SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11499-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

DAVID EDWARD SMITH Respondent

Before:

Mr K.W. Duncan (in the chair)
Mrs C. Evans
Mr S. Marquez

Date of Hearing: 5 August 2016

Appearances

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

The Respondent did not attend and was not represented.

JUDGMENT

Allegations

1. The Allegations against the Respondent made by the SRA were that:

1.1 Between 16 December 2013 and 27 March 2014, he misused client monies belonging to Mr KT ("Client A") for the benefit of an unconnected client, B, in breach of Rules 1.2 (c), 20.1 of the SRA Accounts Rules 2011 ("SAR 2011") and Principles 2, 4, 6 and 10 of the SRA Principles 2011 ("the Principles").

1.2 Between 16 December 2013 and 27 March 2014, he prepared narratives on payment request forms, which were false and misleading in breach of Principles 2 and 6 of the Principles.

2. Dishonesty was alleged with respect to the Allegations above at paragraphs 1.1 and 1.2 but dishonesty was not an essential ingredient to prove those Allegations.

Documents

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

Applicant

- Application and Rule 5 statement including exhibit LPT/1 and Appendix A to the Rule 5 statement dated 11 April 2016
- Statement of Bernard Francis Seymour dated 12 July 2016
- Schedule of costs dated 28 July 2016

Respondent

- Answer to Rule 5 statement dated 5 July 2016
- Letter to the Tribunal from Weightmans LLP dated 4 August 2016

Preliminary Matters

Application to proceed in absence

4. The Respondent did not attend and was not represented. He had instructed Weightmans LLP to write to the Tribunal on 4 August 2016 in which they stated:

> "We write in relation to the hearing listed for tomorrow Friday 5 August to confirm that our client does not intend to attend the hearing and we are not instructed to attend on his behalf. No disrespect to the court is intended by this decision not to attend which is made purely with a view to saving costs bearing in mind the admissions made in the response to the Rule 5 statement. Our client has asked us to ask the Tribunal to take into account the mitigation set out in paragraphs 7 to 13 of the Rule 5 response. He also wishes once again to express his deep regret of his actions".

5. The Applicant applied for the matter to proceed in the Respondent's absence. The Respondent was clearly aware of the date of the hearing and had voluntarily absented himself. In the circumstances it was submitted that the appropriate course of action was to proceed with the matter as indeed the Respondent had requested.

6. The Tribunal considered the representations made by the Respondent in his email and by the Applicant. The Respondent was aware of the date of the hearing and SDPR Rule 16(2) was therefore engaged. The Tribunal had regard to the Solicitors Disciplinary Tribunal Policy/Practice Note on Adjournments (4 October 2002) and the criteria for exercising the discretion to proceed in absence as set out in R v Hayward, Jones and Purvis [2001] QB 862, CA by Rose LJ at paragraph 22 (5) which states:

> "In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:
>
> (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;
> (ii) …;
> (iii) the likely length of such an adjournment;
> (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;
> (v) …;
> (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;
> (vii) …;
> (viii) …;
> (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;
> (x) the effect of delay on the memories of witnesses;
> (xi) …;"

7. The Tribunal had in mind the fact that it must only proceed in the Respondent's absence having exercised the utmost care and caution. In this case the Respondent had invited the Tribunal to deal with the matter in his absence and had conveyed this request through solicitors. The Respondent had voluntarily absented himself from the hearing and it was clear from the terms in which the letter to the Tribunal was written that even if the Tribunal was to adjourn the matter, which was not something sought by the Respondent, this would not result in his future attendance. It was not in the interests of justice to delay matters further and in all the circumstances the proper course of action was to proceed with the matter in the absence of the Respondent.

Factual Background

8. The Respondent was born in 1951 and was admitted to the roll of solicitors on 15 January 1979. At the time of the Rule 5 statement his name remained on the Roll of solicitors. His last practising certificate, which was for the practice year 2014 to 2015 was revoked on 7 December 2015 due to non-renewal.

9. At all material times, the Respondent practised as a fixed share partner of Linder Myers and later as a member of Linder Myers LLP in Manchester ("the Firm"). The Respondent practised at the Firm until 30 June 2014 when he retired, although he continued to assist the Firm with the handover of files to other partners until late July 2014.

