

IN THE MATTER OF CORNELIUS JOSEPH MCCARTHY, solicitors

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr I R Woolfe (in the chair)
Mr R Nicholas
Mr D E Marlow

Date of Hearing: 26th January 2010

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 George Marriott a partner in the firm of Gorvins of 4 Davy Avenue, Knowlhill, Milton Keynes, MK5 8NL on 6 May 2009 that Cornelius Joseph McCarthy, solicitor of Suite 1, 2 Anstruther Road, Edgbaston, Birmingham B15 3NN 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 against the Respondent were that he:

1. Maintained a shortfall in client account, contrary to Rules 19 and 20 Solicitors' Accounts Rules 1990 ("SAR");
2. Improperly transferred monies in round sums from client account to office account without first delivering bills of costs, contrary to Rules 22(3) and 19(4) SAR;
3. Failed to maintain books of account in compliance with SAR, contrary to Rule 6 SAR;
4. Retained client monies for his own benefit;

5. Failed to comply with client care requirements;
6. Intentionally sought to instruct or interfere with and failed to cooperate during an SRA investigation;
7. Failed to comply with directions of the Adjudicator, contrary to Rules 1.02 and 1.06 of the Solicitors Code of Conduct 2007 (“SCC”);
8. Failed to comply with notice served under Section 44B of the Solicitors Act 1974.

The case was put against the Respondent on the basis that he was dishonest with regard to allegations, 2, 4 and 6.

By a supplemental statement pursuant to Rule 7 dated 13th July 2009 the further allegation against the Respondent was that he:

9. Failed to hold professional indemnity insurance from 1st October 2008, contrary to Rule 5.01(c) SCC and contrary to Rules 4.1, 5.1, 5.2 and 10.02 of the Solicitors Indemnity Insurance Rules 2008.

The application was heard at the Courtroom, Third Floor, Gate House, 1 Farringdon Street, London EC4M 7NS on 26th January 2010 when George Marriott appeared as the Applicant and the Respondent appeared and was not represented.

The Evidence before the Tribunal

The evidence before the Tribunal included the Rule 5 statement of the Applicant, together with accompanying bundle which included a Forensic Investigation Report (“FIR”) dated 10th September 2008 and a supplemental report to the FIR dated 15th September 2008 as well as a Rule 7 supplemental statement of the Applicant dated 13th July 2009 together with accompanying exhibit. The evidence before the Tribunal also included a statement of the Respondent dated 24th July 2009. The Tribunal heard the sworn oral evidence of Mr P Parmar (“the FIO”) a senior investigator with the SRA and the sworn oral evidence of, a client, Mr John Bruin.

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

The Tribunal Orders that the Respondent, Cornelius Joseph McCarthy of Suite 1, 2 Anstruther Road, Edgbaston, Birmingham B15 3NN, be suspended from practice as a solicitor for the period of 3 years to commence on the 26th day of January 2010 and it further Orders that he do pay the costs of and incidental to this enquiry fixed in the sum of £12,500.

Preliminary Matter

1. The Respondent applied for an adjournment of the proceedings on the basis that:
 - (i) the Counsel that he had instructed was involved in a part heard case in Lincoln. The adjournment was requested so that Counsel could appear for the Respondent; and

