beyond reasonable doubt.

25. **Allegation 1.5; In breach of all or any of Rules 1.02, 1.03 and 1.06 SCC 2007 he created a bill dated 11 August 2011 in the matter of Mr and Mrs W and charged for work that had not been done; Although dishonesty was alleged, it was not an essential ingredient of the Allegation.**

25.1 The Tribunal noted that the bill was in the same amount as the balance of the client account at the time. The Tribunal considered the time recording ledger and were satisfied that there was no basis for anything more than a very minor amount of work to be billed to this account and certainly not in the sums specified. The letter to the client dated 15 November 2001 demonstrated that work done to that date had been billed and since then only very minor amounts of work had been time-recorded. The Respondent had authorised the bill and the transfer as evidenced by the email sent by his secretary dated 11 August 2011.

25.2 The Tribunal considered the objective test as set out in Twinsectra. Again, there was no doubt that the generating of a bill that bore no relation to work done would be considered dishonest by the ordinary standards of reasonable and honest people.

25.3 The Tribunal considered the subjective test. The client had not required any significant work undertaken since 2001. The Tribunal found that the Respondent knew that the bill was issued on an entirely false basis and with the deliberate intention of clearing the balance in the client account for financial gain. The Tribunal was entirely satisfied that his actions went well beyond recklessness, and that he knew he was acting dishonestly. Accordingly the combined test in Twinsectra was met and the Tribunal found beyond reasonable doubt that the Respondent had acted dishonestly and that this Allegation was therefore proved in full beyond reasonable doubt.

26. **Allegation 1.6; In breach of Rule 19 (2) of the SAR 1998 and, after 5 October 2011, Rule 17.2 of the SAR 2011 he failed to deliver bills or written notification of costs in the matters of Miss MC, B Deceased and Mr and Mrs W; Although dishonesty was alleged, it was not an essential ingredient of the Allegation.**

26.1 This Allegation was an integral element of the dishonest conduct in Allegations 1.1, 1.2, 1.3, 1.4 and 1.5. The Tribunal again considered the combined test in Twinsectra. On the basis of the Tribunal's decision in respect of those Allegations it found this Allegation proved in full beyond reasonable doubt.

27. **Allegation 1.7; In breach of Rule 22 (1) of SAR 1998 and, after 5 October 2011, Rule 20.1 SAR 2011 he withdrew money from client account in circumstances other than permitted by either of the said Rules in each or all of the following aspects;**

**a) 22 February 2011 withdrew £6,444.59 from the B deceased ledger purportedly in respect of fees that were not properly due;**

**b) 25 July 2011 withdrew £1,348.90 from the Miss MC ledger purportedly in respect of fees that were not properly due;**

**c) 11 August 2011 withdrew £1,250.32 from the Mr and Mrs W ledger purportedly in respect of fees that were not properly due;**

**d) 20 March 2012 withdrew £907.20 from the Miss MC ledger purportedly in respect of fees that were not properly due.**

**Although dishonesty was alleged, it was not an essential ingredient of the Allegation.**

27.1 This Allegation reflected the means by which the misconduct proved in Allegations 1.1, 1.2, 1.4 and 1.5 had been executed. The Tribunal again considered the combined test in Twinsectra. On the basis of the Tribunal's decision in respect of those Allegations it found this Allegation proved in full beyond reasonable doubt.

**Previous Disciplinary Matters**

28. None.

**Mitigation**

29. In his Answer, the Respondent expressed his shame at the situation and apologised to the Tribunal for his conduct. In the period between the material time and the matters being referred to the Tribunal the Respondent had suffered a sailing accident. This left him with Post-Traumatic Stress Disorder as well as the memory difficulties referred to above. The Answer stated:

> "The Respondent accepts that the inevitable consequence of his admission of dishonesty in respect of a matter which pre-dates the accident. In the letter from RN dated 7 July 2015 it was confirmed that the Respondent did not intend to file any medical or factual evidence".

The Respondent had made clear from the early stages that he did not challenge the Applicant's case and accepted that he would be struck off the Roll.

**Sanction**

30. The Tribunal referred to its Guidance Note on Sanctions (4th edition) and assessed the seriousness of the misconduct. The motivation had been financial gain for the Firm, in which the Respondent was a Partner. The sums of money involved were not very high, but neither were they insignificant. The Respondent had used his position of trust, both in respect of the Firm and of his clients, to appropriate funds to which the Firm was not entitled. He was an experienced solicitor and this was a planned and sustained course of conduct.

