

IN THE MATTER OF SEAN COLIN GARNER, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr L N Gilford (in the chair)
Mr D Potts
Mr G Fisher

Date of Hearing: 7th April 2009

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of The Law Society by Jayne Willetts, solicitor advocate and partner in the firm of Townshends LLP, Cornwall House, 31 Lionel Street, Birmingham, B3 1AP on 22nd August 2008 that Sean Colin Garner of Garners Solicitors, 1 Oxford Road, Stamford, Lincolnshire, PE9 1BT, solicitor, might be required to answer the allegations contained in the statement that accompanied the application and that such Order might be made as the Tribunal should think right.

The allegations against the Respondent were that:

1. He had made false entries on cheque stubs and payment vouchers contrary to Rule 1(a) and (d) of the Solicitors Practice Rules 1990 ("the SPR") which for the avoidance of doubt was an allegation of dishonesty;
2. He had misappropriated professional charges due to Kelhams Solicitors contrary to Rule 1(a) and (d) of the SPR 1990 which for the avoidance of doubt was an allegation of dishonesty;
3. He had attempted to avoid the payment of VAT on professional charges due to Kelhams Solicitors in breach of Rule 1(a) and (d) of the SPR 1990.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farrington Street, London, EC4M 7NS on 7th April 2009 when Jayne Willetts appeared as the Applicant and the Respondent, who was present, was represented by Margaret Bromley.

The evidence before the Tribunal

The evidence before the Tribunal included a statement from the Respondent dated 11th March 2009.

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

The Tribunal Orders that the Respondent, Sean Colin Garner of Garners Solicitors, 1 Oxford Road, Stamford, Lincolnshire, PE9 1BT, solicitor, be Struck Off the Roll of Solicitors and it further Orders that he do pay the costs of and incidental to this application and enquiry to be subject to a detailed assessment unless agreed between the parties to include the costs of the Investigation Accountant of the Law Society.

The facts are set out in paragraphs 1-8 hereunder:

1. The Respondent, born in 1962, was admitted as a solicitor in 2000. At the material times the Respondent was an equity partner with two other partners at Kelhams Solicitors of 9 Broad Street, Stamford, Lincolnshire, PE9 1PY. The Respondent had been an equity partner since 1st January 2003.
2. Following notification by the Respondent's partners of concerns of false accounting, an Investigation Officer ("IO") had commenced an inspection at the Respondent's practice on 6th September 2007. As a result he had prepared a Forensic Investigation Report ("the FI Report") dated 29th October 2007.
3. The IO had identified that six personal payments had been made to the Respondent ranging from £78.96 to £3,000 between 20th July 2004 and 15th August 2006. The Respondent had entered his own name on the cheques but had entered the name "Mr GM" on the payment vouchers and the cheque stubs. The effect had been that the firm's cashier had posted false payee entries to the client account ledger cashbook and to the relevant client's ledger accounts.
4. The Respondent's explanation, through his solicitors, had been that those had been "gifts" from a client (Mr BW) in recognition of the Respondent's efforts on his behalf. The Respondent had admitted that the payments had been concealed from his partners.
5. The Respondent had contacted 25 clients and had invited them to pay the firm's professional fees to him personally rather than to the firm in order to reduce their fees by not accounting for VAT. Confirmation in writing had been obtained from eight of the twenty clients that they had made payments to the Respondent personally.
6. The Respondent had admitted through his solicitors that he had asked the clients to make payments to him direct and that he had received ten payments direct from clients totalling £600. He had subsequently paid to Kelhams £89.51 which had been the VAT element of the personal payments.

7. By letter dated 20th December 2007, a caseworker had forwarded to the Respondent a copy of the FI Report and had sought his explanation.
8. The Respondent's explanation had been provided in a letter from his solicitors dated 21st January 2008.

The Submissions of the Applicant

9. The Applicant referred to the facts of the allegations and noted that while the Respondent had admitted the facts of allegation 1, he had denied dishonesty. Similarly, in relation to allegation 2, the Respondent had denied both misappropriation and dishonesty. As to allegation 3, he had denied any intention to avoid VAT. This was because he had genuinely believed that he had not been liable for VAT. The Applicant submitted that the case turned on the state of mind of the Respondent. The Applicant noted that the Respondent had referred to a breakdown of relations between the partners and also to the alleged wrongdoings of his partners. However, the Applicant submitted that it was the Respondent's own actions, rather than those of his partners, that were subject to the consideration of the Tribunal.