- (ii) The Respondent had not realised that Mr John Bruin would be attending to give evidence in the current proceedings. He had paid the fine imposed upon him by the Adjudicator in the case of Mr Bruin within the applicable time limits but, in accordance with the Order of the Adjudicator, had made an application to the Birmingham County Court for a detailed assessment of costs. That application was currently before the County Court in Birmingham and had been adjourned until around the middle of April 2010. The outcome would have an effect on the current matters before the Tribunal.
2. In questioning from the Tribunal it appeared that Counsel had only informed the Respondent of his unavailability due to other matters the previous evening. This had been by way of a handwritten note which was not in the Respondent's possession.
 3. In the Applicant's submission the Respondent had been aware of today's hearing since August 2009. To grant an adjournment on the basis of a letter from Counsel that was not before the Tribunal was in the Applicant's submission not good enough. In any event it was unclear as to whether Counsel had received instructions from the Respondent and no witness statement had been received on his behalf. According to the Tribunal's own Practice Note on adjournments, the non-appearance of a representative was on the face of it not a sufficient reason for an adjournment.
 4. The Applicant also opposed the second ground relied upon by the Respondent in requesting an adjournment. Mr Bruin's statement already appeared at page 29 of the Applicant's bundle and Mr Bruin's evidence would be restricted to the matters in that statement, matters which the Respondent had been aware of as long ago as 21 April 2008. The matter that was before the Birmingham County Court involved the detailed assessment of costs and was not relevant to the allegations before the Tribunal today. In summary the Applicant said that the application was yet another application to stall the proceedings. The propensity of the Respondent to delay proceedings was illustrated by the facts surrounding allegation 7.
 5. The current agreed position between the Respondent and the Applicant was that the Respondent admitted all the allegations with the exception of the dishonesty element to allegations 2, 4 and 6.
 6. In response to the Applicant's submissions the Respondent said that although he had been criticised for not moving fast enough on these proceedings he had suffered from depression and his recent bereavement.

Decision of the Tribunal on the Preliminary Matter

7. The Tribunal would not allow the Respondent's application for an adjournment. The Tribunal had listened most carefully to what both the Applicant and the Respondent had had to say and had found that neither of the grounds for adjournment that the Respondent had put forward was sufficient for the following reasons:
 - (i) Insofar as the lack of representation was concerned the Tribunal had had regard to paragraph 4(d) of its own Practice Note. No evidence had been put before the Tribunal that Counsel had been instructed and neither had any

evidence been adduced to show that Counsel was unable to attend. In any event nobody had come from Counsel's chambers to explain the position.

- (ii) Mr Bruin's presence today to give evidence was not a ground for adjournment. The evidence of Mr Bruin was not a surprise having been within the Applicant's bundle which had been served upon the Respondent. In any event Mr Bruin would restrict himself to the matters that were covered in that statement and the Tribunal also found that the costs assessment in relation to Mr Bruin at the Birmingham County Court was not relevant to these proceedings.

The facts are set out in paragraphs 1-77 hereunder:

1. The Respondent, born in 1937, was admitted as a solicitor in December 1980. His name remained on the Roll. At the material time the Respondent practised on his own account as McCarthy & Co, Suite 11, Crest House, 7 Highfield Road, Edgbaston, Birmingham, B15 3ED. The SRA intervened into the Respondent's practice on 29th October 2008.
2. The Respondent did not hold a current practising certificate and was now working as a Legal Adviser on his own account from Suite 1, 2 Anstruther Road, Edgbaston, Birmingham B15 3NN.
3. The Respondent was the sole principal of McCarthy & Co ("the Firm"). The SRA inspected the books of account and other documents at the firm on 6-12 August 2008, culminating in a report of 10th September 2008.
4. An Adjudication Panel considered the report and referred the Respondent's conduct to the Tribunal by a decision of 27 October 2008.
5. At the same time, the SRA investigated a complaint received from a client, Mr Bruin at the end of which an SRA Adjudicator made a number of directions. The Respondent's subsequent failure to follow these directions was the subject of allegations 7 and 8.

Client Account Shortfall

6. The list of liabilities to clients produced to the FIO by the Respondent suggested that they were in agreement with the balances shown in the clients' ledgers but failed to include additional liabilities to clients as at 30 June 2008 in the amount of £151,079.36, representing a cash shortage in the Respondent's client account in the same amount.
7. The cash shortage arose in relation to two clients, one of whom was Mr Bruin, where the Respondent had either transferred monies on account of costs from client to office bank account without delivering a bill or where the Respondent had improperly lodged client money in office bank account without having delivered a bill. All but one of the transfers identified by the FIO were in round sums.

