SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11475-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

DENIS CHARLES WYNN Respondent

Before:

Mr S. Tinkler (in the chair)
Mr M. Jackson
Lady Bonham Carter

Date of Hearing: 11 May 2016

Appearances

Andrew Bullock, Counsel of Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant

Nick Trevette, Solicitor of Murdochs Solicitors, 45 High Street, Wanstead London E11 2AA represented the Respondent

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JUDGMENT

Allegations

1. The allegations against the Respondent made by the Applicant were that:-

1.1 Between 18 October 2011 and 31 January 2015 he made one hundred and forty seven transfers totalling £97,828.58 from the client account to the office account of Wynn & Co, a firm of which he was the principal, which were not allocated to clients. He thereby breached any or all of the following:

1.1.1 Rule 20.1 of the SRA Accounts Rules 2011 ("SRA AR 2011");

1.1.2 Principles 2, 4, 6 and 10 of the SRA Principles 2011 ("the Principles").

1.2 He failed to give or to send bill of costs, or other written notification of costs to his clients before taking payments from client account to a total value of £13,424.80 on seven client matters between November 2007 and January 2015. He therefore breached Rule 17.2 of the SRA AR 2011 and in so far as the conduct preceded 6 October 2011, breached Rule 19.2 of the Solicitors' Accounts Rules 1998 ("SAR 1998").

1.3 He failed to replace a shortfall on his firm's client account, (which he had been formally notified of in November 2014) arising from breaches of the SRA AR 2011, promptly or at all, and thereby breached any or all of the following:

1.3.1 His obligations under Rules 7.1 and 7.2 of the SRA AR 2011;
1.3.2 Principle 2 and 6 of the Principles.

1.4 He failed to return client monies promptly or inform clients that money was retained at the end of the matter on three files in which the accumulated balance was £84,318.79. The monies had been held on the different files since May 2013, February 2014 and March 2014. He therefore breached Rule 14.3 and 14.4 of the SRA AR 2011.

1.5 Between December 2010 and January 2015 he failed to carry out reconciliations of his client account as provided for in Rule 29.12 of the SRA AR 2011 in breach of that Rule, and in so far as the conduct preceded 6 October 2011 he breached Rule 32(7) of the SAR 1998.

1.6 He failed to submit an Accountant's Report for the year ending June 2014 which was due to be filed by December 2014 and therefore breached Rule 32 of SRA AR 2011.

2. Dishonesty is alleged with respect to the allegation at paragraph 1.1 but dishonesty is not an essential ingredient to prove that allegation.

Documents

3. The Tribunal considered all the documents in the case including:

Applicant

- Application and Rule 5 Statement with exhibit SEJ1 dated 26 January 2016
- Interim Report of Sara Houchen dated 23 March 2015
- Witness Statement of Sara Houchen with exhibits 1 and 2 dated 14 April 2016
- Cost Schedules dated 26 January 2016 and 4 May 2016

Respondent

- Statement of the Respondent in response to the Rule 5 Statement dated 11 March 2016
- Amended Response of the Respondent to the Rule 5 statement dated 10 May 2016
- Schedule of Medical Appointments attended by the Respondent (undated)
- Letter from Dr Melanie Hargreaves dated 9 May 2016
- Statement of Means dated 10 May 2016

Factual Background

4. The Respondent was born in 1942 and admitted to the Roll of Solicitors in December 1975. At the date of the hearing, the Respondent's name remained on the Roll and he held a practising certificate subject to conditions. At all relevant times the Respondent carried on in practice as a sole practitioner at Denis Wynn & Co ("the Firm").

5. Following the receipt of a qualified accountant's report, a Forensic Investigation Officer ("FIO") commenced an investigation of the Firm's books of accounts and other documents on 2 February 2015. The inspection culminated in a Forensic Investigation Report ("FIR") dated 23 March 2015. The FIR confirmed that, as at 31 December 2014, a minimum cash shortage existed upon the client account of £111,253.38. The FIO could only give a minimum shortage figure due to the absence of an accurate list of client liabilities. The Firm was intervened into on 1 May 2015 and the shortage continued to exist at the date of intervention.

6. In November 2014 the Respondent's accountant advised him of a shortfall in client account. This related to the period to June 2013 and was in the sum of £58,435.05. The FIO reviewed the Firm's bank statements and the cashbook prints from August 2011 to 31 January 2015. The cause of part of the minimum client account shortage was that a total of one hundred and forty seven client to office transfers were identified as having been made totalling £97,828.58. The transfers were not recorded on the Firm's cashbook and had not been allocated to specific clients.

