

IN THE MATTER OF DUNCAN SCOTT WALL, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr A H B Holmes (in the chair)
Mr P Haworth
Mr G Fisher

Date of Hearing: 3rd June 2004

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of the Office for the Supervision of Solicitors ("the OSS") by Jonathan Goodwin of Jonathan Goodwin Solicitor Advocate, 17e Telford Court, Dunkirk Lea, Chester Gates, Chester, CH1 6LT on 1st October 2003 that Duncan Scott Wall of St John's Terrace, East Boldon, Tyne and Wear, NE36 OLT (whose address was subsequently notified to be c/o Dipe Lane, East Boldon, Tyne and Wear) solicitor might be required to answer the allegations set out in the statement which accompanied the application and that such Order might be made as the Tribunal should think right.

The allegations were that the Respondent had been guilty of conduct unbecoming a solicitor in each of the following particulars namely:

- (i) he withdraw monies from client account other than as permitted by Rule 22 of the Solicitors Accounts Rules 1998;
- (ii) that contrary to Rule 7 of the Solicitors Accounts Rules 1998 he failed to remedy breaches promptly upon discovery;

- (iii) that he utilised clients' funds for his own purpose;
- (iv) that he utilised clients' funds for the benefit of other clients;
- (v) that he misappropriated clients' funds which for the avoidance of doubt is an allegation of dishonesty;
- (vi) that by reason of the matters set out in the Forensic Investigation Report dated 24th June 2003 the Respondent has acted contrary to Rule 1 of the Solicitors Practice Rules 1990.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London, EC4M 7NS when Jonathan Goodwin appeared as the Applicant and the Respondent appeared in person. The evidence before the Tribunal included the admissions of the Respondent as to the breaches of the Solicitors Accounts Rules but the denial of allegation (v) that he had dishonestly misappropriated clients' funds. The Respondent gave oral evidence. At the hearing the Respondent handed up the letter which he sent by fax to The Law Society on Saturday 3rd May 2003, a letter received from Counsel he expected to represent him at the hearing and a bundle of testimonials. The facts were not in dispute but the interpretation of those facts was.

The Law Society's Investigation Officer, Mr Rowson, gave oral evidence.

At the conclusion of the hearing the Tribunal made the following Order:

The Tribunal Order that the Respondent, Duncan Scott Wall C/o Dipe Lane, East Boldon, Tyne & Wear, solicitor, be struck off the Roll of Solicitors and they further Order that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £10,500.00 inclusive.

The facts are set out in paragraphs 1-22 hereunder:

1. The Respondent, born in 1963, was admitted as a solicitor in 1989. At the material times he practised on his own account under the style of Duncan Wall, Solicitor from offices at 8 Coronation Street, South Shields, Tyne and Wear, NE33 1AZ.
2. There was a resolution of the appropriate panel of The Law Society on 24th July 2003 to intervene into the Respondent's practice. At the time of the hearing the Respondent was employed as an assistant solicitor undertaking criminal law work at Ben Hoare Bell & Co, 47 John Street, Sunderland, Tyne and Wear.
3. An Investigation Officer from the Forensic Investigations Department of The Law Society attended at the Respondent's office to commence an inspection on 10th June 2003.
4. The Respondent told the Investigation Officer ("the IO") that he had commenced sole practice in 1996. He conducted a general practice assisted by an unadmitted staff of four.

