SOLICITORS DISCIPLINARY TRIBUNAL

Case No. 11684A-2017

IN THE MATTER OF THE SOLICITORS ACT 1974 (as amended)

BETWEEN:

SOLICITORS REGULATION AUTHORITY — Applicant

and

DANIEL CLARKE — Respondent

Before:

Mrs J. Martineau (in the chair)
Mr W. Ellerton
Mr M. Palayiwa

Date of Hearing: 22 January 2018

Appearances

Rory Mulchrone, Counsel of Capsticks Solicitors LLP, 1 St George's Road, Wimbledon, London SW19 4DR for the Applicant.

The Respondent represented himself.

JUDGMENT

Allegations

1. The allegation against the Respondent, who was not a solicitor, made by the Solicitors Regulation Authority ("SRA") was 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 involved in a legal practice, in that he:

1.1 Whilst employed as a legal cashier at Geoffrey Parker Bourne Limited ("the Firm") between October 2010 and 1 August 2011 and GPB Solicitors LLP ("the Successor Firm") between 2 August 2011 and 13 February 2013, made transfers from client account to office account other than in the circumstances allowed under Rule 22 of the Solicitors Accounts Rules 1998 ("SAR 1998") and/or Rule 20 of the Solicitors Accounts Rules 2011 ("SAR 2011") and in doing so breached Rules 1.02, and 1.06 of the Solicitors Code of Conduct 2007 ("SCC") and Principles 2, 6, 7 and 10 of the SRA Principles 2011 ("the Principles").

2. Dishonesty was alleged in relation to allegation 1.1. However dishonesty was not an essential ingredient for proof of that allegation.

Documents

3. The Tribunal reviewed all the documents submitted by the parties, which included:

- Notice of Application dated 28 June 2017
- Rule 5 and Rule 8(5) Statement and Exhibit LXS1 dated 28 June 2017
- Applicant's Schedule of Costs dated 19 January 2018

Factual Background

4. The Respondent was not a solicitor and his name had never appeared on the Roll of Solicitors. At all material times the Respondent was employed by the Firm until August 2011, and the Successor Firm from August 2011 until his resignation on 16 May 2013. He was employed by the Firm in the accounts department. He was the Finance Co-ordinator from September 2010 until his resignation.

5. The Firm was established on 1 October 2009 and operated as a Legal Disciplinary Practice. The Firm ceased practice and transferred its business to the Successor Firm on 2 August 2011.

6. The SRA provided notice of a forensic investigation on 13 May 2013. On 16 May 2013, the Respondent submitted his resignation. The letter of resignation stated:

> "I hereby offer my resignation from my position as finance co-ordinator at GPB Solicitors.
>
> In order to keep the firm running I have gone above and beyond the remit of my role and have consistently utilised client's monies to pay bills, wages and anything else that kept the firm going.

> I have acted on my own in the above and ensured that no-one else knew of my actions.
>
> I will stress that I have not benefitted personally from my actions but thought that, in the long run, I was doing what was necessary.
>
> I realise that my actions have put both you and the firm in a very difficult position and I am sincerely sorry for this.
>
> I would be grateful if you would accept this resignation with immediate effect."

7. On 20 May the SRA inspection commenced. An Interim Forensic Investigation Report dated 9 September 2013 was produced ("the Interim Report") with the Final Forensic Investigation Report ("the Final Report") being produced on 4 August 2014. The Interim Report revealed a shortage on client account as at 30 April 2013 in the sum of £1,681,044.96.

8. On 8 October 2013, the Adjudication Committee of the SRA resolved to intervene into the Firm. The intervention took place on 9 October 2013.

9. The Respondent was interviewed by the FI Officer on 22 August 2013. In that interview the Respondent again stated that he had made all of the transfers in the knowledge that they were in breach of the accounts rules.

10. The Final Report identified breaches of the SAR 1998 and the SAR 2011, in that significant sums of money had been transferred from client account to the office account to pay for shortfalls in office account. Those transfers had created a shortage on the client account.

