SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11558-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

MICHAEL DAVIS Respondent

Before:

Mr A. N. Spooner (in the chair)
Mr M. N. Millin
Mrs N. Chavda

Date of Hearing: 17 May 2017

Appearances

Jonathan Goodwin, solicitor advocate of Jonathan Goodwin Solicitor Advocate Ltd, 69 Ridgewood Drive, Pensby, Wirral, CH61 8RF, for the Applicant.

The Respondent did not appear and was not represented.

JUDGMENT

Allegations

The Allegations against the Respondent were set out in the Rule 8 Statement. The Respondent had previously been described as the Second Respondent prior to the severance of his case from that of the First Respondent.

1. The Allegations against the Respondent, who was not a solicitor and who was, at the material time, employed by the First Respondent's practice, were that he had been guilty of conduct of such a nature that in the opinion of the SRA it would be undesirable for him to be employed by a solicitor in connection with his or her practice as a solicitor in that he:

1.1 intimated and pursued personal injury claims in circumstances where the purported client(s):

a) had not returned signed client retainers, signed Conditional Fee Agreements ("CFAs") or any other written confirmation of instructions stating they wished the firm to act on their behalf; and /or

b) had notified the firm they did not wish to pursue a personal injury claim,

and in so doing he breached Principles 2 and/or 6 of SRA Principles 2011 ("the Principles").

1.2 he made representations to Third Party Insurers ("TPIs") which were inaccurate and misleading and in so doing, he breached Principles 2 and/or 6 of the Principles.

Documents

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

Applicant

- Application and Rule 8 Statement with exhibit JRG/1 dated 23 September 2016

Respondent

- Respondent's Answer to the Rule 8 Statement dated 29 December 2016
- Statement of Respondent dated 29 December 2016
- Respondent's Statement of Means dated 29 December 2016

Preliminary Matters

Absence of the Respondent

3. The matter was originally listed on 16 May 2017 with a time estimate of three days. On that occasion the case against the First Respondent had been adjourned and the cases had been severed. The Respondent had not attended the Tribunal but had participated in part of that hearing by telephone. The Respondent had told the Tribunal that it was not his intention to attend the substantive hearing as he did not

intend to pursue a career in law any further. It was not cost-effective for him to attend a three-day hearing in those circumstances.

4. Having directed that the Respondents' cases be severed, the Tribunal had indicated its intention to hear the matter against the Respondent the following day. This was to give the Respondent an opportunity to reconsider his decision not to attend the hearing. The Respondent had continued to participate by telephone while this was being explained. The Chair made clear to the Respondent that the Tribunal did not have the power to compel his attendance but that were he to attend this may assist both the Tribunal and the Respondent. There would be questions that would be dealt with at the substantive hearing, including, if applicable, costs. The Respondent confirmed that he understood that it was in his interests and the Tribunal's interests for him to attend but his position remained the same and he would not be attending. The Respondent had confirmed that he did not require the attendance of any of the Applicant's witnesses. The Respondent was informed that the case would be heard at 10am the following day.

5. The Respondent did not attend on 17 May 2017 and the Tribunal considered whether to proceed in his absence.

6. The Tribunal concluded the Respondent was clearly aware of the date of the hearing and Rule 16(2) of the Solicitors (Disciplinary Proceedings) Rules ("SDPR") was therefore engaged. On the basis of the remarks made by the Respondent on the telephone the previous day, the Tribunal was satisfied that the Respondent was aware that the matter was listed for a substantive hearing.

7. The Tribunal concluded the Respondent had deliberately absented himself, which was consistent with his stated intention. There would be no benefit in adjourning the matter as the Respondent had made it clear that he would not attend any hearing on a subsequent listing. It was not in the interests of justice to delay the case further in circumstances where the Respondent had told the Tribunal directly that he had no intention of attending.

8. In the circumstances the Tribunal was satisfied that it was appropriate to proceed to hear the application in the absence of the Respondent. Mr Goodwin was reminded of his duty to bring to the Tribunal's attention any points that the Respondent may have raised had he attended and to address them fully.

