

IN THE MATTER OF STEPHEN JOHN HENDELES, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr. R. B. Bamford (in the chair)
Mr. D. Green
Mrs C Pickering

Date of Hearing: 15th October 2009

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 David Elwin Barton of 13-17 Lower Stone Street, Maidstone, Kent ME15 6JX that Stephen John Hendeles of 2 Jays Close, Bricket Wood, St Albans, Hertfordshire AL2 3UJ be required to answer the allegations contained in the statement which accompanied the application and that such Order be made as the Tribunal should think right.

On 23rd October 2008 Mr Barton, the Applicant made a supplementary statement containing a further allegation.

The allegations set out below are those contained in the original and supplementary statements.

The allegations against the Respondent were that:

1. Contrary to Rule 7 of the Solicitors' Accounts Rules 1998 he failed to remedy breaches of the Rules promptly upon discovery;

2. Contrary to Rule 19 (2) of the said Rules he transferred money from client to office account in payment of fees but did not first send to the client or paying party a bill of costs or other written notification of the costs incurred;
3. He withdrew money from client account in circumstances not permitted by Rule 22 (1) of the said Rules and did so far for his own benefit. In so doing the Respondent was dishonest; alternatively he was reckless;
4. Contrary to Rule 22 (5) of the said Rules he withdrew money from client account in relation to particular clients which exceeded the money held on their behalf;
5. Contrary to Rule 32 (1) of the said Rules he failed to keep accounting records properly written up at all times;
6. Contrary to Rule 32 (2) of the said Rules he failed to record all dealings with client money on the client side of a separate client ledger for each client;
7. That he has failed to act with integrity, contrary to Rule 1.02 of the Solicitors' Code of Conduct 2007. The Respondent has also been dishonest.

The application was heard at The Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London EC4M 7NS when David Elwin Barton appeared as the Applicant and the Respondent was represented by Chloe Carter of Counsel instructed by Messrs Bond Pierce Solicitors.

The evidence before the Tribunal

The evidence before the Tribunal included certain admissions of the Respondent and the oral evidence of Miss Graham, Miss Taylor and the Respondent. A copy of the Respondent's points of objection (relating to a remuneration certificate application) were handed up at the hearing.

Prior to the hearing the Respondent had confirmed that he admitted allegations 1,2 & 3 (save that he disputed that those withdrawals of money had been for his own benefit or that in so doing he had been dishonest or reckless) he admitted allegations 4, 5 & 6. He denied allegation 7.

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

The Tribunal Orders that the respondent, Stephen John Hendeles of 2 Jays Close, Bricket Wood, St Albans, Hertfordshire, AL2 3UJ, solicitor, be suspended from practice as a solicitor for the period of five years to commence on the 15th day of October 2009 and it further Orders that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £19,000.00, such costs Order not to be enforced without the consent of the Tribunal.

The Respondent's background

The Respondent, born in 1945, had been admitted as a solicitor in 1974. His name remained on the Roll of Solicitors.

At the material times the Respondent was a sole practitioner practising under the style of Stephen Hendeles & Co from 22-24 Kingsford Street, London NW5 4JT. The Law Society had intervened into the Respondent's practice on 22nd February 2008. After that date he had worked as a solicitor in another firm in compliance with conditions placed on his practising certificate but owing to lack of instructions that work had come to an end. At the date of the hearing the Respondent was unemployed. He continued to hold a practising certificate subject to conditions which prevented him from practising as a sole principal.

The agreed facts are set out in paragraphs 1 - 45 hereunder:

1. On 11th November 2007 Miss Taylor, an Investigation Officer ("IO") employed by the Solicitors Regulation Authority (SRA) commenced an inspection of the Respondent's books of account and other documents. Her inspection concluded on 28th November 2008. Her written report dated 14th January 2008 was before the Tribunal.
2. The IO's report revealed that the Respondent's firm undertook residential and commercial conveyancing, litigation and a small amount of probate work. The Respondent was assisted in his practice by an assistant solicitor, a trainee solicitor and three support staff.
3. The Respondent's books of account did not comply with the Solicitors' Accounts Rules.
4. The Respondent had informed the IO that he thought he had a shortage on his client account of approximately £99,000 which had been accumulating since April 2007, explaining that his accountants had indicated that debit balances on client account didn't cause difficulty as long as they had been cleared by the time the accountants came to prepare the annual Accountant's Report.
5. The Respondent explained that the deficit had arisen due to volume of work and because sometimes postings on ledgers were not up to date, so that money which appeared to be available for a client, was not.
6. The IO reported that she had found incorrect postings; a suspense account showing unexplained office credits; improper transfers and debit balances on client ledger accounts. This situation meant that she could not establish that funds held on client account were sufficient to meet the liabilities to clients. The IO had ascertained that a minimum cash shortage existed at 31st August 2007 in the sum of £181,912.71. It was however, explained subsequent to the Report that after the inspection date the Respondent had raised a bill for £48,208.14 and posted it as a debit to a ledger entitled "One Off", said to have been in respect of "various unbilled transfers". The clients concerned were not identified. It was also subsequently established that a figure of £2,900 relating to the client A had been counted twice. These matters led the Applicant to rely on a minimum shortfall figure of £129,959.94 rather than the figure expressed in the IO's Report. The shortage arose as the result of 41 debit balances and a number of improper transfers from client to office account.
7. The Respondent explained that every week he had a standing order transferring £500 from office to client bank account to cover any shortfalls and he had increased its

frequency to a daily basis, as well as an additional £600 on a weekly basis. In September 2007 he had replaced £15,134.86 by way of the £500 and £600 standing orders, plus an additional amount of £17,400 in October 2007 and a further £7,800 in November 2007. These payments to client account totalled £40,334.86. On 23rd and 26th November 2007, the Respondent paid £25,000.