11. On 30 June 2015, the Respondent emailed the SRA attaching a revised statement of events. He explained that the revised statement was "significantly at odds to my previous explanation to the forensic investigators in my earlier interview". The revised statement of events explained that he had not instigated the improper transfers – he had been instructed to do so by Tony Kirton ("TK")[1], who was the CEO, and SF, a financial advisor. He complied with those instructions as he did not want to lose his job. He also wanted to ensure that staff were paid and retained their jobs. When it became evident that the Firm's auditors would discover that the client account was significantly overdrawn, TK instructed the Respondent to export the report that was to be provided to the auditors to excel and delete the overdrawn matter. He "objected vehemently to this and stated that this would not only be a huge breach but that it was a lie that could not be sustained". Despite those objections the Respondent was told "without any doubt at all" that he had no choice and that he "did not even have the luxury of walking away any more" as he was "complicit in the previous transfers."

[1] Tony Kirton, Simon Newbold, Zakia Khalid, Roy George and Adrian Organ were formerly Respondents in this matter. Their case was dealt with by way of an Agreed Outcome on 12 January 2018 Case No. 11684-2017.

12. The Respondent explained that when the letter advising of the SRA's inspection was received it was clear that everything was going to be uncovered. The Respondent was told that the Firm would have no choice but to sue him personally for his actions and that the auditors would also sue him owing to the fact that he had hidden information from them that was vital to the audit. TK offered him the alternative of writing a letter of resignation stating that he had acted alone and had hidden the shortfall from the management of the Firm and from the auditors. TK offered him £200,000 to accept the offer; if he did so the SRA would not intervene, the staff would keep their jobs and the insurance company would have to pay out to cover the client account shortfall. The Respondent agreed to take the blame and the money offered. He did not receive the money, and had no contact with TK once he resigned. He did not tell anyone the truth even after the intervention as he was frightened of the consequences of admitting that he had already lied as well as the actions that he was forced to undertake. He had made no personal gain from the transactions.

Witnesses

13. The following witnesses provided statements and gave oral evidence:

- Ms Carolann Shimmin – Forensic Investigation Officer
- Daniel Clarke – the Respondent

Findings of Fact and Law

14. 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.

15. **Allegation 1.1 - Whilst employed as a legal cashier at the Firm between October 2010 and 1 August 2011 and the Successor Firm between 2 August 2011 and 13 February 2013, made transfers from client account to office account other than in the circumstances allowed under Rule 22 of the SAR 1998 and/or Rule 20 of the SAR 2011 and in doing so breached Rules 1.02, and 1.06 of the SCC and Principles 2, 6, 7 and 10 of the Principles.**

15.1 Rule 22 of the SAR 1998 stated that:

> "(1) Client money may only be withdrawn from a client account when it is:
>
> (a) properly required for a payment to or on behalf of the client (or other person on whose behalf the money is being held);
>
> (b) properly required for payment of a disbursement on behalf of the client or trust;
>
> (c) properly required in full or partial reimbursement of money spent by the solicitor on behalf of the client or trust;
>
> (d) transferred to another client account;

(e) withdrawn on the client's instructions, provided the instructions are for the client's convenience and are given in writing, or are given by other means and confirmed by the solicitor to the client in writing;

(ea) transferred to an account other than a client account (such as an account outside England and Wales), or retained in cash, by a trustee in the proper performance of his or her duties;

(f) a refund to the solicitor of an advance no longer required to fund a payment on behalf of a client or trust (see rule 15(2)(b));

(g) money which has been paid into the account in breach of the rules (for example, money paid into the wrong separate designated client account) - see paragraph (4) below;

(ga) money not covered by (a) to (g) above, where the solicitor complies with the conditions set out in rule 22(2A); or

(h) money not covered by (a) to (g) above, withdrawn from the account on the written authorisation of the SRA. The SRA may impose a condition that the solicitor pay the money to a charity which gives an indemnity against any legitimate claim subsequently made for the sum received."