Factual Background

9. The Respondent, at all material times, was employed as a clerk by CSL ("the Firm"). On 10 June 2016 the First Respondent informed the SRA that the Respondent was no longer employed by the Firm.

10. The Forensic Investigation Department ("FI") of the SRA carried out an inspection of the books of account and other documents of the Firm commencing on 28 April 2014 and produced a Report dated 27 November 2014 ("the FIR"). The Investigation Officer ("IO") reviewed 36 personal injury client matter files and noted that in 22 of the client matters the Firm had failed to obtain signed client retainers, signed CFAs, or any other written confirmation of instructions from clients stating they wished the

Firm to act on their behalf. In 22 of the client matters the client had notified the Firm that they did not wish the Firm to pursue a personal injury claim. In two matters, the clients had informed the Firm that they had not given their instructions and did not wish the Firm to pursue personal injury claims on their behalf.

11. Contrary to those instructions the Firm pursued the claims and received damages on their behalf. The IO identified that the Firm completed claim notification forms ("CNF's") on behalf of clients who had indicated they had not instructed the Firm to pursue personal injury claims.

12. Sections L and N of the CNFs confirmed to TPI's that the client(s) had entered into CFAs and that the Firm was acting as the claimant's solicitor.

13. It was noted that representations were made to TPIs indicating the clients would be attending medical examinations, with subsequent attempts to obtain pre-medical offers in circumstances where the client(s) had cancelled instructions to the Firm and had no intention of attending a medical examination.

MA

14. The Firm acted in the personal injury matter of MA, the fee earner responsible being the Respondent. On 1 July 2013 the Firm completed a telephone confirmation sheet which represented the Respondent's discussion with MA at the outset of the case. This recorded the circumstances of the road traffic accident and the details of the defendant driver. On 26 July 2013 the medical appointment agency wrote to the Firm and notified them that they had received "communication from your client that they no longer wish to pursue their personal injury claim". On 9 August 2013 the TPI wrote to the Firm acknowledging receipt of MA's CNF, admitting liability and releasing a payment of stage one costs in the sum of £240. The Firm did not inform the TPI that MA was not pursuing a personal injury claim. On 9 August 2013 the Firm wrote to MA stating "further to your previous instructions, we confirm that we previously closed off your file of papers. However, before doing so we had already submitted details of your claim to the defendant insurers. We are legally obliged to inform you of any offers which we receive and confirm that we have today received an offer from the defendant to settle your claim for personally (sic) injuries in the sum of £1000...After deducting 25% of your damages in respect of our costs plus £212 in respect of the After The Event insurance policy, you will receive the net sum of £538".

15. On 22 August 2013 the TPI forwarded the damages cheque in the sum of £1,000 to the Firm. On 4 September 2013 the Firm received a telephone call from solicitors acting on behalf of MA. They notified the Firm that MA had attended their offices with the damages cheque in the sum of £538. The file note recorded that she had advised her solicitors that she "has never instructed us to act on her behalf. The client has said that she has never signed any paperwork or accepted any offers and is therefore unsure why she has received a payment".

GR

16. The Firm acted in the personal injury matter of GR and fee earner responsible was the Respondent. On the electronic file there was an email dated 5 August 2013 from an associate solicitor of the Firm to the Respondent stating "hi, this client has emailed to cancel. He asked not to be contacted again". A file note dated 6 August 2013 recorded "Client has cancelled, please cancel any arranged sign ups".

17. Following this cancellation, the Firm continued to process a personal injury claim on his behalf and on 12 September 2013, the TPI wrote to the Firm making a premedical offer of £1250. On 18 September the Firm wrote to GR informing him that he would receive the net sum of £725.50. On 10 October 2013 the Firm accepted the offer and in a statement of truth declared that they were authorised by the claimant to sign the statement. On 25 October 2013 the Firm again wrote to GR enclosing the cheque in the sum of £725.50. On 6 November 2013 GR wrote to the Firm objecting to the suggestion that the Firm had settled his claim and confirming that he did not agree or consent to any claim being made.

