

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 11791-2018

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

JOHN ROTHESAY MACKENZIE
DAVID JOHN SUMMERSCALES

First Respondent
Second Respondent

Before:

Mr A.N. Spooner (in the chair)
Mr P. Jones
Mrs N. Chavda

Date of Hearing: 31 October 2018

Appearances

There were no appearances as the matter was considered on the papers.

JUDGMENT ON AN AGREED OUTCOME

Allegations

1. The allegations contained in the Rule 5 Statement against the Respondents made by the Solicitors Regulation Authority (“SRA”) were that whilst in practice as partners at Redferns Solicitors (“the Firm”) in Weymouth:
 - 1.1 From 2014 to 2016 they failed to establish and maintain proper accounting systems and/or internal controls over accounting systems in breach of all or any of Rule 1.2(e) of the Solicitors Accounts Rules 2011 (“SAR”) and Principles 6 and 8 of the SRA Principles 2011 (“the Principles”).
 - 1.2 Between October 2015 and 28 November 2016 they failed to prepare any or adequate client account reconciliation statements every 5 weeks in breach of all or any of Rules 29.12 of the SAR and Principles 6 and 8 of the Principles.
 - 1.3 From January 2014 they caused or allowed two suspense accounts to be used inappropriately in that they were used regularly for monies relating to named clients which should have been posted to individual client ledgers in breach of any or all of Rules 29.25 of the SAR and Principles 6 and 8 of the Principles.
 - 1.4 From January 2016 they failed to keep proper accounting records to show accurately the position with regard to the money held for each client and trust in breach of any or all of Rules 1.2(f), 29.1 and 29.2 of the SAR and Principles 6 and 8 of the Principles.
2. The allegation against the First Respondent alone was that in his capacity as the Compliance Officer for Finance and Administration (“COFA”) at the Firm, from 2014, he:
 - 2.1 failed to ensure or take adequate steps to ensure compliance with the Firm’s regulatory obligations under the SAR; and/or
 - 2.2 failed to report material non-compliance with the Firm’s obligations to the SRA as soon as reasonably practicable;

in breach of his obligations under Rules 8.5 of the SRA Authorisation Rules 2011.

Documents

3. The Tribunal had before it the following documents:-
 - Rule 5 Statement dated 26 February 2018
 - Answer of the First Respondent (undated)
 - Answer of the Second Respondent dated 30 March 2018
 - Statement of Agreed Facts and Agreed Outcome 10 October 2018

Factual Background

4. The First Respondent was admitted to the Roll of Solicitors in October 1971. He joined the Firm in 1992 and from 14 November 2012, he was the Firm’s COFA. The

Second Respondent was admitted to the Roll of Solicitors in February 1988. He joined the Firm in 2004 and from 14 November 2012, he was the Firm's Compliance Officer for Legal Practice ("COLP").

Application for the matter to be resolved by way of Agreed Outcome

5. The parties invited the Tribunal to deal with the Allegations against the Respondents in accordance with the Statement of Agreed Facts and Agreed Outcome annexed to this Judgment. The parties submitted that the outcomes proposed were consistent with the Tribunal's Guidance Note on Sanctions.

Findings of Fact and Law

6. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondents' rights to a fair trial and to respect for their private and family lives under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
7. The Tribunal reviewed all the material before it and was satisfied beyond reasonable doubt that the Respondents' admissions were properly made.
8. The Tribunal considered its Guidance Note on Sanction (December 2016). In doing so the Tribunal assessed the culpability and harm identified together with the aggravating and mitigating factors that existed. The Tribunal considered that the level of fine and the restrictions proposed for each Respondent was appropriate and proportionate having regard to their individual levels of culpability and their means.
9. The Tribunal considered the First Respondent to be more culpable and determined that a fine in the sum of £12,000.00 was appropriate and proportionate. The Tribunal considered that that sum should be reduced to reflect the limited means of the First Respondent, and accordingly ordered that he pay a fine in the sum of £4,000.00.
10. The Tribunal considered that a fine in the sum of £10,000.00 adequately reflected the lesser culpability of the Second Respondent, and was an appropriate and proportionate sanction.
11. Having determined that the proposed sanctions were appropriate and proportionate, the Tribunal granted the application for matters to be resolved by way of the Agreed Outcome.