8. Mr Bruin told the SRA that he had never received a bill from the Respondent, despite having paid a total of approximately £18,000 in cash on account of costs.
9. Initially, the Respondent indicated that he was seeking legal advice upon the matter and was unable to discuss it with the FIO until he had obtained that advice. The SRA saw no evidence that the Respondent sought any legal advice or any documentary evidence that the shortfall has been rectified.
10. The Respondent later agreed that there were cases in which bills had not been raised which he recognised as a failure to comply with the SAR.
11. The SRA wrote to the Respondent on 18th September 2008 and requested his explanation of the cash shortage. In response, the Respondent denied that there was any shortage in client account but stated that there was an “apparent” shortage, due to his breaches of the SAR.
12. The Respondent offered to submit proof that the shortage had been rectified, if required. The Respondent was required to deliver this independent documentary evidence: firstly by letter of 18th September 2008 and then by specific request within the Report to the Adjudication Panel, upon which the Respondent was invited to in comment on 14th October 2008.
13. The Respondent did not provide the required or any proof that the shortfall had been remedied. The shortage remained at the time that the firm was intervened into in October 2008.

Failure to Maintain Books of Account

14. The Respondent retained the services of a bookkeeper to whom he supplied documents from which the bookkeeper was charged with maintaining books of account. The bookkeeper often had to rely upon bank statements and the return of paid cheques before he could retrospectively write up the books.
15. The Respondent gave the bookkeeper bills at the end of the year, to check that they matched the client ledgers and the cashbook. They did not always do so. The Respondent told the SRA that his bookkeeper was unlikely to have been provided with all bills.
16. The Respondent recognised that his central record of bills “was incomplete” and that he “did not ... keep records correctly ... in every case”. For example, in respect of Mr Bruin, the Respondent stated that there had been “an element of mis-posting in our account in respect of the [the total paid by Bruin]”.
17. The Respondent apologised for and explained that the problems arose because of external pressures and distractions caused by family illnesses and the illness of his bookkeeper. The Respondent conceded that he had not kept the books of account as well as he would have wished and also stated that he knew of problems which arose in keeping the books of account during the considerable time in which his bookkeeper was absent through illness.

Personal Use of Client Monies

18. Mr Bruin told the FIO that he paid the Respondent almost £18,000 on account of costs. The Respondent did not provide Mr Bruin a bill of costs in respect of any of his requests for money, which were paid by Mr Bruin in cash at a public house and at a hotel.
19. Mr Bruin told the IO that he felt bullied into providing cash to the Respondent and even resorted to selling his wife's car to provide cash for one of the Respondent's demands for money.
20. The client ledger recorded that Mr Bruin paid the Respondent a total of £17,114. The ledger suggested that it had been paid into office account. The ledger did not accurately reflect payments into the bank account and only £3,000 was actually paid into the bank account, although this was wrongly lodged into the office bank account when it remained client money until such time as a bill of costs was delivered. The Respondent did not deliver such a bill.
21. The remaining £14,114 of the cash provided by Mr Bruin was not paid into either the client or office bank account.

Client Care Documentation

22. The FIO noted that the client matter files reviewed appeared incomplete and did not contain client care letters.
23. The Respondent did not provide Mr Bruin with a client care letter setting out costs information.

Obstruction and Interference with SRA Investigation

24. The SRA required the Respondent to produce his central bills file containing the bills from the last two years as part of the inspection.
25. On 12th August 2008 the Respondent told the FIO that he did not have the central bills file with him but that he would bring it to the office in the afternoon for inspection. A file was provide to the FIO that afternoon together with a note from the Respondent in terms that he was unable to return to the office but that the attached file was the requested central bills file and contained the bills for the years 2006-2007 and 2007-2008. The Respondent also telephoned the FIO and stated that he had "popped in" to the office with the bills folder.
26. When the Respondent produced the folder of bills for inspection on the afternoon of 12th August 2008 he did not disclose to the FIO that the folder contained duplicate bills which had been created on different dates to those which were printed on the face of the bills.
27. A number of the bills within the folder were created other than on the date stated on the bill.