WR

18. The Firm acted in the personal injury matter of WR and the fee earner responsible was the Respondent. On 22 October 2013 Firm wrote to WR confirming that they were willing to act for him in his claim against the defendant driver in this matter. On 18 November 2013 WR emailed the Firm in the following terms:

> "To whom it may concern!! A medical has been arranged for me, under your companies instruction, with [SM]...This I confirm I have in writing!! I would like to know who gave you authority to make this arrangement? I had had no contact with [CSL]!! I wish to make it absolutely clear that I have not and do not have anything to do with this fraudulent action!!...In my opinion, your action is no more than 'having a punt' at a claim!!"

19. The file was closed and a file closure form was completed by the Respondent who recorded "client has never instructed us to make a claim and has reported us to the SRA… I think we set this one up as a punt".

J Family

20. The Firm acted in the personal injury matters of this family and the fee earner responsible was the Respondent.

21. On 16 July 2013 the medical agency notified the Firm that Mrs J did not wish to pursue a claim on behalf of her child. On 17 July 2013 the Firm wrote to the TPI stating "we anticipate receiving details of our client's medical appointment within the next few weeks. Before we proceed with this, please confirm if you wish to put forward any pre-medical offers on this occasion".

22. On 31 July 2013 the Firm wrote to the medical agency to cancel instructions for medical examinations of three further members of the J family. On the same day the Firm wrote to the TPI and made the same enquiries regarding a pre-medical offer as

in the letter dated 17 July 2013. On 19 August 2013 the Firm closed its file. The Firm's file closure form described the reason for the closure of the file as being "client cancelled. Client advised will report us to Law Society if receives any further calls from us…"

Witnesses

23. None.

Findings of Fact and Law

24. 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.

25. **Allegation 1.1: The Respondent intimated and pursued personal injury claims in circumstances where the purported client(s):**

    a) **had not returned signed client retainers, signed CFAs or any other written confirmation of instructions stating they wished the firm to act on their behalf; and /or**

    b) **had notified the firm they did not wish to pursue a personal injury claim, and in so doing he breached Principles 2 and/or 6 of the Principles**

Applicant's Submissions

25.1 The Applicant submitted that by pursuing and intimating the personal injury claims described above, the Respondent had acted without integrity and had not behaved in a way that maintained the trust the public placed in the provision of legal services. To pursue claims in the absence of instructions and to make representations that were inaccurate and misleading would be objectively viewed as inappropriate and wrong. The test for lack of integrity was an objective one and it was not necessary for the Applicant to prove that the Respondent would have appreciated that his actions would have been viewed as inappropriate, wrong and lacking integrity. The Applicant referred the Tribunal to Scott v Solicitors Regulation Authority [2016] EWHC 1256 (Admin) and the definition in Hoodless &Ors v FSA [2003] UKFSM FSM007 which referred to integrity connoting "moral soundness, rectitude and steady adherence to an ethical code". Scott, endorsing the approach adopted in Solicitors Regulation Authority v Chan &Ors [2015] EWHC 2659 (Admin), distinguished between the objective test for assessing whether a Respondent had lacked integrity and the subjective test which was required when considering allegations of dishonesty.

Respondent's Submissions

25.2 In his Answer to the Rule 5 statement and in his Witness Statement the Respondent admitted that personal injury claims were intimated and pursued were clients had not signed retainers, CFAs or any other written confirmation of instructions stating that they wished the Firm to act on their behalf. He stated this was the practice of the Firm

and he had been told by management and supervisors that as long as there was a completed telephone confirmation sheet then fee earners could proceed with the file based on verbal instructions.

