

IN THE MATTER OF RICHARD JOHN SWINBURN, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr A G Ground (in the chair)
Mrs J Martineau
Mr J Jackson

Date of Hearing: 23rd September 2008

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of the Solicitors Regulation Authority by Jonathan Richard Goodwin of Jonathan Goodwin, Solicitor Advocate, 17E Telford Court, Dunkirk Lea, Chester Gates, Chester CH1 6LT that Richard John Swinburn of Tewin, Hertfordshire, might be required to answer the allegations set out in the statement that accompanied the application and that such Orders might be made as the Tribunal should think right.

The allegations were that the Respondent, Richard John Swinburn, had been guilty of conduct unbecoming a solicitor and/or breach of relevant Rules in each of the following particulars, namely:-

1. The Respondent had failed to comply with an undertaking.
2. The Respondent had failed to keep the recipient of the undertaking informed as to reasons for the delay in its discharge.

3. The Respondent had failed to deal promptly and substantively with correspondence received from the Law Society and/or the Solicitors Regulation Authority.
4. The Respondent had failed to comply with the expectation of an Adjudicator dated 3rd January 2007.
5. The Respondent had failed to keep accounts properly written up in accordance with Rule 32 of the Solicitors Accounts Rules 1998.
6. The Respondent had failed to maintain a cash book to record transactions taking place on a day to day basis contrary to Rule 32 (2) of the 1998 Rules.
7. The Respondent had failed to carry out reconciliations as required by Rule 32 (7) of the 1998 Rules.
8. The Respondent had withdrawn cash from client account contrary to Rule 23 of the 1998 Rules.
9. The Respondent had failed to produce practice accounts and records to the Investigation Officers contrary to Rule 34 (1) of the 1998 Rules.
10. The Respondent had failed to transfer costs from client to office account within 14 days of delivery of bills, contrary to Rule 19 of the 1998 Rules.
11. The Respondent had failed to provide adequate or sufficient costs information and/or client care letters and client care information contrary to Rule 1 (a), (c), (d) and (e) and 15 of the Solicitors Practice Rules 1990 ("SPR").
12. The Respondent had failed to disclose material information to his client(s) contrary to Rule 1 (a), (c), (d) and (e) of SPR.
13. The Respondent had made representations that were misleading and/or inaccurate to a client. In all the circumstances the Respondent's conduct was dishonest, alternatively reckless.
14. The Respondent had made a claim for costs which he knew he could not justify, contrary to Rule 1 (a), (c), (d) and (e) of the SPR. In all the circumstances, the Respondent's conduct was dishonest, alternatively reckless.
15. The Respondent had failed to have regard to the Money Laundering Regulations 2003.
16. The Respondent had failed to comply with the Solicitors Indemnity Insurance Rules 2006, due to non payment of insurance premium(s).
17. The Respondent had facilitated, permitted or acquiesced in the Investigation Officers being misled. In all the circumstances the Respondent was dishonest, alternatively reckless.

18. The Respondent had failed to advise the Solicitors Regulation Authority of County Court Judgments against him, 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 was unrepresented and did not appear.

The evidence before the Tribunal consisted of the Rule 5 Statement dated 7th February 2008, together with its exhibit which included, inter alia, correspondence between Mr Swinburn and the Solicitors Regulation Authority, relevant correspondence from third parties and a report of the multiple complaints investigation team dated June 2007.

An Affidavit of Service dated 25th June 2008 was produced to the Tribunal. The Tribunal was satisfied that Mr Swinburn had been served with the relevant documents and that he was aware of the date of the substantive hearing. Moreover, the Tribunal noted a letter dated 22nd September 2008 from Mr Swinburn to the Practising Certificates Department of the Solicitors Regulation Authority. This letter was copied to the Applicant. In his letter Mr Swinburn explained that at the present time he saw no benefit in remaining on the Roll. As he had not renewed his practising certificate, he requested that his name be removed from the Roll with immediate effect. He explained that in the circumstances he would not be attending his hearing before the Tribunal and he suggested that the proceedings be adjourned generally.

The Tribunal dealt with the letter of 22nd September 2008 as an application by the Respondent for an adjournment. The Applicant opposed the application. The Tribunal was satisfied that no valid reasons had been put forward to justify an adjournment and directed that the substantive hearing should proceed.