8. At 28th November 2007, a shortage of £116,577.85 remained. The Respondent told the IO that he was to receive £53,000 statutory compensation from his landlord on 15th December 2007. Shortly after that date the IO was notified that the Respondent had paid £46,000 into client bank account, further reducing the shortage.
9. The Respondent confirmed that the remaining shortage would be reduced by the continuing standing orders of £500 and £600 and, if needed, he would arrange a second charge on his property to provide further money. He had taken the situation very seriously.
10. The debit balances contributing to the shortfall ranged from £14 to £59,193.15. Two debit balances were exemplified in the IO's Report.

'Clients One-Off Matters' Ledger

11. The Respondent's bookkeeper explained this ledger as being like a suspense account used for unidentified transfers. He said that every morning the Respondent would transfer from client to office account anticipated costs which were normally round sum amounts. On occasions the Respondent would over transfer money due to the firm which he would allocate as a debit balance to the client column of the 'Clients One-Off Matters' ledger. Corrections were subsequently made upon the Respondent's instructions.

Clients: Mr & Mrs D

12. In a letter to the clients of 22nd March 2007 the Respondent said, "I quoted you fees of about £1,250 plus VAT and disbursements. They may go up to about £1,500 and we do charge £150 for acting for the Alliance & Leicester which is a nominal fee". A second letter from the firm to Mr and Mrs D of the same date stated "I enclose a note of our firm's costs and disbursements". The bill, totalling £2,350, was also dated 22nd March 2007.
13. The client ledger account recorded that a client to office transfer of £2,000 had taken place on 21st March 2007. The Respondent had told the IO that he had been informed by the client that the money had been deposited in his firm's client bank account, but there had been a delay at the bank.
14. The IO noted that on 23rd and 27th March 2007 a further £1,400 was transferred from client to office bank account, £1,050 in excess of the delivered bill. When asked about this the Respondent explained that he had undertaken a lot of extra work on the file and the clients did receive a bill covering the whole amount that he took. That bill was dated 23rd May 2007, two months after the transfer had been made.

15. In his memo to the bookkeeper dated 23rd May 2007 the Respondent said previous bills had been replaced by the cumulative bill dated 23rd May 2007. That cumulative bill totalled £4,043.25. Costs of £3,400 had been transferred in March 2007, leaving £643.25 to be transferred from client to office bank account. On 14th June 2007, a client to office transfer of £881.25 took place.
16. A letter from the Respondent's firm to Mrs D dated 31st March 2007, stated, "I am now dealing with the second charge as requested by you. I am charging you what I hope is a fairly small sum of money for the work involved". The bill totalled £881.25. A client to office transfer in that amount was made the day before the letter and bill were sent.
17. These matters, the over transfer and the failure to notify the clients of the second bill for £881.25, meant that a debit balance of £1140.30 remained on the client side of the ledger.

Other Transfers

18. The IO had been able to establish that as at the inspection date, 31st August 2007, there were five over transfers from client to office bank account in excess of the costs that should have been billed ranging from £45 to £48,208.14 (the latter figure is dealt with in para 6 above), but in his report the IO explained that upon review of the 'Clients One-Off Matters' ledger she had noted that in the office column of the ledger bills were not always posted when a client to office transfer took place. On 31st August 2007, a credit balance on the office side of £71,714.83 was in existence as a result.
19. On 27th November 2007, the IO had requested an up to date ledger print of the 'Clients One-Off Matter' ledger. On 18th September 2007, the credit balance rose to £94,142.83 and on 28th September 2007 the bill for £48,208.14 had been posted to the office column of the client ledger reducing the credit balance to £45,434.69. The Respondent's bookkeeper had informed the IO that it had not been sent to anyone as it was a bill for 'various unbilled transfers' to reduce the credit balance on the office side. The Respondent had informed the IO that he could not understand the concept of the 'Clients One-Off Matter' ledger, but he had not raised a bill for £48,208.14. There was no file relating to the matter.

Client Ms A – purchase of property

20. From a review of a listing of payments from the firm's client bank account dated 31st August 2007, the IO noted that the first client to office transfer was for £2,000 on 1st August 2007. Further amounts were transferred on 20th, 21st, and 22nd August 2007, totalling £5,900. In total £7,900 was transferred from client to office bank account.
21. The bill had been delivered on 21st August 2007. The Respondent explained that there had not been a deliberate improper transfer, and accepted that Ms A should have received the bill before any transfer was made. The total of the bills was £4,999.75 but had been recorded on the ledger as £4,993.75.

22. The Respondent's explanation to the IO as to why he had over transferred £2,900 in respect of Ms A's bill of costs was that she had been billed incorrectly and he was unsure where the bill had come from.
23. He agreed the existence of the debit balance of £2,900 resulting from the over transfer saying that he thought he had been in funds.
24. The IO had asked the Respondent if he had made over transfers from client account to keep his office overdraft within its limit of £45,000. He had responded that he would never do that, pointing out that he had a reserve facility to go up to an overdraft of £55,000.

