No. 10317-2009

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF FRANK ONOKEBHAGBE EGBOH, solicitor (The Respondent)

Upon the application of Robin Havard
on behalf of the Solicitors Regulation Authority

Mr L N Gilford (in the chair)
Mr R Prigg
Mr D Gilbertson

Date of Hearing: 24th November 2010

FINDINGS & DECISION

Appearances

Michael Robin Havard, solicitor, of Morgan Cole, Bradley Court, Park Place, Cardiff, CF10 3DP appeared on behalf of the Solicitors Regulation Authority ("SRA").

The Respondent did not appear and was not represented.

The application was dated 9 September 2009 and a supplementary statement was dated 7 April 2010.

Allegations

The allegations against the Respondent in the Statement pursuant to Rule 5(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 were that:

A. He failed to maintain properly written up Books of Accounts contrary to Rule 32 of the Solicitors' Accounts Rules 1998.

B. He permitted funds to be drawn from client account other than in accordance with Rule 22(1) of the Solicitors' Accounts Rules 1998 leading to a cash shortage.

C. He conducted himself in a manner that was likely to compromise his integrity

contrary to Rule 1.02 of the Solicitors' Code of Conduct 2007.

D. He conducted himself in a manner which was contrary to the best interests of his clients in breach of Rule 1.04 of the Solicitors' Code of Conduct 2007.

E. He conducted himself in a manner which would undermine the public's trust in the profession contrary to Rule 1.06 of the Solicitors' Code of Conduct 2007.

F. He acted where there existed a conflict of interest in breach of Rule 3 of the Solicitors' Code of Conduct 2007.

G. He obtained loans from clients without: insisting that the client sought independent legal advice; providing any security; agreeing to pay interest on the loan; any written agreement and any indication of how or when the loan would be repaid.

The further allegations against the Respondent in the Supplementary Statement pursuant to Rule 7 of the Solicitors (Disciplinary Proceedings) Rules 2007 were that:

H. He conducted himself in a manner which would undermine the public's trust in him and/or the profession contrary to Rule 1.06 of the Solicitors' Code of Conduct 2007.

I. He has failed to respond to correspondence from the Solicitors' Regulation Authority.

In respect of allegations C-H - the Applicant alleged that the Respondent acted dishonestly, although it was submitted that the allegations could be found proved without a finding of dishonesty.

Factual Background

1. The Respondent was born in 1962 and was admitted as a solicitor in 1998. At all material times he carried on business as a partner at Franks Solicitors of 313 Mare Street, Hackney, London E8 1EJ. It was understood that the Respondent was now residing in Nigeria.

2. The allegations set out in the Rule 5 Statement fell into two categories, first non-compliance with Rule 32 of the Solicitors' Accounts Rules and secondly that he had obtained loans from clients in breach of the Solicitors' Code of Conduct 2007. The allegations in the Rule 7 Statement related to a conviction of driving with excess alcohol, resulting in a disqualification from driving for a period of three years.

3. Ms Whatmore, who was present at the Tribunal hearing, a Forensic Investigation Officer with the SRA assisted by Mr Mike Davies, Senior Investigator, had attended at the Respondent's offices on 2 September 2008 and various subsequent dates in order to carry out an investigation.

<u>Allegations A, D and E</u>

4. On inspecting the books it was apparent that they were not in compliance with the Solicitors' Accounts Rules as various receipts and payments had not been allocated to specific client ledgers and overpayments had occurred. In the circumstances, whilst it was possible to conclude that shortages existed, it was not possible to attempt to

calculate with any accuracy the firm's total liabilities to its clients as at 31 July 2008. Of specific concern was the use of a suspense account and the fact that overpayments had occurred primarily as a consequence of the lack of organisation in maintaining proper books of account. Ms Whatmore discovered numerous receipts and payments of sums of money between December 2007 and 31 July 2008 at which time there was a credit balance of £4,069.03 illustrated on ledger sheets entitled "Unallocated Trans", which was described by the Respondent as a suspense ledger account. It was evident that the Respondent had little idea of the source of the funds paid into the suspense ledger. The Respondent was asked about one entry in the ledger of £8,693.48 and he had no idea where this money had come from, although in a letter to the SRA received on 27 October 2008 (in the Forensic Investigations Department), having been received elsewhere in the SRA the day previously, he attempted to suggest that this sum related to fees and disbursements. In the letter Mr Egboh stated: "Basically these are the fees and disbursements not transferred to office a/c. Bill of cost (sic) were debited to respective clients' a/c and credited to this unallocated a/c. To cover up the shortfalls and errors made. This amount is used as a safety net to cover up shortfalls and errors." After giving a breakdown of the sums making up the total, Mr Egboh continued: "These are not actual receipts. Since the Lawbytes software that our firm uses does not allow any transaction to be entered if it will result in debit balances. So, if there are any errors or debit balances then the amount to correct the error should be credited to the respective clients a/c and show it as outstanding receipts in Reconciliation. Once these amounts are deposited into client a/c from the office a/c, the outstanding receipts will be cleared, hence these are the debit balances in respective client's a/c."