28. Ten bills in one matter were created between six to eighteen months after the purported date of the bill. Further bills in that matter were created during the course of the SRA inspection.
29. The FIO found only one bill which correlated to any of the client to office account transfers. That bill was dated 8th February 2008 and was in the amount of £11,750, although the transfer from client to office account was made three days prior to the bill, on 5th February 2008. The Respondent admitted that he transferred costs in circumstances when he had not delivered a bill of costs.
30. On 19th August 2008 the Respondent told the FIO that not all of the bills in the folder had been delivered to clients.
31. The Respondent's bookkeeper made the following comments to the FIO:
 - (i) that he could only work from the documents that the Respondent supplied and that, in the absence of bills, he had often had to rely upon bank statements and the return of unpaid cheques by the bank before he could write up the books of account;
 - (ii) that he had rarely seen bills to post to clients' ledgers;
 - (iii) that he did not see any bills unless they were given to him at the end of the year to check that they matched the cashbook and the ledgers and that on occasions they did not match;
 - (iv) that he had not seen any of the bills within the bills folder that the Respondent provided to the FIO; and
 - (v) that he had not seen any signed bills prior to those which the Respondent had provided to the FIO.
32. The Respondent told the SRA that he had no reason to complain about his bookkeeper but suggested that the SRA had placed "severe pressure" upon him, and "treated him harshly" and that the Respondent would "obtain an accurate statement" from his bookkeeper in due course. The bookkeeper had not provided a further statement.
33. The Respondent had since admitted that he "arrange[d] to have some bills recreated so to speak".
34. The Respondent instructed his secretary to photocopy bills on the morning of 12 August 2008 which were presented to the SRA in a file which the FIO had observed that morning.
35. The Respondent stated that his "papers were in disarray and some of his files could not be located". The Respondent suggested that the creations were "accurate and reflect work properly done and properly charged for by us."

Failure to Comply with Directions of Adjudicator

36. Mr Bruin made a complaint to the Legal Complaints Service (“LCS”) on 22 January 2007. Mr Bruin had instructed the Respondent in 2002 in respect of grievance procedures that he instituted against his employers and subsequently in a claim for unfair dismissal. The case was listed for a three day hearing but was postponed on a number of occasions.
37. Between 2003 and 2004 Mr Bruin paid sums on account of the Respondent’s costs and Counsel’s fees in the sum of £18,450. In October 2004 Mr Bruin paid the Respondent £8,000, of which £3,000 was for Counsel’s fees to appear at the hearing before the Tribunal. In October 2004 Mr Bruin’s employers put forward an initial offer to settle of £7,800 which had risen to £9,000 by November 2004, at which time Mr Bruin met with Counsel. Mr Bruin decided to accept the offer and the settlement was concluded by other solicitors on behalf of Mr Bruin. As settlement was reached without the need for a hearing, it was agreed that the fees paid in respect of Counsel’s fee would be returned to Mr Bruin.
38. The Respondent failed to provide a breakdown of costs or a copy of his bills to Mr Bruin’s representatives, despite repeated requests for the information. The Respondent also failed to return the £3,000 in Counsel’s fees and ignored Mr Bruin's repeated requests in November 2004 to return the monies.
39. Mr Bruin’s complaint concerned the Respondent’s:
- (i) failure to provide client care information, including details of his charging rates or a likely estimate of costs;
 - (ii) delay in the conduct of the case;
 - (iii) failure to keep Mr Bruin advised of progress;
 - (iv) failure to give costs risk benefit analysis advice during the retainer;
 - (v) failure to provide bills and receipts for monies paid on account; and
 - (vi) failure to obtain and provide witness statements.
40. Before the LCS investigated, the complaint was first referred back to the Respondent in the hope that it could be resolved under the complaints handling procedures pursuant to Rule 15 of the Solicitors Practice Rules 1990. The Respondent again failed to provide the required information and bills. The LCS therefore wrote to the Respondent on 12th September 2007, requiring his response to the complaint and the requested documents.

Section 44B Notice

41. The SRA issued notice under Section 44B Solicitors Act 1974 on 12th October 2007 after which the Respondent provided a file of papers. The file was not complete. The file contained no copy of the application to the Employment Tribunal, no directions of

the Tribunal, no attendance notes detailing meetings, no breakdown of costs or likely costs distinguishing between fees, VAT and disbursements and no reference to costs at all other than a demand for the sum of £2,000 on 6th March 2003; the acknowledgement of the receipt of £2,350 on 7th April 2003; demands for £1,000 on 23rd October 2003, £3,500 + VAT on 20th May 2004 and £2,625 on 19th October 2004. There was also a letter dated 23rd November 2004 in terms that Mr Bruin would receive a credit from the Respondent in the sum of £3,000 + VAT in respect of Counsel's fees which were not used; Mr Bruin did not receive this letter.

