

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF BENJAMIN TUBB, (The Respondent)

Upon the application of Jonathan Goodwin
on behalf of the Solicitors Regulation Authority

Mr A H B Holmes (in the chair)
Mr R Hegarty
Mrs L Barnett

Date of Hearing: 21st and 22nd June 2010

FINDINGS & DECISION

Appearances

Jonathan Richard Goodwin Solicitor Advocate of 17E Telford Court, Dunkirk Lea, Chester Gates, Chester CH1 6LT was the Applicant.

The Respondent was in person.

The application to the Tribunal, on behalf of the SRA, was made on 17th July 2009.

Allegations

The Allegations against the Respondent were that he had:

1. Failed to account to his client in respect of monies due.
2. Acted in a way which was fraudulent, deceitful or otherwise contrary to his position as a Solicitor; and
3. Taken unfair advantage of his client.

4. By virtue of the findings of fact particularised in the Judgment of the High Court dated 13th February 2006 (the Judgment) the conduct of the Respondent overall had amounted to a breach of Rule 1 of the Solicitors' Practice Rules 1987 and/or 1990 ("SPR") in that his independence and/or integrity had been compromised, or was likely to have been compromised and/or the duty to act in the client's best interest had been compromised, or was likely to have been compromised and/or the good repute of the solicitor, or the solicitors' profession had been compromised, or was likely to have been compromised.
5. The highly critical findings of fact particularised in the Judgment, of itself, had damaged the good repute of the Respondent and/or the profession, such as to amount to a breach of Rule 1 (d) of the SPR 1990.
6. The Respondent had failed to provide a substantive response to correspondence from the SRA contrary to Rule 20 of the Solicitors' Code of Conduct 2007.

Factual Background

1. The Respondent, born in 1935, was admitted as a Solicitor in 1962. As at the date of the hearing, his name remained on the Roll of Solicitors.
2. At all relevant times, the Respondent had practised in partnership with the firm of Signy & Co (1st January 1970 - 11th September 1989) then practised as a Consultant at the firm of Steggles Palmer until 30th November 1997 and as a Consultant with Kidd Rapinet until 30th April 1998. He was currently a Consultant with D Fisher & Co, 40, High Street, Burrow Green, Sevenoaks, Kent TN15 8BJ.
3. The Respondent had first represented Mr Aivazian in or around 1977 in respect of the purchase of a house. Mr Aivazian had been impressed with the Respondent's services in relation to that transaction and had used him for subsequent transactions.
4. In 1983, Mr & Mrs Aivazian had decided to go into the laundrette business and had purchased a shop at 154 Edgware Road in or around February 1983. The Respondent had acted on that purchase.
5. In the following years, Mr & Mrs Aivazian had developed their business to the extent that by October 1992 they had owned six laundrettes. The relationship between the Respondent and Mr & Mrs Aivazian had deteriorated and in due course they had commenced proceedings against the Respondent in relation to monies they had asserted had been owed to them. A Writ had been issued on 30th November 1992 and, after an enormous delay, the matter had come on for hearing before Master Moncaster. That hearing had resulted in a Judgment dated 13th February 2006 and a subsequent Judgment dated 5th June 2006.
6. The Court had found in favour of Mr Aivazian in a number of respects with quantum to be assessed subsequently. Master Moncaster's Judgment of 5th June 2006 had dealt with the question of capital and interest. The capital sum due from the Respondent to Mr Aivazian had been in excess of £172,000.

7. The Judgments of 13th February and 5th June 2006 had identified a number of failings, had been highly critical of the Respondent and had included a finding that the Respondent had acted dishonestly in a number of respects.
8. Inter alia, Master Moncaster had said at paragraph 52 of his Judgment:
- “I accept Mr Aivazian’s versions of the events and find that there was no loan of £17,000 whether from Mr L or anybody else, including Mr Tubb. I find that Mr Tubb did not make cash payments to Mr Aivazian, from funds in his client account, of £5,000.00, £5,000.00 and £10,000. The absence of any mention of the £5,000.00 payments in the financial statements, I think shows that no such payments were made or thought of at the time.....”
9. In respect of the Euromed Loan of £21,000, the Court had held “That loan too was bogus.”
10. In respect of the Mr M loan of £40,000, the Court had held:
- “The other cash loan is one of £40,000.00 on 2nd July 1985.....Therefore the entry subsequently made of £40,000.00 repayment of this bogus loan is not accurate in that there was in my view no such loan.....”
11. In relation to the alleged Barclay’s fee, the Court had held:
- “The other relatively substantial item is a fee of £5,000.00 allegedly paid to Barclays for commission on a loan.....Barclays did also admittedly receive two sums of £500.00 in an advance fee or some such in relation to the same transaction. Mr Tubb’s evidence, though again it is surprising that he has such a recollection after this length of time, is that the £5,000 was a different and extra fee which was chargeable by Barclays on top of the two sums of £500.00. It seems to me that is unlikely; there can’t, as far as I can see, be any real reason why three separate sums should have been charged by Barclays in relation to that transaction and I therefore disallow that item”
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- “but the duty was on the solicitor to keep accounts of the transactions into which he entered, and if he failed to do that, as he quite plainly has failed to do in this case, then he must make good any items which cannot be justified. This is particularly so of course in the case of a solicitor who regrettably I have found to be dishonest.”
12. The SRA had written to the Respondent by letter dated 17th September 2007 seeking his explanation. A further letter had been sent dated 4th October 2007 when he had failed to reply to the initial letter. The Respondent had replied by letter dated 19th October 2007 explaining that he hoped to be able to give a full reply in the course of the next ten days. In his reply of 29th October 2007, the Respondent had explained that it would take him about six weeks to reply in detail to the points raised by the SRA. He had also indicated that he intended to appeal the Court’s decision. After some further correspondence during which no substantive response had been received

