No. 10200-2009

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF ALAN VINCENT FARNELL, solicitor (Respondent)

Upon the application of Iain George Miller
on behalf of the Solicitors Regulation Authority

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr A N Spooner (in the chair)
Mr R Nicholas
Mr M Palayiwa

Date of Hearing: 11th May 2010

FINDINGS AND DECISION

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

Appearances

Iain George Miller, solicitor of Bevan Brittan LLP, Fleet Place House, 2 Fleet Place, Holborn Viaduct, London, E4M 7RF appeared for the Solicitors Regulation Authority ("SRA").

The Respondent did not appear and was not represented.

The application to the Tribunal on behalf of the Solicitors Regulation Authority ("SRA") was made on 24th February 2009.

Allegations

1. The Respondent breached Rule 1(a), (c) and (d) of the Solicitors Practice Rules 1990 ("SPR"); and to Rules 1.02, 1.04 and 1.06 of the Solicitors Code of Conduct 2007 ("the Code") in that:

   (i) he had used client money for his own purposes and without his client's consent;

(ii) he had obtained loans from his clients without ensuring that those clients took any independent legal advice;

(iii) he drew down funds from clients' disbursement loan accounts to pay referral fees to introducers which were properly payable by the firm;

(iv) he entered into conditional fee agreements with miner clients when such agreements were not in the client's best interest as the firm's costs would be paid under a Claims Handling Agreement agreed with the Department of Trade and Industry ("DTI").

2. He failed to comply with the Solicitors Accounts Rules 1998 ("SARs") in that:

(i) he had transferred money in respect of invoices that had not been delivered to the client in breach of SAR Rule 19(2);

(ii) he had withdrawn money from client account other than in accordance with Rule 22.

In the Applicant's statement he stated for the avoidance of doubt that the allegations (except allegation 1(iv)) were put on the basis that the Respondent acted dishonestly.

Factual Background

1. The Respondent, born in 1950, was admitted as a solicitor in 1974. His name remained on the Roll of Solicitors.

2. At all material times the Respondent practised either on his own account or in partnership under the name Twigg Farnell with offices in Nottingham and Rotherham.

3. The allegations arose as a result of an investigation of Twigg Farnell Solicitors undertaken by Forensic Investigation Officers (FIOs) of the SRA between January and May 2008, giving rise to a Forensic Investigation Report ("the FI Report") dated 5th June 2008. The FI Report identified the matters which gave rise to allegations.

4. The FIOs became aware that the Respondent had entered into an Individual Voluntary Arrangement ("IVA") which had been approved by the required majority of creditors on 8th November 2007. The Respondent's debts totalled about £1.2m, about a fifth of which was owing to HM Revenue and Customs, and the remainder related to debts owed to clients. The Respondent had provided detailed explanations of the firm's financial problems.

"Loans" from clients: allegations 1(i) and (ii) and 2(ii)

McD (deceased)

5. The Respondent's firm acted for the administrators of an estate. The grant of letters of administration was dated 16th December 1997. The deceased's estate was to be held in trust for his two children "until one of them attains the age of 18 years". The deceased's property was sold for £37,000 on 23rd July 1999.

6. Over the course of the ensuing two and a half years, four "loans", totalling £62,750 were taken from the estate funds held by the firm. The FIO saw written loan agreements expressed to be made between the estate trustees and the Respondent and his then partner which provided for repayment over a period of years. In each case, the amount borrowed, which was transferred to the office account immediately or within a few days, reduced the balance of the client account to a minimal level. There was no loan agreement available in respect of the fourth "loan".

7. The trustees told the FIO that the signatures on the first three "loan" agreements appeared to be theirs, although they did not recall signing the second and third agreements. They explained that they considered it to be one loan, and that on the first occasion the Respondent had told a trustee to telephone a solicitor for independent legal advice, which she had done. The trustees did not recall signing a fourth agreement. They confirmed that they had not been offered any security for the money. One trustee had been aware of the Respondent's cashflow problems but had been assured by him that the two children's inheritance would not be placed in jeopardy.