Costs

12. The parties agreed that the First Respondent should make a contribution to costs in the sum of £3,000.00. The parties agreed that the Second Respondent should make a contribution to costs in the sum of £15,100.00. The Tribunal considered the costs application to be appropriate and proportionate, and ordered that the Respondents pay a contribution to the costs in the agreed amounts.

Statement of Full Order

13 John Rothesay Mackenzie

1. The Tribunal ORDERED that the Respondent, JOHN ROTHESAY MACKENZIE, solicitor, do pay a fine of £4,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £3,000.00.
2. The Tribunal further Ordered that the First Respondent shall be subject to conditions imposed by the Tribunal as follows:
 - 2.1 The First Respondent may not:
 - 2.1.1 Be a Compliance Officer for Legal Practice or a Compliance Officer for Finance and Administration;
 - 2.1.2 Hold, receive or have access to client money;
 - 2.1.3 Be a signatory on any client account or office account or have the power to authorise electronic transfers from any client account or office account;
 - 2.1.4 Apply to the Tribunal to vary or rescind the restrictions within the period of 5 years of the date of this order.
 - 2.1.5 There be liberty to either party to apply to the Tribunal to vary the conditions set out above.

14. Damian John Summerscales

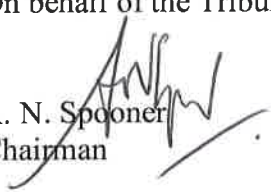
1. The Tribunal ORDERED that the Respondent, DAMIAN JOHN SUMMERSCALES, solicitor, do pay a fine of £10,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £15,100.00.
2. The Tribunal further Ordered that the Second Respondent shall be subject to conditions imposed by the Tribunal as follows:
 - 2.1 The Second Respondent may not:
 - 2.1.1 Be a Compliance Officer for Legal Practice or a Compliance Officer for Finance and Administration;
 - 2.1.2 Hold, receive or have access to client money;
 - 2.1.3 Be a signatory on any client account or office account or have the power to authorise electronic transfers from any client account or office account;
 - 2.1.4 Apply to the Tribunal to vary or rescind the restrictions within the period of 3 years of the date of this order.

2.1.5 There be liberty to either party to apply to the Tribunal to vary the conditions set out above.

Dated this 31st day of October 2018

On behalf of the Tribunal

A. N. Spooner
Chairman

A handwritten signature in black ink, appearing to read 'A. N. Spooner', is written over the typed name and title.

Judgment filed
with the Law Society
on 31 OCT 2018

IN THE MATTER OF THE SOLICITORS ACT 1974

AND IN THE MATTER OF

SOLICITORS REGULATION AUTHORITY

Applicant

and

JOHN ROTHESAY MACKENZIE

(SRA ID: 104132)

First Respondent

DAMIAN JOHN SUMMERSCALES

(SRA ID: 138634)

Second Respondent

MICHELLE MARY MACLENNAN HIND

(SRA ID: 386240)

Third Respondent

STATEMENT OF AGREED FACTS AND AGREED OUTCOME
(First and Second Respondent)

The Tribunal Proceedings

1. By an application dated 26 February 2018 and a statement made under Rule 5(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the Rule 5 Statement"), the Solicitors Regulation Authority ("the SRA") brought proceedings before the Solicitors Disciplinary Tribunal concerning the conduct of John Mackenzie ("First Respondent"), Damian Summerscales ("Second Respondent") and Michelle Hind ("Third Respondent").

The Parties to this Agreed Outcome

2. The SRA, the First Respondent and the Second Respondent have agreed to the outcome set out below relating to the proceedings against those respondents. The Third Respondent is not a party to this Agreed Outcome. The allegations as set out below are the basis of this Agreed Outcome between the SRA and the First and Second Respondents.