25.3 The Respondent stated that the procedure for progressing files was "quite different to the other firms I had worked at previously". He was assured by his superiors that the Firm was not in breach of any rules in submitting CNFs or progressing the claims generally while the signed retainers were retained by the office. The Respondent stated that another change of procedure to which he was unaccustomed was when he was told by the office manager that the medical reports, when received from the medical agency, should not be sent to clients for their agreement but sent directly to the TPI with a Stage 2 settlement pack in order to seek offers of settlement. The Respondent, and others, had questioned this practice and been told that this was "perfectly acceptable" and that this was how matters were to be dealt with in the future. When this was questioned and discussed further the office manager informed the Respondent that this practice was not in breach of any rules and that if the Respondent refused to comply with the new procedure he was welcome to leave the Firm. This advice came from individuals who were both qualified solicitors and the Respondent did not feel that he had any authority to question their knowledge of the rules or the new directive further. There were other examples of procedures which the Respondent queried, but, again was assured that there was no breach of the rules. The Respondent stated that due to the passage of time he was unable to recall the exact circumstances regarding each of the clients mentioned in the report but stated that he had acted in accordance with office procedures at the time.

25.4 The Respondent denied that his conduct had been of such nature as to make it undesirable for him to be employed by a solicitor in connection with his or her practice as a solicitor.

The Tribunal's Findings

25.5 The Tribunal reviewed the correspondence between the purported clients and the Firm both directly and via the medical agency. There were no signed client retainers on the relevant files nor was there any other written confirmation of instructions stating that they wished the Firm to act on their behalf, indeed they had positively asserted that they did not wish the Firm to pursue such claims. The Respondent had admitted this allegation and the Tribunal was satisfied beyond reasonable doubt that the admission was properly made.

25.6 Intimating pursuing personal injury claims in circumstances where the Firm other had no instructions to do so or had specific instructions not to do so clearly lacked integrity, as defined in Hoodless. The Tribunal accepted the submission that it was an objective test as set out in Chan and Scott. The sort of conduct is completely inconsistent with behaving in a way that maintained the trust the public placed in the provision of legal services as the Respondent had acted without instructions. The fact that it may have been office procedure was obviously a matter of concern but it did not absolve the Respondent of his obligations to act with integrity. The Tribunal found this allegation proved in full beyond reasonable doubt.

26. **Allegation 1.2: The Respondent made representations to TPIs which were inaccurate and misleading and in so doing; he breached Principles 2 and/or 6 of the Principles.**

Applicant's Submissions

26.1 The Applicant submitted that the representations made to the TPI, for example in the case of GR, were inaccurate and misleading. He had made those representations on 23 August 2013 but had known as early as 6 August 2013 that the clients did not wish to pursue a claim. In the case of the J family the Firm had been notified by the medical agency that the appointments being cancelled on 31 July 2013 but nevertheless told the TPIs that they would be receiving details of their client's medical appointment within the next few weeks.

Respondent's Submissions

26.2 The Respondent denied this Allegation as it was his understanding, based on instructions from his supervisors, that he could proceed on the basis of verbal instructions. In respect of the letter 23 August 2013 in the case of GR, the Respondent did not specifically recall this letter but confirmed that it was a standard letter that he used on many occasions. The Respondent was under the impression that even if the clients did not wish to attend a medical appointment, he was under a duty to act in a client's best interests by trying to secure a pre-medical offer from the TPI. He stated that he was not subject to any review, training or disciplinary action to address the situation as this was a common practice of the Firm. The Respondent was responsible for managing up to 400 live cases at any one time and described the office as a "very fast paced environment, very different to the environments I previously worked in". He stated that he was "never entirely comfortable" with the constant change of office procedures while working at the Firm. Many of the changes were communicated verbally rather than in writing. In his witness statement he stated that he was actively seeking alternative employment for the majority of the time he was employed with the Firm. He continued "in relation to the allegations levied against me and my conduct, whilst I accept the findings contained within the SRA report I wish to make it known that I was only following directives given to me by [AC] and [the office manager]".

The Tribunal's Findings

26.3 In the case of GR the Respondent had specially stated on 6 August 2013 "Client has cancelled; please cancel any arranged sign ups". On 23 August 2013 he had written to the TPI "We anticipate receiving details of our client's medical appointment within the next few weeks". The effect of this letter was that the impression was given that the Firm was instructed by GR, that the instructions were continuing and that there was a medical appointment expected in the coming weeks. None of that was correct and accordingly the letter of 23 August 2013 was wholly inaccurate and entirely misleading.

