

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF HIDDADURA ANTHONY OLIVER M ABEYNAYAKE,
(The Respondent)

Upon the application of Mr Ian Ryan
on behalf of the Solicitors Regulation Authority

Mr D Potts (in the chair)
Mr E Nally
Mr D Gilbertson

Date of Hearing: 27th July 2010

FINDINGS & DECISION

Appearances

Mr Ian Ryan, a member and partner of Finers Stephens Innocent LLP, 179 Great Portland Street, London, W1W 5LS, was the Applicant.

The Respondent was neither represented nor present.

The application to the Tribunal, on behalf of the SRA, was made on 23rd October 2009 with a Supplementary Statement made on 4th March 2010.

Allegations

The allegations against the Respondent were that he had:-

1. Abandoned his practice in breach of Rule 1 of the Solicitors' Code of Conduct 2007 (SCC 2007).

2. Deliberately and improperly utilised clients' funds for the benefit of himself and/or others in breach of the Solicitors Accounts Rules 1998 (the 1998 Rules).
3. Failed to act in his client's best interests contrary to Rule 1 of the SCC 2007.
4. Failed to comply promptly or at all with the terms of an undertaking in breach of Rule 10.05 of the SCC 2007.
5. Failed to deliver promptly or at all an Accountant's Report for the firm Oliver Abey & Co for the period 1st October 2007 to 30th September 2008, which had been due on 31st March 2009 as required by Section 34 of the Solicitors Act 1974 and the rules made thereunder.
6. Failed to deliver promptly or at all an Accountant's Report for the firm Oliver Abey & Co for the period from 1st October 2008 to 3rd February 2009, which had been due on 3rd August 2009, as required by Section 34 of the Solicitors Act 1974 and the rules made thereunder.

Preliminary Matter

The Applicant invited the Tribunal to deal with the matter in the absence of the Respondent. He explained that an order for substituted service had been made on 20th May 2010 and that in accordance with that order proceedings had been served by advertisement in The Times and in the Law Society Gazette. The Applicant told the Tribunal that the Respondent was believed to be residing in Sri Lanka and that he had not contacted the SRA since his faxed letter from Sri Lanka of 13th January 2009. The Tribunal agreed that as the Respondent had been duly served the matter should proceed in his absence.

Factual Background

1. The Respondent, born in 1956, was admitted as a solicitor in 1991. As at the date of the hearing his name remained on the Roll of Solicitors but he did not have a current Practising Certificate.
2. At all material times the Respondent had practised on his own account under the style of Oliver Abey & Co at 2nd Floor, 4 Merrivale Road, Harrow, Middlesex, HA1 4BH (the firm).
3. Following reports from clients of the firm that they had been unable to contact the Respondent, an Investigation Officer of the SRA had attended the firm's offices on 8th January 2009 for an inspection and had produced a report dated 23rd January 2009 (the report).
4. The matters, the subject of the report, had been considered by an Adjudication Panel of the SRA on 29th January 2009 when a decision had been made to intervene into the firm and to refer the Respondent's conduct to the Solicitors Disciplinary Tribunal.

Allegation 1

5. The Investigation Officer had attended the firm's offices twice on 8th January 2009 and on both occasions had been unable to gain access. A letter had been placed on the door of the offices informing the Respondent that an inspection was due to commence on 15th January 2009.
6. On 13th January 2009 the SRA had received a fax from the Respondent explaining that he was in Sri Lanka attending his mother's funeral but would return to the UK on 21st January 2009 when he would make available "all the relevant documentary information and the relevant files for your investigation".
7. The Investigation Officer had attended the firm's offices again on 15th January 2009 and 21st January 2009, and on both occasions had been unable to gain access. The Investigation had therefore been terminated.

Allegations 2 and 3

8. Following a report to the SRA by a client of the firm, the SRA had contacted the Abbey National Bank who had confirmed that they had identified five properties where mortgages had been drawn down by the firm but where no charges had been registered in favour of the bank as follows:-
 - (i) H - 12 J C House, London
Date of completion 23rd December 2008 in the sum of £212,000.00.
 - (ii) C - 39 H Road, Sutton Coldfield
Date of completion 16th December 2008 in the sum of £500,000.
 - (iii) B - The B, Orpington.
Date of completion 28th November 2008 in the sum of £550,000.
 - (iv) Mg - A House, Stoke-on-Trent.
Date of completion 23rd December 2008 in the sum of £172,500.
 - (v) Mi - G House, Powys.
Date of completion 24th December 2008 in the sum of £427,500.
9. The statement of Ms TC of Abbey National confirmed that the completion statements had been signed by the Respondent and that the mortgages had been drawn down and that to date no charges against the properties had ever been registered in favour of the Abbey National.
10. The firm had held bank accounts with Barclays Bank plc and Habib Bank AC Zurich. The Respondent had been the sole signatory on the mandates for all accounts.
11. The statement of Mr IP of Barclays Bank plc confirmed receipt of the mortgage monies referred to in paragraph 8 above into the firm's client account and payment out to various third parties within a short period of time.