The evidence relating to Miss Graham's bill (allegation 7)

25. Both Miss Graham and the Respondent had made written statements. Both of them gave oral evidence.
26. The Respondent acted for Miss Graham in connection with her sale of a flat in London, W9. The completion statement prepared by the Respondent recorded his receipt of sale proceeds of £801,327.91, the Respondent's costs of £13,750 plus disbursements and VAT and a balance due to Miss Graham of £4.40.
27. On 3rd October 2007 the Respondent delivered a bill setting out his costs of £13,750, a charge for "postages and petty incidents" (£30), bank transfer charge (£30), a further bank transfer charge (£30), faxes (£10), "paid mortgage broker on instructions" (£256"), "managing agents" (£175). Those items totalled £14,281 upon which VAT was £2,499.17 (not £2,497.42 as stated in the bill). With a disbursement of £30, Land Registry Fees, the total costs and disbursements amounted to £16,810.17. A figure of £870 at the bottom of the "Costs" column was unclear.
28. Miss Graham received the bill on 9th October 2007. On 23rd October 2007 Miss Graham asked the Respondent to obtain a remuneration certificate.
29. The Respondent offered Miss Graham a refund of £8,100 in two stages. When Miss Graham first complained the Respondent reduced the charges by £3,600. Following a meeting on 29th October he reduced them by a further £4,500.
30. The Law Society prepared a remuneration certificate report dated 9th July 2008 and it was accepted by the Adjudicator in his decision of the 11th August 2008 that a reasonable charge for the Respondent's work was £3,155, excluding disbursements and VAT, amounting to a reduction of more than 75%. The Respondent had lodged objections to the Adjudicator's decision. The remuneration certificate had not become effective.
31. Miss Graham's sale had been completed on 3rd October 2007.
32. It was the Respondent's evidence that he had not been given full information by Miss Graham at the outset. He said she had attended his office frequently and had made a number of phone calls as well as sending faxes. The Respondent said that during the course of handling Miss Graham's transaction he had discovered that Miss Graham

was in arrears with her service charges and the managing agents were unwilling to provide replies to the Respondent's enquiries until that had been rectified.

33. He also learned that Miss Graham had mortgage arrears and her mortgagee had issued possession proceedings. Shortly before contracts were due to be exchanged her mortgagee instructed bailiffs to evict Miss Graham. The Respondent had been instrumental in persuading the mortgagee to allow Miss Graham to effect her sale. He had attended a Court hearing on her behalf.
34. Office copy entries obtained revealed a second charge on the property.
35. The Respondent had in the past recalled that he had been unaware that there was a tenant at the property, but had come to accept that this fact had been disclosed by Miss Graham when she completed the Respondent's standard information request form.
36. The Respondent went on to explain that prior to exchange of contracts a new purchaser at a higher price emerged. The Respondent was involved in negotiations which culminated in the original purchaser agreeing to pay £20,000 for an exclusivity agreement, negotiated and drafted by the Respondent. Contracts were exchanged on 29th August.
37. After exchange of contracts, the purchaser's solicitors notified the Respondent that their pre-completion Land Registry search had revealed a third charge registered against Miss Graham's title. This was an equitable charge, the result of a charging order made to secure the payment of outstanding credit card and balances.
38. The Respondent had negotiated an extension of the completion date in an attempt to synchronise Miss Graham's proposed purchase with her sale.
39. The Respondent had also undertaken work in connection with Miss Graham's proposed purchase which proved abortive when she was not able to make necessary financial arrangements. She had paid a £1,000 deposit to estate agents and the Respondent had had to bring pressure to bear upon them to secure the release of that deposit to Miss Graham.
40. The Respondent had calculated his bill on the basis of the time he had spent on Miss Graham's matters. Although he did charge £300 per hour for a while, he had returned to his former charge of £250 per hour after being advised that he would be unlikely to secure £300 upon formal detailed assessment by the Court. He accepted that he had made only a few brief notes on the file. He explained that it was not his practice to make attendance notes on conveyancing files.
41. It was Miss Graham's evidence that she made full disclosure of her financial position and the charges that were registered against her title, and likely to be so registered, to the Respondent when she first instructed him.
42. She accepted that the Respondent had attended a hearing relating to the possession order obtained by her first mortgagee. She said she had dealt with the Court herself and the Respondent had been present for only ten minutes.

43. Miss Graham said she had wanted the sale of her property to proceed speedily. She had no reason not to make a full and detailed disclosure of her position to the Respondent.
44. In her written statement Miss Graham said that she had asked the Respondent on a number of occasions to tell her what he thought his charges would be. He had told her that he would tell her later. In her oral evidence she said she had asked him “once or twice”.
45. Miss Graham said she had been very upset when she received the Respondent’s bill for £13,750 and the completion statement providing that the net proceeds of sale she was to receive was some £4. Miss Graham said that if she had known that that would be the outcome of her sale, she would have handed the property to her first mortgagee in compliance with its possession order and would have “walked away”.