Allegations

Allegations - First and Second Respondents

3. The allegations made against the First and Second Respondents on behalf of the SRA are that whilst in practice as partners at Redferns Solicitors, Lupins Business Centre, Weymouth, Dorset, DT4 7SS ("the Firm"):

- 3.1 From 2014 to 2016, failed to establish and maintain proper accounting systems and/ or internal controls over accounting systems in breach of all or any of Rule 1.2(e) of the SAR 2011 and Principles 6 and 8 of the SRA Principles 2011.

The facts and matters relied upon in support of this allegation are set out in paragraphs **146 - 163** of the Rule 5 Statement.

- 3.2 Between October 2015 and 28 November 2016, failed to prepare any or adequate client account reconciliation statements every five weeks in breach of all or any of Rule 29.12 of SAR 2011 and Principles 6 and 8 of the SRA Principles 2011.

The facts and matters relied upon in support of this allegation are set out in paragraphs **148 – 150** and **163** of the Rule 5 Statement.

- 3.3 From January 2014, caused or allowed two suspense accounts to be used inappropriately in that they were used regularly for monies relating to named clients which should have been posted to individual client ledgers in breach of all or any of Rule 29.25 of the SAR 2011 and Principle 6 and 8 of the SRA Principles 2011.

The facts and matters relied upon in support of this allegation are set out in paragraphs **151 – 156; 163** of the Rule 5 Statement.

- 3.4 From January 2016, failed to keep proper accounting records to show accurately the position with regard to the money held for each client and trust in breach of all or any of Rule 1.2(f), Rule 29.1 and Rule 29.2 of SAR 2011 and Principles 6 and 8 of the SRA Principles 2011.

The facts and matters relied upon in support of this allegation are set out in paragraphs **157 - 163** of the Rule 5 Statement.

Allegation - First Respondent only

4. It is further alleged against the First Respondent that, in his capacity as the Compliance Officer for Finance and Administration ("COFA") at the Firm, from 2014, he:

4.1 failed to ensure or take adequate steps to ensure compliance with the Firm's regulatory obligations under SAR 2011; and/ or

4.2 failed to report material non-compliance with the Firm's obligations to the SRA as soon as reasonably practicable;

in breach of his obligations under Rule 8.5 of the SRA Authorisation Rules 2011.

The facts and matters relied upon in support of this allegation are set out in paragraphs 164 - 169 of the Rule 5 Statement.

Admissions

5. The First and Second Respondents make the admissions set out below, which are accepted by the SRA as meeting the full seriousness of the case set out in the Rule 5 Statement.

Admissions - First Respondent

6. The First Respondent admits that during his period of acting as a partner of the Firm:

6.1 after the Third Respondent joined the Firm on 1 December 2013, he did not maintain proper controls over the accounting systems;

6.2 between October 2015 and 28 November 2016, he failed to prepare any or any adequate client account reconciliation statements every five weeks;

6.3 from January 2014, he caused or allowed the suspense account named "*MH misc*" to be used inappropriately, but he does not admit that his use of a suspense account was a serious issue (see mitigation section below);

6.4 from January 2016, he failed to keep proper accounting records to show accurately the position with regard to the money held for each client and trust;

6.5 from 2014, in his capacity as the Compliance Officer for Finance and Administration ("COFA") at the Firm, he failed to:

6.5.1 ensure or take adequate steps to ensure compliance with the Firm's regulatory obligations under the Solicitors Accounts Rules 2011 ("SAR 2011");

6.5.2 report material non-compliance with the Firm's obligations to the SRA as soon as reasonably practicable;