Detailed Assessment of Costs

42. The Adjudicator's directions included the following:

“I further direct McCarthy & Co, within 28 days of the date of the letter accompanying my Decision to apply to the Court for a detailed assessment of their costs in connection with Mr Bruin's unfair dismissal litigation, such application to be made pursuant to Section 70 of the Solicitors Act 1974 as amended and further, that such application be made at the cost of McCarthy & Co who shall indemnify Mr Bruin against any reasonable costs or charges incurred in receiving his own legal advice or representation in connection with such detailed assessment.”
43. The Adjudicator's decision was sent to the Respondent under cover of a letter of 30th April 2008. The final date for compliance with the Decision was therefore 28th May 2008.
44. The Respondent wrote to the SRA on 29th May in terms that he had issued an application for the detailed assessment of costs. The Respondent included a copy of his application, also dated 29th May 2008, with the letter and advised that he would inform the SRA once he was aware of a hearing date.
45. On 2nd June 2008 the Respondent stated that he considered that by making an application he had satisfied the Adjudicator's decision.
46. The SRA informed the Respondent that he needed to provide evidence that the application had actually been lodged with the court, either by way of a sealed application from the court or an acknowledgement of his application from the court, together with a court reference number confirming that the application had been filed.
47. The Respondent replied on 5 June 2008 in which letter he stated that he had done “everything [in] his power to issue the application referred to by the Adjudicator” but was unable to provide the evidence required by the SRA or a claim number.
48. On 11 June, the SRA informed the Respondent that a short letter from the court acknowledging the application would be sufficient evidence that the application had actually been made. In reply, the Respondent stated that he had heard that the court had received the application and that he was “at present in correspondence with [the court]”. The LCS specifically requested sight of this correspondence.

49. On 18 June 2008 the Respondent sent a copy of a letter from Birmingham County Court acknowledging receipt of his application for the assessment of costs, following which the LCS closed their investigation.
50. Mr Bruin, in the meantime, had instructed solicitors to bring a claim in professional negligence against the Respondent. They enquired of the court as to the status of the application for assessment of costs. On 2nd September 2008 the court stated that the application was returned to the Respondent because it was defective and not properly made. The Court advised that the Respondent had not filed a further application. The Respondent said that the application was made under CPR 7 and the Court directed that it should be made under CPR 8.
51. Upon discovering that the Court had written in such terms, the SRA wrote to the Respondent on 24th September 2008 requiring:
- (i) his answer to the allegation that he had failed to comply with the Adjudicator's Order;
 - (ii) copies of all relevant documents which supported his explanation;
 - (iii) his explanation of why he did not submit a correct form to the Court upon notification that his original Application was defective; and
 - (iv) his reasons, if he had decided not to pursue the Application, for not complying with point 4.3 of the Order of the Adjudicator.
52. On 8th October the Respondent told the SRA that he had submitted a further application in the correct form.
53. Between 10th October 2008 and 20th December 2008 the SRA repeatedly requested evidence to substantiate this explanation in the form of a copy of the original application, a copy of any correspondence from the Court confirming that the application had been made, a copy of the ledger sheet showing the cheque that had been raised for the payment of the court fee, a copy of any correspondence received from the Court advising that the application had been incorrectly made and a copy of the new application made and confirmation from the court thereof. The Respondent failed to provide any such proof.
54. Despite not being able to provide any of the above proof, the Respondent claimed to have done "all things possible so far as to implement the orders of the Adjudicator."
55. The Respondent wrote to the SRA on 22nd December 2008 in terms that he was unable to finalise the application to the Court to assess costs and could not comply with the order because he did not have access to Mr Bruin's files following the intervention into his practice. The SRA intervened into the Respondent's practice two months prior to this, on 29th October 2008.
56. The Respondent also failed to repay Mr Bruin the sum of £18,000 in the alternative, as directed by the Adjudicator at Point 4.3 of the Directions Order.