Oral evidence on behalf of the Applicant

10. James Carruthers gave evidence on Oath. He referred to the FI Report dated 29th October 2007 drafted by him following his inspection of the Respondent's practice on 6th September 2007. He explained that he had found six payments by cheque prepared by and payable to the Respondent. However, the associated payment vouchers, cheque stubs, entries in client cash book and client ledgers had been incorrect, showing the six amounts to have been paid to Mr GM. In these circumstances, the firm's books of account had not been properly written up. The first cheque had been dated 15th July 2004 and the sixth cheque dated 11th August 2006. The total of the six payments had been £5,328.96. In addition, Mr Carruthers had found some 20 matters where the Respondent had requested clients to make payments to him directly. These payments had amounted to £1,260.25.
11. In cross-examination, Mr Carruthers confirmed that the entries as to the amounts of the six cheques had been correct. He had not been able to interview the Respondent during his inspection because the Respondent had left the firm on 31st August 2006. Mr Carruthers agreed that some of the Respondent's requests to clients for direct payment had been sent by email. In answer to a question from the Tribunal, Mr Carruthers said that he would have expected to see evidence on the relevant files of the payment of gifts by a client. The six cheques had involved false accounting.

Further submissions by the Applicant

12. Ms Willetts explained that the facts were not complex but that the Respondent had embarked on a deliberate campaign to deceive his partners over a period of time. She referred to the test of Twinsectra Ltd v Yardley and Others [2002] UKHL 12 and submitted that the Respondent's actions would have been considered dishonest by the ordinary standards of reasonable and honest people and that the Respondent had been aware that by those standards he had been acting dishonestly. The Respondent had

made false entries on accounting documents. Ms Willetts submitted that solicitors were relied upon to produce accurate and truthful documents. The effect of the Respondent's false entries had been to place the partnership accounts in breach of the Solicitors Accounts Rules. The Respondent had wanted to conceal the payments and had used a dishonest method to achieve his deception.

13. Turning to the misappropriation of fees in some 20 matters, the Applicant submitted that as an equity partner in the firm the Respondent had been in a business relationship with his partners. Such a relationship required the utmost good faith and integrity. His clients had been clients of the firm and not clients of the Respondent personally. His requests for direct payments and his subsequent retention of those payments was, the Applicant submitted, not only dishonest but had involved those clients in the commission of the criminal offence of avoiding the payment of VAT. The Respondent had been fully aware of what he was doing. He had seen an opportunity to increase his income at the expense of his fellow partners. He had failed to pay some 20 lots of fees into the firm's client account or to draw up appropriate bills. The Respondent had not been practising alone and indeed had an employee acted, just once, as the Respondent had acted, that employee would have been dismissed for gross misconduct. The Applicant submitted that the Respondent's explanations of his conduct were disingenuous.
14. The Applicant stressed that it was clear from the Respondent's witness statement (at paragraph 21) that the reason for his false entries on accounting documents had been to avoid drawing attention to the gifts he had received. She submitted that the Respondent had a clear and deliberate plan to deceive his partners. In addition the Respondent had colluded with the two relevant clients, Mr GM and Mr W in the deception. The Applicant submitted that the deception had clearly been pre-meditated. Moreover, although the Respondent had justified his actions by reference to learning, in April 2005, of wages paid to his partners' wives and of newspaper and magazine payments, he had in fact received his first gift of £3,000 in July 2004. That was before his knowledge of any payments. Further the Applicant submitted that the Respondent appeared to be indulging in "tit for tat" on the basis of "you do wrong by me, I'll do wrong by you".
15. The Applicant stressed that the allegation of dishonesty did not involve an isolated incident but six cheques resulting in false accounting records and some 20 payments of fees direct and without VAT.