8. The Respondent did not make repayments on time in accordance with the provisions of the agreements. Subsequent agreements had been entered into even though the Respondent had defaulted, the trustees being unaware of such default.

9. When the FIO interviewed the Respondent he agreed that his own interests had overridden those of the clients.

10. The terms of the Respondent's IVA proposal precluded any preferential creditors. Without the consent or knowledge of his IVA supervisor, the Respondent made payments totalling £9,319 against his debt to the trustees in preference to other creditors. The Respondent had not informed the trustees of his IVA.

11. The Respondent told the FIO that about £22,000 remained due to the eldest beneficiary who had then reached the age of eighteen and was therefore entitled to her share.

P

12. The accounting records showed that the Respondent took five loans from the client during the period from 3rd July 2000 to 15th March 2001 in amounts ranging from £4,000 to £20,000 totalling £57,500.

13. The client had not taken independent legal advice. The loans were repaid before the Respondent's entry into the IVA.

G

14. The Respondent had acted for a friend, G. He had taken a loan of £3,500 from G and his partner on 31st December 2002 which the Respondent said he repaid with interest.

R

15. The Respondent acted for R, his cousin, in divorce proceedings. He had taken a loan

from her of £500 on 31st December 2002 which was repaid on 10th January 2003, prior to the IVA.

Dr T (deceased)

16. The Respondent acted for Dr T in connection with her late mother's estate, which included the sale of the deceased's property. Dr T was the executrix and sole beneficiary.

17. An interim distribution of £60,000 had been paid to Dr T on 13th November 2007 and three further payments totalling £178.10 had been made from the estate. On 28th December 2007, the Respondent made an unauthorised transfer, which he described as a loan, of £20,000 from the client's balance of £20,267.18 to the firm's office account. Dr T was a close family friend. The Respondent was at the time due to visit her and he believed "she would have been alright about it".

18. The Respondent had stayed at Dr T's house on New Year's Eve 2007. He subsequently met with her on 18th January 2008 in London when he provided her with interim accounts. Dr T queried an account recording the "loan" which was provided to her by a junior solicitor at the Respondent's firm at the end of January 2008.

19. In an email of 12th February 2008 to Dr T, the Respondent said:

> "The simple fact is that without your knowledge or consent I borrowed £20,000 from the sale of your mum's house on 28th December 2007.
>
> I accept that this was totally wrong and could result in my being struck off...
>
> I thought that the money would come in quickly and so could be repaid with interest without you ever having to know."

The e-mail went on to explain that the money was needed to pay staff wages and explained the Respondent's financial problems.

20. £8,952.40 was credited to the client account on 19th February 2008 from the Respondent's pension fund as part-repayment. £10,928.51 was then paid to Dr T on 7th April 2008, being the whole balance of the client funds held by the firm for her at that date.

21. This debt to Dr T post-dated the IVA and was therefore not included within it. The pension funds were exempt from inclusion as assets within the IVA proposal.

Misuse of client money in respect of personal injury cases: Allegations 1(i) and .(iii)

22. The FIO examined the Respondent's firm's database of 2,308 referred "industrial disease" claims.

23. Personal injury clients were required to take out a disbursement funding loan and after the event insurance. On occasion monies drawn down under the disbursement funding loan were used to pay the introducer's fee. The Respondent accepted that this

meant that the client would be "standing the interest on the referral fee...".

24. The FIOs reviewed a sample of nine files and their analysis was before the Tribunal. It showed that:

    (a) On or about the date that client damages were received, "interim bills" were raised by the firm and a portion of the client's damages were transferred to the firm's office account in respect of the interim bill, despite the firm's obligation to remit damages to the funder of the claim.

