

IN THE MATTER OF FIONA MARGARET SWAINSTON, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mrs K Todner (in the chair)
Mr D Potts
Mr D E Marlow

Date of Hearing: 15th January 2008

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of The Law Society by Michael Robin Havard, Chairman, of Morgan Cole solicitors, Bradley Court, Park Place, Cardiff, CF10 3DP on 16th July 2007 that Fiona Margaret Swainston of Fiona Swainston, solicitors, Rua 5 de Outubro 174, 8135-101 Almancil, Algarve, Portugal, solicitor might be required to answer the allegations contained 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 and/or where stipulated in breach of the Solicitors' Overseas Practice Rules 1990 in each of the following respects, namely that she:-

1. Has failed to maintain proper books of accounts in accordance with Rule 12(2) of the Solicitors' Overseas Practice Rules 1990.
2. Has failed to prepare client account reconciliations since September 2005.
3. Has held client monies improperly in suspense accounts.
4. Has withdrawn monies from client account otherwise than is permitted by Rule 12(3) of the Solicitors' Overseas Practice Rules 1990, leading to a cash shortage.

5. Has withdrawn monies from client account when there were insufficient funds in the client account leading to a cash shortage.
6. Following the withdrawal of monies from client account leading to a cash shortage, she has failed on discovery to remedy promptly the consequent cash shortage.

The application was heard at The Court Room, Third Floor, Gate House, 1 Farringdon Street, London EC4M 7NS on 15th January 2008 when Michael Robin Harvard appeared as the Applicant and the Respondent appeared in person.

The evidence before the Tribunal included the admissions of the Respondent.

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

The Tribunal Orders that the Respondent, Fiona Margaret Swainston of Fiona Swainston Solicitors, Rua 5 De Outubro 174, 8135-101 Almancil, Algarve, Portugal, solicitor, be suspended from practice as a solicitor for an indefinite period to commence on the 15th day of January 2008 and it further Orders that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £8,955.00.

The facts are set out in paragraphs 1 - 13 hereunder

1. The Respondent, born in 1962, was admitted as a solicitor in 1996. At the beginning of 1998 the Respondent took over a practice in Portugal and had been practising on her own account since then in Almancil, Algarve. Investigation Officers of The Law Society (the IOs) began an inspection of the Respondent's books of account and other documents at her office in Portugal on 9th October 2006. The IOs' report dated 18th December 2006 was before the Tribunal.
2. The Respondent accepted that her books of account had not been kept in accordance with Rule 12 of the Solicitors' Overseas Practice Rules 1990 and there had been a failure to prepare client account reconciliations.
3. Suspense accounts had been created for each month from September 2005 to September 2006 into which various sums had been paid in respect of client matters. There was no accurate record of the source of the funds and it was impossible for the IOs to form a true picture of the client money held by the firm.
4. The IOs were able to establish minimum cash shortages of €20,153.17 and £4,449.39 as at 30th September 2006, such cash shortages being caused by payments made in excess of funds held for the clients concerned.
5. On inspection of 233 Euro client ledgers and 34 Sterling client ledgers, it was apparent that there were serious shortcomings with regard to recording of the payments being made into, and out of, client account. The IOs could not place reliance on the ledgers produced.
6. Nine sample client matters were reviewed in detail. In seven matters the client ledgers provided were correct and confirmed the minimum cash shortages as at 30th September 2006.

7. With regard to the other two cases, whilst the client ledgers had not been maintained there were sufficient funds to cover the debit balances indicated on the ledger.
8. The IOs set out details of the following three of the seven matters where there were cash shortages.

9. Client: J and C

The Respondent acted for three clients in their purchase of property in the Algarve. On 15th September 2006, the balance on the relevant client ledger stood at €2,416.50. By 20th September 2006, the Respondent had made payments out of client account totalling €10,707.28 giving rise to a cash shortage of €8,290.78. At an interview with the IOs on 11th October 2006, the Respondent said that she had been told that monies were due from the clients but had not been received.

10. Client: S

The Respondent acted for S in his purchase of a property. On 23rd December 2005, there was a client balance of €18,753.47. As at 29th March 2006, payments had been made out of client account totalling €24,632, resulting in a cash shortage of €5,878.53 which had been in existence for over six months.

