CO/1983/2005

Neutral Citation Number: [2005] EWHC 2915 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Friday, 11th November 2005

B E F O R E:
LORD JUSTICE MAURICE KAY
MR JUSTICE PENRY-DAVEY

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SINGLETON
(CLAIMANT)

-v-

THE LAW SOCIETY
(DEFENDANT)

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MISS F MORRIS (instructed by Irwin Mitchell) appeared on behalf of the CLAIMANT
MR G WILLIAMS QC (instructed by The Law Society) appeared on behalf of the DEFENDANT

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J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE MAURICE KAY: This is the judgment of the Court, to which both members of the Court have contributed.

2. This is an appeal pursuant to section 49 of the Solicitors Act 1974 against a decision of the Solicitors' Disciplinary Tribunal ("SDT"). The appellant, James Albert Singleton, is 50 years of age. He was admitted as a solicitor on 15th January 1981. He practised on his own account as James Singleton & Co at 4 Worsley Road, Worsley, Greater Manchester. By an application made on 29th March 2004 he was charged with conduct unbefitting a solicitor. This allegation was particularised in the following nine paragraphs:

"(a) that books of accounts were not properly written up contrary to Rule 32 of the Solicitors' Account Rules 1998;

(b) that he had utilised clients' funds for the benefit of other clients;

(c) that contrary to Rule 15 he had not paid clients' funds received into client account promptly or at all;

(d) that false entries had been made in books of accounts;

(e) that he had been responsible for unreasonable delay in the conduct of professional business;

(f) that he transferred funds from client account to office account other than as permitted by Rule 22 of the Solicitors' Accounts Rules 1998;

(g) that he failed to notify his lender client of relevant information;

(h) that contrary to Practice Rule 6 he acted for vendor purchaser and lender in a conveyancing transaction;

(i) that he made a secret profit as a result of improper charges for telegraphic transfer fees."

3. The application was heard by the SDT on 14th December 2004. At the conclusion of the hearing that day the SDT ordered that the appellant be struck off the Roll of Solicitors and that he pay the costs of the application. The full findings were filed with the Law Society on 17th March 2005. He now appeals to this court against the striking off.

4. At the outset of the hearing before the SDT it was said that all the allegations were admitted. It became apparent there was an issue as to whether the appellant had acted dishonestly in relation to the allegations or any of them. He maintained that he had not. In the event, the SDT found dishonesty in relation to allegations (d) and (i). On appeal to this Court, the case for the appellant is that the SDT erred on the issue of dishonesty in two distinct ways. First, it is said that there was substantive error in the approach to dishonesty. Secondly, there is a complaint that there was procedural unfairness surrounding the issue of dishonesty.

5. Before turning to the way in which the grounds of appeal have been advanced, it is appropriate to describe in a little more detail the factual basis of the two allegations which resulted in the finding of dishonesty. As to allegation (d), there were several instances were the appellant's books of account contained entries representing funds being received into the client bank account on occasions when no such funds were paid into that account. As a result, the false entries gave the ledger accounts of certain clients an appearance of balance when they were in fact deficient. This enabled the appellant to issue cheques in one case to three beneficiaries and in another case to the Inland Revenue in respect of stamp duty which were drawn on the client account at a time when the ledger entries relating to the particular clients falsely indicated a sufficiency of funds. Allegation (i) related to 91 occasions on which the appellant had charged clients the sum of £20 as a disbursement in respect of telegraphic transfer fees in conveyancing matters when the actual cost per transfer was £10. In this way, £10 worth of profit costs was given the appearance of a disbursement. The case for the appellant was that, in relation to allegation (d), the false entries were not made dishonestly but were necessitated by characteristics of the computer system which would not allow negative balances on client account; and in relation to allegation (i) that the sums of £10 were administrative charges "to cover my expenses". The appellant said that he had done that for many years, that he did not

think that there was anything wrong with it and that he was sure that "everybody does it".

Dishonesty: the substantive complaint

6. The findings of the SDT are set out in the paragraph 82 of its reasons in the following terms:

> "The Tribunal applied the test in the case of **Twinsectra v Yardley**. In summary, with regard both to his making entries which were false in order to circumvent safety features on his firm's computerised account system and in obtaining payment from clients in respect of a disbursement larger than that he paid out, the Respondent behaved in a way that would be regarded by other solicitors as being dishonest. It was not open to the Respondent to set his own standard of honest. The Respondent, in effect, had turned a blind eye to the nature of what he was doing, regarding both areas of wrongdoing as an expedient measure. The Tribunal did not feel that he could not have failed to conclude that his actions were not the actions of an honest solicitor."