7. The remainder of the minimum client shortage was caused by client money in office account in the sum of £13,424.80. On the client matter balance list dated 31 December 2014 the FIO identified seventy two office credits totalling £46,567.92. These ranged from £0.12 to £10,382.50. The FIO reviewed eighteen client matters relating to the office credits and in seven of these concluded that client monies had been transferred to office account without a bill or other written notification of costs being sent to the client. The amounts transferred in these seven matters ranged from £500 to £6,100.00.

8. On the first day of the FIO's visit (2 February 2015) she identified a minimum shortage on the Firm's client account of £80,000. The Respondent's obligation under the SRA AR 2011 was to remedy the breaches promptly upon discovery. The Respondent had known of a substantial shortage since November 2014 and at the date of the hearing the shortage had not been remedied.

9. The FIO identified three large client balances when reviewing the Firm's ledgers. These were all probate matters. There had been no movement on the client ledgers for in excess of twelve months and no action on the client matter.

10. The Firm's client account reconciliation statements, for the period July 2012 to January 2015, included the cashbook balance, the bank statement balance and a list of outstanding cheques but in breach of the SRA AR 2011, no comparison figures had been made. When the FIO compared the figures on the reconciliation statements every statement showed a difference. The difference was not clearly stated, no reason for the difference was given and no comparison had been given to the client ledger balances either.

11. The Firm's Accountant's Report for the year ending June 2014 was due to be submitted to the Applicant by December 2014. At the time of the first FIO visit the accountants had not been instructed to commence work on the report. By 11 March 2015, the accountants had been instructed to prepare the outstanding report but due to other commitments were not going to be able to commence work until the end of April 2015.

Witnesses

12. None.

Findings of Fact and Law

13. 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.

14. **Allegation 1.1 -Between 18 October 2011 and 31 January 2015 the Respondent made one hundred and forty seven transfers totalling £97,828.58 from the client account to the office account of Wynn & Co, a firm of which he was the principal, which were not allocated to clients. He thereby breached any or all of the following:**

1.1.1 Rule 20.1 of the SRA AR 2011

1.1.2 Principles 2, 4, 6 and 10 of the Principles

14.1 The FIO had identified that the Respondent had made one hundred and forty seven transfers totalling £97,828.58. These transfers were from client account to office account and were not allocated to a specified ledger. Subject to some exceptions, client account money may only be withdrawn from a client account on behalf of a

specified client. There are provisions in Rule 20.1(i), (j) and (k) which allow money to be withdrawn not on behalf of a specified client in certain circumstances. None of those exceptions applied to the transfers made by the Respondent.

14.2 In interview with the FIO, on 11 March 2015, the Respondent confirmed that he had first made unallocated transfers at the end of 2010 but had rectified most of them in early 2011. Due to ill-health, the Respondent had fallen behind with the books of account and lost track of the transfers. The Respondent stated that the transfers had been made in order to maintain the practice.

14.3 The Respondent admitted allegations 1.1, 1.1.1 and 1.1.2 and the Tribunal found them proved beyond reasonable doubt. By his actions the Respondent had breached Rule 20.1 of the SRA AR 2011 and Principles 2, 4, 6 and 10.

15. **Allegation 1.2 – The Respondent failed to give or to send bill of costs, or other written notification of costs to his clients before taking payments from client account to a total value of £13,424.80 on seven client matters between November 2007 and January 2015. He therefore breached Rule 17.2 of the SRA AR 2011 and in so far as the conduct preceded 6 October 2011, breached Rule 19.2 of the SAR 1998.**

15.1 The remainder of the cash shortage, identified by the FIO, related to client monies being held incorrectly in office account. The monies had been transferred without a bill of costs or other written notification of costs to the client concerned. The FIO identified that the Firm had seventy two office credits showing on the client matter balance list dated 31 December 2014. The FIO selected eighteen client matter files relating to office credits with a balance in excess of £500.00 for review. A credit balance was found on seven of those matters. When the FIO asked the Respondent about these transfers he readily accepted the transfers had been made without a bill of costs or other written notification of costs being given to the clients.

15.2 The Respondent had told the FIO that he understood the requirements of the Account Rules and that written notification was required before any costs could be taken. The Respondent admitted the allegation and the Tribunal found it proved beyond reasonable doubt.