The Respondent's Comments

57. The SRA raised matters which had been identified by the FIO with the Respondent on 18th September 2008, asking for his explanation of matters in the FIR and specifically:
- (i) why his books of account were not in compliance with SAR;
 - (ii) why there was a cash shortage and for documentary evidence that it had been rectified;
 - (iii) why costs had been transferred from client to office account in round sums in circumstances in which bills of costs had not been delivered to clients;
 - (iv) why there was no client care documentation on certain files;
 - (v) the circumstances surrounding the production to the FIO of a central record of bills where the evidence suggested that they had been created upon dates other than those on the face of the documents and which had not been delivered to clients, including clients P, B and T; and
 - (vi) why the Respondent's bookkeeper had limit access to documents from which to maintain the firm's accounts.
58. The SRA's letter was acknowledged on 19th September 2008, at which time the Respondent was reported to be ill. A further interim response was made by letter of 23rd September 2008 in which the Respondent stated:
- (i) that he was seeking legal advice;
 - (ii) that he was unable to respond to the SRA within the prescribed time due to illness and pressure of work; and
 - (iii) that he had complied with the decision of the Adjudicator following the complaint of Mr Bruin.
59. The Respondent replied more substantively to the SRA on 6th October 2008. The Respondent:
- (i) apologised for his failure to comply with the Solicitors Accounts Rules;
 - (ii) stated that he would respond fully on other matters raised after he had received advice upon the position; and
 - (iii) said that he was in the course of amending his application for the assessment of costs of B;
60. The Respondent told the SRA that he prioritised the solution of his clients' legal problems over and above his duty to comply with the rules of professional conduct.

61. Following receipt of the Respondent's response, the SRA prepared a draft report to be considered by an Adjudication Panel. The draft report was sent to the Respondent and his comments invited under cover of a letter of 14th October 2008.
62. An extension of time within which to respond was sought and granted and the Respondent replied by letter of 24th October 2008. Within his reply, the Respondent admitted that:
 - (i) he had not been able to attend "fully and properly ... to a good number of matters" which had placed him in breach of the rules of professional conduct;
 - (ii) accounts matters were out of date;
 - (iii) bills of costs had not always been delivered on time; and that
 - (iv) he had been unable to remedy the breaches of SAR in a proper manner.
63. The Respondent further stated that:
 - (i) he was investigating relevant matters;
 - (ii) he had been under severe pressure and that his life had been disrupted by family members' severe illnesses;
 - (iii) he had suffered from the equivalent of a nervous breakdown;
 - (iv) whilst he accepted that he had not complied with the rules of professional conduct, he had not been dishonest; and that
 - (v) he had paid Mr Bruin £2,000 and the SRA's costs in the sum of £850.
64. The Respondent's indemnity insurance for the indemnity year 2007-2008 expired on 30 September 2008.
65. The Respondent failed to obtain indemnity insurance from 1 October 2008. No indemnity insurance was held for the period from 1 October 2008 until the SRA intervened into the Respondent's practice on 29 October 2008.
66. In the absence of indemnity insurance, the Respondent was required to make an application to enter the Assigned Risks Pool ("ARP"). The Respondent failed to make any such application.
67. The SRA wrote to the Respondent on 24 December 2008 requiring his explanation for his failure to obtain indemnity insurance for the period from 1 October 2008 to 29th October 2008 or to apply to enter the ARP.
68. The Respondent replied by letter of 6th January 2009. The Respondent did not deny that he did not have indemnity insurance for the period from 1 October 2008. The Respondent suggested that he took steps to obtain insurance but was unable to do so because there was no insurable interest after the SRA intervention into his practice.

69. The Respondent stated that he was suffering from physical and mental health illnesses and had provided two reports from Dr VW, Consultant Psychiatrist, dated 31st July 2008 and 27th August 2008 and a report from Dr O'C dated 27th August 2008. Dr VW confirmed that the Respondent was not his patient. The Respondent was required in his response to the draft report to the Adjudication Panel (sent on 14th October 2008) to provide any other or further medical reports regarding his health but none was provided.