The submissions of the Applicant

46. The Respondent’s books of account were not in compliance with the Solicitor’s Accounts Rules. The Respondent informed the IO that he believed there was a shortage on his client account of approximately £99,000. The IO had established a somewhat larger minimum cash shortage.
47. It is a requirement of the Solicitors Accounts Rules that the balances on client ledgers and the total sum held should be readily ascertainable but this was not so because the books of account were inadequately written up. It was clear that the Respondent knew of the existence of the shortage of at least £99,000. A significant shortage on client account had existed for a period of time. The Respondent had devised his own method of reducing it whilst at the same time continuing to run his accounting procedures in the same manner as had led to its creation. The Respondent therefore knew he was creating a shortage and that by definition he was using client money. That money was going into his office account.
48. The assertion that he was not doing this dishonestly was not sustainable on the facts. It was dishonest conduct in relation to the use of client money. If the Respondent was not dishonest he was grossly reckless and there was a serious dereliction of his duty to safeguard client money which was at risk over a protracted period of time.
49. Rule 7 of the Solicitors Accounts Rules required the Respondent promptly to remedy the breaches that created the shortage. He did not do so, preferring to adopt a scheme for repayment over a period of time, which in itself repeated the breaches.
50. With regard to the “Clients One-Off Matters” ledger, Solicitors Accounts Rules (Rule 32(2)) created an obligation to record all dealings with client money on the client side of a separate client ledger account for each client. The recording of dealings with client money in a ledger such as this was a breach of the rule. Self-evidently it was not a client ledger account in the name of an individual client. It purported to record dealings with client money relating to a large number of clients. Furthermore, the fact that there were incorrect postings and a suspense account meant that the books of account were not properly written up as required by Rule 32(1).

51. Money was improperly transferred from client to office account in breach of Rule 22 and in circumstances which showed a personal misuse of client money by the Respondent. The Respondent did not have an honestly held belief that he was entitled to that money. He was at best grossly reckless with his clients' money.
52. The Respondent had acted for Mr and Mrs D in connection with their property purchase and he transferred from client to office account a sum of money before a bill was delivered. Rule 19 (2) of the Solicitors' Accounts Rules required a bill or written notification of costs to be delivered first. He did this the day after receiving the instructions. To compound the position there was in addition an over-transfer of costs. Transferring such costs in this manner and before money was received on account of costs could not have been accompanied by an honestly held belief that the Respondent was entitled to that money on that day.
53. The so-called "Clients One-Off Matters" ledger was substantially overdrawn. This money should have been retained in client account but it had been transferred to the Respondent's office account from which inevitably he benefited personally.
54. The facts demonstrated improper transfers from client to office account. There were two examples showing what the Respondent did in breach of Rule 22.
55. The Respondent had made round sum transfers from client to office account about which when writing to the SRA he said, "were made as a best guess estimate. These round sums are no longer made and we have adopted different and stricter procedures so that exact transfers are made on each client". Taken in conjunction with the Respondent's knowledge of the existence of a significant shortage on client account, his conduct in relation to such round sum transfers could only be viewed as dishonest. The documentation provided with the Respondent's letter did not appear to support the withdrawal of £2,350 of Mr and Mrs D's money on which the IO reported.
56. In the matter of Miss Graham the Respondent's completion statement purported to show that the Respondent charged £13,750 plus disbursements. The bill contained only one disbursement described as such by the Respondent, namely a fee to the Land Registry of £30. The other items were not on their face disbursements, and in relation to the last two items ("paid mortgage broker on instructions", and "managing agents") it was not possible readily to understand what these items were for. On its face the completion statement was misleading because the Respondent's fees were more than £13,750. If the other items were fees (and they did appear in the fees column), the total fees were £14,281.
57. The Respondent's position was that, although he had undertaken rather more work than would have been the case in a routine domestic conveyancing transaction, his bill might have been a little on the high side. He had agreed to reduce it as a matter of good-will and as a commercial decision. The repayment had been made in stages. Miss Graham had collected cheques from the Respondent's office and had banked them.
58. In a letter of 3rd September 2008 the Respondent said that he could not remember the precise reason why he reduced the bill. He stated that, "My agreement to reduce the

bill, and I cannot now remember the precise reason why, could possibly have been that it would have been a speedier way of resolving the matter rather than have to go through time consuming correspondence.”

59. It was submitted that precise reasons for a reduction of this magnitude within such a short period would not easily be forgotten. The Respondent had stated that he would stand by his profit costs figure, although within a period of less than a month he reduced it by over a half. The Respondent repaid £4,500 by instalments rather than by one payment. The fees were not the subject of proper disclosure in accordance with Rule 2 of the Solicitors Code of Conduct. The Respondent’s method of calculation and his assessment of the value of his work was completely at odds with the remuneration certificate report. Any claimed ability to stand by a bill was inconsistent with a quick refund of over half the amount billed. Such a refund of £8,100 was consistent with culpable overcharging, and a recognition of that by the Respondent.
60. The Respondent had stated that he reduced the bill in two parts because Miss Graham was short of money, but that did not explain why he made two payments. It was to be explained by Miss Graham confronting him twice about overcharging. That was why, it was submitted, he refunded the money. The Respondent then wrongly argued she was stopped from applying for a remuneration certificate, having accepted the reductions. The remuneration certificate report recommended a further reduction of £2,245.
61. The Applicant’s dishonesty allegation was based on the submission arising from these facts that the Respondent knew he had charged and taken fees that he knew he could not justify. The immediate repayment of £8,100 when confronted was evidence of such knowledge, together with the attempt to stop the remuneration certificate being obtained.
62. The Respondent’s asserted inability to recall precisely why the reduction had been made was a convenient memory lapse and the circumstances were consistent with dishonesty.
63. It was apparent from the remuneration certificate report that no costs information was given to Miss Graham as required by Rule 2 of the Solicitors’ Code of Conduct 2007. None of the circumstances was consistent with open and honest conduct in relation to charging fees in Miss Graham’s case.
64. The Respondent said that he drafted an exclusivity agreement in connection with the sale of Miss Graham’s property to the first prospective purchaser. It was clear from the documents that he had simply revised an earlier document prepared for the same purpose for another client and he could not explain how he spent some forty five hours on the matter between June to the beginning of October (when completion took place) as that amount of time would have to have been spent at the hourly charging rate he claimed. The Tribunal could not be sure that Miss Graham had asked for an indication of the Respondent’s ultimate charges.