10. The SRA received a report dated 19 December 2014 from the Firm on 23 December 2014. The Firm reported that they had discovered that the Respondent had diverted client monies held on behalf of client A in order to pay a Costs order for client B. The Firm also stated they would provide further information and supporting documentation as soon as they completed their enquiries. The SRA received a further report from the Firm by email dated 13 April 2015 after they had completed their investigations. The Firm stated that monies were transferred from client A to a third party without the authority of client A. The Firm further stated that they had written to both clients seeking their authority to disclose documentation and details from the files to the SRA for the purposes of the investigation.

Allegation 1.1

11. Client A instructed the Respondent in December 2011 to act in the sale of his business which was a supermarket, off-licence and post office. In order for client A to effect a sale, he agreed that the buyer could take possession and pay the sale sum by instalments over an extended period. Completion took place in June 2014. The completion statement and client ledger showed that the sum of £111,360.58 was received from the buyer's solicitor, which was made up of the following payments:

    - 9 December 2011 – £10,000
    - 12 December 2013 – £75,000
    - 30 June 2014 – £26,360.58

12. Four payments totalling £80,000 were made from client account, purportedly at the request of client A, to a third party, client B. The payments were made by "Fastpay".

13. After the above transfers were made, £26,534.58 remained on client account after deduction of costs and disbursements. Client A's client account was debited on three occasions namely 14 February 2014, 6 March 2014 and 27 March 2014 with a £6 administration charge relating to the processing of "Fastpay". Although an administration charge was noted on the "Fastpay request" form dated 16 December 2013 this charge did not appear to be debited from client account.

14. Following the Respondent's departure from the Firm, the partner who took over the matter from the Respondent contacted client A to finalise instructions. The client intimated that he had not yet discussed with the Respondent what the arrangements

should be in respect of payment of the completion monies. In order to clarify the discrepancy between the information given by client A and the information held on the file about payments to a third party, the Firm arranged a meeting with the Respondent on 12 December 2014. A meeting was also arranged with client A which took place on 15 December 2014. At this meeting client A confirmed that he expected to be paid all the completion monies and was unaware of any payments to a third party. The Firm carried out further investigations and held further discussions with the Respondent on 15 and 16 December 2014. The Respondent confirmed that the payment of £80,000 was made to client B to settle a third party debt under a court-ordered settlement agreement. The Respondent also confirmed that a negligence claim had been threatened against him on a litigation file by client B. On 15 and 16 December 2014 the Firm made transfers from office to client account to rectify the shortage that had arisen on client A's client account.

15. On 18 November 2015 a letter was sent to the Respondent by the SRA requesting an explanation. In his response dated 7 December 2015 the Respondent stated that he did not dispute any of the facts set out in the SRA's letter and he confirmed that the allegations arising from those facts were all validly made and he did not contest any of them. The Respondent confirmed during discussions with the Firm that he had been acting for client B in a litigation matter against four defendants. Client B had been successful in receiving an award of damages from one of the defendants but had been ordered to pay the costs of all four defendants incurred between 1 January 2012 and 23 August 2013. Judgment had been given on 16 August 2013. The Respondent had informed the Firm that he had come under pressure from client B to make the payment of the costs, otherwise claims would be made against him. A total of £80,000 was paid from client A's client account between 16 December 2013 and 27 March 2014 to satisfy the order for costs.

16. The Respondent explained that the events took place during a period of intense pressure and stress both in his personal and professional life and that he had made restitution to the Firm of the monies.

17. The Applicant submitted that the Respondent made unauthorised withdrawals from client A's client account and abused his position of trust in that he received funds following the sale of client A's property and used those funds for the benefit of an unconnected client, client B, in order to avoid a negligence action against him, thus misusing client A's monies.

18. In misusing client A's monies for the benefit of client B the Applicant submitted that the Respondent had breached SAR 2011 and had failed to act with integrity as he was required to do by Principle 2 of the Principles. His conduct had also undermined the trust the public placed in him in breach of Principle 6 and he had failed to protect client money in breach of Principle 10.

<u>Allegation 1.2</u>

19. Four payments were made by "Fastpay" to client B. The information for the beneficiary on the first three "Fastpay request" forms described the payments as instalment payments and the fourth payment was described as a settlement balance for client A. The Respondent also wrote on the "Fastpay request" forms that the narrative

to appear in the accounts ledger was "supplier at client's request", "further payments to supplier" and "settlement balance to [B]". The narrative for the payments on 16 December 2013, 14 February 2014 and 6 March 2014 was misleading as it gave the impression that the client had requested the payments, when this was not the case. The narrative on all four payments was also false and misleading as it gave the impression that the payments were to be made on behalf of client A when the payments had in fact been made for the benefit of an unconnected client.