11. Client: R

The Respondent acted for clients in relation to property transactions. As at 20th February 2004, the balance on the client ledgers stood at £2,052.68. By 1st July 2004, payments had been made out of client account totalling £6,502.07. The resulting cash shortage of £4,449.39 had been in existence for over twenty four months.

12. Further, on 17th November 2005, the Respondent delivered an Accountant's Report for the year ending 31st March 2005 showing a client account shortage at that time of £35,053.76.

13. The Respondent told the Tribunal that a member of her staff had misappropriated client funds. It had been her practice to handle the payment of rates for clients who owned property in Portugal but lived outside that country. The rates had to be paid at an office in person and the precise amounts payable could not be ascertained in advance. It had been her practice to sign client account cheques without the name of the payee or the amount completed so that a member of staff could attend the rate office to settle the rates bill. The counterfoils had not been completed and it had not been possible thereafter to establish the sum paid. This system had facilitated the misappropriation of funds by a member of staff. Thereafter the Respondent had made sure that the name of the payee was written on such a cheque but explained that it was not possible to complete the amount until there was the physical attendance at the rate office. Sometimes such payments had been made on behalf of a client for whom she held no funds or insufficient funds to cover the payment.

The Submissions of the Applicant

14. The Respondent had responded to enquiries made of her by The Law Society. She had admitted the facts and the allegations. The Applicant wished to make it plain that he made no allegation of dishonesty against the Respondent. It had been the IOs' position that the Respondent's books of account were in a state of disarray but there had been no failure of a deliberate nature. The Respondent had responded promptly to correspondence addressed to her but the shortages on client account remained in existence. During the course of correspondence with the Solicitors Regulation Authority the Respondent had indicated that her financial management controls at her firm had been very lax. She had further indicated that a member of her staff had misappropriated monies and had accepted that her record keeping had not been all that it should have been, leading to her need for suspense accounts.
15. The way the Respondent conducted her management of client funds, in particular the use of blank cheques drawn on client account, demonstrated a clear risk of abuse and/or failure to record precise amounts paid. The Law Society was concerned that at the date of the hearing there were still shortfalls on client account and the Respondent had been in breach of the requirement that she take immediate action to remedy bookkeeping errors or shortage of funds. There seemed to be no assurance that the matters of concern were going to be resolved in the near future or possibly at all.

The Submissions of the Respondent

16. The Respondent realised the seriousness of the allegations made against her and she had admitted them. She asked the Tribunal to recognise how seriously she had taken the matter as she had attended the Tribunal Hearing having left a seriously ill baby daughter at home.
17. Since the IO's visit the Respondent had been working to identify all of the items on the suspense accounts and to repay shortages on client account from her own resources. She had secured loans from her bank to reduce the shortages but had not been able to borrow sufficient money to eliminate them.
18. The Respondent's practice provided her with a living wage in Portugal but her income was not great by UK standards.
19. At the time of the hearing the unidentified items on the suspense account amounted to some €23,000. Some of the items had been identified in general terms for instance they related to rates or bills of costs. The Respondent's staff had been going through the files and other documents to establish who had paid costs and in what amounts.
20. The Respondent was the only lawyer in the practice which undertook mainly conveyancing for United Kingdom and Irish clients. She undertook some probate work for overseas clients in Portugal but her practice was made up of some 80% conveyancing work.
21. The Respondent had taken on a new bookkeeper who was a British citizen with wide experience of keeping books in professional firms. She was working for the

Respondent for three days per week writing up the ledgers. It was the intention that she would take charge of cheque requests.