The submissions of the Respondent

65. The Tribunal could not be sure that Miss Graham had notified the Respondent of the possession proceedings and the other matters affecting her property when she first instructed the Respondent. Because the Tribunal could not be sure the Tribunal was not able to make a finding of fact adverse to the Respondent.
66. Both the Respondent and Miss Graham agreed that she had been provided with a “Client Care Letter” setting out the Respondent’s hourly charging rate. The original document was not available and it was unclear whether that rate was £250 or £300 per hour.
67. The Respondent accepted that he had at no time given any indication to Miss Graham of the likely amount of his final bill. It was the Respondent’s position that he considered that he should have done so but he did not concede that Miss Graham had asked the Respondent to provide such a figure on more than one occasion.
68. It was the Respondent’s case that the transaction proved to have a number of facts distinguishing it from a routine conveyancing transaction and necessitating his undertaking a considerable amount of work. The bill, although it did not specify this on its face, included work in connection with Miss Graham’s proposed simultaneous purchase of a property, which proved abortive.
69. The Respondent admitted all of the breaches of the Solicitors Accounts Rules alleged against him, save that he did not accept the minimum shortage calculated by the IO, which figure had since been resolved with the Applicant, who had come to accept that the correct figure was £129,989.94.
70. In relation to allegation 5 the Respondent denied that he acted for his own benefit or that he acted dishonestly or recklessly.
71. The allegation that he acted contrary to Rule 1.02 of the Solicitors’ Code of Conduct by overcharging in relation to the case of Miss Graham was denied by the Respondent in his entirety.
72. The test for dishonesty in the Tribunal was that set out by the House of Lords in Twinsectra – v – Yardley [2002] 2 A.C.164. It was a two stage test, the first stage being objective and the second stage subjective, namely:-
 - (a) “Whether [the solicitor] acted dishonestly by the ordinary standards of reasonable and honest people” (the objective test); and, if so
 - (b) “whether [the solicitor] was aware that by those standards he was acting dishonestly” (the subjective test).
73. The second stage required “a dishonest state of mind, that is to say consciousness that one is transgressing ordinary standards of honest behaviour”.
74. It had been suggested that if the Respondent had not acted dishonestly his conduct had been reckless. In the criminal law a person acted recklessly if he was aware of a risk

or deliberately closed his mind to a risk which did or would exist and it was unreasonable to take the risk: R – v – G [2004] 1 AC 1034.

75. For the approach to recklessness the Tribunal had in, Mariaddan, Findings 15th March 2007, at paragraph 137 made a finding that “there had been a pattern of reckless disregard on the part of the Respondent for the procedures which were intended to protect the public.” In the Twinsectra case reference had been made to a solicitor taking a “blinker approach” to his professional duties as a solicitor.
76. The standard of proof in the Tribunal is the criminal standard; namely that the Tribunal is sure. See, for example, the cases of Campbell – v – Hamlet [2005] UPKC 19 and the Tribunal case of Beresford and Smith, 9th April 2009.
77. A bundle of testimonials attesting to the Respondent’s competence and good character had been placed before the Tribunal. Character evidence is relevant to a charge which involves an allegation of a guilty state of mind, including an allegation of dishonesty (Bryant – v – The Law Society) and also an allegation of recklessness as this is also an allegation of a guilty mind. That evidence as to the Respondent’s good character supported his case that he had not been dishonest or reckless.
78. The Respondent’s conduct was neither dishonest nor reckless. In particular, the following factors pointed strongly against dishonesty and against recklessness:
 - (a) The Respondent had explained the procedure he adopted and why he thought it was compliant with the Solicitors Accounts Rules. He kept transparent records of his use of the procedure. The Respondent’s costs book was examined by the IO during the investigation and discussed with the Respondent’s bookkeeper. The Respondent would not have recorded his procedure were he acting dishonestly;
 - (b) The Respondent had volunteered to the IO that there was a shortage on client account at their first meeting. At all times he had admitted that there was a shortage as at 31st August 2007 of £129,989.94. Such conduct on the Respondent’s part was inconsistent with dishonesty;
 - (c) When the IO’s inspection began the Respondent had been making payments to client account for six months and had at 1st November 2007 paid in a total of £80,000. Such proactive repayment was inconsistent with dishonesty;
 - (d) The Respondent had no motive for dishonest conduct. He was not compelled to remain within his overdraft limit of £45,000, as he had a reserve overdraft of up to £55,000.
 - (e) The Respondent had at the time suffered (and continued to suffer) from very severe depression and extreme anxiety. That was part of the background which explained how he became over reliant on his bookkeeper and found it difficult to insist that his bookkeeper completed the ledgers more quickly.
 - (f) A further difficulty had been that the Respondent’s firm suffered a serious fire in November 2006. Following the fire, the firm operated from two rooms in

the lower floors of the building in an office space measuring 12 foot by 6 foot. The fire-damaged building suffered from flooding on a number of occasions which led to the corruption of the firm's computer system. The building's landlord served notice to quit upon the Respondent in September 2007. These problems and the volume of work handled by the Respondent meant that accounting problems accumulated and ledgers were not able to be promptly written up.