16. **Allegation 1.3 - The Respondent failed to replace a shortfall on his firm's client account, (which he had been formally notified of in November 2014) arising from breaches of the SRA AR 2011, promptly or at all, and thereby breached any or all of the following:**

1.3.1 His obligations under Rules 7.1 and 7.2 of the SRA AR 2011;
1.3.2 Principle 2 and 6 of the Principles.

16.1 On 6 November 2014 the Respondent's accountant had written to him enclosing a copy of the Accountants Report for the year ending 30 June 2013. In round terms a shortage of over £58,000 was identified. The shortage continued over time and at the start of the FIO's inspection there was a minimum shortage on client account of £80,000. By the date of the FIR this had crystallised as a minimum cash shortage of £111,253.38.

16.2 To date, the SRA had made payments totalling £394,956.63 to clients of the Firm from the compensation fund. The precise amount of the shortage will not be known until the intervention is concluded as the amount paid out does not take into account work in progress and will need to be adjusted. The Applicant and Respondent agreed that there was a minimum cash shortage of over £111,000.00. The Respondent had not made any payment to replace the shortage as he said he was awaiting the final figure.

16.3 The Respondent admitted the allegation. He had not complied with his obligations under Rules 7.1 and 7.2 of the SRA AR 2011 and had breached Principles 2 and 6. The Tribunal found allegations 1.3, 1.3.1 and 1.3.2 proved beyond reasonable doubt.

17. **Allegation 1.4 – The Respondent failed to return client monies promptly or inform clients that money was retained at the end of the matter on three files in which the accumulated balance was £84,318.79. The monies had been held on the different files since May 2013, February 2014 and March 2014. He therefore breached Rule 14.3 and 14.4 of the SRA AR 2011.**

17.1 As part of the FIO's investigation three large client balances were identified where there had been no movement on the client ledger for in excess of 12 months and no action on the client matter file. The three balances were £6,287.11, £13,355.97 and £64,675.71. The presumption was that the matters had been completed and that the funds should have been released back to the clients concerned. If there was a reason that the monies needed to be retained for longer than 12 months the clients should have received a written explanation as to why the monies were being retained. No such explanation had been sent.

17.2 The Respondent acknowledged that there had been a delay in completing these matters and that he was not aware of the requirement to write to clients every twelve months to inform them of any client balance and the reason it was being held. The Respondent admitted the allegation and the Tribunal found it proved beyond reasonable doubt.

18. **Allegation 1.5 - Between December 2010 and January 2015 the Respondent failed to carry out reconciliations of his client account as provided for in Rule 29.12 of the SRA AR 2011 in breach of that Rule, and in so far as the conduct preceded 6 October 2011 he breached Rule 32(7) of the SAR 1998.**

18.1 The Respondent had carried out reconciliations but he had failed to carry out reconciliations that were adequate in accordance with the requirements of the Account Rules. There had been no comparison of the cashbook balance and the bank statement balance. When the FIO compared the figures every reconciliation statement showed a difference but the difference was not clearly stated and no reason for the difference was given. The Respondent acknowledged that reconciliations were not being conducted in accordance with the Accounts Rules and admitted the allegation. The Tribunal found the allegation proved beyond reasonable doubt.

19. **Allegation 1.6 – The Respondent failed to submit an Accountant's Report for the year ending June 2014 which was due to be filed by December 2014 and therefore breached Rule 32 of SRA AR 2011.**

19.1 The Firm's Accountant's Report for the year ending June 2014 was due to be delivered in December 2014. It was not delivered in December 2014 and was outstanding at the time of the FIR. The Respondent admitted the allegation and the Tribunal found it proved beyond reasonable doubt.

20. **Allegation 2- Dishonesty is alleged with respect to the allegation at paragraph 1.1 but dishonesty is not an essential ingredient to prove that allegation.**

20.1 The Applicant submitted that the Respondent's actions were dishonest according to the test laid down in Bryant and Bench v The Law Society [2007] EWHC 3043 (Admin) which followed Bultitude v The Law Society [2004] EWCA Civ 1853, and applied the test for dishonesty as formulated in Twinsectra v Yardley and others [2002] UKHL 12. The Twinsectra test requires that the person has a) acted dishonestly by the ordinary standards of reasonable and honest people and b) realised that by those standards he was acting dishonestly.

20.2 The Application's position was that the Respondent's conduct in making money transfers over an extended period of time from client account to office account, which were not being allocated, was dishonest by the standards of reasonable and honest people. The Respondent had taken his clients' money not for their own particular purposes but to put the office account of the Firm in order and, as set out in the FIR, to prevent an overdraft arising and to provide working capital for the Firm. The Respondent was taking other people's money for his own circumstances. It was inconceivable that any solicitor would not understand this to be wrong. There was an irresistible inference that the Respondent appreciated that by the standards of reasonable and honest people his actions were dishonest.