    (b) There was no evidence on file of these "interim bills", or any other written notification of costs, being delivered to the client.

    (c) The amounts transferred averaged £2,000 per matter and totalled £10,160.24 in the five matters examined.

    (d) In all five cases the amount actually due to the firm at the end of the matter was less than the amount transferred by way of interim billing. The firm's usual practice at this stage was to raise a final bill and a credit note and make a correcting transfer from the office bank account to client bank account. These correcting transfers ranged from £90.17 to £726.62, totalling £2,109.62 in the five matters. The period of time between the interim bill and transfer and the correcting transfer ranged from 63 to 181 days.

25. The Respondent explained that this practice had been adopted to assist with cash flow problems, but the client did not suffer.

26. The FIOs found that personal injury clients entered into individual loan agreements with commercial funders which had their own written agreements with the Respondent's firm as a “panel solicitor” or "appointed representative”.

27. All agreements and guidance examined contained a stipulation that upon receipt of damages, the monies received should first be applied to repay the loan. The Respondent had been in breach when he applied the client's damages to payment of his own costs. The delay between receipt of damages and repayment of the loan resulted in an increase in the interest incurred by the client, although the Respondent in a letter of 28th July 2008 stated:

    > "At the conclusion of the case the interest that was payable by the client under the Consumer Credit Act Agreement was only calculated to the date that damages were received and so the client suffered no loss in this regard."

Mining claims - allegation 1(iv)

28. The British Coal Corporation was the defendant in two separate High Court group actions and in 1997 liability of the British Coal Corporation was established to pay compensation for damages caused to miners for two types or medical condition, namely: (i) Respiratory Disease ("RD") including Chronic Obstructive Pulmonary Disease ("COPD") and (ii) Vibration White Finger ("VWF"). On 1st January 1998 the liabilities of British Coal were transferred to the DTI.

29. There was a Claimants' Solicitors Group ("CSG") for each scheme, membership of which was open to any firm of solicitors that represented claimants. Following discussion between representatives of the DTI and the CSG and under the supervision of the High Court, complex claims handling agreements ("CHAs") for both of the above actions. The CHAs were agreed on 22nd January 1999 for VWF and 24th September 1999 for COPD. These provided a framework within which all claims were to be conducted as Court approved schemes. The CHAs stipulated that all claims must be made through a firm of solicitors accepted to the panel by the DTI. Twigg Farnell prosecuted these claims pursuant to CHAs agreed with the CSG.

30. There were time limits for making claims under the CHAs. VWF claims had to be made by 31st January 2003 and RD claims by 31st March 2004. Whilst the schemes are now closed, claims continued to be progressed.

The CHAs

31. The DTI appointed AON/IRISC ("IRISC") to administer the schemes under their supervision. The CHAs covered inter alia medical evidence to support a claim; the way in which a claim would be progressed; the amount of damages to be paid on a successful claim and the costs payable to the solicitors for prosecuting the claim.

32. Under the CHAs solicitors were entitled to claim their costs from the DTI and the CHAs provided how they were to be calculated.

High Court Deeming Provisions

33. In relation to RD claims pursuant to paragraph 3.2 of the order of the Honourable Mr Justice Turner dated 1st October 1998, claimants shall be deemed:

> "(a) to be a Plaintiff on the writ herein the date of commencement of that Plaintiff's action being the date of notice of the claim and interest on general damages shall run from that date;
>
> (b) to have served proceedings upon the Defendant on the next day on which the Register is received (as provided at paragraph 3.2 above) subsequent to the entry of the Plaintiff's details upon the Register"

34. With regard to VWF action, the High Order (Newcastle Upon Tyne District Registry Division) dated 25th August 1994 stated:

> "2. Definitions
>
> 2.1.1 British Coal Vibration White Finger Litigation ("WFL") shall be the name given to the procedural arrangements for the disposal of the Plaintiff's actions more particularly defined by the directions prescribed by this Order and any subsequent order(s)...
>
> 4. Parties
>
> Those Plaintiffs listed at Schedule 2 hereto are those Plaintiffs whose

actions are the subject of WFL at the date of this order.