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

The Tribunal Orders that the Respondent Richard John Swinburn of Tewin, Hertfordshire, solicitor, be Struck Off the Roll of Solicitors and it further Orders that he do pay the costs of and incidental to this application and enquiry assessed by the Tribunal at £30,000.00 to include the costs of the Investigation Accountant of the Law Society.

The facts are set out in paragraphs 1 – 13 hereunder:-

1. The Respondent, Richard John Swinburn, born on 27th July 1963, was admitted as a solicitor on 15th May 1989. At all material times he practised, on his own account, under the style of Swinburn Solicitors from offices at 34 High Street, Welwyn, Hertfordshire. On 9th August 2007 an Adjudication Panel resolved to intervene into the Respondent's practice and to refer his conduct to the Solicitors Disciplinary Tribunal. In November 2007 Mr Swinburn was made bankrupt. He was due to be discharged in November 2008.
2. On 17th April 2007 the Investigation Casework Team ("ICT") commenced an inspection of Mr Swinburn's practice. The ICT's report dated June 2007 was before the Tribunal.

3. The Solicitors Regulation Authority (“SRA”) had written to Mr Swinburn on 9th July 2007 seeking his explanation. He had replied by an undated letter received by the SRA on 16th July 2007.

4. During the course of the inspection the ICT had noted that the books of account were not in compliance with the Solicitors Accounts Rules. Matters of concerns had also been identified relating to:-

Practice Rules 1 and 15 and the Solicitors Costs Information and Client Care Code 1999;

Money Laundering Regulations 2003;

Undertakings;

Failure to disclose material information to client(s), and misleading representations to a client.

5. Mr Swinburn had been unable to produce his practice accounts, either at the beginning of the inspection or by the time the ICT Report was finalised. Mr Swinburn had said that his accountant was waiting for information from the Bank. However, the accountant had explained to the Investigation Officers that Mr Swinburn owed approximately £4,000 in fees and the outstanding Accountant’s Report would not be finalised until those fees had been paid.

6. The ICT Report had detailed breaches of Rule 32 (7) of the Solicitors Accounts Rules 1998 in that Mr Swinburn did not appear to have reconciled his client account in accordance with the Rule. A review of three of the client ledgers for a Mr C had showed that they had not been written up properly and were not up to date in accordance with Rule 32 (1). In breach of Rule 23 of the Solicitors Accounts Rules, the Investigation Officers had noted some 20 cash withdrawals from client account between July 2006 and March 2007.

7. During the course of the inspection, Mr Swinburn had failed to produce practice accounts and records. He had claimed that all the accounts information had been stored on a laptop that was faulty and that accounts information had been taken from his office by the accountant. Subsequently, the accountant had confirmed that she had not taken any original documentation from the firm and that there was no cashbook for the office account.

8. During the investigation, the Officers had reviewed nine matters where, in breach of Rule 19 of the 1998 Rules, Mr Swinburn had billed clients and had taken payments for those costs piecemeal by transfers from client account and/or the bill had not been raised and/or money received on account of costs had not been transferred within 14 days.

9. Some 10 files had been selected for review from which issues of concern, involving breaches of the Solicitors Practice Rules, had arisen. These included failure to account, to render a bill, to provide sufficient costs information, to provide client care information and overcharging in breach of Practice Rule 1. The Tribunal had before it full details of these files which are summarised as follows:-

Mr H - Administration of his mother's estate

There was no copy of the terms of business on the file or any evidence that the client had been given information about costs or about a complaints handling system in accordance with Practice Rule 15. Mr H had been billed for £5,200.00 plus VAT of £910.00 on 5th January 2007 and funds had been transferred from client to office account to discharge the bill on 9th January 2007. However, Mr H had never received a bill. The file had subsequently been reviewed by a costs draftsman who had found overcharging of at least £3,000.00.

Mr M - Administration of the estate of Ms H L

There was no evidence of a client care letter, or a copy of the terms of business on the file. Moreover, there was no evidence that Mr M had been kept up to date with the work being done or with the costs position. Mr M could not recall having been sent a bill for £5,500.00 plus VAT. However, on the ledger, payment of the bill had been made by the piecemeal transfer of sums from client to office account between 26th January 2007 and 7th February 2007. Subsequent review by a costs draftsman had found overcharging of about £4,500.00.

Mr R and Mr M - Business advice and freehold issues.

There was no estimate of fees on the files. A sum of £8,100.00 plus VAT had been billed at 7th July 2006. The costs had been transferred from client to office account piecemeal between 2nd August 2006 and 3rd October 2006. The clients had said they did not get a bill for £8,100.00. Subsequent review by a costs draftsman had found overcharging of at least £7,000.00.