6.6 And as a consequence, he breached:

6.6.1 Rules 1.2 (e), 1.2 (f), 29.1, 29.2, 29.12, Rule 29.25 of the SAR 2011;

6.6.2 Principles 6 and 8 of the SRA Principles 2011 ("the Principles");

6.6.3 Rule 8.5 of the SRA Authorisation Rules 2011.

Admissions – Second Respondent

7. The Second Respondent admits that during his period of acting as a partner of The Firm:

7.1. from 2014 – 2016, he did not maintain proper controls over the accounting systems;

7.2. between October 2015 and 28 November, he failed to prepare any or any adequate client account reconciliation statements every five weeks;

7.3. from January 2014, he caused or allowed suspense accounts to be used inappropriately;

7.4. from January 2016, he failed to keep proper accounting records to show accurately the position with regard to the money held for each client and trust;

7.5. And as a consequence, he breached:

7.5.1. Rules 1.2 (e), 1.2 (f), 29.1, 29.2, 29.12, Rule 29.25 of the SAR 2011;

7.5.2. Principles 6 and 8 of the SRA Principles 2011 ("the Principles");

The Agreed Facts

8. The facts and matters set out below are agreed between the SRA and the First and Second Respondents.

9. The First Respondent is a solicitor and he was admitted to the Roll of Solicitors on 1 October 1971. He joined the Firm in 1992 and from 14 November 2012, he was the Firm's COFA.

10. Second Respondent is a solicitor and he was admitted to the Roll of Solicitors on 15 February 1988. He joined the Firm in 2004 and from 14 November 2012, he was the Firm's Compliance Officer for Legal Practice.
11. The Third Respondent joined the Firm as a Partner In December 2013, and brought clients from her previous firm, Grant and Hind Solicitors (ID: 564659). New client and office accounts were set up and the money from Ms Hind's previous firm was transferred into those accounts. The Firm also maintained their pre-existing client and office accounts.
12. From December 2013, the Firm's partnership was made up of the First, Second and Third Respondents. The Firm was an authorised partnership with its head office at Lupins Centre, 1-3 Greenhill, Weymouth, Dorset. According to information provided to the SRA by the Firm, it undertook work primarily in the areas of family/ matrimonial/ children law, property, wills, trust and tax planning. Approximately 25% of the work was funded by Legal Aid. The Third Respondent was head of the Firm's conveyancing department.
13. On 24 August 2016, the SRA commenced an forensic investigation ("FI").
14. The SRA's interim forensic investigation report was completed on 8 November 2016. The Investigation revealed that due to the books of account not being up to date, no opinion could be offered as to whether the Firm had sufficient funds to meet its liabilities to clients. The interim forensic investigation report also identified that a bogus grant of probate had been relied upon by the Third Respondent in a probate matter.
15. The final forensic Investigation report was completed on 20 March 2017. The investigation revealed unexplained transfers of client money between ledgers and unexplained transfers of client money from client account on cases that the Third Respondent was case holder for.
16. Compliance with the SAR 2011 is the responsibility of each Principal in a firm as set out in Rule 6.1.

Reconciliations

17. Rule 29.12 states that client account reconciliations must be prepared every five weeks. These were not completed every five weeks at the Firm.
18. The FIO attended the Firm on 24 August 2016 and at that time the most recent client reconciliation was for month ending 31 October 2015. Although the FIO requested client reconciliations for the period between October 2015 and August 2016, the only reconciliations that were provided on 18 October 2016 were for November 2015 and

December 2015 and these could not be relied upon as they were not compliant. The reconciliation prepared for November 2015 was not adequate because it did not contain a client matter balance listing. The reconciliation for December 2015 was not adequate as the reconciliation figures did not match figures on the bank statement or the cashbook.