The submissions on behalf of the Respondent

16. Ms Bromley noted that there was no suggestion that the Respondent had not been entitled to the gifts from Mr W. Both Mr W and Mr M had been aware as to how the Respondent was to receive the gifts so as to avoid difficulties with his partners. However, the Respondent accepted that he had gone about things in the wrong way but that at the time he had not thought about the accounting records. Ms Bromley urged the Tribunal to consider the background and all the circumstances and submitted that concealment by the Respondent had not amounted to dishonesty.
17. Turning to allegation 2, Ms Bromley stressed that letters and emails to the clients had been written openly and that there was no evidence of concealment. In fact, the

Respondent had thought that his partners would have seen his correspondence and his emails had been typed by the firm's receptionist. Ms Bromley noted that very small amounts of money had been involved with only £615 in fact received by the Respondent. The Respondent had believed that it had been accepted within the firm that small fees could be retained by the relevant partner. He had regarded such small fees as akin to the commissioner's fees kept by one of the partners. Ms Bromley explained that the Respondent now regretted his actions but had believed, at the time, that he had been dealing with small fees in an acceptable way within the partnership. She explained that the Respondent's former partners were repaying his capital and moreover that they had not sought to recover any sums in respect of the small fees.

18. As to allegation 3, the Respondent had not been registered for VAT and had mistakenly believed that VAT had not been payable. He had subsequently accounted for the VAT. The Respondent had also self-reported the details of the small fees by his solicitor's letter of 12th October 2006 to The Law Society.
19. Ms Bromley explained that his partnership at Kelhams had been the Respondent's first experience of partnership. His actions had not involved "tit for tat" but had been what he had believed to be acceptable in that firm. The Tribunal would have to determine the Respondent's belief and understanding at the material time. Ms Bromley submitted that mistaken ill-judged actions did not make the Respondent dishonest.

The decision of the Tribunal

20. Having considered all the evidence, both oral and documentary, the submissions of the Applicant and those on behalf of the Respondent and the testimonials, the Tribunal found all three allegations proved to the highest standard of proof. The Tribunal also found that the Respondent had been dishonest in that he knew at the material times that what he was doing in relation to both the gifts and to the fees was dishonest. The Respondent had deceived his partners and had taken steps involving false accounting to conceal his receipt of gifts from a client. While working within a partnership he had not only sought fees on his own account, payable to him personally, but had involved the firm's clients in the avoidance of VAT.

Representations as to mitigation and costs

21. Ms Bromley explained the Respondent's professional and personal circumstances to the Tribunal and referred the Tribunal again to the various testimonials. She stressed that the Respondent had learnt his lesson and that the allegations had arisen from the very particular circumstances of his partnership and accordingly that there was no danger of any recurrence. Ms Bromley provided the Tribunal with details of the Respondent's monthly outgoings. She said that the Respondent bitterly regretted his actions and apologised to the Tribunal. Ms Bromley reminded the Tribunal that in a small number of cases a finding of dishonesty had not led to the striking off of a solicitor and that the Tribunal could in these particular circumstances impose appropriate conditions.
21. The Applicant applied for costs in the sum of £11,099.72. Submissions were made as to the effect of the case of Merrick v The Law Society, the Applicant referring in particular to paragraph 61 and Ms Bromley to paragraph 63.

The decision of the Tribunal as to penalty and costs

22. Having considered the submissions and the evidence as to the Respondent's means, the Tribunal was satisfied that the appropriate penalty was for the Respondent to be struck off the Roll of Solicitors. The Tribunal regarded the dishonesty of the Respondent, committed as a partner in the course of his practice, as extremely serious. A strike off was necessary both to maintain the reputation and integrity of the profession and also to assure the protection of the public. The Tribunal was also satisfied that an Order for costs, to be assessed if not agreed, was appropriate in the circumstances, given both the amount of the costs and the age and circumstances of the Respondent.
23. On the application for a stay of the Order, the Tribunal considered Ms Bromley's representations as to the Respondent's need for time to get his affairs in order. The Applicant opposed the application for a stay because of the finding of dishonesty.
24. The Tribunal refused to order a stay. It noted that the Respondent had been aware that he had been facing extremely serious allegations. In such circumstances the Tribunal considered that the Respondent should have taken appropriate steps in advance of the hearing.

DATED this 18th day of September
on behalf of the Tribunal

L N Gilford
Chairman