Any Plaintiff whose action is the subject of the Practice Note shall join the WFL upon:

(a) complying with the terms of the Practice Note, and;

(b) notifying the Steering Committee of its intention to join the SG or;

(c) by order of the Court."

All claims under the British Coal litigation are therefore contentious.

Cases undertaken by Twigg Farnell

35. The 104 claims handled by Twigg Farnell were for "people who walked in off the street" and were handled by an admitted solicitor who had previously conducted industrial disease claims at a different firm.

36. The claims had been pursued by Twigg Farnell under the terms of the CHA as a result of which the firm received costs for successful claims paid by the DTI through IRISC. In fourteen of the forty successful VWF cases, the firm had made deductions from the clients' damages in respect of their costs, in addition to claiming them from the DTI.

37. The Respondent had been made aware of a Member of Parliament's concerns about deductions being made from miners' compensation and he had asked the assistant solicitor (at the time a trainee) to deal with this.

38. The deductions made in the 14 matters ranged from £107.27 to £2,901 totalling £20,524.27. These amounts were taken by the firm in respect of its costs in addition to the firm receiving its fixed costs from the DTI in accordance with the agreed CHAs.

39. The period between the (reduced) damages being paid to the client and the date of reimbursement ranged from about nine months to over six years.

Mr A

40. In the case of Mr A, a miner, his claim was registered with the RISC on 29th September 2000. A letter was sent to him on 12th July 2001 which stated:

> "...we note that there is no written agreement in connection with the payment of our costs in this matter.
>
> We did agree to undertake work on your behalf on a "no win no fee" basis and this is still the case. However, if you wish us to continue to act on your behalf you will need to sign a written agreement."

41. Mr A attended the firm's offices on 17th July 2001 and signed a Contingency Fee

Agreement ("CFA") and an authority for IRISC to make damages cheques payable to Twigg Farnell. The CFA provided that:

> "If you obtain damages you pay us 25% of your damages plus any disbursements. This figure includes VAT at the standard rate."

The firm received the agreed fee under the CHA, but also raised an invoice being 25% of the damages plus VAT from which the CHA fees received were deducted, leaving a balance of £107.27 which was deducted from Mr A's damages.

42. In interview the Respondent pointed out that he had not been aware of any deductions being made initially, and then was not aware that the deductions actually exceeded the amount which should have been claimed: he had not been involved with the detail of the miners' schemes.

Submissions

43. It was submitted that the above facts disclosed a systematic abuse by Mr Farnell of the trust placed in him by his clients and the misuse of money entrusted to him. It was further submitted that all of these allegations (save for allegation 1.4) demonstrated conscious impropriety or dishonesty on his part.

The Tribunal reviewed the following documents:

Submitted by the Applicant:

- The Applicant's statement with appended documents including the FIO's Report dated 5th June 2008

Submitted by the Respondent:

- A letter that the Respondent addressed to the Tribunal dated 29th March 2010 and a document prepared by the Respondent entitled "History of the Firm".

Witnesses

An FIO, Mr Clive Howland, gave oral evidence in which he confirmed the accuracy of the contents of the aforementioned FI Report dated 5th June 2008.

The Tribunal's Findings as to Fact and Law

44. The Tribunal found all of the facts set out above to have been established, indeed the Respondent did not seek to deny the facts supporting the allegations or the allegations themselves.

45. In his letter of 29th March 2010 the Respondent indicated that he had wished to have his name removed from the Roll of Solicitors and he did not wish to waste the Tribunal's time simply so that he could try to convince people that he did not know that he was not a dishonest person.