15.2 Rule 20 of the SAR 2011 stated that:

"Client money may only be withdrawn from a client account when it is:

(a) properly required for a payment to or on behalf of the client (or other person on whose behalf the money is being held);

(b) properly required for a payment in the execution of a particular trust, including the purchase of an investment (other than money) in accordance with the trustee's powers;

(c) properly required for payment of a disbursement on behalf of the client or trust;

(d) properly required in full or partial reimbursement of money spent by you on behalf of the client or trust;

(e) transferred to another client account;

(f) withdrawn on the client's instructions, provided the instructions are for the client's convenience and are given in writing, or are given by other means and confirmed by you to the client in writing;

(g) transferred to an account other than a client account (such as an account outside England and Wales), or retained in cash, by a trustee in the proper performance of his or her duties;

(h) a refund to you of an advance no longer required to fund a payment on behalf of a client or trust (see rule 14.2(b));

(i) money which has been paid into the account in breach of the rules (for example, money paid into the wrong separate designated client account) - see rule 20.5 below;

(j) money not covered by (a) to (i) above, where you comply with the conditions set out in rule 20.2; or

(k) money not covered by (a) to (i) above, withdrawn from the account on the written authorisation of the SRA. The SRA may impose a condition that you pay the money to a charity which gives an indemnity against any legitimate claim subsequently made for the sum received."

The Applicant's Submissions

15.3 The utilisation of client account monies for the running of a firm was not permitted by the accounts rules and thus the Respondent had breached Rule 22 of the SAR 1998 and Rule 20 of the SAR 2011 as alleged. In his letter of resignation, the Respondent admitted that he had used client monies in breach of the prevailing accounts rules. The improper transfers made by the Respondent had commenced in 2010, and had continued until 2013. It was noted that the accounts reports for the years 2010-2011 and 2011-2012 were qualified for a number of reasons, including that office account credit balances had resulted from the transfer of monies from client account before a bill was raised. It was submitted that those transfers were also improper as Rule 19.2 of the SAR 1998 and Rule 17.2 of the SAR 2011 required that monies for payment of a solicitor's fees could only be properly required where a bill of costs, or other written notification of the costs incurred, had been sent to the client before any payment was taken.

15.4 The amount of client monies that had been misappropriated was significant. In making the improper transfers, the Respondent had put a significant amount of client money at risk. There was no guarantee that the monies were going to be repaid either by the Firm/Successor Firm or its insurers. In placing client monies at risk in that way, the Respondent had failed to protect client monies and assets in breach of Principle 10, and had undermined the trust the public placed in him and in the legal profession in breach Principle 6 and Rule 1.06. The Respondent was fully aware of the accounts rules and the permitted uses for client monies. In his interview of 22 August 2013, he confirmed that he had "read all of the solicitors accounts rules". In breaching the rules the Respondent had plainly failed to comply with his legal and regulatory obligations in breach of Principle 7.

15.5 In considering whether the Respondent's conduct lacked integrity, the appropriate test was that endorsed in the case of Newell-Austin v SRA [2017] EWHC 411 (Admin), in that a lack of integrity meant the failure to steadily adhere to a moral code. The Respondent was aware of the sacrosanct nature of client monies. Notwithstanding that knowledge he repeatedly and deliberately breached the accounts rules so as to support the company. This conduct clearly lacked integrity irrespective of his assertion that he was instructed to make the transfers by TK.

The Respondent's Submissions

15.6 The Respondent admitted that he had breached the accounts rules, Principles 6, 7 and 10 and Rule 1.06 as alleged. The Respondent denied that he had acted without integrity in breach of Rule 1.02/ Principle 2. It was TK's conduct that lacked integrity; the Respondent was simply the tool by which that lack of integrity was demonstrated. He had no option but to carry out the instructions he received as TK was his boss and any failure to comply would result in the loss of his employment. He made the transfers and amended the report going to the auditors as he was under duress, and as such had taken actions that he would not normally take. As regards the resignation letter, he was instructed to write that by TK. He agreed to do so in the hope that it would mean that the company would not be the subject of an intervention by the SRA and thus his colleagues would retain their employment.