20.3 The Respondent was an extremely experienced solicitor at the time he was making the transfers. He was used to not only the practical aspects of practice but also the management of a law firm. He had been in partnership or practising as a sole practitioner since he qualified and must have understood the sacrosanct character of the client account and that the monies were not there to be taken to fund a business. The Respondent's actions were not a one-off, his was an extended course of conduct over approximately four years and the sums involved were large, in excess of £100,000. The movement of money was always one way from client to office account. A solicitor who believed (however mistakenly) he was "borrowing" from client account could be expected over four years to make a repayment. However, no monies went back from office to client account and the shortage accumulated.

20.4 The Respondent had admitted the allegation and therefore the underlying facts. The Tribunal considered the objective test as set out in Twinsectra. To take money from clients to fund one's own business would clearly be viewed by an objective observer as dishonest. There was, therefore, no doubt that the Respondent's actions would be considered dishonest by the ordinary standards of reasonable and honest people. The Tribunal considered the subjective test. The number of transfers, the clear use of money to fund his business when it was nearly overdrawn, the time period involved and the lack of repayments lead almost inevitably to the conclusion that the Respondent knew he was misusing client money and being dishonest. Furthermore, although it had been late in the day, the Respondent had also admitted that he knew, at the time, that what he was doing was dishonest and wrong. There could be no more

clear confirmation of his state of mind at the time than his own evidence. 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 proved.

Previous Disciplinary Matters

21. None.

Mitigation

22. Since 2007 the Respondent had suffered a number of significant health issues as set out in the medical evidence that he had submitted to the Tribunal. This information was provided to the Tribunal by way of context to the events that had occurred and not by way of excuse. There was no premediated decision by the Respondent to act in a dishonest way. He had made the transfers with the intention of putting them right. As his health deteriorated his practice suffered. The transfers from client account to office account continued. The Respondent rightly accepted that he fell well below the standards expected of a solicitor in practice. If the Respondent had taken advice in 2011 he may have been able to close the Firm himself and in doing so avoided the intervention and related costs.

23. The Respondent was an old fashioned solicitor. He had managed the Firm's accounts with an assistant but without an accountant or bookkeeper. It was very difficult to run a practice without the assistance of an accountant or bookkeeper well versed in the requirements of the SRA. The Firm became a mess and spiralled downwards. The Respondent had not once sought to go behind what he said in interview with the FIO or to make excuses.

24. The Respondent is married with three adult step-children. He jointly owns his home with his wife. The home has a value of £550,000 and is subject to an equity release charge which the Respondent took out with the intent of trying to pay monies back. Of the £130,000 secured by the charge, £70,000 remains which he intended to use to repay the compensation fund. Some of the money had been used to pay for run-off insurance cover on the closure of the Firm. The Respondent had a state pension, some small other assets and a number of liabilities totally approximately £40,000. He also had the costs of the intervention and this hearing. The Respondent's situation was described as dire in many respects, especially in light of his age and health.

25. The Respondent apologised to the Tribunal for his actions and the fact he had let the profession down. He was a proud, decent man in many respects whose business had got into trouble. With his back against the wall he had made the wrong decision at the time in the belief that he would put it right but this never happened.

Sanction

26. The Tribunal referred to its Guidance Note on Sanctions (4th Edition) when considering sanction. The Respondent's motivation for the misconduct had been to prop up the Firm. One hundred and forty seven transfers had occurred over a significant period of time. The Respondent had direct control over the Firm and the circumstances giving rise to the misconduct. He was an experienced solicitor. Client

money was at risk, over £100,000 was missing and clients had been compensated by the profession. The Respondent had acted in breach of a position of trust.

27. The harm caused by the Respondent's actions was reasonably foreseeable. The Respondent's misconduct had caused harm to the reputation of the legal profession. Although no individual client had suffered loss this was only because the compensation fund had paid out. The Respondent must have known or ought reasonably to have known that his conduct was in material breach of his obligations to protect the public and the reputation of the legal profession.