46. It was the Applicant's submission that the facts disclosed a systematic abuse by the Respondent of the trust placed in him by his clients and the misuse of money entrusted to him. The facts demonstrated conscious impropriety or dishonesty on the part of the Respondent, indeed the Respondent himself accepted in his email addressed to Dr T that what he had done was not honest and was conduct that would lead to his being struck off the Roll.

47. Having found the allegations to have been substantiated the Tribunal was required to make a ruling on the question of dishonesty. The Tribunal was mindful of the two-part test set out in Twinsectra Ltd v Yardley and Others [2002] UKHL 12. The Tribunal found that in taking money from a deceased's estate, to which his executrix and sole beneficiary client was entitled, to bolster his office account, and to enable office outgoings to be met without informing the client beneficiary that he was doing so, the Respondent's conduct was dishonest by the standards of reasonable and honest people. In light of the email that the Respondent addressed to his client, Dr T, the Tribunal was satisfied so that it was sure that the Respondent did not have an honest belief that he had authority or a proper purpose in taking such money and therefore that he knew that what he was doing was dishonest by those same standards.

Mitigation

48. The Tribunal summarised the contents of the Respondent's aforementioned letter and his document "History of the Firm".

49. The Respondent had become an active member of APIL and had been an active member of special interest groups helping to draft APIL responses to a number of Law Commission Green Papers. He had been accredited as a Fellow of APIL although he has since resigned his APIL membership.

50. The Respondent's wife had paid for his practising certificate in the hope that he might find employment. He had allowed his practising certificate to lapse when employment was not forthcoming. An approach by a local firm seeking his assistance as a locum to cover for staff illness had not resulted in employment as the firm's insurers had indicated that his employment would have an adverse effect on that firm's indemnity premium. The Respondent had therefore considered himself to be unemployable. He had thrown himself fully into voluntary work.

51. The clients, who had also been friends, had been supportive and remained close friends.

52. The Respondent had handled a caseload of divorce and related family work, had become a family mediator and had always had a good reputation for training staff. In 2002 after a monitoring visit by The Law Society he had been authorised to take five trainees.

53. During 2002 and 2003 the Respondent's firm began to suffer a decline in business in relation to its personal injury practice. This had been a direct result of the involvement of claims management companies. The fortunes of the firm had continued to decline leading to staff redundancies in 2003.

54. The firm had had unhappy experiences with claims management companies and had terminated its agreement and reported two of them to the police.

55. The Respondent set out in detail a number of difficulties which had been encountered by his firm.

56. Owing to the financial pressures upon him occasioned mainly by the funding of the disease claims, he fell in to arrears with tax and national insurance. A petition had been presented by the Revenue in the spring of 2007 but the Revenue had agreed to adjourn because a substantial bill was due for detailed assessment at the beginning of June 2007 and sufficient moneys were expected to clear the arrears and the Respondent had submitted an application to reclaim £112,000 VAT which had been paid on behalf of industrial disease clients out of their loan accounts but without invoices addressed to the firm which included VAT. The fee earner dealing with those cases had not realised that the VAT should be claimed from the date of the invoice rather than the date when the firm paid it. Customs & Excise had allowed a substantial proportion but disallowed others because they were more than three years old. It was ironic that the Respondent had obtained Counsel's opinion that one of his creditors did not have a claim against the firm in the light of which it would not have been necessary to enter into the IVA.

57. With regard to the "loan" taken from Dr T, the Respondent explained that at the time the transfer of £20,000 was made, he had been promised cheques totalling in excess of £20,000 from clients in payment of bills. Those payments had not materialised. The wages due to the staff had to be paid on 29th December 2007 and the firm was some £20,000 short. At the time it was anticipated that a detailed assessment hearing would take place in January 2008 leading to the sum of £85,000 being paid to the firm. Further, he was able to claim a pension payment of £9,000 on 15th February 2008. He had not referred the matter to Dr T because the Respondent and his wife were to spend New Year with her. He knew that Dr T would agree to the loan. She had in fact subsequently confirmed that she would most certainly have willingly agreed.