The Sworn Oral Evidence of Mr Parmar, the FIO

70. The FIO confirmed the contents of his Forensic Investigation Report dated 10th September 2008 to be true. In cross examination by the Respondent he was asked whether or not he had subjected his bookkeeper to severe pressure so as to make him tearful. The FIO denied that was the case. He did confirm that the bookkeeper had been recovering from a knee operation and that the Respondent had been absent from the office due to his wife's illness. In general the FIO had found the bookkeeper to be fine and normal and he had given no indication that he was being put under pressure by either the FIO or his colleague.
71. The FIO had confirmed that he had not asked the bookkeeper directly about Mr Bruin.
72. The FIO accepted that the Respondent had been cooperative during the investigation. However it had been hard to get a direct answer from the Respondent.
73. The FIO said that the Respondent had told him during the investigation that he could not put his hands on all of the paperwork and that only some of the bills that he had seen had been signed.
74. The FIO denied that the cashier had mentioned any "problem cases" to him.

The Sworn Oral Evidence of Mr Bruin

75. Mr Bruin confirmed the truth of the contents of his statement dated 4th September 2008. He had instructed Mr McCarthy, the Respondent, in or around 2002 in relation to his employment tribunal claim. He had paid a total of £18,000 in cash, with £3,000 being paid to the firm in cash at their offices and the rest being paid in cash at places where he had met the Respondent. Part of the £18,000 had been in respect of barrister's fees totalling approximately £3,000. However, it became clear that the barrister would not represent him and that the work he had done was only an assessment. The barrister had told him that the Respondent ought to refund the monies received in respect of the barrister's fees. However, when he had asked Mr McCarthy for the refund, he had become angry and had told him that the money had been disbursed.
76. The dates indicated on the ledger accounts of McCarthy & Co for payment of the sums was not correct; he had not seen Mr McCarthy since 16 December 2004. At that stage he had changed his solicitors and lodged a complaint with the Legal Complaints Service.

77. In cross examination by the Respondent it was put to Mr Bruin that when he had first instructed the Respondent he had been in an emotional state. Mr Bruin denied that he had been in any such state and said that the Respondent had been late for every meeting and had been very rude. He did however agree with the Respondent that he had held at least 4 meetings with him and had worked hard for him. When it was put to Mr Bruin that he had incurred around 100 hours of the Respondent's time, Mr Bruin said that this would include social time as well. When asked by the Respondent whether it was true that the Respondent had travelled to Bristol for him, Mr Bruin said that it was and that the Respondent had taken two witness statements from that occasion neither of which he had ever seen despite making 8 or 9 requests to do so. It was also put to Mr Bruin that receipts had been sent to him by the Respondent for the monies received from him, however, Mr Bruin denied that this was the case.

The Submissions of the Applicant

78. The Respondent admitted all of the allegations save for dishonesty in allegations 2, 4 and 6. Dishonesty was not an essential ingredient of any one of the allegations, but that the case was put against the Respondent on the basis that he was dishonest with regard to those allegations. It was however open to the Tribunal to find any or all of those allegations proved without any element of dishonesty. In looking at dishonesty the Tribunal would need to consider each allegation separately and be satisfied so that they were sure that dishonesty had occurred. In that regard the objective and subjective tests in Twinsectra v Yardley and Others [2002] UKHL 12 would need to be satisfied, that is:

“Before there can be a finding of dishonesty it must be established that the Defendant's conduct was dishonest by the standards of reasonable and honest people and that he himself realised by those standards his conduct was dishonest.”

The subjective test would therefore only need to be applied if the objective part of the test was satisfied.

79. Whilst the SRA had some sympathy for the nature and cause of the external pressures and distractions upon the Respondent, the need for full compliance with SAR and with the Rules of Professional Conduct concerning client monies was paramount. As such, the SRA asserted that the Respondent's conduct and approach fell below the standard that was expected and required of solicitors by clients, the regulator and the public at large.
80. In regard to personal use of client monies, whilst the Respondent admitted this breach but said that the monies were not used for his own benefit, the SRA asserted that the inevitable conclusion to be drawn from the facts was that the Respondent retained the money for his own use.
81. The Applicant also asserted that on 12th August 2008 the Respondent had not disclosed to the FIO that the folder contained duplicate bills which had been created on dates different to those which were printed on the face of the bills, intending to mislead the FIO into believing that the file was a central record of genuine contemporaneous bills when it was not, and when the Respondent knew that it was

not. The Applicant asserted that the Respondent sought to deceive the FIO into believing that the Respondent had returned the file to the office from his home address when he had not and the Respondent knew that he had not.