Ms S and A H - Negligence by a Will writer and advice on property

The Will action had been settled by a Consent Order dated 6th October 2005 for £35,000.00 in full and final settlement, including costs and interest. However, there was no evidence on the files, prior to 6th October 2005, that the clients had been advised of, agreed to or understood the terms of the settlement. The sum of £35,000.00 had been received into client account on 6th October 2005. However, the Consent Order was not approved by the Court until 22nd December 2005. A letter had been sent to Ms H dated 6 October 2005, explaining that she and her sister would receive £8,500.00 each and all their fees were covered. Although the letter had said "I enclose our final account", no copy invoice had been found on the file. In February 2007 Ms S H had asked for a remuneration certificate. There was no evidence that Mr Swinburn had dealt with this request. In neither file, at any point, had the clients been provided with information about terms of business, managing costs or assessing cost benefit. No details of the costs of £16,043.62 in the Will action had been provided. Moreover Mr Swinburn had purported to lend Ms H £4,000.00 in October 2005 as a "favour". However, unknown to her, the £4,000.00 "loan" had been paid to her from her damages held in client account. Mr Swinburn had told Ms H that the Court had not released the money whereas in fact the £35,000.00 was in client account and he had already transferred costs of £16,043.62 to office account in respect of costs.

Mr C - Personal injury claim

There was no evidence that regular costs information had been provided, nor any bills sent during the retainer. Although liability had never been an issue, Mr C signed a conditional funding agreement to include a 100% success fee. Damages of £30,000.00 had been paid into client account on 5th April 2006. £20,000.00 had been paid to Mr C on 18th April 2006. On 22nd April 2006 Mr Swinburn had raised a bill for £8,510.64 plus VAT of £1,489.36 and had transferred £10,000.00 from client account to office account to settle the bill. There was no evidence on the file that the bill had been sent to Mr C. On 14th December 2006, the insurance company paid £22,584.50 in full and final settlement of all costs. Mr Swinburn had advised the Investigation Officers that this had been an interim payment, but, as at April 2007, Mr Swinburn had not taken any steps to apply for a detailed assessment. Moreover, on 4th July 2007, Mr Swinburn had written to Mr C, who had obtained judgment for the sum of £10,000.00 deducted as costs. In his letter Mr Swinburn had purported to give legal advice to Mr C with whom, as a judgment debtor, he was in a position of conflict.

10. During an interview on 17th April 2007, Mr Swinburn had stated to the Investigation Officers that he was not a director of any company. However, Mr Swinburn had been a director of a company called Claremark since 1st November 1995 (according to Companies House).
11. Mr Swinburn had provided details of five County Court Judgments during the investigation. Previously he had failed to notify these judgments to the Solicitors Regulation Authority. This was in breach of Rule 1 of the Solicitors Practice Rules. These judgments were registered either against him or his firm.
12. When reviewing a conveyancing file of Mr C, it had been noted by the Investigation Officers that no proof of client's identity had been obtained nor any evidence that Mr Swinburn had checked the source of funds of some £475,000.00, in compliance with the Money Laundering Regulations 2003.
13. It had been noted during the investigation that Mr Swinburn's professional indemnity insurance premium of £12,000.00, due for payment in October 2006, had not been paid. The Investigation Officer had subsequently discovered that Mr Swinburn had not paid, in full, the premium for the previous year.

The Submissions of the Applicant

14. Mr Goodwin stressed that Mr Swinburn's failure to provide practice accounts and records was an extremely serious matter as were his attempts to mislead the Investigators. He said that the regulatory authority could only carry out its functions if provided with all the relevant material. It was vital, in the interests of both the public and the profession, that solicitors cooperated with and gave clear and direct answers to the Solicitors Regulation Authority.
15. Mr Goodwin highlighted Mr Swinburn's explanation to the Investigation Officers about the firm's books of account. Mr Swinburn had said, on 17th April 2007, that everything was on his computer and that the books of account were pretty much up to

date. However, on the second day of the investigation, key information was still not available, namely; ledgers, office and client account statements, cheque stubs and bank reconciliations for the last six months. Mr Swinburn also said that the accounts information had been taken away by the accountant. Subsequently, the accountant explained that she had not removed any original documentation from the firm. Mr Goodwin submitted that Mr Swinburn had misled the Investigation Officers as to the firm's books of account during the investigation. Moreover, he had said that he was not a director of a company when in fact he was.

