

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 11781-2018

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

MICHAEL DAVID SCHWARTZ

Respondent

Before:

Mr J. A. Astle (in the chair)

Mr S. Tinkler

Mr M. Palayiwa

Date of Hearing: 26 July 2018

Appearances

There were no appearances as the matter was dealt with on the papers.

JUDGMENT ON AN AGREED OUTCOME

Allegations

1. The Allegations against the Respondent made by the Applicant were that he:
 - 1.1 Filed at the Solicitors Disciplinary Tribunal and served on the SRA a witness statement dated 22 December 2016, for the purposes of a hearing listed to consider an application made by him to vary the restrictions which were placed on his practice as a solicitor by the Solicitors Disciplinary Tribunal on 9 September 2016, which he knew contained false and/or misleading information. In so doing he breached all or alternatively any of Principles 1, 2 and 6 of the SRA Principles 2011 and failed to achieve Outcome 5.1 of the SRA Code of Conduct 2011.
 - 1.2 Deliberately and knowingly breached the restrictions which were placed on his practice as a solicitor by the Solicitors Disciplinary Tribunal on 9 September 2016. He did this by appearing in Court on behalf of Toussaint & Co Solicitors on 14 September 2016 in circumstances where he was aware of the restriction imposed by the Tribunal requiring him to seek prior approval of the SRA before working for Toussaint & Co Solicitors. In so doing he breached all or alternatively any of Principles 2, 6 and 7 of the SRA Principles 2011.
2. Dishonesty was alleged against the Respondent in respect of Allegations 1.1 and 1.2. However, proof of dishonesty was not an essential ingredient for proof of the Allegations.

Documents

3. The Tribunal had before it the following documents:-
 - Rule 5 Statement dated 2 February 2018
 - Statement of the Respondent dated 11 April 2018
 - Statement of Agreed Facts and Indicated Outcome

Factual Background

4. The Respondent was born in 1954. He was admitted to the Roll of Solicitors on 15 March 1979. His SRA ID number is 118966.
5. On 23 February 2017, the Tribunal had activated a 5-year suspension which had been suspended for a period of 5 years from the conclusion of proceedings against the Respondent on 9 September 2016. On 9 September 2016 the Tribunal had imposed conditions on the Respondent's practice in addition to the suspended suspension.
6. At the time of the hearing the Respondent was therefore suspended from practice.

Application for the matter to be resolved by way of Agreed Outcome

7. The parties invited the Tribunal to deal with the Allegations against the Respondent in accordance with the Statement of Agreed Facts and Indicated Outcome annexed to this Judgment. The parties submitted that the outcome proposed was consistent with the Tribunal's Guidance Note on Sanctions.

Findings of Fact and Law

8. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
9. The Tribunal reviewed all the material before it and was satisfied beyond reasonable doubt that the Respondent's admissions were properly made.
10. The Tribunal considered the Guidance Note on Sanction (December 2016). In doing so the Tribunal assessed the culpability and harm identified together with the aggravating and mitigating factors that existed.
11. The Respondent had admitted to serious professional misconduct including dishonesty. As identified in the Statement of Agreed Facts and Indicated Outcome, the misconduct was repeated, continued over a period of time and involved the misleading of the SRA and the Tribunal. The Respondent was an experienced solicitor and the Tribunal assessed his culpability as high.
12. The harm to the reputation of the profession was significant in circumstances where a solicitor breached restrictions put in place for the protection of the public and then lied about it to the Tribunal. There was also a risk of harm to clients as the Respondent had flouted the very restrictions that were put in place to protect them.
13. Matters were aggravated by the fact that the Respondent had been disciplined on three previous occasions by the Tribunal. The matters which had given rise to the suspended suspension and the restrictions had, in themselves, been serious. The Respondent had been found to have breached a number of Principles including lacking integrity.
14. The Tribunal noted the mitigation put forward by the Respondent. It was not suggested that any of it amounted to exceptional circumstances and indeed the Tribunal found none. The only appropriate and proportionate sanction was that the Respondent be struck off the roll and the Tribunal therefore approved the sanction proposed by the parties.

Costs

15. The parties had agreed costs in the sum of £2,600.00. The Tribunal was satisfied that this was an appropriate sum and approved this element of the Agreed Outcome.

Statement of Full Order

16. The Tribunal Ordered that the Respondent, MICHAEL DAVID SCHWARTZ, 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 £2,600.00.

Dated this 21st day of August 2018
On behalf of the Tribunal

A handwritten signature in black ink, appearing to read 'J. A. Astle', written in a cursive style.