26.4 In the case of the J family the Firm was informed on 16 July 2013 that there was to be no claim in respect of Mrs J's child. Despite this, a letter in the same terms as GR was sent to the TPI the next day. On 31 July 2013 the Firm cancelled instructions to the medical agency in respect of the whole family but simultaneously wrote to the TPI

inviting a pre-medical offer and stating that medical appointments were expected in the coming weeks. Again, this was completely misleading and was the polar opposite of the reality of the position.

26.5 Making misleading and wholly inaccurate representations to TPIs, in this case repeatedly, clearly lacked integrity. Trust in the profession depended on representations being made by firms of solicitors to be accurate and reliable. The representations made by the Respondent were wholly inconsistent with behaving in a way that maintained the trust the public placed in the provision of legal services. The Tribunal found this allegation proved in full beyond reasonable doubt.

Application for an Order under Section 43 Solicitors Act 1974 ("the Act")

27. The Tribunal referred to its Guidance Note on Sanctions (December 2016) when considering whether to make an order under Section 43(2) of the Act in accordance with Section 43(1) and (1A) of the Act.

28. The Tribunal was mindful of the fact that such an Order was regulatory, not punitive and its purpose was to enable the regulator to exercise control over the employee.

29. The Tribunal noted all that the Respondent had submitted in his Answer and his Witness Statement. He may well have been in an invidious position but he had considerable experience, having worked in the legal sector for nearly 25 years. This was reflected in the fact that he acknowledged that the procedures he was following were a departure from normal practice. He may have lacked formal training and not been adequately supervised while at the Firm but he clearly knew the difference between what was ethical and what was not, and even if he did not, that would be equally troubling.

30. The Tribunal was satisfied that it would be undesirable for him to be employed by a solicitor in connection with his or her practice as a solicitor without the permission of the SRA. This was necessary for the protection of the public and the reputation of the profession.

Costs

31. The Applicant applied for costs in the sum of £5,400. The Applicant had not filed and served an up to date schedule of costs, which it had been directed to do by 9 May 2017. The figure had been calculated by taking the figure contained in the costs at the date of issue, which had been served on the Tribunal and the Respondent, and attributing 15% to the Respondent. The original costs at the date of issue had related to two Respondents, one of whom was awaiting a substantive hearing, his case having been severed from this Respondent. The reason for the lack of a schedule was that much of the preparation time had been taken up preparing for the adjournment application

32. The Respondent had provided a statement of means on 29 December 2016 but had not provided any update since then. The Applicant told the Tribunal that the Respondent was no longer working for CSL and they could not say if he was now in employment

or not. The Applicant also noted that the statement of means did not contain information about the Respondent's savings.

The Tribunal's Decision

33. The Tribunal noted that both parties were in default of the directions made by the Tribunal. The Applicant's reasoning that the adjournment application had precluded the preparation of a cost schedule was not impressive.

34. However the Tribunal had to balance that against the fact that it had made findings against the Respondent, who had denied one of the Allegations and had opposed the making of a Section 43 Order.

35. In the circumstances the fairest and most appropriate approach was to order the Respondent to pay costs fixed in the sum of £2,000.

Statement of Full Order

36. The Tribunal Ordered that as from the 17th day of May 2017 except in accordance with the permission of the Solicitors Regulation Authority:-

(i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor MICHAEL DAVIS;
(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice the said Michael Davis
(iii) no recognised body shall employ or remunerate the said Michael Davis;
(iv) no manager or employee of a recognised body shall employ or remunerate the said Michael Davis in connection with the business of that body;
(v) no recognised body or manager or employee of such a body shall permit, the said Michael Davis to be a manager of the body;
(vi) no recognised body or manager or employee of such a body shall permit the said Michael Davis to have an interest in the body;

And the Tribunal further Ordered that the said Michael Davis do pay the costs of and incidental to this application and enquiry fixed in the sum of £2,000.00.

Dated this 6th day of June 2017
On behalf of the Tribunal

M. N. Millin, Solicitor Member
pp On behalf of A. N. Spooner, Chairman

Judgment filed
with the Law Society
on 06 JUN 2017