

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF MARK JAMES CLARKE, solicitor (Respondent)

Upon the application of Mohammed Afzal  
on behalf of the Solicitors Regulation Authority

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Miss T Cullen (in the chair)  
Mr P Housego  
Mrs C Pickering

Date of Hearing: 9<sup>th</sup> March 2010

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**FINDINGS & DECISION**

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**Appearances**

Mr Mohammed Afzal of HMA Law Solicitors, 5 Tenby Street, Birmingham B1 3EL, for the Applicant.

Mr David Morgan of Radcliffes Le Brasseur, 5 Great College Street, London SW1P 3SJ for the Respondent.

The application to the Tribunal on behalf of the Solicitors Regulations Authority (“SRA”) was made on 1<sup>st</sup> July 2009.

**Allegations**

The Respondent:-

1. Failed to obtain professional indemnity insurance, pursuant to Rule 4 of the Solicitors Indemnity Rules 2008.
2. Failed to apply to the Assigned Risks Pool (“ARP”), pursuant to Rule 10 of the Solicitors Indemnity Rules 2008.
3. Practised without a practising certificate in breach of Rule 20.01 of the Solicitors Code of Conduct 2007.

By a supplementary statement dated 7<sup>th</sup> January 2010, it was alleged that the Respondent:-

4. Dishonestly misappropriated clients' money contrary to Rule 1 (a) of the Solicitors Practice Rules 1990 ("the Rules") and/or Rule 1 of the Code of Conduct ("the Code").
5. Failed to remedy client account shortfalls upon discovery, contrary to Rule 7 of the Solicitors Account Rules ("SAR").
6. Wrongly retained client monies in his office bank account, contrary to Rule 20 (2) SAR.
7. Failed to pay professional disbursements, in accordance with Rule 19 (1) SAR.
8. Failed to deliver his accountant's report, contrary to Rule 35 SAR.
9. Failed to provide adequate supervision of client matters, pursuant to Rule 13 of the Rules. Further, or in the alternative, the Respondent failed to supervise and manage his practice, pursuant to Rule 5 of the Code.

### **Factual Background**

1. The Respondent, born in 1964, was admitted on 1<sup>st</sup> November 1990 and his name remained on the Roll of Solicitors. At the material time the Respondent was practising as a sole practitioner under the style of Clarke & Company at Old Christchurch Road, Bournemouth.

#### Allegations 1 and 2

2. The Respondent was under a duty to renew the professional indemnity insurance for his firm on or before 1<sup>st</sup> October 2008 and failed to do so, or to apply for cover to the Assigned Risks Pool ("ARP") before the start of the relevant indemnity period. He continued to practise at Clarke & Company without indemnity insurance until 3<sup>rd</sup> March 2009 when the ARP confirmed he had insurance with them from 1<sup>st</sup> October 2008.

#### Allegation 3

3. The Respondent failed to renew his practising certificate by 1<sup>st</sup> November 2008 and his certificate was terminated by the SRA on 15<sup>th</sup> December 2008. The Respondent continued to practise without any practising certificate in place until 3<sup>rd</sup> March 2009 when he was granted a practising certificate for the year 2008/2009.

#### Allegations 4 – 7

4. The SRA started an inspection of the Respondent's books of account and other documents. A copy of the SRA's Forensic Investigation Report ("FIR") dated 21<sup>st</sup> October 2009 was before the Tribunal.
5. The SRA found a shortfall of £63,807.18, as at 30<sup>th</sup> April 2009, in the Respondent's client account, which was found to be caused by £63,807.18 of unpaid professional disbursements being held in the Respondent's office account.

6. A legal executive at the Respondent's firm used Counsel extensively on one particular case. The client paid an outstanding invoice from the Respondent's firm in the sum of £78,966.15 promptly. This included £43,716.15 for professional disbursements, and was paid by the Respondent into the firm's office account. The Respondent failed to pay the outstanding disbursements once the funds had cleared. Over two years later, the payments to Counsel were made.

Allegation 8

7. The Respondent failed to deliver his Accountant's Report for the year ending 30<sup>th</sup> April 2009 which was due by 31<sup>st</sup> October 2009.

Allegation 9

8. On one particular matter, the client received a bill of costs for £224,175.00. The matter was dealt with by a legal executive at the Respondent's firm. However, the Respondent's firm used a computerised form of time recording which showed the total cost of the time charged was £107,222.50. The Respondent stated that fee earners at the practice did not record all of their work onto the system and that the hourly rate for the legal executive had increased. There was no evidence that the Respondent provided any costs estimates to the client.
9. The Tribunal reviewed all the documents submitted by the Applicant which included:
- (a) Rule 5 Statement dated 1<sup>st</sup> July 2009.
  - (b) Supplementary Statement dated 7<sup>th</sup> January 2010.
10. The Tribunal reviewed all the documents submitted by the Respondent which included:
- (a) Witness statement of Mark Clarke dated 19<sup>th</sup> February 2010.
  - (b) Position statement dated 4<sup>th</sup> December 2009.
  - (c) Timeline document.
  - (d) Medical report from Dr Boakes dated 17<sup>th</sup> September 2009.
  - (e) References concerning the Respondent's character.

**Witnesses**

The following persons gave oral evidence:-

The Respondent, Mark James Clarke.