7. The reference to **Twinsectra v Yardley** is a reference to the test of dishonesty which is customarily applied in cases such as this. Lord Hutton defined the test in these terms ([2002] UKHL 12, at paragraph 36):

> " . . . dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people although he should not escape a finding of dishonesty because he sets his own standards of dishonesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct."

Although **Twinsectra** was a civil action for breach of trust, it is common ground that the test is appropriate in proceedings before the SDT.

8. On behalf of the appellant Miss Morris is severely critical of the final sentence in paragraph 82 of the SDT's findings:

> "The Tribunal did not feel that he could not have failed to conclude that his actions were not the actions of a honest solicitor."

9. It is undoubtedly a clumsy and, standing alone, an unintelligible sentence. It contains three negatives, four if one includes the negative implicit in the word "failed". However, the sentence does not stand alone. In our judgment, when paragraph 82 is read in full, it undoubtedly contains a proper application of the **Twinsectra** test. It seems to us that the convoluted final sentence contains a typographical or editorial error. It would only make sense and be consistent with the rest of the paragraph if, for example, the first "not" were to be deleted.

10. Further evidence that the SDT correctly understood the **Twinsectra** test and applied it, can be inferred from paragraph 90 of the findings where it refers to its finding -- a reference, we believe, to paragraph 82 -- as embracing one of "conscious impropriety". "Conscious impropriety" is a concept referred to by Lord Nicholls of Birkenhead in **Royal Brunei Airlines v Tan** [1995] 2 AC 378. It was Lord Nicholls' approach in the **Royal Brunei** case which was considered and further explained in **Twinsectra**. On behalf of the Law Society Mr Williams QC submits that "dishonesty" and "conscious impropriety" are used as synonyms by the SDT. Miss Morris does not disagree. In our judgment, it would be wholly unreasonable to allow the unintelligible sentence at the end of paragraph 82 to sustain a submission that the SDT fell into legal error on the issue of dishonesty. We are entirely satisfied that it did not.

The offending sentence is no more than a typographical or editorial error. Paragraphs 82 and 90, read together, satisfy us that the SDT properly understood the **Twinsectra** test and applied it appropriately.

Procedural error

11. It is axiomatic that an allegation of dishonesty made against a solicitor is particularly serious. If proved, the consequences are inevitably severe. The essential complaint under this ground of appeal is that the appellant was not provided with adequate notice or particulars of the allegation of dishonesty. As in most similar cases, the disciplinary offence alleged against him was "conduct unbefitting a solicitor". That offence can be committed with or without the element of dishonesty. At no point in the Rule 4 statement or in any other document was there an unequivocal reference to dishonesty. The case for the appellant is that it was only on the morning of the hearing, 14th December 2004, that he was told by the representative of the Law Society, Mr Cadman, that the case was to be put on the footing of dishonesty. Mr Cadman maintains that he had previously told the appellant that the matter would be presented as an allegation of dishonesty in the course of telephone conversations on 15th October and 6th December 2004. The appellant disputes that. The transcript of the proceedings on 14th December discloses that Mr Cadman began by saying that the nine allegations "are all admitted". He then referred to "repetitive and deliberate misconduct hidden by false accounting, with a total abrogation of his obligations and duties as custodian of his clients' funds". He also referred to the actions having been taken "intentionally to avoid detection and to circumvent his own safety checks within his accounting systems" and said that "false entries were made so that monies could be improperly . . . withdrawn". At the end of his opening, Mr Cadman repeated much of this. Upon the completion of the opening, the Chairman appears to have raised the question as to whether it was a dishonesty case, to which Mr Cadman replied "it is a dishonest case, yes". The appellant, who was representing himself, then proceeded to address the Tribunal. He denied dishonesty. Essentially, his defence was one of sloppiness and overwork. At the conclusion of his mitigation, the Chairman again raised the issue of dishonesty and enquired as to the notice that had been given. The dispute between Mr Cadman and the appellant as to previous telephone references remained. At no stage did the appellant seek an adjournment once the true nature of the allegations had been made clear to him. In its findings, the Tribunal stated:

> "If an allegation was to be made of dishonesty the Tribunal considered that this should be expressly stated in writing and ideally in the Rule 4 Statement so that a Respondent knew without a shadow of a doubt the case he had to meet at the earliest stage in the proceedings. Be that as it may the Tribunal found that there was conscious impropriety on the part of the Respondent in this case."