5. The IO noted that the firm's books of account were not in compliance with the Solicitors Accounts Rules.
6. A list of liabilities to clients as at 30th April 2003 was produced for inspection, which totalled £190,792.94 after adjustment. The item on the list were in agreement with the balances shown in the clients' ledger and a comparison of the total liabilities with cash held on client bank accounts at that date, after allowance for uncleared items, showed the following position:

Liabilities to clients	£190,792.94
Cash available	<u>1,348.48</u>
	<u>£189,444.46</u>

7. The Respondent agreed to the existence of a cash shortage at 30th April on client account but did not agree with the amount that the IO had calculated. The Respondent had not analysed the figures. The cash shortage calculated by the IO had been partly replaced as follows:

<u>Date</u>	<u>Details</u>	<u>Amount</u>
9 June 2003	Personal funds paid into client bank account by Mr Wall from the remortgage of his private property	£65,086.72
11 June 2003	Delayed mortgage advance received in respect of S	<u>68,850.00</u>
		<u>£133,936.72</u>

8. At the date of the IO's Report £55,507.74 of the cash shortage had not been replaced. The Respondent indicated that he could repay "what I think I owe, not immediately, but there is money on the way". He said that this would be between £15,000 to £30,000.
9. The Respondent had presented the IO with a statement dated 12th June 2003 headed "Duncan Wall Solicitors, Options for the future". The full text of that statement was as follows:

"Having considered the financial position that the firm is facing I have considered the future viable options.

Obviously what I hope to avoid is a complete closure of the business with the attendant loss of jobs and goodwill as well as the resulting adverse publicity for the local profession.

Option 1

I am in discussion with another solicitor concerning a partnership. This would obviously have to operate on strict supervision by The Law Society and I would not be a signatory to the client account. Further details can be given if requested.

Option 2

I have arranged with a firm in Gateshead (H) that they would take over the supervision of the business with a view to clearing the work in progress, clearing debt balances and then closing. In a sense this is a preferred option as it will provide for a managed termination of the firm whilst safeguarding the public and causing as little damage as possible within the local community.

Option 3

I have just opened discussions with another firm (I would not want to name them as yet) to seek employment with them and part of that scenario would be that they take over assets of this firm. Clearly I accept that any such employment would have to be approved pending the outcome of current enquiries."

10. The IO reported that the cash shortage was caused in the following way:

(i)	Improper Transfers from client to office bank account	£76,091.49
(ii)	Improper payment from client bank account	13,663.95
(iii)	Overpayments and over-transfers from client bank account	95,185.85
(iv)	Book difference – shortage	<u>4,503.17</u>
		<u>£189,444.46</u>

Improper transfers from client to office bank account

11. Between 1st July 2000 and 11th April 2003 there were 167 improper transfers from client to office bank account ranging from £1 to £3,950 and totalling £114,332.35. During the same period there were office to client bank account transfers totalling £38,240.86 as rectification of some of the above improper transfers, leaving the balance of improper transfers at 30th April 2003 as £76,091.49.
12. These transfers had not been allocated to any client matter. They were allocated to a "VAT Movement" ledger in the client account.
13. The IO asked the Respondent if the reason for these transfers was to ensure that the office bank account stayed within its bank overdraft limit. The Respondent said "by and large, yes". The overdraft limit was £6,500. The Respondent had been constantly under pressure from the bank, which had by the date of the IO's Report, called in the overdraft.
14. The IO noted that there were a number of occasions when improper transfers were made from client to office bank account which allowed personal payments to be made

from office bank account. The following three examples were set out in the IO's Report.

<u>Date</u>	<u>Transfer to Office</u>	<u>Payment from Office</u>	<u>Details of Payment</u>
17 Sept 2002	£ 1,398.00	£ 1,398.00	Transfer to the Respondent's personal bank account
17 Feb 2003	2,200.00	900.00	Transfer to the Respondent's personal account
		1,300.00	Transfer to Office 2 account and on following date £1,200 transferred from Office 2 account to the Respondent's personal account.
31 March 2003			Inland Revenue for the Respondent's personal tax

15. When the Respondent was asked if the reason for these transfers was to allow the personal payments to be made from office bank account, he said "No, I will not accept that as a lot of business expenses are paid out of my personal account. So yes, they may have gone to my personal account but not for personal benefit."