16. Mr Goodwin referred to breaches of undertakings. He explained that Mr Swinburn had failed to comply with an undertaking given to discharge, on completion, the charges registered against a property and had failed to keep the recipient of the undertaking informed of the reasons for the delay. His failure led to an adjudication decision dated 3rd January 2007 whereby the Adjudicator expected the Respondent to discharge his undertaking within 7 days of receipt of notification of the decision failing which he directed the Respondent's conduct to be referred to the Tribunal. The Respondent failed to comply with the decision. Although completion took place in August 2005, a Second Charge, for a loan of some £24,818.52, had not been discharged by June 2007. Mr Goodwin noted that although the breach of the undertaking had resulted from a failure to verify what his client had told him about the amount required to redeem the charge, it still resulted in a considerable delay in complying with the undertaking and a failure to keep the recipient informed. Mr Goodwin submitted that it was vital that solicitors comply with their undertakings.
17. Mr Goodwin submitted that in relation to allegation (13), Mr Swinburn had made representations to a client (Ms H) that were misleading and/or inaccurate. It was also alleged that his conduct was dishonest. Moreover, in relation to allegation (14) that Mr Swinburn had made claims for costs that he knew he could not justify (to clients Mr H, Mr M, Mr R and Mr M, Ms SH and Ms AH and Mr C). It was also alleged that his conduct was dishonest. Finally, in relation to allegation (17) that Mr Swinburn had misled the Investigation Officers, again it was alleged that he was acting dishonestly. Mr Goodwin referred to the "combined test" specified in the Twinsectra case and submitted that it had been fully satisfied by the evidence before the Tribunal that Mr Swinburn had acted dishonestly.

The Submissions of the Respondent

18. Although Mr Swinburn did not attend and was not represented at the hearing, the Tribunal had read all his responses to the Solicitors Regulation Authority. In addition, when outlining the facts to the Tribunal, in the absence of Mr Swinburn, Mr Goodwin had drawn the Tribunal's attention to the specific representations including admissions made by Mr Swinburn in relation to each of the allegations. The Tribunal took particular note of the contents of Mr Swinburn's letter of 16th July 2007, detailing his responses to the ICT's Report of June 2007 and of his undated letter sent by fax to the SRA on 3rd August 2007.

The Findings of the Tribunal

19. Having considered all the evidence including the written responses of Mr Swinburn together with the submissions of the Applicant, the Tribunal was satisfied that all of

the allegations had been proved. Moreover, the Tribunal found that in not telling Ms H that damages of £35,000.00 had been paid into client account on 6th October 2005 and in purporting to “lend” her £4,000.00 of these monies, in overcharging in a series of cases and in misleading the Investigation Officers, Mr Swinburn’s conduct was dishonest by the standards of reasonable and honest people. Having considered all Mr Swinburn’s responses, the Tribunal was satisfied, so that it was sure, that Mr Swinburn did not have an honest belief in what he was saying or claiming and therefore that he knew that what he was doing was dishonest by those same standards. In particular the Tribunal was concerned that while Mr Swinburn admitted the overcharging he gave no explanation for it. The Tribunal was particularly concerned by the distress caused to clients and that he misled the Investigation Officers. This was because the Solicitors Regulation Authority can only carry out its function to protect the public and to uphold the integrity of the profession if it is provided with all the relevant material and the cooperation of and direct and truthful answers by anyone under investigation.

20. The Tribunal noted that Mr Swinburn had appeared before the Tribunal previously on 9th December 2003 in relation to allegations of conduct unbefitting a solicitor. The evidence then before the Tribunal included the admissions of the Respondent. In finding the allegations proved in 2003 the Tribunal noted that an aggravating feature had been the Respondent’s failure to deal with post-completion work in a large number of conveyancing transactions and failure to deal with letters of enquiry addressed to him by lender clients. The Tribunal had ordered that Mr Swinburn pay a fine of some £7,500.00 together with costs of £2,000.00.
21. In the present circumstances, given the findings of dishonesty, the Tribunal was satisfied that Mr Swinburn should be Struck Off the Roll of Solicitors and that he should pay costs duly assessed at £30,000.00 to include the costs of the Investigation Accountant of the Law Society.

Dated this 10th day of December 2008
On behalf of the Tribunal

A G Ground
Chairman