58. Upon the SRA's intervention into the practice on 31st July 2008 the firm's accounts were frozen. The Respondent's son had £48,600 in client account and was expecting to exchange contracts on the house purchase that day. He had been told like any other client that he would have to apply to the SRA Compensation Fund for the return of his money and that this would take some six weeks. That would have meant that he would have lost the house but without being asked as soon as she heard what had happened, Dr T had provided him with a loan to enable his purchase to proceed.

59. The Respondent invited the Tribunal to give due weight to the testimonials written in his support, all of which attested to his competence and integrity.

Costs

60. On the subject of costs the Applicant requested fixed costs in the full amount claimed, a schedule of costs having been supplied to the Respondent in advance of the hearing and provided to the Tribunal at the hearing. The Applicant pointed out to the Tribunal that the authorities required it to take a Respondent's means into account when making a costs order and invited it to Order that the Respondent bear the Applicant's costs which should be subject to a detailed assessment unless agreed between the

parties but that the Respondent should be granted an opportunity to make representations as to means.

Sanction and Reasons

61. The Tribunal noted the points set out in mitigation by the Respondent and that he had suffered a number of difficulties in his practice which left him short of money. Where a solicitor finds himself with serious cashflow problems it is incumbent upon him immediately to recognise either that he must seek funding from a proper source or recognise that his firm is no longer viable.

62. The Respondent took the most serious step when he resorted to client account to meet his office expenditure. It was the Respondent's position that the money was taken as a loan and that he would pay it back. The fact is that clients' moneys are sacrosanct and are not available to a solicitor for his personal purposes. It is incumbent upon a solicitor to exercise a proper stewardship of client funds and any failure is to be regarded as wholly unacceptable. For the reasons set out above the Tribunal found that the Respondent acted dishonestly. It is fundamental to the practice of a solicitor that he be a person who acts with the utmost probity, integrity and trustworthiness. Any failure to maintain such high standards on the part of a solicitor is not to be tolerated both in order to protect the public and to maintain the good reputation of the solicitors' profession. The public is entitled to believe that a solicitor is to be trusted "to the ends of the earth".

63. The Tribunal considered the Respondent's behaviour in respect of the moneys taken from Dr T to be the most serious matter before it; but it also had regard to the very serious the fact that he had taken loans from clients without ensuring that those clients had independent legal advice and that he had used clients' disbursement loans to pay referral fees to introducers, and had entered into Conditional Fee Agreements with miner clients when such agreements were not in the clients' best interests as the firm's costs were to be paid under a CHA agreed with the DTI.

64. The Respondent's conduct in connection with these matters had led to serious breaches of the Solicitors Accounts Rules and because of the importance of handling clients' money punctiliously in accordance with those Rules, any breach is of itself a serious matter.

65. Having regard to all of the circumstances the Tribunal took the view that it was both proportionate and appropriate to Order that the Respondent be struck off the Roll of Solicitors. It was further appropriate that he bear the Applicant's costs and in the absence of any representation from the Respondent it was right that such costs should be subject to detailed assessment unless agreed between the parties. The Tribunal accepted the Applicant's view that the Tribunal should take into account the Respondent's means and Ordered that should the Respondent wish to raise any issues with regard to his ability to pay such costs, he could make an application to the Tribunal within 28 days of the date of the hearing that the Tribunal should consider evidence as to his means and/or ability to pay.

66. At the conclusion of the hearing the Tribunal Ordered that the Respondent, Alan Vincent Farnell, solicitor, be Struck Off the Roll of Solicitors and it further Ordered

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 with liberty to the Respondent to apply to this Tribunal should he wish to raise any issues with regard to his ability to pay costs, such application to be made within 28 days of today's date.

Dated this 18th day of June 2010
On behalf of the Tribunal

A N Spooner
Chairman