15.7 In his statement dated 16 February 2016, the Respondent explained that on receipt of a letter from the SRA in May 2015, he "realised that these allegations were not going away" and he was advised to "do what is morally right for myself, for the SRA, for the insurance people and for the other people that are involved". He apologised for not telling the truth in his interview with the FI Officer. He felt that at the time if he had said that it was TK, TK would have said that there was no evidence that TK had conducted the transfers or instructed that the transfers be made, whereas there was evidence that the Respondent had made all the transfers. In his oral evidence the Respondent explained that he had realised that no-one would accept that the management, and in particular TK who was the 51% shareholder, had no knowledge of the deficit. Such a position was farcical. It was simply not feasible that TK did not notice that £1.6 million was missing from the client account; indeed, he was fully aware as he had directed the withdrawal of those monies. Further, an examination of the client matters would have shown that there were debit balances in relation to matters at the Firm's former Nottingham office which had been run by TK. The Respondent had not made any transfers in relation to Nottingham clients. Further, it was TK who had signed the transfer forms.

The Tribunal's Findings

15.8 The Tribunal found that the Respondent had breached the accounts rules, Principles 2, 7 and 10 and Rule 1.06 on the facts, evidence and the admission of the Respondent. The Tribunal then considered the allegation that the Respondent's conduct was lacking in integrity contrary to Rule 1.02/Principle 2.

15.9 The Tribunal noted that in his interview, when the FI Officer commented that "… in hindsight you probably wouldn't have taken the actions you did" the Respondent replied:

> "No, I don't know whether that's actually true … if, in hindsight, it had saved the company or the employees from not getting paid for a few months, then yeah, I probably would [although not to the amount of £1.6 million] … if I had been asked at the time [to] … borrow £12,000 to pay the wages for one month and we know that at the end of the month there's gonna be money there to put it back and its only one month, then to be honest, I think that, **I know it's the wrong thing to do,** but I also balanced that with my loyalties to my

colleagues, I wanted them to be paid on time and in full at the time." (**The Tribunal's emphasis)**.

15.10 Whilst the Respondent asserted that he had not told the FI Officer the truth during his interview as he felt he had to stick to the story contained in his resignation letter, the above comments were made at the conclusion of the interview, when the Respondent had already accepted full responsibility for the transfers. The Tribunal considered that irrespective of any duress that the Respondent asserted he was subject to, he had the opportunity to state at that time that he would not have breached the rules again in the same way. On the contrary, it was clear that the Respondent would put his loyalties to his colleagues above his regulatory obligation to protect client monies. That this approach was lacking in integrity was self-evident.

15.11 The Respondent acknowledged that his actions were a very serious breach of the accounts rules, and he knew that to be the case at the time the transfers were made. During cross-examination he accepted that he could have resigned or reported matters to the COFA or a senior solicitor, but that instead he had made the transfers as instructed. The Tribunal determined that notwithstanding any duress, the Respondent had other avenues open to him which he did not pursue. The Tribunal found that even if, on his case, he was subject to bullying and duress by TK, transferring significant sums of client money in the knowledge that it was improper to do so was clearly conduct which lacked integrity. The Respondent had placed the interests of his colleagues and the retention of his employment above the interests of clients and the protection of client monies. The fact that the Respondent asserted that he was, in effect, made to do so, did not absolve him of culpability for his conduct. No employee who transferred client monies in knowing breach of the rules could be said to have acted with integrity. The Tribunal found that the Respondent had failed to act with integrity in breach of Rule 1.02/Principle 2. Accordingly, the Tribunal found allegation 1.1 proved beyond reasonable doubt.