## Findings as to Fact and Law

### Allegations 1, 2, 3, 5, 6, 7, 8 and 9

11. The Tribunal found all these allegations to have been substantiated, indeed they were admitted by the Respondent.

### **Allegation 4 - That the Respondent dishonestly misappropriated clients' money contrary to Rule 1 (a) of the Solicitors Practice Rules 1990 ("the Rules") and/or Rule 1 of the Code of Conduct ("the Code").**

12. This allegation related to Counsel's fees which had been paid by the client. These fees were paid into the Respondent's office account but were not paid to Counsel until over two years after the monies had been received from the client. The Applicant submitted that the Respondent had been dishonest by paying Counsel's fees into his office account and failing to pay those fees to Counsel within the time required by the SAR. Furthermore, the monies remained in office account and were not used for the purpose that they had been paid. The Applicant submitted that the delay and knowledge of delay was evidence of the Respondent's dishonesty. The Applicant also referred the Tribunal to admissions made by the Respondent to the Forensic Investigation Officer that he had been aware shortly after or around May 2007 that the monies had been paid into office account. The Applicant referred the Tribunal to the case of *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12.
13. The Applicant submitted that both the objective and subjective test referred to in *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12 was satisfied as the Respondent knew monies had come in and were specifically paid for a third party but the Respondent had failed to pay that third party. The Respondent had knowledge of the payment due to Counsel and admitted he could not pay the fees to Counsel otherwise the firm would exceed its overdraft limit.
14. The Respondent, in his oral evidence, referred the Tribunal to the timeline document provided by his Accounts Department which confirmed the client had paid a bill which included Counsel's fees by a direct bank transfer into the Respondent's office account on 2<sup>nd</sup> May 2007. There had been a freezing injunction over the client's international assets and that was the reason why the money came in as a direct bank transfer from one of the only accounts that the client had been permitted to use. However, the Respondent did not become aware that the bill had been paid until March 2008 when he was provided with the monthly management accounts. Until then he did not know that Counsel's fees had not been paid out. There had been difficulties with his Accounts Department and whilst the Respondent accepted he knew the bill had been paid on 2<sup>nd</sup> May 2007, he did not become aware until March 2008 that Counsel's fees had not been paid. The Respondent's cashier had left at this time and he had arranged for an employee of his accountant to make all relevant postings while he sought and engaged a replacement cashier. This took some six months. The new cashier was asked to prepare management accounts as one of the first tasks. She did so, and discovered the problem. She told the Respondent who was unaware of the problem until then. When he found out about it he took action immediately. As soon as the Respondent became aware that Counsel's fees had not been paid, he tried to earmark monies in order to pay off Counsel's fees. The matter

had been further complicated as there had been a number of Counsel's fees, Counsel had continued to act in the matter whilst his fees had been outstanding, and part way through the case, leading Counsel had been changed. Payments had been made for some Counsel's fees and Counsel's clerk had not raised any issues with the Respondent. Indeed, the Respondent made Counsel aware of the situation after he himself became aware in 2008 and explained the fees would be paid in due course. The case was still ongoing at the time.

15. The Tribunal accepted the Respondent's chronology of events and accepted that while the client paid Counsel's fees into the Respondent's office account on 2<sup>nd</sup> May 2007, he had not been aware until March 2008 that Counsel had not been paid. The Tribunal found the Respondent to be an honest and credible witness and noted that as soon as the Respondent realised Counsel's fees had not been paid, he took steps to arrange for those fees to be paid as soon as possible. These were not the actions of a dishonest person and the Tribunal, having considered the test of dishonesty in the *Twinsectra Ltd v Yardley* case, were satisfied that the Respondent's actions would not be considered dishonest by the ordinary and reasonable standards of honest people. Accordingly, the Tribunal did not find allegation 4 to have been proved.

### **Mitigation**

16. The Tribunal was referred to the medical report of Dr Boakes which gave details of the Respondent's health problems. The Respondent had been a victim of obvious dishonesty by an employee who he had known for 20 years and the effect of this had been dire on his finances. The Respondent had taken advice from an Insolvency Practitioner and intended to enter into an IVA in order to enable all the creditors to be repaid. The Tribunal was provided with details of his income and financial position. The Respondent was now employed with a former client and was not working as a solicitor. He dealt with internal employment and litigation issues but did not carry out any reserved activities. He did not intend to return to private practice but did want to keep his options open for the future.

### **Costs Application**

17. Both parties confirmed the Respondent had agreed to pay the Applicant's costs in the sum of £9,000.00.

### **Previous disciplinary sanctions before the Tribunal**

18. None.

### **Sanction and Reasons**

19. The Tribunal had already indicated they had found the Respondent to be a credible and transparent witness. This was also borne out by the strong references provided and the fact that one of the Respondent's clients had offered him employment. The Tribunal had sympathy for the position the Respondent had found himself in, and it was clear that he had been a victim of the actions of one of his employees.

20. Nevertheless, there had been serious breaches which the Respondent had admitted and indeed, failure to obtain professional indemnity insurance or apply to the Assigned Risks Pool and practising without a practising certificate were serious regulatory matters that put the public at risk. They also prevented the Authority from carrying out its regulatory functions and whilst the Tribunal accepted the Respondent had taken steps to try and rectify the position, the accepted breaches had caused damage to the reputation of the profession and had placed the public at risk.
21. The Tribunal noted the Respondent's medical difficulties and were also mindful that allegations 5, 6 and 7 all related to the same matter and arose from the same facts.
22. The Tribunal had also considered the case of Frank Emilian D'Souza v The Law Society [2009] EWHC 2193 (Admin). The Respondent was currently in employment and accordingly, notwithstanding his debts, the Tribunal decided the appropriate sanction was to fine the Respondent the sum of £5,000.00 and order him to pay the Applicant's costs as agreed in the sum of £9,000.00.
23. The Tribunal Orders that the Respondent, MARK JAMES CLARKE of 84 Brackendale Road, Queen's Park, Bournemouth, BH8 9HZ, solicitor, do pay a fine of £5,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Orders that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £9,000.00.

Dated this 13<sup>th</sup> day of May 2010  
On behalf of the Tribunal

T Cullen  
Chairman