from the Respondent, the matter had been referred to an Adjudicator, who on 11th March 2008 had resolved to refer the conduct of the Respondent to the Tribunal

Documentary Evidence before the Tribunal

13. The Tribunal reviewed the Rule 5(2) Statement together with the documentary exhibits as detailed in that Statement including, inter alia, the Judgments of Master Moncaster dated 13th February & 5th June 2006 and the Report dated 4th November 2004 of BDO Stoy Hayward prepared for the action in the High Court on behalf of the Plaintiffs on the basis of all available books and records. The Tribunal also had the benefit of a bundle of correspondence between the Applicant and the Respondent handed to the Tribunal by the Applicant on the first day of the hearing together with a bundle of documents headed "Summary Integrity Notes For Consideration" handed to the Tribunal on the same day by the Respondent.

Preliminary Matters

Application by the Respondent for an adjournment

14. The Respondent made an application for an adjournment on the basis that he had received only one of the three witness statements needed by him to deal with the proceedings. He explained to the Tribunal that he had expected the Applicant to obtain statements from, and produce as witnesses, the author of the BDO Stoy Hayward Report, prepared for the action in the High Court on behalf of the Plaintiffs, and also Mr Aivazian's Accountant. The Respondent referred to the detail in his letter of 17th June 2010 that was before the Tribunal.
15. Moreover, the Respondent explained to the Tribunal that there were some solicitors willing to help him in the future when they had been able to consider some 25 years of paperwork.
16. The Applicant opposed the application for an adjournment. He referred the Tribunal to the Rule 5(2) Statement dated 17th July 2009 in which it had been clearly stated that the findings of fact, particularised in the Judgments of 13th February and 5th June 2006, were relied upon as prima facie evidence of the Respondent's misconduct and dishonesty. He referred the Tribunal to Rule 15 of the Solicitors (Disciplinary Proceedings) Rules 2007 and to Constantinides v The Law Society CO/1813/2005.
17. The Applicant also referred the Tribunal to the Respondent's letter to him of 30th September 2009 in which the Respondent had stated that at least three witnesses would be essential on his behalf because he realised that sufficient evidence would be needed to over-turn the Master's "opinion". The Applicant also referred the Tribunal to his reply, dated 2nd October 2009, in which he had explained to the Respondent, that in the absence of a successful appeal, the decisions of the Master remained undisturbed and constituted prima facie evidence upon which the Tribunal would be entitled to rely. He had also referred the Respondent to Rule 15 of the Solicitors (Disciplinary Proceedings) Rules 2007.
18. The Applicant explained that it had never been his intention to call or to rely on any witnesses, other than Mr Aivazian who was now a widower and that given the

Judgments the Respondent should not have been taken by surprise by anything in Mr Aivazian's statement of 23rd May 2010. The Applicant submitted that the Respondent had had ample opportunity to prepare his response, both from July 2009, when the Rule 5 Statement had been served and from March 2010, when the matter had been listed for hearing.

19. In response, the Respondent stressed that there were many points in the BDO Stoy Hayward Report, prepared for the action in the High Court, on behalf of the Plaintiffs, that he had wished to question. Moreover, that he had not been able to afford an appeal and had not been able to access papers because of a dispute with his former solicitors. He insisted that the Master had made wrongful conclusions based on lies.