J. A. Astle
Chairman

Judgment filed
with the Law Society
on 21 AUG 2018

IN THE MATTER OF THE SOLICITORS ACT 1974

and

IN THE MATTER OF MICHAEL DAVID SCHWARTZ

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

MICHAEL DAVID SCHWARTZ

Respondent

STATEMENT OF AGREED FACTS AND INDICATED OUTCOME

1. By its application dated 2 February 2018, and statement made pursuant to Rule 5(2) of the Solicitors (Disciplinary proceedings) Rules 2007, which accompanied that application, the Solicitors Regulation Authority ("the SRA") brought proceedings before the Solicitors Disciplinary Tribunal concerning the conduct of the Respondent, Michael David Schwartz.

Allegations

2. The allegations against the Respondent were that he:

- 1.1 Filed at the Solicitors Disciplinary Tribunal and served on the SRA a witness statement dated 22 December 2016, for the purposes of a hearing listed to consider an application made by him to vary the restrictions which were placed on his practice as a solicitor by the Solicitors Disciplinary Tribunal on 9 September 2016, which he knew contained false and/or misleading information. It is alleged that in so doing he breached all or alternatively any of Principles 1, 2 and 6 of the SRA Principles 2011

("the Principles") and failed to achieve Outcome 5.1 of the SRA Code of Conduct 2011 ("the Code").

1.2 Deliberately and knowingly breached the restrictions which were placed on his practice as a solicitor by the Solicitors Disciplinary Tribunal on 9 September 2016 by appearing in Court on behalf of Toussaint & Co Solicitors on 14 September 2016 in circumstances where he was aware of the restriction imposed by the Tribunal requiring him to seek prior approval of the SRA before working for Toussaint & Co Solicitors. It was alleged that in so doing he breached all or alternatively any of Principles 2, 6 and 7.

3. In addition, by allegation 2, dishonesty was alleged against the Respondent in respect of allegations 1.1 and 1.2 above.

Admissions

4. The Respondent admits the allegations in their entirety (such that he admits having acted dishonestly).

Agreed facts

The following facts and matters are agreed between the SRA and the Respondent:

5. The Respondent was born in 1954. He was admitted to the Roll of Solicitors on 15 March 1979 and his SRA ID number is: 118966. The Respondent's address is

████████████████████ FULL DATE OF BIRTH AND ADDRESS REDACTED BY THE TRIBUNAL

6. The allegations arise out of previous proceedings to which Mr Schwartz had been the Respondent (Case No 11459-2015). A substantive hearing took place in the Solicitors Disciplinary Tribunal in respect of those proceedings on 8-9 September 2016 ("the substantive hearing"). At the conclusion of the substantive hearing, the Tribunal had imposed various conditions on the Respondents' practice, including that "*The Respondent may not work as a solicitor other than in employment approved by the Solicitors Regulation Authority*" ("the permission restriction"), in addition to a suspended 5-year suspension.

7. Following an application to vary the permission restriction by the Respondent (which was refused by the Tribunal), and a subsequent application by the SRA to activate the suspension on the basis that the Respondent had breached the permission restriction, on 23 February 2017 ("the February hearing"), the Solicitors Disciplinary Tribunal activated the 5-year suspended suspension (to which the Respondent is currently subject).
8. The statement of full order which the Tribunal made at the conclusion of the February hearing, when it activated the suspension, was as follows: "*The Tribunal Ordered that the Respondent, MICHAEL DAVID SCHWARTZ, solicitor, be suspended from practice as a solicitor for the period of 5 years from 9 September 2016 i.e. the period of suspension will be until 9 September 2021 and it further Orders that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £2,250.*"

Allegation 1.1

9. On 11 November 2016, the Respondent had applied to vary the permission restriction ("the application to vary"). The application to vary was opposed by the SRA on the basis, in part, that there was evidence that the Respondent had already breached the permission restriction, which the SRA was at the time investigating.
10. The Tribunal originally listed the hearing of the Respondent's application to vary to take place on 17 January 2017. However, in circumstances in which the SRA was conscious that the Respondent was not able to work pending the conclusion of the SRA's ongoing investigations, the SRA wrote to the Tribunal to request that the hearing of the Respondent's application to vary be brought forward. The Tribunal subsequently brought the hearing forward and it took place on 22 December 2016 ("the December hearing").
11. In readiness for the December hearing, the SRA filed and served written submissions dated 14 December 2016. The SRA also filed and served a witness statement (together with Exhibits) of Ms MyAnh Ta, Authorisation Officer at the SRA, dated 19 December 2016. Both the written submissions and the witness statement of MyAnh Ta dated 19 December 2016 set out the investigations which the SRA had been conducting following the substantive hearing into the apparent breaches of the permission restriction (i.e. that the Respondent had been working as a solicitor without having first obtained permission

to do so from the SRA). No response was received from the Respondent to either the SRA's written submissions or the witness statement of MyAnh Ta.