19. The Firm's Accountants, Elson Greaves also identified that three way client account reconciliations were not carried out. In the Accountant's Report Form for 1 January 2015 – 31 December 2015, the Accountants report confirm that "*reconciliations for one of the client accounts were not made available and no testing could be carried out on that account.*"

Suspense accounts

20. Rule 29.25 of SAR 2011 stipulates that suspense client ledger accounts may be used only when it can be justified. The examples provided in the rule are for temporary use on receipt of an unidentified payment or if time is needed to establish the nature of the payment or the identity of the client.
21. Two suspense ledgers were used at the Firm by the First Respondent and the Third Respondent. The first suspense account named "*misc 2014*" was opened on 17 January 2014. This was used throughout 2014 and 2015 with the last entry being 26 December 2015 and a balance of £2,282.60 on 31 December 2015. The second suspense account named "*MH misc*" was opened on 9 January 2014. The last entry was on 1 October 2015 with a balance of £12,473.35 on 31 December 2015 and a largest balance of £1,544,788.03 on 25 April 2014. As the majority of the transactions on the suspense accounts were for named clients, there was no justification for their use as the majority of entries should have been posted to individual client ledgers. As set out above, ledgers at the Firm were not updated throughout 2016 so no monies relating to named clients were posted in 2016.
22. The non-temporary use of suspense accounts was one of the qualifications in the Accountant's report for 1 January 2014 – 31 December 2014, submitted on 25 November 2015.
23. The First Respondent knew that suspense ledgers were being used as he made transactions in the "*misc 2014*" ledger and his knowledge of the Third Respondent's use of "*MH misc*" was at the latest, from the delivery of the Accountant's Report to the Firm for period ending 31 December 2014 on or around 25 November 2015.
24. The Second Respondent's knowledge of the use of the suspense accounts is, at the latest, from the delivery of the Accountant's Report to the Firm for period ending 31 December 2014 on or around 25 November 2015.

Accounting records and use

25. Rule 1.2(f) stipulates that proper accounting records must be kept to show accurately the position with regard to the money held for each client and trust. Rule 29.2 stipulates that all dealings with client money must be appropriately recorded (a) in a client cash account or in a record of sums transferred from one client ledger account to another; and (b) on the client side of a separate client ledger account for each client (or other person or trust).
26. The records were not kept up to date to accurately show the position with regard to the money held for each client and/ or trust as the client ledgers were not updated by the Firm from January 2016 to 28 November 2016, which meant that it is not possible to establish whether the Firm had sufficient funds to meet its liabilities to clients.
27. As at December 2015, there was a difference of £1,361,782.01 recorded between the bank statement and the cashbook and a difference of £566,476.41 between the cashbook and the client matter balance totals.
28. When the FIO inspected the firm on 31 July 2016 a list of liabilities was not available.
29. The Firm's Accountant's report for year ending 31 December 2015, which was submitted after a visit to the firm on 27 September 2016, is heavily qualified and the report concluded that it was not possible to provide an opinion on whether the client funds held were sufficient to meet the liabilities of clients. They identified a difference between client ledger totals and the bank statement of £1,273,747.68.
30. In the absence of a list of liabilities to clients, reconciled client accounts and books of accounts with discrepancies, the First and Second Respondents failed to ensure that proper account records were maintained at the Firm.

Intervention

31. On 24 November 2016, the Adjudication panel of the SRA resolved to intervene into the Firm. The Intervention began on 28 November 2016.

Mitigation

32. The following points are advanced in mitigation by the First and Second Respondents. Their inclusion in this document does not amount to adoption of such points by the SRA, but the SRA accepts that account can properly be taken of the following points in assessing whether the proposed outcomes represent a proportionate resolution of the matter.

33. An Explanation With Warning ("EWW") letter was sent to the First Respondent on 7 June 2017. The First Respondent responded to the EWW on 28 June 2017.

34. An EWW was sent to the Second Respondent on 7 June 2017. The Second Respondent responded to the EWW on 29 June 2017.

35. The First Respondent states that:

- (i) that the Firm had accounting systems in place;
- (ii) although accounting records were not in best order, this was caused as a result of issues between the accountants and the Third Respondent;
- (iii) reconciliations were not done and that, as COFA, he should have ensured that they were;
- (iv) he operated a miscellaneous ledger but that it was not a suspense ledger in the proper sense as it was for small one-off matters which did not justify a separate file or ledger being created;
- (v) he accepts that he should have reported matters to the SRA, although he had remained confident that the accountants and the Third Respondent would resolve matters.