22. The Respondent awaited funds due from clients and anticipated the receipt of such funds imminently in cases where they had been overpaid or where payments had been made on the client's behalf when the Respondent was not fully in funds.
23. The Respondent had not defrauded clients and had not deliberately flouted the rules. The Respondent had made substantial injections of capital. She handed up a list setting out the financial position. The present total shortage on suspense accounts was a little in excess of €23,000. Realistically she expected half of that money to be replaced by clients and recognised that she herself would have to meet the balance.
24. The Respondent had now asked her clients for more money than was anticipated to meet rates payments with a view to refunding any overpayment to the client when the figure had been established.
25. The Respondent assured the Tribunal that she had implemented a new system whereby she would always check to see that money held for clients was sufficient to meet payments made.
26. The suspense accounts had been created as the Respondent's record keeping was not sufficiently accurate to identify every receipt and payment made. No further suspense accounts had been created since September 2006 as all posting subsequent to that date had been duly identified and attributed to the relevant client.
27. The Respondent made reference to the letter she had addressed to the Head of the Investigation and Enforcement Compliance Director at The Law Society dated 24th January 2006. In that letter she gave some background information namely that she had taken over the practice in Portugal at the beginning of 1998 following the death of the previous sole practitioner. The firm had been run by an English solicitor, who had been based in the United Kingdom, and the office had been managed by a dual English/Irish qualified solicitor who had left the office two or three months before the Respondent arrived. In those months the practice had been supervised by a Portuguese lawyer. At the outset the Respondent encountered difficulty in obtaining funds from the English solicitor in respect of ongoing matters and she suffered initial hostility from the local Bar which refused to register her, despite being required to do so under the terms of European legislation. Following intervention by the International Directorate of The Law Society the Respondent had been registered with the Portuguese Ordem Dos Advogados. A number of local lawyers had brought a criminal case against the Respondent claiming that she was holding powers of attorney on behalf of clients illegally.
28. The Respondent had encountered difficulties in recruiting and keeping suitable staff who understood the need for strict adherence to Law Society rules.
29. The Respondent's accountant had visited Portugal in December 2006 to prepare the Accountant's Report and during his visit he and the Respondent fully discussed the situation in order to formulate a strategy to resolve the problems and to ensure that the situation did not arise again. The accountant had agreed to return at the end of

February by which time all suspense items would have been attributed to a particular client or the money reimbursed if the former proved impossible.

30. The Respondent acknowledged that the keeping of her accounts records had not met the standards required by The Law Society but she asked that all other circumstances be taken into account. She had taken steps to tighten up procedures to ensure that similar difficulties did not happen again and she did appreciate that she must fully comply with the rules.

The Tribunal's Findings

31. The Tribunal found all of the allegations to have been substantiated. Indeed they were not contested.
32. The Tribunal recognised that the Respondent was honest and straightforward. The way in which she used her client account was wholly inappropriate and the failure to keep proper records and to ensure that she made payments on behalf of clients only when those clients had put her fully in funds was not acting in the best interests of her clients, the public or indeed herself. She had seriously failed to comply with the Solicitors Accounts Rules. Such compliance is a fundamental requirement of practise as a solicitor, even a solicitor who is practising overseas.
33. The Respondent had not come before the Tribunal in a position to assure it that she had put all matters right. In essence she told the Tribunal that she had done the best that she could but there still remained a substantial shortage on client account. She anticipated recovering about one half of the remaining shortage from clients. She had explained that she had borrowed the maximum that she was able to borrow and there appeared to be little prospect of her rectifying the remaining shortage from her own resources.
34. The Tribunal was not able to permit a solicitor who was running a practice with a shortfall on client account to continue. If all of the clients of the firm had required their money to be returned to them the Respondent would not have been able to do so. It followed, of course, that where she was making payments on behalf of clients for whom she held insufficient funds to meet those payments she was thereby utilising monies belonging to other clients to make such payment. That was a situation that was wholly unacceptable.
35. It was for those reasons that the Tribunal considered that it was both appropriate and proportionate to suspend the Respondent from practice for an indefinite period with immediate effect.
36. The Tribunal indicated to the Respondent that its members wished her to see that there was light at the end of the tunnel and pointed out that it was open to her to apply to the Tribunal for the period of suspension to be brought to an end. The Tribunal considered that another division of the Tribunal considering such application would be very unlikely to view it favourably unless the Respondent could demonstrate that she had put her house in order and that she had acquired a full understanding of the importance of compliance with the Solicitors Accounts Rules and that she had a full

commitment punctiliously to comply with the Accounts and other Rules by which solicitors in practice are bound.

37. The Applicant had sought the costs of and incidental to the application and enquiry and had provided the Tribunal with a schedule of costs. The Respondent had indicated that she would like the Tribunal to make a fixed order for costs so that she knew where she stood. She took no objection to the Applicant's own costs but considered that the IOs' costs were rather high. The Tribunal took the details of the costs sought and the Respondent's representations into account and ordered the Respondent to pay the costs of and incidental to the application and enquiry fixed in the sum of £8,955.00.

Dated this 11th day of February 2007
On behalf of the Tribunal

Mrs K Todner
Chairman