Improper payment from client bank account

16. On 18th October 2002 a payment of £13,663.95 to HM Customs & Excise in respect of the firm's VAT liability was made from client bank account and charged to the "VAT Movement" ledger in the client account.
17. The IO asked the Respondent if he knew that this payment to discharge the firm's liability for VAT had been made from client bank account. The Respondent said "Yes".
18. When the IO asked the Respondent why this payment had been made from client bank account the Respondent replied "I was twenty minutes away from being made bankrupt by the Customs & Excise. I had no option but to pay it and hope it was there". In his oral evidence the IO conceded that the Respondent might have said "believe" rather than "hope".

Overpayments and over-transfers from client bank account

19. Between 14th July 2000 and 4th April 2003 debit balances ranging from £0.01 to £68,850 had arisen on 122 client ledger accounts due to overpayments and overtransfers from client bank account. The Respondent had said that these were mainly due to accounting errors.
20. The IO included the following two examples in his Report.

(1) DS and the Respondent

The Respondent acted for himself and his wife in respect of the purchase of a property.

On 15th August 2000 when the client ledger balance for this account was £5,347.47 a payment from client bank account in the sum of £6,000 was made to DS and the Respondent. It was charged to the client ledger resulting in a debit balance and a client account shortage of £652.53.

The Respondent told the IO that he did not know how this overpayment had occurred but he confirmed that he had benefited personally. This cash shortage remained in existence at the date of the Report.

(2) LS

The Respondent acted for LS in the purchase of a property.

On 31st March 2003 when £24,396.82 was held for the client, the following payments were made from client bank account and charged to the client ledger:

<u>Date</u>	<u>Description</u>	<u>Amount</u>
		£
31.03.03	Client to office transfer - costs	253.50
31.03.03	Purchase monies	92,950.00
31.03.03	Client to office transfer - VAT	<u>43.32</u>
		<u>£93,246.82</u>

These transactions resulted in a shortage of £68,850 in respect of this client.

21. The Respondent explained that the property purchase was completed even though the mortgage advance had not been received. He said that there had been some confusion with the bank which had led to the firm thinking that the advance had been received when it had not.
22. The mortgage advance was received on 11th June 2003 eliminating the debit balance and client account shortage.

The Submissions of the Applicant

23. It had been made clear to the Respondent and he was well aware that there was an allegation of dishonesty made against him. He was well aware of the seriousness of that allegation.
24. The Respondent admitted all of the allegations save for allegation (v).
25. The Solicitors Accounts Rules breaches were clearly demonstrated in the Investigation Officer's Report. With regard to the question of whether or not the Respondent had behaved dishonestly, the Tribunal was invited to apply the combined test set down in the case of *Twinsectra Limited v Yardley and Others* [2002] UKHL12. The Tribunal had to be sure that a member of the public would consider it dishonest for a solicitor to act in the way that the Respondent did and that the Respondent himself knew that what he was doing was wrong and dishonest.
26. The Tribunal was invited to give due consideration to the ruling in the case of *Bolton v The Law Society* that any member of the solicitors' profession was expected to discharge his duties with integrity, probity and complete trustworthiness. Any solicitor who fails so to do must expect to be subject to severe sanctions.
27. In the case of *Weston* considered by the Court of Appeal it was said that the Solicitors Accounts Rules exist to afford members of the public maximum protection. There is a heavy obligation on solicitors to ensure observance of the Solicitors Accounts Rules.
28. Even if the Respondent were found not to have acted dishonestly a finding of dishonesty was not a requirement for the Tribunal to take a serious view of the Solicitors Accounts Rules breaches. In the submission of the Respondent those breaches did fall into the serious category.
29. Transfers from client to office bank account had been made by the Respondent when office account payments were due to be made. The transfers were not demonstrated to be proper transfers made in accordance with the Solicitors Accounts Rules, for instance if a bill or written intimation of costs had been delivered to the client concerned. These transfers were, in the submission of the Applicant, made to alleviate the Respondent's cashflow problems and enable him to keep his firm afloat. The Tribunal also noted that certain personal payments had been made out of client account.
30. The Tribunal would also bear at the forefront of its mind the fact that a substantial payment had been made to Customs & Excise to discharge the Respondent's VAT liability because in his own words he was "twenty minutes from bankruptcy". There could be no doubt that that payment was an act of dishonesty. The Respondent had deliberately utilised client funds which he knew he was not entitled to to satisfy his own pressing indebtedness. In so doing he had preferred his own interest over the interest of his clients.