- (g) The Respondent was 63 years of age and had been an admitted solicitor for almost 33 years. It made no sense to suggest that the Respondent would at that stage in his career embark on dishonest or reckless conduct.
79. With regard to Miss Graham's complaint and allegation 7, the Respondent acted for Miss Graham in relation to her property sale and her abortive purchase. The Respondent had explained the work which he undertook and he had provided a written summary.
80. The Respondent's bill dated 3rd October 2007 set out £13,750 plus £40 on items which would also amount to profit costs. Although the bill only referred to Miss Graham's sales this was a mistake as the bill was also for work in connection with her abortive purchase. The Respondent had carried out extensive work on both files.
81. By letter dated 23rd October 2007 Miss Graham had asked the Respondent to obtain a remuneration certificate. He had discussed Miss Graham's complaint with her in his office and as a goodwill gesture agreed to reduce the bill by £3,600. However, Miss Graham sought a further reduction of the bill in her letter dated 29th October. Miss Graham and the Respondent met on 31st October and he agreed a further reduction of £4,500 in full and final settlement. The Respondent understood that Miss Graham had accepted this. She received and banked cheques from the Respondent over a number of weeks and received in total a reduction of £8,100.
82. The Respondent's practice was intervened on 22nd February 2008. Following this, on 15th March 2008, Miss Graham made a complaint to the Legal Complaints Service stating that the outstanding charge of £8,708.42 was still not acceptable to her and she would like further compensation.
83. This led to the remuneration certificate report dated 9th July 2008 followed by a final assessment dated 11th August 2008 which came to the conclusion that a fair and reasonable fee would have been £3,155 plus VAT and disbursements. The remuneration certificate itself was never issued because the Respondent had submitted grounds of objection that had not been considered by an Adjudication Panel and in the meantime the parties conciliated Miss Graham's complaint, with Miss Graham accepting £1,500 in full and final settlement of her remuneration certificate and inadequate professional service complaints, without prejudice to the Respondent's contention that the remuneration certificate report and final assessment were wholly incorrect.
84. The Respondent had accepted, with hindsight, that his original charges were on the high side however he did not have any dishonest intention to overcharge Miss Graham nor did he deliberately or knowingly do so.

85. The Applicant relied on two matters in support of its case that the Respondent dishonestly overcharged Miss Graham, first his prompt agreement to refund her £8,100 when she complained; and secondly the remuneration certificate report and the final assessment which were said to demonstrate that the charges made were so excessive as to be deliberate. Neither point was a good one.
86. The Respondent's agreement to refund Miss Graham £8,100 was a goodwill gesture to keep the client satisfied and to try and deal with the issue commercially. Solicitors were under an obligation under Rule 2.05 to handle complaints promptly, fairly and effectively. A Practice Standards report issued to the Respondent following a monitoring visit on 22nd May 2006 commended the Respondent for his good service ethic and the fact that where complaints had arisen, genuine efforts had been made to resolve them.
87. The remuneration certificate and the final assessment contained a number of errors. The abortive purchase was work which had not been taken into account. There had been no reference to the fact that after Miss Graham asked the Respondent to apply for a remuneration certificate, he had agreed to give her a further discount of £4,500 which she had accepted. She did not pursue her request for a remuneration certificate until four and a half months later, after the Respondent's firm had been intervened. The remuneration certificate report stated that although a reduction had been proposed by the solicitors the same "had not been taken or agreed to by the client". This was not correct, Miss Graham had accepted and received the reduction of £8,100. The remuneration certificate report indicated that no client care letter had been sent to Miss Graham. That was not correct. That letter indicated an hourly charging rate of at least £250 – the author of the report allowed only £220. The remuneration certificate report stated that "the Respondent's file did not contain any time recording for work undertaken in attendances and the perusal/preparation of documentation." The author failed to note and consider the Respondent's workings that were on the file.
88. The further remuneration certificate report stated that it was considered that there were a couple of issues pertaining to the sale of the client's leasehold property which could not have been envisaged at the outset of the matter but those issues were relatively minor and would not have increased the work required to be undertaken to complete the transaction significantly. That was incorrect as the Respondent had explained.
89. The remuneration certificate report also stated that all letters and emails out and telephone calls should be charged at 6 minutes each and letters and emails should be charged at 3 minutes each. That was not correct. The Respondent's client care letter charged his time at his hourly rate and in units of 1/10 hour for writing letters and making/taking telephone calls and in units of 1/20 hour for considering letters received. However that did not mean that only one unit was chargeable for each such matter. A long letter or a long telephone call would be charged according to actual time taken.
90. The remuneration certificate report stated that 1 hour and 30 minutes should be charged for attendances. That was too low. Miss Graham attended the Respondent's

office in person or on the telephone almost every day and had taken up a great deal of the Respondent's time.