5. Rule 16 of Appendix 3 to the Solicitors' Accounts Rules 1998 states that suspense client ledger accounts may be used only when the solicitor can justify their use; for instance, for temporary use on receipt of an unidentified payment, if time is needed to establish the nature of the payment or the identity of the client. The suspense account appeared to form an integral part of the accounts system of the firm.

Allegations B, D and E

6. During the course of the investigation, the Respondent provided a bank reconciliation report entitled "Uncleared Items". Included on the report were seven "receipts", some of which were purported to have been received as long ago as April or May 2008. All client ledger accounts were reviewed and it was ascertained that in most of these cases, funds had been paid out when in fact the receipts had not been banked, resulting in overpayments. Seven instances of overpayment were cited totalling £1,576.83, in the Forensic Investigation Report. In the case of Mr D, the bank reconciliation report recorded that on 29 April 2008, an amount of £413.59 was received by the firm on account of costs. However, the actual receipt of this money, according to the note made by the bookkeeper could not be found on, or reconciled against, the client account bank statement. The client matter listing showed that the firm held a credit balance of £7.71 in relation to this client as at 31 July 2008. However, this was reliant on the credit of £413.59 and as this was not actually received into client bank account the true position was that an overpayment of £405.88 had occurred in respect of this client. A broadly similar situation arose in the case of client Mr B, where an amount of £998.75 was received by the firm on account of costs, recorded on 1 May 2008. The actual receipt of the money could not be found on or reconciled against the client's bank statement according to the

bookkeeper's note. The client matter listing showed no reference to this client as at 31 May 2008, 30 June 2008 or 31 July 2008 and therefore there was no credit balance against which the reversal of the credit entry for £998.75 could be set. Mr Egboh advised that he thought the receipts were debit balances and provided a list with further explanation which the SRA understood had been compiled by the firm's bookkeeper.

Allegation C-G - Loans from clients £55,000

7. There were two instances of loans from clients: Ms A £48,000 and Ms O £8,000.

8. By a handwritten letter dated 23 October 2006 Franks Solicitors and, in particular, the Respondent, were instructed to act on behalf of Ms A in the purchase of a property for £243,000. The instructions in fact came from a third party but a client care letter was sent to Ms A dated 27 October 2006. Between 21 February 2007 and 8 March 2007 the client ledger account and client account bank statement recorded monies totalling £48,000 received in six separate payments from Nigeria. By a letter dated 24 April 2007, a firm of mortgage brokers A-Z enquired about the source of the deposit money. The brokers indicated the lender wished to have sight of the bank statement showing the transfer of funds from Nigeria to Ms A's client account but there was no evidence that this information had been supplied. In its letter A-Z made specific reference to requirements regarding anti-money laundering. The next event recorded on the file was a letter from the Respondent dated 6 November 2007, some six months later, confirming that Ms A no longer wished to proceed with her purchase. The sum of £47,877.05 remained in client account until February 2008. The investigation revealed there were entries in the client ledger account between 27 February 2008 and 17 July 2008. Whilst details of six transactions suggested that the amounts stipulated were refunded to the client, it was discovered that they were actually transferred to Franks' office bank account. Furthermore, despite the details of the transactions being described in this way, the first of which was dated 27 February 2008, a letter was on file from Ms A to Franks dated 5 February 2008 stating that "Further to my telephone conversation with you yesterday, I authorise Franks solicitors to utilise my deposit funds in your client account. I expect that you will refund the funds back to me within the next twelve months".

9. The circumstances relating to a loan of £8,000 from a client Ms O were similar to those relating to Ms A. The firm, and in particular the Respondent, were instructed to act on Ms O's behalf in a remortgage of her property.