The Submissions of the Respondent

31. The Respondent explained that when he opened his practice he had the assistance of a cashier. When his books of account were maintained manually he had encountered no problems. Subsequently he had replaced his initial cashier and he went over to a computerised accounts system.
32. The cashier had enjoyed a wealth of experience as a legal cashier. She had advised that VAT charged to and paid by clients should be retained in client account. He had accepted that advice although he had come to realise that it was wrong. Thus substantial sums of money representing VAT collected remained in client account.
33. The Respondent had had a computerised accounts system installed. There had been a number of problems. The firm had suffered a loss of data and corruption of the computer's hard drive. The backup system had not worked. For instance PAYE records were lost. It had been necessary to reconstitute the accounts records and while this was being done the firm was operating "blind". Accounts had not been available on completion of conveyancing matters and it was necessary to place reliance on the cashier keeping a record. The disarray in the accounting system had been directly responsible for the consequential breaches of the Solicitors Accounts Rules.
34. With regard to allegation (v), that the Respondent had acted dishonestly, the Respondent accepted that he had sole responsibility for the proper keeping of accounts and the proper treatment of clients' money. The Respondent's cashier had opened a ledger entitled "VAT Movement" ledger account. It had been the cashier's practice to put entries he could find from the bank statement. The cashier had told the Respondent that that had been the only way to prepare and balance a set of accounts. The Respondent had taken no money from client account which he did not believe was fair. The Respondent had come to accept that retaining VAT in client account was wrong.
35. When he realised how seriously inaccurate his accounting system had proved, the Respondent wrote to The Law Society inviting The Law Society to intervene into his practice with a view to the clients' interest being protected.
36. The Respondent said with regard to the payment to Customs & Excise that at the time he withdrew the money from client account he needed the money and he believed that it was available to him. He believed he was entitled to the sum transferred out of client account. The Respondent said it was not a question of not knowing and not caring. The Respondent recalled that what he had said to the IO at the interview at the time of the inspection was not that he hoped the money was in client account but that there was sufficient money to which he was entitled in client account to meet the payment to Customs & Excise.
37. The Respondent said that the situation which arose in his firm was one that he would not wish on anyone. He almost always had suffered cash flow problems. When he lost all of the firm's financial records he had a stark choice either to carry on and reconstitute the records or to cease practice immediately.

38. The prime issue for the Tribunal to rule upon was that of dishonesty. It was for the Tribunal to decide, "did the Respondent have an honest belief that money to pay Customs & Excise was there in client account and available to him". The Respondent did believe that the money was there in client account and he was entitled to it. That did not amount to dishonesty.

The Finding of the Tribunal on the question of dishonesty

39. The Tribunal found allegation (v) to have been substantiated against the Respondent and had therefore made a finding that he had acted dishonestly. A solicitor has a high duty not only to comply with the Solicitors Accounts Rules and to treat clients' money held by him scrupulously but he also has a duty to exercise proper stewardship over clients' money. It is part and parcel of that high duty to maintain complete and accurate records and not to transfer client money out of client account for any purpose without being absolutely certain that to do so is not a breach of any part of the Solicitors Accounts Rules.
40. In the light of the Respondent's own evidence it was inconceivable that he had any proper idea of the amount of monies representing VAT collected that was held in client account. In not carrying out a careful checking exercise, the Respondent turned a blind eye to the fact that there might not have been sufficient money representing VAT collected to cover the payment which he made. No member of the public would consider that to be honest, nor would the Respondent himself have considered that this was an honest course to adopt. The Tribunal in reaching this conclusion did apply the combined test in *Twinsectra v Yardley*. The Tribunal is firm in its view that no member of the public would consider such an action on the part of a solicitor to be an honest action and no practising solicitor could not know that such an action was dishonest.