12. It is common ground that natural justice and Article 6 of the European Convention on Human Rights and Fundamental Freedoms require that a person be given adequate notice and particulars of allegations made against him and that, in the context of disciplinary proceedings against a solicitor, adequate notice and particulars of dishonesty are necessary. Mr Williams, who has unrivalled experience of prosecuting disciplinary cases before the Tribunal, frankly concedes that it is his practice, when acting as a prosecutor, to refer expressly to dishonesty in the Rule 4 statement or, failing that, in a further document communicated to a respondent well in advance of any hearing. Nevertheless, he submits that, even if the appellant only heard the word "dishonesty" for the first time on the morning of the hearing, there has been no significant unfairness in this case. He suggests that dishonesty was always implicit in relation to the allegations in respect of which it was found namely making false entries in the books of account and obtaining secret profits. He further submits that the transcript discloses that the appellant was able to deal with the allegation of dishonesty before the Tribunal. At no stage did he protest about the lack of notice, nor did he seek an adjournment. Moreover, the

appellant is not a novice in a matter such as this. He had been the subject of a previous disciplinary hearing in 2001 in which dishonesty had been alleged, albeit not proved.

13. There is force in Mr Williams' submissions. However, this is a very serious matter and, in our judgment, the failure expressly to allege or particularise dishonesty in a document in advance of the hearing constituted a procedural flaw. We do not consider that it makes any difference whether or not on one or two occasions Mr Cadman had referred to dishonesty in telephone conversations. We suspect that he had, at least in relation to the conversation on 15th October, because he has produced an attendance note to that effect. Moreover, the response of the appellant to the disciplinary proceedings seems to have been somewhat ostrich-like until the day of the hearing. There is evidence of communications going unanswered and promises unfulfilled. However, we conclude that it is unacceptable for the Tribunal to make findings of dishonesty when there has been no documentary pleading of such an allegation in a clear and timeous way. It may be that, with proper notice of such an allegation, the appellant would have chosen to be professionally represented, as he was in 2001. It may be that, if the Tribunal had reminded him of his options when the allegation of dishonesty was being pursued on 14th December, he would have asked for an adjournment or elected to give sworn evidence, on the basis that this would be likely to carry more weight than his unsworn submission. It may be that he would have adduced further evidence, such evidence which he seeks to adduce on this appeal to the effect that his clients were notified of the £20 charge for telegraphing transfers. We simply do not know whether matters would have proceeded in these different ways. In our judgment, this is not a case in which this court should simply say that compliance with procedural fairness would not have made a difference. That is not the point. We conclude that in bringing disciplinary charges against a solicitor, the Law Society is under an obligation to give timely notice of an allegation of dishonesty with relevant particulars when appropriate unless it is obvious from the nature of the charge (for example, where the allegation is that the solicitor has committed or been convicted of a criminal offence which necessarily involves dishonesty). In the present case, Miss Morris justifiably complains that even if Mr Cadman did refer to dishonesty at an earlier stage than the appellant remembers, at no stage was it made clear which of the nine allegations were said to be afflicted by dishonesty. In the event, the Tribunal confined itself to just two of those allegations.

14. We have come to the conclusion that it is necessary to quash the decision of the Tribunal. In this eventuality, both parties urge us not to remit the matter to the Tribunal for a rehearing but to deal with the matter ourselves. The appellant has placed before us a modicum of evidence which was not before the Tribunal, namely evidence that his conveyancing clients were made aware from the outset that he would be charging £20 for a telegraphic transfer. Beyond that, he has been content to rely on the submissions of Miss Morris. With the agreement of the parties, we are disposed to deal with the matter ourselves, absent a finding of dishonesty. The parties accept that, in the circumstances of this case, this court is not in the best position to decide that issue. Miss Morris then submits that, without proof of dishonesty, the sanction of striking off is disproportionate. Mr Williams submits that, even without dishonesty, the allegations which have been admitted by the appellant are so serious and persistent that the ultimate sanction of striking off remains the appropriate one.

15. It is a significant feature of this case that the appellant faced broadly similar allegations in 2001. Although an express allegation of dishonesty failed on that occasion, the Tribunal concluded that the appellant's behaviour "had come very close to dishonesty". It expressed its serious view of the matter by imposing a fine of £13,000. On the present occasion, the Tribunal expressed the view that:

> "It was extraordinary that he did not appear to learn the lesson inherent in the outcome of the earlier disciplinary proceedings."

16. We entirely agree. It is also a significant feature of the present charges that some of them occurred at about the time of the 2001 hearing. The Tribunal stated:

> "Even if the Tribunal had not made a finding of conscious impropriety . . . it would have made an order striking the Respondent off the Roll for his very serious failures which amounted to a total abrogation of his responsibilities as a solicitor."

17. We observe that the secret profit in respect of the £20 charged in respect of telegraphic transfers, but half of which was retained by the appellant, was found to have occurred on 91 occasions. It is no answer to say that the clients were forewarned that the disbursement would be £20. What they were not forewarned of was that half of it was accruing to the benefit of the appellant. So far as the books of account were concerned, there had been 44 receipts entered into the client cashbook which were not supported by the movement of funds into the client bank account. The appellant had also transferred funds from his client account to his office account improperly on 21 occasions involving a total of just under £5,000. By any standards, these were serious and sustained breaches, set against the background of the earlier disciplinary proceedings which ought to have impressed upon the appellant the seriousness of his position.