Witnesses

20. None.

Findings of Fact and Law

21. 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.

22. **Allegation 1.1 - Between 16 December 2013 and 27 March 2014, he misused client monies belonging to Client A for the benefit of an unconnected client, B, in breach of Rules 1.2 (C), 20.1 of the SRA accounts rules 2011 ("SAR 2011") and Principles 2, 4, 6 and 10 of the SRA Principles 2011 ("the Principles").**

Allegation 1.2 - Between 16 December 2013 and 27 March 2014, he prepared narratives on payment request forms, which were false and misleading in breach of Principles 2 and 6 of the Principles.

22.1 The Respondent, in his Answer to the Rule 5 statement, admitted both the Allegations including the Allegations of dishonesty. Notwithstanding these admissions, the Applicant was required to prove all the Allegations beyond reasonable doubt.

Applicant's Submissions in respect of Dishonesty

22.2 The Applicant submitted that the Respondent's actions were dishonest in accordance with the test for dishonesty accepted in Bultitude v Law Society [2004] EWCA Civ 1853 as applying in the context of solicitors disciplinary proceedings, i.e. the combined test laid down in Twinsectra Ltd v Yardley and Others [2002] UKHL 12: the person has acted dishonestly by the ordinary standards of reasonable and honest people and realised that by those standards he or she was acting dishonestly.

22.3 In misusing client monies belonging to client A for the benefit of client B and in preparing narratives on payment request forms that were false and misleading the Applicant submitted that the Respondent had acted dishonestly by the ordinary standards of reasonable and honest people.

22.4 The Applicant further submitted that the Respondent was aware that it was dishonest by those standards. The Respondent's misuse of the monies was deliberate as it was done to avoid a negligence claim against him, as he admitted to his Firm. The improper transfers were made over the course of some three months and could

properly be described as a "course of conduct". The Respondent did not inform his Firm about the improper transfers when he left the Firm and he concealed the improper payments by preparing and misleading narratives on the "Fastpay" payment requests. In requesting "Fastpay" payments from client A's client account on the dates referred to, the Respondent knew that client A had not authorised this payment.

The Tribunal's Decision

22.5 The Respondent had admitted Allegations 1.1 and 1.2 and had further admitted the Allegation of dishonesty in respect of each of those Allegations. The Tribunal found the Allegations properly made and proved in full beyond reasonable doubt, including dishonesty, on the evidence and on the basis of the admissions.

Previous Disciplinary Matters

23. None.

Mitigation

24. In mitigation it was submitted that the Respondent had previously been in practice as a solicitor for over 35 years. He had during that time, until the issues which gave rise to these proceedings, had an unblemished career. Whilst at the Firm he had taken on a commercial litigation case for a client, which after success in establishing liability, led to directions involving the need to instruct forensic accountants to analyse the defendant's extensive accounting records for the purpose of obtaining a further finding on quantum. The client had been unable to afford the accountants fees or the continuing fees of the Firm and counsel, and the policy of the Firm precluded the possibility of a conditional fee agreement or the allowance of extended credit. The Respondent agreed to an alternative approach proposed by the client by which additional witness evidence would be obtained, founding an application being made to revise the directions of the court. Unfortunately, however, the Respondent ran out of time for compliance with the original directions. When the second hearing then took place as originally directed the client had failed to obtain a substantial finding in his favour as a result of the insufficiency of evidence and representation. This resulted in a Costs order being made against him which placed the Respondent in what he felt to be an impossible position as the client was threatening a negligence claim against him. No formal claim was ever made but the client made it clear that if the Respondent did not provide a solution he would bring a claim in negligence.

25. The Respondent had built up a long-standing relationship with the client and out of a sense of misguided loyalty and duty he felt responsible for the circumstances he faced. Rather than notifying the Firm's insurers of circumstances that might have given rise to a claim in negligence, he transferred the monies from the account of client A as set out above.

26. The Respondent had not gained financially from the misuse of client monies, indeed he had paid the amount concerned from his own resources. Had he notified the Firm's insurers, any negligence claim would have been paid by them. The Respondent told the Tribunal in his Answer that his decision to misuse client A's money was made in circumstances when he was under immense pressure not only as a result of the

threatened negligence claim but also due to stress in his family life including serious health issues experienced by a close family member. The Respondent himself also suffered health issues.