12. On the morning of the December hearing, the Respondent produced to the SRA and to the Tribunal his witness statement for the hearing. The witness statement, which contained a statement of truth, was signed by the Respondent and dated 22 December 2016. In addition, Counsel for the Respondent (who was, therefore, acting on his behalf and according to his instructions) produced a written note of submissions on behalf of the Respondent.

13. At paragraph 9 of the Respondent's witness statement (page 86), the Respondent said that (emphasis added), "*I accept that I did one Court attendance on 14/9/16. This was prior to publication of the S.R.A.'s reasons and I incorrectly thought that until publication I could work. On reflection I realised that this was incorrect.*" That purported excuse was repeated on behalf of the Respondent by his Counsel (at pages 98 and 99) in his note of submissions in the following terms (emphasis added): "*Mr Schwartz accepts that he breached the current restrictions by appearing in Court for Toussaint & Co on 14 September. He has since realised that his understanding of the date of imposition of the restrictions was erroneous and wishes to apologise for this one admitted breach. In mitigation, Mr Schwartz had been under enormous pressure in the Tribunal and this lapse is possibly understandable in the circumstances.*"

14. Accordingly, in his witness statement dated 22 December 2016 (signed with a statement of truth) and in his instructions to his Counsel, at the December hearing, the Respondent:

i. Admitted that he had acted in breach of the restrictions imposed on his practice by the Tribunal at the conclusion of the substantive hearing in September 2016, in circumstances in which the SRA had not given their permission for him to be employed by Toussaint & Co Solicitors; and

ii. Maintained that he only did so inadvertently because he believed at the time that the restrictions did not come into effect until the publication of the judgement from the substantive hearing.

15. At the December hearing, the SRA was given permission by the Tribunal for its Counsel, Ms Marianne Butler, to cross examine the Respondent, who had been called to give live evidence in support of the application to vary. The Respondent was cross examined regarding his position that he had been allegedly mistaken as to the date on which the restrictions came into effect. During that cross examination, which was recorded in a transcript, Mr Schwartz accepted that, contrary to what he had claimed in his witness statement and in his instructions to Counsel:

- i. He had in fact known at the conclusion of the substantive hearing (on 9 September 2016) that the restrictions came into immediate effect (as was obvious from the fact that they had been read out by the Tribunal Chair on 9 September 2016); and
- ii. That consequently he had in fact known at the time of acting for Toussaint & Co Solicitors on 14 September 2016 that he was acting in breach of the restrictions; and
- iii. That consequently he had lied to the SRA and the Tribunal in his witness statement (and via his Counsel) when he had argued to the contrary.

16. At the conclusion of the December hearing, the Tribunal refused the Respondent's application to vary, finding that there had been no appeal at the time by the Respondent and no change of circumstances. In doing so, the Tribunal additionally recorded, however, that it was *"extremely concerned that despite paragraph 9 of Mr Schwartz's witness statement, Mr Schwartz knew when he attended Court [on 14 September 2016] that he [was in breach of the Restrictions]"* and said that it took an *"extremely dim view"* of that fact.

17. In the Tribunal's Findings dated 10 January 2017, the Tribunal further stated as follows: *"The Tribunal was extremely concerned that despite what was clearly stated at paragraph 9 of the Respondent's witness statement, signed on the day of the hearing, the Respondent admitted in his oral evidence that the content of that paragraph was not correct. The Respondent had accepted that the Order was read out in full at the conclusion of the hearing on 9 September 2016. The Respondent knew, when he attended court on 14 September 2016, that he was breaching the Order made by the Tribunal, just 5 days earlier. It was a matter of great concern that the Respondent had given two different accounts about this on the same day. It may be that the Applicant would pursue the apparent dishonesty and lack of integrity which had been displayed in the course of this application and the Respondent's evidence. Mr Halstead's submission*

that the Respondent should be given credit for admitting that some evidence in his witness statement, signed on the day of the hearing, was untrue was unusual; the Respondent could be given no such credit."

18. At the outset of the December hearing (to consider the Respondent's application to vary), it had been the SRA's position that it was not yet in a position to apply for the Respondent's suspension to be activated pending the conclusion of the investigation into apparent breaches of the permission restriction. Following the cross examination described above, it was submitted by Counsel for the SRA at the hearing that:

- i. It was now appropriate for the SRA to apply for such activation;
- ii. In the alternative it would be appropriate for the Tribunal to activate the suspension of its own accord.