10. At an interview with the Respondent on 9 October 2008 the Respondent confirmed to the SRA Investigators that he had asked Ms A for a loan in order to pay "outstanding debts" related to the business. In a letter to the SRA dated 19 January 2009 the Respondent suggested that he did advise her to seek independent legal advice and received confirmation that she did. There was neither correspondence nor attendance notes which suggested that the Respondent either gave such advice or received any such assurance. Furthermore, at the interview with Ms Whatmore on 9 October 2008 the Respondent stated that he had not advised Ms A to seek independent legal advice. Finally whilst the Respondent made reference to the use of the net proceeds of sale of a property in London to repay the loan, there was no evidence that the loan had been repaid to date. In respect of Ms O, again while in his letter dated 19 January 2009 the Respondent suggested that he did advise Ms O to seek independent legal advice and

received confirmation that she did, no such evidence was found on the file in the form of either correspondence or attendance notes. Furthermore, when interviewed on 9 October 2008 the Respondent confirmed that the loan was to pay "business debts" and also stated that he did not advise Ms O to seek independent legal advice.

11. Following correspondence with the SRA arising out of the investigation on 26 February 2009 an adjudication panel resolved to refer the Respondent to the Tribunal and at the same time resolve to intervene in the practice of Franks Solicitors.

Allegations H and I

12. On 3 March 2009 at North West Essex Magistrates Court the Respondent was convicted of "driving with excess alcohol", contrary to Section 5(1)(a) and Schedule 2 of the Road Traffic Act 1988. Following a one-vehicle collision on 1 November 2008 the Respondent was subjected to a breath test by the police. He was found to have 86 micrograms of alcohol in 100 millilitres of breath, which was more than double the prescribed limit of 35 micrograms of alcohol per 100 millilitres of breath. The Respondent was disqualified from driving for a period of three years, to be reduced by nine months upon completion of a course approved by the Secretary of State, and fined £350 plus prosecution costs. A certificate of conviction had been obtained. On 16 July 2009 the SRA wrote to the Respondent regarding the matter, inviting response by 30 July 2009. The Respondent failed to reply. A further letter of 10 September 2009 elicited no response.

Preliminary Matter

13. After the Tribunal had begun the hearing an email was received in the Tribunal's offices from the Respondent in response to an email and attached documents sent on 23 November 2010 by the Applicant. The Respondent made a Supplementary Statement dated 24 November 2010 in which he sought an opportunity to respond to the allegations against him and asked for an adjournment. The Respondent referred to exchanges of emails which had taken place with the Applicant. He stated that his confirmation to the Applicant that he had received the Applicant's emails was true, but that he did not receive the copy of the Rule 5 Statement with allegations A to J. He submitted that he thought the Disciplinary proceedings were only relating to his drink-driving offence, failure to report to The Law Society and failure to respond to SRA letters.

14. The Applicant directed the Tribunal's attention to the bundle of emails which he had handed in to the Tribunal. They commenced on 9 August 2010 and ran through to 10 November 2010. The bundle consisted of relevant extracts rather than entire emails. The Applicant had already confirmed to the Tribunal that in an email of 21 October 2010 the Respondent had stated "as I had already mentioned in my previous correspondence, I would not be able to attend the hearing on 24 November as I now reside in Nigeria. As such, I wish to deal with the matter by email. I will send my response to the allegations made against me very soon, which I hope the Tribunal would consider." In an email dated 5 October 2010 from the Applicant's firm, the Respondent had been asked to confirm receipt of three separate emails with attached documents sent to him on 1 October 2010. This email listed the three emails sent on 1 October and the documents which had been attached to them. Included was the following:

"Second email (sent at 11.28 am) contained:

5. Signed Rule 5 Statement; and

6. Bundle of documents - pages 1-56."

The Respondent had replied by email on 6 October "I confirm the receipt of three separate emails sent to me on Friday, 1st October 2010, with all the attached documents."

Decision of the Tribunal upon the Respondent's Application to Adjourn

15. The Tribunal had carefully considered the Respondent's Supplementary Statement received while the hearing was in progress. He based his application to adjourn on not having received the copy of the Rule 5 Statement which he had also referred to in his statement dated 16 November 2010. However the Tribunal found it was proved upon the papers submitted by the Applicant that the Respondent had received the Statement and accordingly the Application to Adjourn was denied.