12. In particular, funds received from Abbey National in respect of the C purchase (39 H Road, Sutton Coldfield) on 15th December 2008 had been transferred to the firm's client account at the Habib Bank on 18th December 2008.
13. There had been insufficient funds in the client account for the transfer to Habib Bank to have utilised any other monies other than the funds drawn down in respect of the C mortgage.
14. The statement of Mr SH of the Habib Bank showed receipt of the same funds on 18th January 2009. On 19th January 2009 those funds had then been sent to various banks in South East Asia on the instruction of the Respondent for the alleged purchase of properties in Singapore and Sri Lanka by individuals based in the UK.
15. The funds transferred to Barclays client account in respect of the H, B, Mg and Mi matters had subsequently been transferred out of the account to various other banks. The Mi funds (£427,500) had been returned to the Abbey National under indemnity.
16. The H, B and Mg were unaccounted for and no charge had been registered against the relevant properties (or in respect of the C funds).

Allegation 4

17. The Respondent had acted for the purchasers of a property and Langleys Solicitors had acted for the vendors.
18. The Respondent had given an undertaking to Langleys on 14th October 2008 for half of their costs in the purchase whether the matter were to proceed to completion or not. That undertaking had been reiterated on 22nd December 2008 when the Respondent had confirmed that he was no longer instructed.
19. Langleys had written to the Respondent on four occasions between 3rd February 2009 and 3rd March 2009, after which a complaint had been lodged with the Legal Complaints Service (LCS). The LCS had written to the Respondent on 5th June 2009 and 22nd June 2009 by recorded delivery. No response had been received. The undertaking remained undischarged.

General

20. The Respondent had not been written to in respect of the report following the intervention. He had not made any further contact with the SRA after his faxed letter from Sri Lanka on 13th January 2009.

Allegations 5 and 6

21. The Respondent had been required to deliver an Accountant's Report for the firm to the SRA for the year ending 30th September 2008 and for the period ending 3rd February 2009. Neither report had been received by the SRA.

22. The SRA had written to the Respondent for an explanation on 21st February 2009, 15th September 2009, 8th October 2009 and 23rd October 2009. No response had been received.

Documentary Evidence before the Tribunal

23. The Tribunal reviewed the Rule 5(2) Statement, the Supplementary Statement and the documentary exhibits attached to both Statements. It also had the benefit of a print-out from the Compensation Fund, obtained on 26th July 2010, showing a total claimed from the Fund, as at that date, of £1,586,835.46.

Submissions of the Applicant

24. Having taken the Tribunal through the facts of the allegations and the documentary evidence, the Applicant submitted that the evidence before the Tribunal clearly showed, inter alia, that the funds received from Abbey National, in respect of mortgages for clients of the firm, had not been used for that purpose. He further submitted that those funds had been misused by the Respondent for his benefit or for the benefit of unknown third parties.
25. In relation to allegation 2; the deliberate and improper use of clients' funds, the Applicant submitted that the Respondent had behaved dishonestly.

The Tribunal's Findings as to Fact and Law

26. Having considered all of the evidence and the submissions of the Applicant, the Tribunal found all of the applications proved to the higher standard. In relation to allegation 2, the Tribunal was satisfied that in drawing down monies in respect of specific mortgages and in failing to register charges in relation to those mortgages, the Respondent's conduct was dishonest by the standards of reasonable and honest people and that the Respondent himself had realised that by those standards his conduct was dishonest. Following the case of Twinsectra v Yardley [2002] UKHL 12, the Tribunal was satisfied that both the objective and the subjective tests relating to dishonesty had been met.

Application for Costs

27. The Applicant handed a Schedule of Costs to the Tribunal and sought an order for costs in the sum of £19,064.30.

Sanction and Reasons

28. The Tribunal stressed that it took an extremely serious view of the Respondent's conduct, including as it did his dishonesty, as it had caused losses to clients and had brought the reputation of the profession into disrepute. In the circumstances, the Tribunal considered that the Respondent could not be allowed to continue to practise and in its view the appropriate penalty was that of striking off and it so ordered.

Decision as to Costs

29. The Tribunal was satisfied that the Applicant was entitled to reasonable costs and fixed the costs in the sum as claimed. It ordered the Respondent to pay the costs of the proceedings, fixed in the sum of £19,064.30.

The Order of the Tribunal

30. The Tribunal Ordered that the Respondent, Hiddadura Anthony Oliver M Abeynayake, 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 £19,064.30.

Dated this 10th day of September 2010

On behalf of the Tribunal

D Potts
Chairman