19. Whilst, as stated above, at the December hearing the Tribunal did refuse the Respondent's application to vary, it declined to go on additionally to activate the suspension in the absence of there being any formal application before it from the SRA to consider. The SRA therefore made a formal application on 9 January 2017 to activate the Respondent's suspension. The hearing of the SRA's application took place on 23 February 2017 and resulted (as stated above) in the suspension being activated. At paragraph 69 of its findings dated 16 March 2017 the Tribunal recorded as follows (emphasis added): *"The Tribunal took into account and reviewed the testimonials submitted for the Respondent. None of the testimonials displayed any knowledge of the findings which had been made by the Tribunal at either the September or December 2016 hearings. An undated reference from a barrister stated that the Respondent was 'in my view a real asset to his profession and is an honest and truthful professional.' This was clearly at odds with the fact that the Respondent had been untruthful to the Tribunal in December 2016..."*

20. By filing and serving a witness statement dated 22 December 2016, which he knew contained false and/or misleading information, for the purposes of a Solicitors Disciplinary Tribunal hearing of the same date, the Respondent:

- i. Failed to uphold the rule of law and the proper administration of justice in breach of Principle 1 because, by stating in his witness statement that the reason as to why he represented a client in Court on 14 September 2016 was because he

"incorrectly thought that until publication" he could work when he knew that to be a lie, he attempted to deceive or knowingly mislead the Solicitors Disciplinary Tribunal and therefore failed to fulfil his obligations to the Court as an Officer of the Court; and

- ii. Failed to act with integrity contrary to Principle 2 because a solicitor of integrity demonstrating moral rectitude and a steady adherence to an ethical code would not attempt to deceive the Court; and
- iii. Failed to maintain the trust the public places in him and in the provision of legal services in breach of Principle 6. Members of the public and other members of the profession would not expect a solicitor to provide information in a witness statement which they knew to be untrue; and
- iv. Failed to achieve Outcome 5.1 of the Code because he attempted to deceive or knowingly mislead the Court.

Allegation 1.2

21. As described above, despite the permission restriction, and in circumstances in which the SRA had not approved the Respondent working as a solicitor for Toussaint & Co Solicitors, the Respondent appeared in Court on behalf of Toussaint & Co Solicitors on 14 September 2016.

22. At paragraph 9 of his witness statement dated 22 December 2016, the Respondent had claimed that the reason he had done so was because, *"This was prior to publication of the SRA's reasons and I incorrectly thought that until publication I could work. On reflection I realised that this was incorrect."* Under cross-examination by Counsel for the SRA, the Respondent admitted, however, that the content of paragraph 9 of his witness statement was not correct. The Tribunal found that, *"the Respondent knew, when he attended Court on 14 September 2016, that he was breaching the Order made by the Tribunal, just 5 days earlier."*

23. By a letter dated 27 January 2017 to the SRA, the Respondent stated that *"3. Re Toussaint it is accepted that I did a Court hearing for Toussaint on 13 September 2016."*¹

¹ This was clearly intended to be a reference to 14 September 2016.

Following the Tribunal hearing I was under and had been under enormous pressure and the lapse was regrettable in the circumstances.” The Respondent subsequently contended in response to a letter from a Regulatory Supervisor at the SRA dated 10 April 2017 that *“I accepted the breach at the Tribunal hearing and the matter was dealt with by the imposition of the suspended order therefore the matter has now been effectively dealt with and is now res judicata.”*

24. By deliberately and knowingly breaching the restrictions which were placed on his practice by the Solicitors Disciplinary Tribunal the Respondent:

- i. Failed to act with integrity contrary to Principle 2 because a solicitor of integrity would not knowingly breach an order of the Court;
- ii. Breached Principle 6 because he failed to maintain the trust the public places in him and in the provision of legal services because members of the public and other members of the profession would not expect a solicitor to totally disregard and deliberately breach the restrictions which had been placed on his practice by the Solicitors Disciplinary Tribunal;
- iii. Contrary to Principle 7, failed to co-operate with his regulator, the SRA, because he failed to obtain its approval to work for Toussaint & Co Solicitors when he attended Court on 14 September 2016.

25. In respect of each of Allegation 1.1 and 1.2, the Respondent's actions were dishonest in accordance with the test for dishonesty laid down in Ivey (Appellant) v Genting Casinos (UK) Ltd t/a Crockfords (Respondent) [2017] UKSC 67. The Respondent acted dishonestly according to the standards of ordinary decent people.