The Respondent's Submissions in Mitigation

41. The Respondent had been confronted with a stark choice when his accounts system failed. He either had to carry on and reconstitute his accounting records or cease to practise immediately. When making that decision the Respondent had been conscious of a number of factors which included himself and his family. The family had difficulties which meant that the Respondent would always be the only income earner. The Respondent took into account his large and loyal client following. He did not want to let them down. Indeed the Respondent had enjoyed the sympathy of clients when they learned of his position, such position not having been hidden from them. The Respondent had also borne in mind the good reputation of the solicitors' profession. He had not considered that such reputation would be enhanced by the failure of his firm. The Respondent had been assured by his cashier that it would take a matter of weeks to reconstitute the accounting records. That had proved to be an inaccurate estimate. The reality was that the reconstitution of the records would take a very long time.

42. All of the actions of the Respondent had been entirely open. There had been no concealment. The Respondent would never have wished to have taken clients' money.
43. The Respondent had recognised his problem and had even turned to The Law Society for help and assistance. Despite contacting The Law Society in May he had been permitted to continue in practice without supervision until the end of July.
44. The Respondent had made a mistake. He had not been guilty of deliberate dishonesty.
45. The Tribunal was invited to give due weight to the written testimonials handed up at the hearing all of which supported the Respondent and spoke highly of his competence and integrity.
46. The Respondent told the Tribunal that he felt a sense of shame appearing before his professional Disciplinary Tribunal. He had worked hard to enter the solicitors' profession and had cherished his status as a solicitor.
47. Despite the finding of the Tribunal in relation to allegation (v) the Respondent hoped that they might feel able not to impose the ultimate sanction upon him.
48. The Respondent was a chastened man and had learnt from his mistakes. He did not, as he did in his own firm, undertake conveyancing. He had trained as a criminal law practitioner and had returned to that specialism. He no longer held client money and would never again wish to hold client money or be involved in the management of a solicitors' practice.
49. The Respondent invited the Tribunal to consider a recent decision of the Divisional Court following an appeal by a solicitor who had been struck off the Roll by order of the Tribunal when dishonesty had been found against him where the Divisional Court reduced the ultimate sanction imposed to a two year suspension from practice. He accepted that before that recent case following the ruling in the cases of Bolton and Weston it was recognised that after a finding of dishonesty by the Tribunal a striking off order was automatic.

The Tribunal's sanction and reasons

50. The Tribunal found all of the allegations to have been substantiated. All had been admitted by the Respondent save allegation (v) and for the reasons set out above the Tribunal did find allegation (v) to have been substantiated.
51. The Tribunal has made a finding that the Respondent's behaviour was dishonest. There are, of course, degrees of dishonesty. The Tribunal recognised that the Respondent was entitled to a proportion of the money which he utilised to discharge his VAT liability. The Tribunal recognised that the Respondent's action demonstrated a lesser degree of dishonesty than for instance the deliberate theft of a large sum of clients' money to further a solicitor's luxurious lifestyle. The Tribunal took into account the admissions of the Respondent, his cooperation both with the IO and The Law Society's investigation and the Respondent's personal circumstances. The duty

of a solicitor to achieve complete compliance with the Solicitors Accounts Rules is a high one. The Tribunal has taken into account the mitigating factors put forward by the Respondent. Having found that the Respondent had not behaved as an honest solicitor would, the Tribunal concluded that the appropriate sanction to impose upon the Respondent was that of a striking off order.

52. The parties had discussed the question of costs and the Respondent had agreed that he would pay the Applicant's costs in the agreed figure of £10,500. The Tribunal accordingly made an order for costs in that fixed sum.

DATED this 16th day of July 2004

on behalf of the Tribunal

A H B Holmes
Chairman