31. The harm caused was of the utmost seriousness. Individual clients had been the victims of unauthorised and improper withdrawal of their funds, in some cases repeatedly and in all cases dishonestly. This tarnished the profession and inflicted serious damage on its reputation. Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin observed:

> "34. 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"."

32. A further aggravating factor was the Respondent's concealment of his wrong-doing from his clients as the bills were never delivered to them. The Tribunal accepted that the Respondent, by his admissions and his co-operation with the SRA, had demonstrated some insight into his conduct. However the misconduct was so serious that a Reprimand, Fine or Restriction Order would be insufficient to protect the public or the reputation of the profession. The only appropriate sanction to consider was a strike-off.

33. The Tribunal considered whether any exceptional circumstances existed that could justify a suspension instead. The Respondent had described the effects of his sailing accident, although no supporting medical evidence had been provided. The Tribunal had some sympathy with his current predicament, however it did not amount to exceptional circumstances and it did not mitigate the misconduct, which pre-dated the accident. The Tribunal considered all the circumstances of this case and found that the protection of the public and the reputation of the profession demanded that the Respondent be struck off.

**Costs**

34. The Applicant applied for costs in the sum of £11,712.20. The letter from RN dated 13 January 2016 made the following submissions on costs;

> "From the moment that the Forensic Investigation started, and indeed before that date, he [the Respondent] has appreciated that his name would be removed from the Roll of Solicitors. He has never hidden from that fact and has sought to expedite that outcome".

The letter went on to detail the efforts made by RN to have matters dealt with as quickly as possible. These had not been successful. The letter continued

> "Despite the fact that Mr Merrick does not hide from the fact that his actions and his decisions have led to these proceedings, it is clear that the proceedings have become significantly more protracted than was possible, and that this will result in far higher costs being claimed than would otherwise have been the case. At the time of writing, the precise figure to be sought by the SRA is not known but in reality Mr Merrick's name could have been removed from the Roll 18 months earlier than will now be the case, and with minimal costs being incurred by the SRA. Instead of this, there will doubtless be a significant costs application and Mr Merrick has incurred additional defence costs as he has been unable to deal with this matter personally due to his state of ill health.

> The Tribunal may feel that it has not been in the interests of the profession or the public for this matter to be so prolonged, and I would ask them to decide whether it would be fair in these circumstances to allow Mr Merrick to pay costs in a far lower sum which equates to the costs in an unchallenged case which had been fast tracked. As this application is based on fairness and the appropriate level of costs to be awarded, no details of the assets, income and expenditure of the Defendant and his wife have been submitted".

35. The Applicant submitted that an investigation was inevitable in a case such as this. The Applicant would refer cases of alleged dishonesty to the Tribunal in all but exceptional circumstances. It would not have been in the public interest to enter into a Regulatory Settlement Agreement ("RSA") rather than issue proceedings. Having issued proceedings the only way in which the Applicant could have reached a RSA with the Respondent would have been to apply to the Tribunal for permission to withdraw the Allegations. There were seven Allegations, each alleging dishonesty and although the Respondent had not challenged any of them, he had only expressly admitted one of them. Therefore the Applicant would have been in the position of having to seek the Tribunal's permission to effectively withdraw six out of the seven Allegations in order to enter into a RSA. The Applicant had concluded that this was not an approach that would have been likely to find favour with the Tribunal. The case had not been protracted and had followed the usual course of one Case Management Hearing and one substantive hearing. In response to questions from the Tribunal, the Applicant submitted that the costs of the investigation were reasonable and proportionate, as were the costs of preparation of the case as a whole. The volume of paperwork that had been provided initially following the investigation had been substantially reduced to focus on what was of direct relevance to the issues in the case.

36. The Tribunal accepted that the FIO had been required to go back several years in her investigation of these matters. However the total number of hours spent was high. The Applicant had been right to bring the proceedings and it would not have been appropriate to withdraw six of the seven Allegations, particularly in circumstances where no express admission of dishonesty had been made. The preparation of the Rule 5 Statement had taken almost 18 hours however, and the Tribunal considered this to be high in view of the early indications from the Respondent that he did not challenge any part of the Applicant's case. In all the circumstances the Tribunal decided that the appropriate costs in this case was £10,000 and the Respondent would be ordered to pay the costs fixed in that sum.

**Statement of Full Order**

37. The Tribunal Ordered that the Respondent, DAVID MICHAEL MERRICK, 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 £10,000.00.

Dated this 30th day of March 2016
On behalf of the Tribunal

A. N. Spooner
Chairman