36. The Second Respondent states that:

- (i) he had no knowledge of any of the matters referred to in the FI report until the SRA commenced their inspection in August 2016;
- (ii) he did not know dishonesty had been alleged against the Third Respondent until the intervention;
- (iii) he accepts that he failed in his duty as COLP but that this was not deliberate;
- (iv) he had a poor understanding of the responsibilities of the COLP and did not appreciate the importance of reporting material failures to the SRA;
- (v) he deeply regrets the failures on his part which were part of the SRA investigation into the Firm.

37. Throughout the SRA's investigation the First and Second Respondents have cooperated with the SRA.

Agreed Outcomes

First Respondent

38. Subject to reduction to take account of financial circumstances, the Applicant and the First Respondent propose the following sanction:

- 38.1. The First Respondent shall pay a fine of £12,000.00;

38.2. A Restriction Order for an indefinite period that the First Respondent shall:

- (i) not act as a COLP;
- (ii) not act as a COFA;
- (iii) not hold, receive or have access to client money or act as a signatory to any client or office account or have the power to authorise electronic transfers from any client or office account;
- (iv) be permitted to apply to the Tribunal to vary or rescind the restrictions, but not within 5 years of the order being imposed.

39. The proposed Restrictions are necessary, reasonable and proportionate as this case relates to a failure discharge duties as the COFA and a failure to have in place effective control measures to protect client money. The role of COLP or COFA requires someone who is able to comply with rules and regulations of the SRA. The First Respondent has demonstrated that he is unable to comply with these. Therefore, restrictions on undertaking those important regulatory functions are proportionate. Similarly, the risk to client money demonstrated by the allegations in this case make it proportionate for the First Respondent's access to client money to be restricted.

40. Having regard to their financial circumstances, the Applicant and the First Respondent agree that the First Respondent's fine shall be reduced to £4,000 on the basis that he has limited means, with monthly arrangements to be negotiated with the HM Treasury.

41. The SRA and the First Respondent agree that the First Respondent, having taken in to account the First Respondent's financial circumstances, shall make a contribution of £3,000 to the SRA's costs and that the SRA agrees to collect the contribution to costs as monthly instalments.

Second Respondent

42. Subject to reduction to take account of financial circumstances, the Applicant and the Second Respondent propose the following sanction:

42.1. The Second Respondent shall pay a fine of £10,000.00;

42.2. A Restriction Order for an indefinite period that the First Respondent shall:

- (v) not act as a COLP;
- (vi) not act as a COFA;
- (vii) not hold, receive or have access to client money or act as a signatory to any client or office account or have the power to authorise electronic transfers from any client or office account;

(viii) be permitted to apply to the Tribunal to vary or rescind the restrictions, but not within 3 years of the order being imposed.

43. The proposed Restrictions are necessary, reasonable and proportionate as this case relates to a failure to have in place effective control measures to protect client money. The role of COLP or COFA requires someone who is able to comply with rules and regulations of the SRA. The Second Respondent was in the position of COLP at the time of the misconduct in this case. He has demonstrated that he is unable to comply with the requirements of this important regulatory function. Similarly, the risk to client money demonstrated by the allegations in this case make it proportionate for the First Respondent's access to client money to be restricted.

44. The SRA and the Second Respondent agree that the Second Respondent shall make a contribution of £15,100 to the SRA's costs.

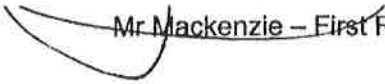
45. The Parties submit that the proposed outcomes represent a proportionate resolution of the matter, consistent with the Tribunal's Guidance Note on Sanctions.

Dated: 10th day of October 2018

Signed:

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Mark Whiting of Capsticks
On behalf of the SRA

Signed:

 Mr Mackenzie – First Respondent

Signed:

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Mr Summerscales – Second Respondent