91. In the final assessment the Adjudicator stated "it is noted that far from agreeing that the discounts were acceptable, she continued to complain about the level of charges." That was not correct. Miss Graham had accepted and banked the Respondent's cheques and made no further complaint until four and a half months later following the intervention.
92. There was no doubt that part of the reason for these errors had been that at the time the Respondent did not have a copy of his client files. The Legal Complaints Service had not provided him with a copy. Normally a solicitor facing an application for a remuneration certificate would have the benefit of being able to review his client file and make submissions with specific reference to documents on the files. The Respondent had been only provided with a copy of the sale file under cover of a letter from the LCS dated 21st November 2008, after the remuneration certificate report and the final assessment had been issued. The original file was removed in the intervention.
93. Had the remuneration certificate report and the final assessment been upheld by the panel, Miss Graham would have received £2,535 plus VAT (£13,790 minus £8,100 minus £3,155). Her acceptance of £1,500 demonstrated that even Miss Graham did not consider that the remuneration certificate report and the final assessment were correct.
94. A solicitor calculating his costs is exercising judgement and it is not a mere matter of arithmetic (Cook on costs 2009 paragraph 22.1). There was room for differences in judgement as to what costs were fair and reasonable. There was an obvious difference between a remuneration certificate officer or taxing officer forming a judgement different from that formed at the time by the solicitor and deliberate and/or dishonest overcharging. There was a clear difference between a solicitor making an error of judgement and deliberate and/or dishonest overcharging.
95. There had been a number of factual errors in the statement supporting allegation 7.
 - (a) The payments to the "mortgage broker on instructions £256" and "Managing Agents £175" were clear from the client file. The payments had been made on Miss Graham's instructions.
 - (b) The Tribunal had been made aware that the Respondent did challenge the remuneration certificate report.
96. All of the disputed allegations should be dismissed and no finding of dishonesty or recklessness should lie against the Respondent.

The Tribunal's Findings of Fact

97. The Tribunal heard the oral evidence of Miss Graham and the Respondent. The Tribunal having seen and heard them give evidence concluded that neither of them was a particularly reliable witness.

98. Miss Graham clearly did not have a complete understanding of the relevant legal terminology or the procedures involved in a conveyancing transaction. She came over as being aggrieved and resented being asked questions.
99. The Respondent accepted that in some respects (for example his recollection that he had not been told about a tenant at Miss Graham's property) had not been accurate. He had put forward his recollection that the transactions in which he had been instructed to act for Miss Graham involved him in considerable work. The Tribunal accepted that Miss Graham might well have been a somewhat demanding client.
100. The Tribunal was required to make a finding of fact as to whether Miss Graham had given the Respondent the fullest possible details including details of the possession proceedings and further charges on her property when she first instructed him.
101. The Respondent and Miss Graham appeared to accept that she had been supplied with a client care letter which set out his hourly rate of charge.
102. Miss Graham in her written statement had said that she had asked the Respondent for an indication of what the ultimate costs might be on a number of occasions although in her oral evidence she said she had asked him on one or two occasions. For his part, the Respondent accepted that he should have given such indication and had not done so, even though he had not been pressed by Miss Graham in this connection.
103. The lack of reliability of the witnesses meant that the Tribunal was unable to be sure that Miss Graham had, as she asserted, given the fullest possible instructions to the Respondent at the outset and had asked him on a number of occasions to provide her with an indication of what her costs might be.

The Tribunal's Findings on the allegations

104. The Tribunal found allegations 1, 2, 4, 5 & 6 to have been substantiated, indeed they were admitted by the Respondent.
105. With regard to allegation 3 the Tribunal found that allegation to have been substantiated in so far as there was breach of Rule 22 (1) of the Solicitors' Accounts Rules. The Tribunal did find that the withdrawal of money was for the Respondent's own benefit as, indeed, the money withdrawn was paid into the Respondent's firm's account and either served to reduce his overdraft or enhanced his bank balance. Money held in office account was utilised for the purposes of the Respondent's firm and such money was therefore used for his benefit.
106. The Tribunal, having applied the test in Twinsectra – v – Yardley concluded that where the Respondent acted in breach of Rule 22 (1) of the Solicitors' Accounts Rules his conduct was dishonest by the standards of reasonable and honest people. Having heard and seen the Respondent give evidence and heard his explanation for his actions and his assertions that he believed that he was entitled to take such monies the Tribunal was satisfied so that it was sure that the Respondent did have an honest belief that he was entitled to such monies and therefore that he did not himself consider that by his actions and by those standards he was acting dishonestly. In

particular the Tribunal took into account the mitigating circumstances put forward by the Respondent and the fact that his accounts were in disarray. Further the Respondent had been aware of a shortfall on client account and had taken steps, transparently recorded, to replace that shortfall. He had drawn the shortage to the attention of the IO as soon as she attended his office. By the time the IO commenced her inspection of the Respondent's books of account he had already made substantial payments into client account in an attempt to correct the shortfall.