27. The Respondent told the Tribunal that he deeply regretted what he had done, something he repeated throughout his letter of 4 August 2016, and that he had admitted the facts and allegations put to him without delay. He was willing to come off the Roll if the Tribunal was agreeable.

Sanction

28. The Tribunal referred to its Guidance Note on Sanctions (December 2015) when considering sanction. The Tribunal assessed the seriousness of the misconduct with reference to the culpability and harm together with any aggravating and mitigating factors.

29. The Respondent's motivation was absolutely not personal financial gain. It was, as he had told the Firm and the Tribunal in his Answer, to avoid a negligence claim from his client and the associated reputational damage. The actions had been planned, evidenced by the fact that they had been repeated. The Respondent had 35 years post-qualified experience and was operating at partner level. He therefore had direct control and sole responsibility for the circumstances giving rise to the misconduct. The Tribunal found there to be a very heavy level of culpability on the part of the Respondent.

30. The Tribunal assessed the harm caused. The Firm had clearly suffered financially, at least in the short term, as they had rectified the shortfall on the client account. This meant that no client had suffered a loss in respect of the misappropriations of monies. The Tribunal acknowledged that the Respondent had made good the loss from his own funds. However the potential harm to the Firm and/or the client had been very significant.

31. The damage to the reputation of the profession was very serious. It was of fundamental importance that the public were able to trust solicitors to hold client money in accordance with the SAR without exception, and not to misappropriate their funds.

32. The matters were aggravated by the Respondent's admitted dishonesty. 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"."

33. The misconduct had been deliberate, calculated and repeated. The Respondent had concealed his wrongdoing from the internal accounts department and, potentially, from the Firm's auditors. The Respondent knew he was in material breach of his obligations to protect the public and the reputation of the profession.

34. The matters were mitigated by the Respondent's lack of any previous matters before the Tribunal. This departure from his usual standards was out of character and the

Tribunal found this to be a very sad case. The Tribunal found his insight and remorse to be genuine and this was reflected in his co-operation with his former Firm and with the SRA and his early and comprehensive admissions. He had not gained personally and indeed had made good the shortfall.

35. The misconduct was so serious that a Reprimand, Fine or Restriction Order would not be a sufficient sanction to protect the public or the reputation of the profession from future harm by the Respondent. The misconduct was at the highest level and the only appropriate sanction was a Strike Off. The protection of the public and of the reputation of the profession demanded nothing less.

36. The Tribunal considered whether there were any exceptional circumstances that would make such an order unjust in this case. The Tribunal had regard to the Respondent's personal circumstances both at the material time and subsequently. The Tribunal accepted that the Respondent had found himself in difficult and regrettable circumstances. However these circumstances were not exceptional so as to justify an indefinite suspension. The only appropriate and proportionate sanction was that the Respondent be Struck Off the Roll.

Costs

37. The Applicant sought costs in the sum of £3474.65. This represented a reduction of £494.00 to reflect the fact that the hearing had taken less time than anticipated and the preparation time had also been reduced.

38. In the letter to the Tribunal dated 4 August, the Respondent's solicitors made the following submission:

> "With regard to the SRA's costs, as a result of Mr Smith's decision not to attend the hearing, we anticipate that the hearing may be shorter than the costs schedule anticipates and we trust that the tribunal will reflect this in the order for costs in favour of the SRA. Our client has also asked us to inform the tribunal that he is not in receipt of a regular income and so asks that, if possible, the order for costs payable in three monthly instalments, the first payment being made 30 days after the hearing date and at 30 day intervals thereafter."

39. The Tribunal considered the Applicant's schedule of costs which had been amended to take account of the factors identified by the Respondent in terms of the length of the hearing. The Tribunal was satisfied that the costs claimed were reasonable and proportionate.

40. The Respondent had not filed a personal financial statement supported by a statement of truth, a direction having been made by the Tribunal on 21 June 2016 that if he wished his finances to be taken into account he should file this by 4pm on 29 July 2016. In those circumstances the Tribunal was unable to consider any reduction of the level of costs as it had insufficient information about the Respondent's financial position. As to the Respondent's request to pay the costs in instalments, this was a matter that the Respondent would need to address directly with the SRA.

Statement of Full Order

41. The Tribunal Ordered that the Respondent, DAVID EDWARD 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 £3,474.65.

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

K.W Duncan
Chairman