82. In regard to the assertion by the Respondent that he had done all things possible to implement the orders of the Adjudicator, the Applicant said that this was misleading because he did not have the documents to be able to make the application. It therefore followed that no proper application had been or could be made and notwithstanding the Respondent's assertion that he had complied with the decision of the Adjudicator to the best of his ability the mere sending of an application in no way satisfied the Adjudicator's decision nor regularised the position relating to Mr Bruin's costs.

The Submissions of the Respondent

83. The Respondent relied upon his statement dated 24th July 2009 in which he explained his situation. He did not accept that he had been dishonest under either of the tests in *Twinsectra*. He admitted that he had been careless, foolish and unable to cope, and that his accounts had been in a mess but not that he had been dishonest. Both he and his staff had been under a lot of pressure during the FIO's visit and at that stage he had not been able to leave his wife for any extended period of time. He had not intended any dishonesty and in recreating documents had merely tried to replicate what would have been there already but had been lost.
84. At the time of the allegations the Respondent had acted foolishly but had a lot of medical problems as well as family difficulties. He accepted that he had not kept up with his accounts but this had not been deliberate.
85. The Respondent wished to apologise to the Law Society and the SRA. He had never gone out to cheat anyone, including Mr Bruin. At the relevant time Mr Bruin had been very friendly towards him and the situation now was that the District Judge would decide in April whether the costs were correct.
86. In the end he had not been able to satisfy the SRA's requirements and as a result his practice had closed down on 29th October 2008. There was an issue in allegation 9 concerning his professional indemnity insurance. At the time of the intervention he had been asked about cover from 1st October to 29th October and had tried to get insurance which he did with new insurers. They had quoted a very reasonable premium which he agreed. However, when the insurers had looked at his application more closely they discovered they had under-quoted and so he was not covered. He had tried to maintain cover but had to admit the breach.
87. In all the circumstances the Respondent asked the Tribunal not to condemn him as being dishonest when what had occurred was that he had been poor at dealing with his responsibilities as a solicitor. He had paid all of his income tax and nothing had been put in his own pocket from these matters.

The Decision of the Tribunal and its Findings

88. The Tribunal had heard that the Respondent had admitted all of the allegations save for the allegations of dishonesty. The Tribunal had considered most carefully all of

the documentation and evidence put before it, as well as the submissions of both the Applicant and the Respondent. The Tribunal found that the objective test in the case of Twinsectra had failed insofar as allegations 2, 4 and 6 were concerned. The Tribunal found that it had not been demonstrated beyond reasonable doubt that the Respondent's conduct in relation to those allegations was dishonest by the standards of reasonable and honest people. The Respondent had been most disorganised and that, together with the external pressures upon him, had led to the allegations before the Tribunal today.

The mitigation of the Respondent

89. The Respondent had suffered a great deal as a result of the proceedings. He had a small pension and no significant assets other than his family home. He asked the Tribunal to be lenient so that he could obtain work as an employed solicitor. The costs of the Applicant seemed very high and he had always made it clear that he would not be contesting many parts of the allegations.

The Order of the Tribunal

90. The Tribunal found all of the allegations admitted and proved but dishonesty had not been found on any allegation. In view of the fact that the allegations were serious and, in order to protect the public and the reputation of the profession, in all of the surrounding circumstances, the Tribunal had decided that the Respondent should be suspended from practice for a period of 3 years.
91. The Tribunal had heard from the Applicant that costs were applied for in the sum of £31,967.17. The quantum of costs was regarded as high but would not be disallowed in principle. Having heard the Respondent's submissions as to his poor financial position and taking into account that the Respondent was to be suspended, the Tribunal had applied the principles in D'Souza v The Law Society [2009] EWHC 2193 (Admin) and would fix costs in the sum of £12,500.
92. The Tribunal Ordered that the Respondent Cornelius Joseph McCarthy of Suite 1, 2 Anstruther Road, Edgbaston, Birmingham B15 3NN, solicitor, be suspended from practice as a solicitor for the period of 3 years to commence on the 26th day of January 2010 and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £12,500.

Dated this 12th day of April 2010
On behalf of the Tribunal

I. R. Woolfe
Chairman