16. **Dishonesty**

<u>The Applicant's Submissions</u>

16.1 The appropriate test for dishonesty was that formulated by Lord Hughes in <u>Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)</u> [2017] UKSC 67:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

16.2 The Respondent had made the transfers in the full knowledge that those transfers were improper; he had deliberately and consciously used client money to support the business. He clearly knew that his actions were wrong – he had admitted that in his interview, and in his statement of 16 February 2016. He had also deleted the matter listings from the report going to the auditors so as to conceal the negative balances. Reasonable and honest people would consider that it was dishonest for an employee of a solicitors firm to support the ongoing running of the firm by utilising client monies to do so, and in breach of the accounts rules.

The Respondent's Submissions

16.3 The Respondent denied that his conduct had been dishonest. Any dishonesty was that of TK, the Respondent was simply doing as instructed by TK who was his boss. The Respondent emphasised that he had not benefitted personally from the improper transfers. When he had objected to the removal of the negative balance client matters from the report that was to be sent to the auditors, he was told without any doubt that he had no choice and that he was already complicit as a result of making the transfers. The Respondent explained that the removal of the matters with negative balances was done "against my will and against my better judgment". During cross-examination, whilst admitting that he knew that the money being transferred was client money that did not belong to the company, the Respondent denied that he had acted dishonestly, as he was acting on instructions. He also accepted that he was the one that had exported matters to excel and then removed the negative balance matters, and that this exercise was conducted so as to conceal the negative balance matters from the auditors. It was put to the Respondent that in using the word "lie" in his statement, it was clear that he understood that he had been dishonest. The Respondent explained that the "lie" was perpetrated by TK; it was TK's lie, not the Respondent's.

The Tribunal's Findings

16.4 The Tribunal agreed that the correct test to be applied when considering dishonesty was that formulated by Lord Hughes in Ivey. The Tribunal determined that it was plain from the Respondent's evidence that he was aware at the time that the transfers made by him were in flagrant breach of the accounts rules; indeed that was admitted by the Respondent. The Tribunal considered that even on his own case, the Respondent had options other than to comply with instructions from his CEO which involved him committing dishonest acts. He had failed to report to anyone at the company the instructions he was receiving, he had not resigned, nor had he simply refused. Even when he had objected strongly to instructions on the basis that what would be produced would be a "lie", he had acted as instructed. The Tribunal did not accept that duress of the nature the Respondent asserted that he suffered was sufficient to exonerate him from responsibility or culpability for his actions. Whilst other options may have caused the Respondent some difficulty, they were nevertheless open for him to take. Taking the Respondent's case at its highest, he had complied with instructions that resulted in his having to commit dishonest acts. The Tribunal found that reasonable people, operating ordinary standards of honesty, would find that using client money to keep a business afloat, in the knowledge that client money was not permitted to be used for that purpose, was dishonest. The Tribunal determined that this would be the case even if members of the public accepted that the Respondent's version of events was true, and that he had been under duress. Whilst

members of the public may well have had sympathy for his position, they would not condone his actions. Accordingly the Tribunal found beyond reasonable doubt that the Respondent's conduct had been dishonest.

Previous Disciplinary Matters

17. None

Mitigation

18. The Respondent had accepted that he had breached the accounts rules as pleaded. The allegations had preyed on his mind and he had been suffering emotional distress and financial hardship for the last 5 years, and had been subject to abuse from former colleagues. He had never benefitted financially from the funds that had been improperly transferred, and had only acted in that way due to the instructions received from TK. At the time he viewed TK as a persuasive and powerful man, who had the ability to end his employment if he did not comply. The Respondent submitted that looking back with the benefit of hindsight, he now realised that he should have resigned. The Respondent accepted that he should be made the subject of an order under Section 43 of the Solicitors Act 1974 (as amended) ("a Section 43 Order").

Sanction

19. The Tribunal had regard to the Guidance Note on Sanctions (5th Edition-December 2016). The Tribunal's overriding objective, when considering sanction, was the need to maintain public confidence in the integrity of the profession. In determining sanction, it was the Tribunal's role to assess the seriousness of the proven misconduct and to impose a sanction that was fair and proportionate in all the circumstances.