Submissions of the Applicant Relating to the Allegations

16. In respect of allegations A, B, D and E, it was submitted that it was evident from interviews with the Respondent that he had little idea of the source of the funds in his suspense account, that there had been wholesale use of the suspense account where sums had lain for unacceptably long periods of time without any home being found for them. Dealing with shortfalls and errors was not a legitimate purpose for a suspense account. It was clear that there had been lump sum transfers to office account without any detailed breakdown of the transactions. The Respondent's explanations to the SRA had been inadequate. In respect of the alleged overpayments it was submitted that it was difficult to understand any logic behind what had occurred but the investigation had shown that the books of account did not give a true picture, and there were insufficient monies to meet client liabilities. Whilst it was not clear who maintained the ledgers and the firm had a bookkeeper the Respondent had oversight.

17. The allegations C-G in respect of the loans to clients were the more serious. In respect of the transfers from client to office account between February and July 2008 described as "refunded to client", it was submitted that as these monies had simply been transferred to office account the only conclusion could be that the entries were designed to mislead. His statements about whether he had advised clients to see independent legal advice were contradictory and this it was submitted was very serious particularly as it appeared that the practice was in a fragile financial position. Consequently in respect of both "loans", the Applicant submitted that neither client was advised to seek independent legal advice, and the Respondent had continued to act when he must, or should, have known that there was an actual, or at least potential conflict of interest; there was no evidence of any security being provided in respect of the loan; there was no evidence to suggest that interest would be payable on the amount of the loan; there was no evidence that the loans had been repaid*, and the description of the transaction in the client ledger was designed to give the appearance that the monies had been refunded to the client and consequently was deliberately misleading. These points it was submitted led to a conclusion that the Respondent had acted dishonestly, and satisfied the twin tests in the case of Twinsectra Ltd -v-

Yardley and Others [2002] UKHL 12.

[The Applicant confirmed via the Clerk that the SRA had attempted to contact Ms A unsuccessfully.]

Allegations H and I

18. The Applicant explained that normally a drink-drive conviction of this type would not lead to a solicitor appearing before the Tribunal, but the Respondent had not dealt promptly with the SRA's enquiries. He had now disputed the level by which he was above the limit but the Tribunal was asked to note that while the minimum period of disqualification was normally twelve months the Respondent had been disqualified for three years. It was felt that the conviction was likely to undermine the public's trust in him and the profession and therefore constituted a breach of the Code.

Documents

19. The Tribunal considered the documents in the case including the Rule 5 Statement and attachments; the Rule 7 Statement and attachments; the Respondent's Statement dated 16 November 2010 with attachments; a bundle of email extracts dated between 6 August 2010 and 10 November 2010; the Respondent's Supplementary Statement dated 24 November 2010 and when considering the application for costs a Schedule of Costs.

Findings as to Fact and Law

20. Having carefully considered the documents and the submissions, the Tribunal found all the facts in the case to have been proved. The Tribunal also found allegations A-G to have been proved, save that they were not satisfied that dishonesty had been proved in satisfaction of the twin tests in the case of Twinsectra. The Respondent's approach to his accounts had been chaotic and he had displayed gross recklessness in dealing with client money and obtaining loans from clients in respect of which there was no evidence that the money had been repaid. He was not able to show that he knew the source of monies held in the suspense account, held for unreasonable lengths of time. It was also clear that overpayments had been made from client account. In respect of allegations H and I, the Tribunal was not satisfied that the proven facts amounted to professional misconduct and accordingly found those allegations not proven.

Mitigation

21. The Respondent was not present and had not made any submission in respect of mitigation.

Costs

22. The Applicant sought costs in the amount of £15,517.67 including the costs of the SRA investigation.

Sanction and Reasons

23. The Tribunal considered that while dishonesty had not been proved against the Respondent, in respect of those allegations which had been proved his conduct was at the serious end of the scale and it was not appropriate for him to remain in practice. Accordingly it ordered that he be struck off.

24. In respect of costs, the Tribunal took into account that two of the allegations, and the allegation of dishonesty, had not been proved. They noted that another member of the firm was referred to on the costs schedule but did not consider that any additional costs would have been incurred as a result of that. The Tribunal assessed costs at £12,300 including the costs of the investigation, this was allocated as to £6,300 including VAT and disbursements for the costs of the Applicant and £6,000 for the costs of the investigation.

Order

25. The Tribunal Ordered that the Respondent, Frank Onokebhagbe Egboh, 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 £12,300.00

Dated this 16th day of December 2010
On behalf of the Tribunal

L N Gilford
Chairman