107. With regard to allegation 7 the Tribunal did find that in connection with Miss Graham's matter the Respondent did fail to act with integrity contrary to Rule 1.02 of the Solicitors' Code of Conduct 2007. The Respondent himself accepted that he should have provided her with an estimate of his ultimate charges. The Tribunal found itself unable to be sure where there were conflicts of interest in the evidence given by the Respondent and by Miss Graham. The Respondent himself accepted that his charges had been somewhat on the high side and he had not been able fully to justify the level of his charges.
108. The Tribunal accepted that the remuneration certificate report and the Adjudicator's assessment had produced a figure that was perhaps rather lower than the work undertaken by the Respondent would have justified.
109. The Tribunal had found that in calculating his charges in connection with acting on Miss Graham's sale and purchase, and in particular dealing with a number of difficulties that arose during the course of those transactions, he had inflated his charges so that the Respondent's conduct was dishonest by the standards of reasonable and honest people. Having heard and seen the Respondent give evidence and heard his explanation for his calculations and his assertions that he had undertaken a great deal of work on behalf of Miss Graham who had not been a particularly easy client the Tribunal was not satisfied so that it was sure that the Respondent did not have an honest belief that his charges were within the bounds of what was reasonable and justifiable and the Tribunal did not find, therefore, that he knew that what he was doing was dishonest by those same standards.
110. In conclusion the Tribunal found with regard to allegation 3 and allegation 7 that the Respondent had not been dishonest because the second part of the Twinsectra test had not been satisfied.
111. At the hearing close attention had been given to the allegation that the Respondent had been dishonest and for the reasons set out above the Tribunal had found that he had not been dishonest. Because of the considerable disarray in the Respondent's accounting records and procedures it would be difficult not to conclude that the Respondent's dealings with client's money were not reckless. He could not be sure at any time that he was taking monies to which he was properly entitled. With regard to Miss Graham's bill, without undertaking a precise calculation, the Respondent could not have been sure that his charges accurately reflected the work which he had undertaken.
112. The Tribunal found that there had been a pattern of reckless disregard on the part of the Respondent for the Solicitors Accounts Rules and required procedures which were

intended to protect the public. The Tribunal considered that the Respondent had taken a “blinkered approach” to his professional duties as a solicitor.

The Tribunal’s sanction and its reasons

113. The arguments before the Tribunal as to whether the Respondent had been dishonest or reckless served to cloud the fundamental breaches of the Solicitors’ Accounts Rules which the Respondent had admitted. Such Rules were in place to protect monies held by a solicitor on behalf of members of the public. The Respondent’s breaches were extremely serious and demonstrated his failure to exercise a proper stewardship over clients’ funds.
114. A failure on the part of a solicitor to act with the integrity required by Rule 1.02 of the Solicitors’ Code of Conduct 2007 was a serious matter.
115. The Tribunal took into account the mitigation offered on the part of the Respondent and also took into account his financial circumstances.
116. The Tribunal concluded that sanctions in the lower range (including even a fine) would not meet the Respondent’s failures.
117. The Tribunal, mindful of its duty to protect the public and the good reputation of the solicitors profession, concluded that the protection of the public had been met by the stringent conditions placed on the Respondent’s practising certificate but took the view that the protection of the good name of the solicitors’ profession had to take precedence over the personal situation of an individual solicitor.
118. The Tribunal had given serious consideration to the imposition of the ultimate sanction upon the Respondent.
119. In view of the Tribunal’s findings on the question of dishonesty, taking into account the Respondent’s long and unblemished career as a solicitor and the high regard in which he was held by a large number of people who had written testimonials in his support, the Tribunal considered that it would be both appropriate and proportionate to impose a suspension from practise as a solicitor for a period of five years upon the Respondent.
120. The Applicant sought the costs of and incidental to the application and enquiry and provided a schedule of such costs at the hearing.
121. It was submitted on behalf of the Respondent that the Applicant had failed to establish his allegations of dishonesty against the Respondent and whilst accepting that the Respondent should bear a proportion of the Applicant’s costs he should not bear the whole of them.
122. It was further submitted that the Respondent, who was unemployed at the time of the hearing, was in a parlous financial position and demonstrated that his outgoings exceeded his modest income. The Tribunal was reminded of the cases of Merrick and de Souza where on appeal it was said that the Tribunal should take into account the

financial circumstances of the Respondent and the Respondent's ability to pay costs before making an award of costs in the favour of the Applicant.

123. The Tribunal concluded that it would not allow the full costs claimed by the Applicant in view of its finding that the Respondent had not been dishonest. The Tribunal did, however, consider it was right that the statement of the Respondent's means and the fact that a long period of suspension would mean that the Respondent would not be able to earn his living as a solicitor for a period of five years, meant that the Respondent was in no position to pay the Applicant's costs. The Tribunal concluded however that it was right in principle that he should be liable for such costs. The Tribunal fixed those costs in the sum of £19,000.
124. In view of the Respondent's situation the Tribunal Ordered him to pay the Applicant's costs in that fixed sum but further Ordered that the Applicant and those instructing him should not seek to enforce that Order without the consent of the Tribunal first obtained. The Tribunal made that Order and wished to indicate that should it come to the attention of the Applicant and those instructing him that the Respondent's financial situation had changed to any substantial degree the Tribunal might favourably consider an application that the Order for costs against the Respondent be enforced.

Dated this 12th day of January 2010

On behalf of the Tribunal

Mr. R. B. Bamford
Chairman