The Decision of the Tribunal

20. Having carefully considered the submissions of both the Respondent and the Applicant and the documents to which it had been referred by both parties, the Tribunal refused the Respondent's application for an adjournment of the hearing.
21. The Tribunal noted that the substantive hearing had been listed in March 2010 for three days and that the Respondent had said that he had approached solicitors only within the last few days, following considerable correspondence, in person, with the Applicant. The Tribunal was concerned to note that the Respondent, whom it considered had had every opportunity to engage with the issues, was seeking to persuade the Tribunal that he had believed that it had been the duty of the Applicant to produce witnesses on whom the Respondent had wished to rely to challenge the Judgments of the Master. The Tribunal did not accept, on the basis of the evidence before it, that the Respondent had not realised that if he wished to challenge the findings of fact of the Master in the High Court proceedings, he would have to present evidence to the Tribunal in the form of witnesses or documents or both. The Tribunal noted that although the Respondent sought to rely on the evidence of Mr Aivazian's Accountant and on that of the author of the BDO Stoy Hayward Report, prepared for the action in the High Court, he had not obtained statements from either of his proposed witnesses and consequently had not been aware of what they might say about any of the relevant matters.

Submissions by the Applicant in relation to the allegations

22. The Applicant explained that while dishonesty was not an essential ingredient of any one of the allegations, he submitted that in relation to allegations 1, 2 and 3, the conduct of the Respondent had been dishonest on the basis both of the higher standard of proof and in accordance with the tests as laid down in Twinsectra v Yardley [2002] UKHL 12.
23. The Applicant further submitted that the findings of the Master, particularised in the Judgment of 13th February 2006, were of themselves sufficient to amount to misconduct, bringing into disrepute the Respondent and/or the profession, even if the Tribunal did not find dishonesty. He explained that in the absence of any evidence in rebuttal, he relied upon the findings of fact, particularised in the Judgment, as prima facie evidence of the Respondent's misconduct and dishonesty.

24. In addition he submitted that the Respondent had failed to co-operate with the SRA in an open and prompt manner and had failed to provide a full and detailed explanation when asked to do so.

Witnesses

25. Anooshavan Aivazian gave sworn evidence relying on his statements of 23rd & 25th May 2010. Inter alia, he explained the background of his claims and gave details of the proceedings. Mr Aivazian told the Tribunal that he had been awarded £172,463.35 plus £250,000 in interest by the Master in the High Court proceedings but had recovered only £75,000 from the Respondent.
26. Mr Aivazian insisted that the Respondent had never given him three sums in cash amounting to £20,000 or any loans of £17,000, £21,000 or £40,000.
27. The Tribunal asked the Respondent if he wished to put any questions to the witness. The Respondent said that new matters had been introduced but that it was beyond him to ask specific questions. He asked the Tribunal to disregard Mr Aivazian's evidence.
28. Benjamin Tubb, the Respondent, gave sworn evidence. He explained that in 43 years of practice there had been no problems as to his integrity, although he had previously appeared before the Tribunal. He stressed that he needed both the author of the BDO Stoy Hayward Report and Mr Aivazian's Accountant to appear before the Tribunal so that they could answer questions and verify matters. The Respondent said that his appearance before the Master had involved three days of Mr Aivazian making statements that had smeared him. He insisted that he had not obtained receipts because he had trusted people. The Judgments had been wrong and whatever the Tribunal decided he would not let go of the matter. The Respondent denied owing Mr Aivazian any monies.
29. In cross-examination, inter alia, the Respondent agreed that the Master had found him to have been dishonest but he pointed out that the Master had not directed The Law Society to investigate. He referred to his appeals under the slip rule in relation to sums of £78,000.00 and £35,000.00 that had been refused as out of time rather than on merit. Although his solicitors had instructions to appeal on the merits, the Respondent explained that he had not been able to put them in funds.
30. The Respondent stressed that he had not prepared for the hearing before the Tribunal and did not have all his papers although he agreed that the SRA had never said to him that they would be relying on three witnesses. Although he had been represented by Solicitors and by Counsel in the High Court, at the hearing in February 2006, he had been cut short because of a lack of time. The Respondent agreed that he had seen the BDO Stoy Hayward Report before the High Court hearing but he had not sought to call the author of that Report or Mr Aivazian's Accountant. He had wanted to instruct his own accountants but had not had the funds to do so. The Respondent insisted that there had been material to rebut the Master's findings in some 20 boxes of relevant material much of which, because of lack of time, had not been put before the Court.
31. The Respondent explained the circumstances in which his accountant had disappeared taking all his original ledger accounts with him although the Respondent was unable

to recall exactly when the relevant documents had become unavailable. The Respondent said that he had prepared a composite account, going back possibly beyond 1982, in late 1992.

32. The Respondent insisted that another client of his, Mr L, had lent sums of £35,000.00 and £17,000.00 to Mr Aivazian. Mr L had wanted nothing in writing and the Respondent had promised Mr L that he would not involve him in any proceedings. The Respondent had not sought any security from Mr Aivazian on behalf of Mr L. He explained that another client of his, Mr M, had loaned Mr Aivazian £40,000.00 and again there had been nothing in writing, nor any security and the Respondent had not wished to involve Mr M in proceedings. The Respondent explained that he would have had written authority from Mr L and from Mr M to make the loans but that he did not have it now.
33. The Respondent said that Mr Aivazian had obtained legal aid funding fraudulently and that investigations were continuing. He believed that the Respondent's Trustee in Bankruptcy had been unable to act fairly because of involvement with Mr Aivazian. Moreover, he considered that the SRA were taking instructions from Mr Aivazian and speaking for the Master's views.