18. It is important to keep in mind what was said by Sir Thomas Bingham MR in **Bolton v Law Society** [1994] 1 WLR 512, at page 518:

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors' Disciplinary Tribunal. Lapses from the required high standard may of course take different forms and be of varying degrees. The most serious involves proven dishonesty . . . If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends on trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off of suspend will often involve a fine and difficult exercise of judgment . . . on all the facts of the case. Only in a very unusual and venial case of this kind will the Tribunal be likely to regard as appropriate any order less severe than one of suspension. It is important that there should be full understanding of the reasons why the Tribunal makes orders which might otherwise seem harsh. There is in some of these orders a punitive element; a penalty may be visited on a solicitor who has fallen below the standard required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention . . . In most cases the order of the Tribunal will be primarily directed to one or other or both of two purposes. One is to be sure the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standard. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order for striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitor's profession as one in which every member, of whatever standard, may be trusted to the end of the earth. To maintain the reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission. If a member of the public sells his house, very often his largest asset,

> and entrusts the proceeds to his solicitor, pending reinvestment in another house, he is ordinarily entitled to expect the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession and the public as a whole is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

19. We refer also to **In the matter of a solicitor (Jiwaji)**, 2nd February 2000, unreported, in which Lord Bingham of Cornhill stated (at paragraph 49):

> "It is true that no loss was in the result caused to any client and that the solicitor is not accused of dishonesty. Nonetheless his conduct undermined the control which the Law Society seeks to exercise over the recording of financial transactions in solicitors' offices, and in particular over the handling and disbursement of clients' monies. The solicitor had a serious record of previous failures, which had culminated in the clearest possible warning."

In that case the court upheld a striking off order.

20. It is thus clear that the sanction of striking off may well be appropriate even in cases where dishonesty is not proved but where it is clear that a solicitor has fallen short of the required standards of integrity, probity and trustworthiness. Although we have concluded that in the present case the finding of dishonesty is vitiated by procedural error, we should not ignore the view expressed by the Tribunal that, even in the absence of dishonesty, it would have made a striking off order for very serious failures "amounting to a total abrogation of his responsibilities as a solicitor". Having regard to the number and duration of the serious failures, and taking into account the 2001 proceedings and the view then taken by the Tribunal, we conclude that the present case is one of wide-ranging and serious conduct unbefitting a solicitor over a long period of time and in the face of a very clear warning on the earlier occasion. We conclude that, even without proof of dishonesty, the appropriate penalty for the protection of the public and the maintenance of the reputation of the profession is and remains an order that the appellant be struck off the Roll of Solicitors.

21. MR WILLIAMS: My Lord, if I may, on the question of costs the appeal has been successfully passed in as much as the procedural impact of the lack of communication to set aside the dishonesty finding, but the actual order of the Tribunal remains undisturbed and to that extent the appeal has failed. The benefit gained by the appellant through the vitiation of dishonesty is the removal of stigma and a possible easier route back via restoration, but the fact that there has been no finding of dishonesty in this case does not mean that restoration follows. It does mean the appropriate test is slightly easier to pass after a period of time. I am instructed to seek costs on behalf of the Law Society in this matter, but I would also follow that by saying that it is perhaps appropriate to say that the Law Society should not pay the costs of the appellant in this case. Those are my submissions.

22. LORD JUSTICE MAURICE KAY: Yes. Miss Morris?

23. MISS MORRIS: The order in this case would be no order for costs. There are two reasons for that. On the most substantial issue in the appeal we were successful, and that was a significant issue. Secondly, because the practical effect of that is, as my learned friend has indicated, for the future my client is in a significantly different position should he apply for restoration. In that sense, both as a matter of principle and that there have been victories on both sides, there should be no order for costs. Ultimately the order itself of the Tribunal has been upheld.

24. LORD JUSTICE MAURICE KAY: Yes. Mr Williams, I have not reminded myself of this previously but am I not right in saying that you submitted a schedule of costs?

25. MR WILLIAMS: I regret that I did not. Neither has my learned friend.

26. LORD JUSTICE MAURICE KAY: Any costs you might be awarded would have to be assessed. We will retire and consider the costs position.

(A short break)

27. LORD JUSTICE MAURICE KAY: We take the view that as the judgment is critical of the procedure adopted by the Law Society before the Tribunal in this case, that in all the circumstances it is appropriate to make no order as to costs. Thank you both very much.