28. Dishonesty was alleged, admitted and proved. Even if the Respondent's actions were not pre-mediated when he made the first transfer by the one hundred and forty seventh transfer they must have been. Unidentified clients were the victims of the Respondent's actions. At the date of the hearing the Respondent had not yet made good the loss arising from the misconduct although he intended to so. In mitigation, the Respondent had had a long and previously unblemished career. He had made open and frank admissions, except in respect of dishonesty, throughout. He had shown insight before the Tribunal. It was regrettable that the Respondent had not taken steps in 2011 to avoid this outcome.

29. There were significant aggravating factors and some, but not many, mitigating ones. The Tribunal considered the Respondent's personal mitigation, including the impact of his health difficulties. A finding of an allegation of dishonesty will almost invariably lead to striking off, save in exceptional circumstances. The Respondent was not arguing exceptional circumstances. The Tribunal considered the range of sanctions available to it, commencing with 'No Order' and concluded that the appropriate sanction was to strike the Respondent's name off the Roll of Solicitors. Whatever the Respondent's personal and health circumstances, significant sums of money were involved over a long period of time and his circumstances did not affect his ability to know what he was doing and that his actions were wrong. The Tribunal hoped that the Respondent would fulfil his intention to make recompense in respect of the client account shortage.

Costs

30. The Applicant applied for its costs, supported by a schedule totalling £17,434.72. The Applicant's starting point was that the costs should be reduced slightly as the time for preparation was less than the seven hours claimed and the hearing had not lasted a whole day. The Applicant's position was that the Respondent had equity in his matrimonial home and cash at the bank that outweighed his immediate liabilities although there would be additional liabilities in respect of the intervention into the Firm and the recoupment of client monies. The Applicant acknowledged that there was a potential issue as to liquidity and how funds could be raised but submitted that the Respondent was certainly not insolvent. Given this, Mr Bullock argued that the Tribunal did not need to consider D'Souza v The Law Society [2009] EWHC 2193 (Admin) nor Merrick v The Law Society [2007] EWHC 2997 (Admin).

31. Mr Trevette acknowledged that the Respondent recognised he had costs to face, he was not arguing extraordinary circumstances. The Respondent had seen the costs schedule, he considered that there should be some reduction and invited the Tribunal

to make an order in the sum it considered appropriate. The Respondent's primary concern was that the costs he was ordered to pay should not be enforced without leave of the Tribunal. This would mean that if payment of costs could not be agreed between the Applicant and Respondent, the Applicant would need to come back to the Tribunal in order to be able to enforce the costs order. In the alternative, if the Tribunal was not agreeable to such an order the Respondent invited the Tribunal to order that costs could not be enforced except by placing a charging order on the Respondent's home.

32. The Applicant was concerned that this could prejudice the Respondent as there would be additional costs if the Applicant had to return the matter to the Tribunal in order to enforce the costs order. Potentially, such an order would give the Respondent an advantage in negotiations with the Applicant. These proceedings had been brought as a result of the Respondent's misconduct and the costs should not fall on the profession. Mr Bullock submitted that the Applicant should not be disadvantaged against the Respondent's creditors. The Respondent was planning to 'downsize' the matrimonial home and was concerned that a charging order would make the process quite difficult.

33. The Tribunal assessed the Applicant's costs. The Tribunal considered the time spent by the legal advisor on the documents to be too much at thirty three hours and halved the amount claimed. It disallowed the claim for hotel accommodation and made other minor adjustments. Having reduced the amounts claimed for preparation and length of hearing, costs were assessed at £14,000.

34. The Tribunal considered whether or not the costs order should be freely enforceable, should not be enforced without leave of the Tribunal or alternatively should be secured by a charging order. The Tribunal took into account the parties' submissions. The Respondent had obtained a loan to try and remedy something of the deficit, he had these funds available but his total assets could be wiped out as the amount he needed to repay had not yet crystallised and could be anything from £111,000 to over £300,000. The Respondent was living on the state pension, his health was poor and the matrimonial home was subject to his wife's interest. It was not certain that he had any equity left in his property. In all the circumstances, the Tribunal ordered that the costs were not to be enforced without leave of the Tribunal. This did not prevent the Applicant and Respondent agreeing costs. If the matter was returned to the Tribunal, the costs of any such application would be a matter for that Division of the Tribunal but whichever party should have agreed a proposal to pay the costs and had not would be likely to bear the costs of any subsequent hearing which would incentivise both parties to agree a sensible approach.

Statement of Full Order

35. The Tribunal Ordered that the Respondent, DENIS CHARLES WYNN, 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 £14,000.00, such costs not to be enforced without leave of the Tribunal.

Dated this 31st day of May 2016
On behalf of the Tribunal

S. Tinkler
Chairman