Submissions by the Respondent in relation to the allegations

34. The Respondent informed the Tribunal that he admitted allegation 6 in that he had not provided the SRA with a substantive response.
35. The Respondent noted that the Tribunal had been made aware of the findings and opinions of the Master. Although he had not been able to answer a lot of the detail, he stressed that he was an honest man. And, although he did not have receipts for cash payments, his accounts had always been checked by his accountants and while he had been acting for Mr Aivazian, he had never received any queries from Mr Aivazian's accountant.
36. The Respondent stressed that he had served the public for 45 years without any complaints and that he had treated Mr Aivazian properly. He had not been able to deal with the hearing before the Tribunal properly because he had expected the SRA to call both Mr Aivazian's accountant and the author of the BDO Stoy Hayward Report, prepared for the action in the High Court, to give further evidence. Moreover, that, as from 1989, he had been a consultant with Steggle Palmer and it had been their duty, not his, to keep proper accounts.

The Tribunal's Findings as to Fact and Law

Allegations 1, 2 & 3

37. Having carefully considered all the evidence, both oral and written, the Tribunal found allegations 1, 2 & 3 proved to the higher standard. Taking account of both Rule 15 of the Solicitors' (Disciplinary Proceedings) Rules 2007 and of the Court's guidance in Constantinides v The Law Society CO/1813/2005 the Tribunal determined that the Respondent had failed to produce any cogent evidence to rebut

the findings of fact made by Master Moncaster in the High Court proceedings in 2006.

38. When giving evidence, the Tribunal had found the Respondent evasive, confused, rambling and not a credible witness. Although evidently angry with the Respondent, the evidence of Mr Aivazian had been clear and consistent. Because it had been served less than the required 14 days before the hearing and the Respondent had challenged it as introducing new matters, the Tribunal had disregarded the second witness statement of Mr Aivazian.
39. The Tribunal had been extremely concerned to have before it a solicitor who had clearly failed to keep full and proper written accounts of all dealings relating to his client Mr Aivazian and his associated companies. The Tribunal did not accept the Respondent's evidence as to the various "loans" that he had said he had made on behalf of other clients to Mr Aivazian. In his dealings with Mr Aivazian, resulting in a failure to account in respect of monies due, the Tribunal considered that the Respondent's conduct had been dishonest by the standards of reasonable and honest people and that he himself, when failing to account in respect of monies due, had realised that by those standards his conduct had been dishonest.

Allegations 4 and 5

40. The Tribunal also found allegations 4 & 5 proved to the higher standard in that the highly critical findings of fact of the Master in the High Court proceedings, which the Respondent had failed to rebut, had amounted to a breach of Rule 1 of the Solicitors' Practice Rules 1987 and/or 1990 (SPR) in that his independence and/or integrity had been compromised as had his good repute and that of the solicitors' profession.

Allegation 6

41. Allegation 6 had been admitted by the Respondent and was found as proved by the Tribunal. The Tribunal noted that although the Respondent had indicated to the SRA that he would be making a substantive response, he had failed ever to do so.

Previous disciplinary sanctions before the Tribunal

42. The Respondent had previously been before the Tribunal on 10th June 1971, 18th January 2001 and 19th November 2002.

Mitigation

43. The Respondent stressed that he had not been dishonest and that the facts of dishonesty did not exist.

Application for Costs

44. The Applicant sought an order for costs fixed in the sum of £20,000.

Sanction and Reasons

45. The Tribunal had found all of the allegations proved on the evidence presented to it. Given the finding of dishonesty, the fact that a former client was still owed a considerable amount of money and the three previous appearances before it, the Tribunal concluded that in order to protect the public and to safeguard the reputation of the profession, the Respondent should not be allowed to continue to practise. Accordingly, the Tribunal Ordered that he be struck off the Roll of Solicitors.

Decision as to Costs

46. The Tribunal noted the small amount of information that it had as to the Respondent's means but was of the view that the SRA's costs should be awarded in full, fixed at £20,000. Accordingly, a costs order was to be made in the sum of £20,000 not to be enforced without the consent of the Tribunal.

The Order of the Tribunal

47. The Tribunal Ordered that the Respondent, Benjamin Tubb, 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 fixed in the sum of £20,000.00 such costs not to be enforced without leave of the Tribunal.

Dated this 12th day of August 2010
On behalf of the Tribunal

A H B Holmes
Chairman