Outcome

26. Mr Schwartz accepts that his admitted dishonest conduct constitutes misconduct of the most serious kind that a solicitor can commit.

27. Having considered the Solicitors Disciplinary Tribunal's Guidance Note on Sanctions (December 2016), the SRA contends, and the Respondent accepts, that in those circumstances, and in the absence of any exceptional circumstances mitigating in favour

of a lesser sanction, the protection of the public and the protection of the reputation of the profession require that the Respondent is struck off the Roll of Solicitors.

28. The following factors aggravate the seriousness of the Respondent's misconduct:

- i. The misconduct involves dishonesty;
- ii. The misconduct was repeated, continued over a period of time and involved the attempted concealment of the wrongdoing from the Tribunal and the regulator. Having deliberately breached the permission restriction, the Respondent then sought to conceal the wrongdoing by lying to, and misleading, the Tribunal at the December hearing;
- iii. The Respondent is an experienced criminal practitioner;
- iv. This is now the fourth occasion on which the Respondent has been disciplined by the Tribunal:

(a) In matter 6171/1992 the Tribunal found that the Respondent had:

- i. Contrary to Rule 8 of the Solicitors Accounts Rules 1986 ("the Accounts Rules") drawn monies out of a client account other than as permitted by Rule 7 of the Accounts Rules;
- ii. Failed to maintain properly written up books of account contrary to Rule 11 of the Accounts Rules;
- iii. Failed to deliver Accountant's Reports within due time notwithstanding the provisions of Section 34 of the Solicitors Act 1974 and the Rules made thereunder.

Both the Respondent and his business partner had appeared before the Tribunal. The Respondent had not contested the allegation. Each was ordered to pay a fine of £2,500.00 together with costs.

(b) In matter 8375/2001 the Tribunal found that the Respondent had been guilty of conduct unbecoming a solicitor in that a blank cheque issued by a client for

fees due to the firm (that the Respondent was then working for) was paid into the Respondent's personal bank account rather than through the firm's bank account as required under the Solicitors Accounts Rules. The Respondent had not contested the allegation and had been fined £1,000.00 and ordered to pay costs. The Tribunal considered the degree of carelessness on the part of the Respondent was substantial and went on to state that *"Anyone who had had previous allegations substantiated against them before the Tribunal should tread with extreme care in all aspects of their conduct and the respondent (sic) had not done so"*.

- (c) In matter 11459/2015 (the matter with which the substantive hearing in September was concerned), the Tribunal was concerned with the failure by the Respondent over a period of several months in 2013 to pay cash given to him by clients into the firm's account until being prompted to do so by action on the part of the client concerned. Whilst at the substantive hearing dishonesty was not found prove to the requisite standard, the findings were serious: the Respondent was found to have breached Principles 2, 4, 5, 6 and 10, in addition to having breached Rule 14.1 of the Solicitors Accounts Rules 2011 and Rule 1.1 of the SRA Practice Framework Rules 2011. In imposing a suspended suspension of 5 years upon the Respondent, along with the conditions on his practising certificate, and requiring that the Respondent should pay costs, the Tribunal observed that *"the Respondent had a high level of culpability for his misconduct"*, that *"the relevant aggravating factors were that the misconduct was repeated"*, and that whilst *"He had shown insight"*, he *"had scarcely co-operated with the SRA"*. As stated above, the suspended suspension was activated by the Tribunal on 23 February 2017, which, in addition to recording that *"the Respondent had been untruthful to the Tribunal in December 2016"* found that *"the Respondent had deliberately flouted a Restriction, of which he was aware, just five days after it was imposed. This was a serious breach, which showed a cavalier disregard for the Order which the Tribunal had made just a few days before. It also showed that the Respondent was unwilling or unable to comply with regulatory measures"*.

29. The following is put forward by the Respondent in mitigation (but not endorsed by the SRA):

In his response to the Rule 5 Statement the Respondent has apologised to the Tribunal and in admitting the allegations accepted that his actions fell below the high standards expected of a solicitor in practice.

The Respondent panicked when he made the statement the day prior to the hearing which was unfortunate and regrettable. However, they were actions that took place during an extremely stressful time of his life when he was under great financial pressure and culminated in some poor decisions on the spur of the moment which now have had an adverse effect on his entire life.

Costs

30. With respect to costs, the Respondent agrees to pay the SRA costs of the application in the sum of £2,600.00.

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**Alastair Henry John Willcox, Senior Legal Adviser, Legal & Enforcement Department
(For and on behalf of the Applicant Solicitors Regulation Authority)**

DATED 26.07.2018

M D SCHWARTZ

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Michael David Schwartz

DATED 25.07.2018