20. The Tribunal found that the Respondent's motivation for his misconduct was to retain his employment and that of the other members of staff, and to prevent the company from closing. The Tribunal found that the Respondent was not motivated by personal gain; there was no self-enrichment as a result of his actions. His actions were not spontaneous and were in breach of the trust placed in him as a custodian of client monies. He was directly responsible, as he knowingly made the improper transfers. The Respondent was experienced in legal accounts, having worked in the finance department since 2007 and being promoted from a legal cashier through to being the Finance Co-ordinator. He had read the accounts rules, and was aware of the regulatory and legal requirements in regards to client monies.

21. The Respondent's conduct had caused a high level of harm to the reputation of the profession and had diminished the trust the public placed in the provision of legal services. There was always harm to the reputation of the profession when client monies were used for purposes other than those permitted by the rules. Client monies were sacrosanct and the rules were in place to ensure that such monies gained maximum protection. In making the improper transfers the Respondent knew that he would cause damage to the reputation of the profession.

22. The Respondent's conduct was aggravated by his proven dishonesty. His conduct had been deliberate and regularly repeated over approximately 3 years. The Respondent had sought to conceal that conduct by providing the auditors with a report which omitted the negative balance matters. He was conscious of his impropriety at the time, and was also conscious that his actions were in material breach of his obligation to protect the public and the reputation of the profession.

23. The Tribunal considered that the Respondent had shown some insight into his misconduct – he had never sought to resile from his admission that he made the transfers and that he knew that to do so was improper. His admissions to breaching the accounts rules were made immediately. He accepted that having breached those rules, he ought to be subject to a Section 43 Order.

24. The Tribunal considered that a Section 43 Order was necessary to protect the public and the reputation of the profession. The Tribunal determined that given its finding of dishonesty, it was highly unlikely that the Respondent would obtain permission from the SRA to return to work in a legal practice. Having removed his ability to work in that way, it would be unfair and disproportionate to impose a financial penalty in addition to a Section 43 Order. Accordingly, the Tribunal ordered that the Respondent be subject to a Section 43 Order.

Costs

25. Mr Mulchrone applied for costs in the sum of £15,286.20. This amount took into account the costs ordered by the Tribunal in relation to others who had been severed from this case by way of an Agreed Outcome. The costs were proportionate given that the Respondent was the only one to proceed to trial, and were in fact less than his share of the actual costs incurred. The fees charged by Capsticks to the SRA were based on the complexity of the case overall.

26. The Tribunal determined that this had not been a complex matter. It noted that the other Respondent's had been ordered to pay costs on a joint and several basis. If those costs were shared equally amongst those Respondents, their liability would be £10,600.00 each. The issues in relation to this Respondent were narrow, and were not complex in nature. The Tribunal was taken to a very small number of the documents contained in the hearing bundle. The Tribunal determined that the nature of this case was such that costs in the sum claimed were excessive. In considering the complexity of the facts, the issues to be determined and the time it would take to prepare for the hearing, the Tribunal found that the reasonable and proportionate amount of costs for this matter was £7,500.00.

Statement of Full Order

27. The Tribunal Ordered that as from 22nd January 2018 except in accordance with Law Society permission:-

    (i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor DANIEL CLARKE;

(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice the said Daniel Clarke;

(iii) no recognised body shall employ or remunerate the said Daniel Clarke;

(iv) no manager or employee of a recognised body shall employ or remunerate the said Daniel Clarke in connection with the business of that body;

(v) no recognised body or manager or employee of such a body shall permit the said Daniel Clarke to be a manager of the body;

(vi) no recognised body or manager or employee of such a body shall permit the said Daniel Clarke to have an interest in the body;

And the Tribunal further Ordered that the said Daniel Clarke do pay the costs of and incidental to this application and enquiry fixed in the sum of £7,500.00.

Dated this 31st day of January 2018
On behalf of the Tribunal

Jane Martineau

J. Martineau
Chair