SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 10653-2010

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

PHILIP LUKE TARBUCK Respondent

Before:

Mr. A. G. Gibson (in the chair)
Mr J C Chesterton
Mrs L. McMahon-Hathway

Date of Hearing: 5th May 2011

Appearances

Jayne Willetts, solicitor (of Jayne Willetts & Co Solicitors, Cornwall House, 31 Lionel Street, Birmingham, B3 1AP) for the Applicant.

The Respondent appeared and was represented by Marion Smith of Counsel, instructed by Nick Trevette, solicitor of Murdochs, 45 High Street, Wanstead, London, E11 2AA.

JUDGMENT

Allegations

1. Following discussion between the parties and with the approval of the Tribunal, the fourth allegation was amended. The allegations as amended against the Respondent were that:

1.1 Withdrawals were made from client account in excess of monies held on behalf of clients in breach of Rule 22(5) of the Solicitors Accounts Rules ("SARs 1998");

1.2 Costs were transferred from client to office account without first delivering a bill or written notification of costs to clients, contrary to Rule 19(2) of the SARs 1998;

1.3 Client funds were incorrectly held in office account in breach of Rule 22(1)(b) of the SARs 1998;

1.4 He failed to deliver up to his lender client the part of the original files to which the client was entitled or otherwise failed to hold them to the client's order contrary to Principle 12.13 of the Solicitors Practice Rules 1990;

1.5 He failed to disclose details of his professional indemnity insurers upon request in breach of Rule 18 Solicitors' Indemnity Insurance Rules 2008 and 2009 ("SIIR").

1.6 He failed to disclose material facts to lender clients in conveyancing transactions that bore the hallmarks of fraud contrary to Rules 1(a) and 1(c) and 1(d) of the Solicitors Practice Rules ("SPR 1990"). Dishonesty was alleged in relation to this allegation but it was not necessary to prove dishonesty for the allegation to be made out.

1.7 He failed to deliver an Accountant's Report for the year ending 31 March 2009 contrary to section 34 of the Solicitors Act 1974 and Rule 35 of the Solicitors Accounts Rules 1998.

2. Allegations 1.1, 1.2 and 1.3 were admitted. Allegation 1.4 was admitted as amended. Allegation 1.7 was admitted. Allegations 1.5 and 1.6 were denied.

Documents

3. The Tribunal reviewed all the documents submitted by the Applicant and the Respondents, which included:

Applicant:

- Rule 5 Statement dated 4 November 2010 with exhibits;
- Schedule of Claims on the compensation fund, numbered 138765;
- Accounts ledger card, matter code INV00154;
- Applicant's Schedule of Costs dated 4 May 2011.

Respondent:

- Respondent's Statement dated 4 May 2011;
- Closing client account bank statement;
- Notice to all known creditors regarding the Respondent's IVA dated 28 July 2010, with copy of the Chairman's report and attachments;
- Estimated Statement of Affairs as at 8 June 2010 under Insolvency Act 1986;
- Income and expenditure accounts 23 July - 23 August 2010 for the Respondent;
- Bundle of testimonials.

Factual Background

4. The Respondent was born in 1955 and admitted as a solicitor in 1988. He did not hold a current Practising Certificate. He formerly practised on his own account at Philip Tarbuck & Co ("the firm") of Clerkenwell, London, until the firm ceased to practise on 30 September 2009.

Allegations 1.1 to 1.3

5. An inspection was commenced at the Respondent's practice on 11 June 2009. As a result a Forensic Investigation Report ("FI Report") dated 22 December 2009 was prepared.

6. The Forensic Investigation Officer ("FIO") identified that there was a cash shortage on client account as at 31 May 2009 of £23,690.84. This figure was made up of debit balances on eighteen client ledgers ranging from £0.01 to £3,682 and totalling £16,112.09. [Allegation 1.1]

7. Of this sum (£16,112.09) a total of £13,541.95 arose because funds were transferred in respect of the firm's bills of costs but exceeded those that were properly available for transfer. In addition sums had been transferred from client to office account in respect of costs where bills or other notification of costs had not been delivered to the clients. It was agreed between the parties that the Respondent admitted that there were two instances where this occurred and the amounts involved totalled £3,220.00. References to other alleged instances were not proceeded with. [Allegation 1.2]

8. The FIO further identified that if the transfers had not been made, by 28 May 2009 the office bank account would have been overdrawn by an amount of £28,079.25 being an amount of £13,079.25 in excess of the firm's office account overdraft facility, which had a limit of £15,000.

9. In addition the FIO reported that there were client funds of £7,578.75 that were incorrectly held in office account. The firm had acted for a client in a litigation matter in which Mr N of counsel was instructed. On 19 March 2008, the office side of the relevant account in the clients' ledger was debited with a cheque payment in an amount of £7,578.75, which the Respondent confirmed was in respect of the

professional fees of Mr N. The Respondent also confirmed that this cheque was not cashed and that it remained outstanding on the firm's office account bank reconciliation as at 31 May 2009. On 2 April 2008, an amount of £10,000.00 was transferred from client to office bank account in reimbursement of, inter alia, the office account payment to Mr N. On 19 June 2008 and 28 October 2008 the client side of the ledger was charged with payments of £4,000.00 and £3,755.00 respectively. These payments, totalling £7,755.00 were, inter alia, in respect of the liability of £7,578.75 and thus Mr N had in the event been paid from client account and not from office account. [Allegation 1.3].

10. The Respondent replaced the total cash shortage on client account by 15 July 2009. The cash shortage in respect of debit balances was rectified as follows:

Date	Detail	Amount
04 Jun 09	Client account deposit	£14,528.15
08 Jun 09	Inter-ledger transfers	690.00
10 Jun 09	Inter-ledger transfers	893.86
15 Jul 09	Transfer from office to client bank account	0.08
		£16,112.09

The cash shortage in respect of clients' funds incorrectly held in office bank account in an amount of £7,578.75 was replaced on 18 June 2009 by a transfer made from office to client bank account.

Allegations 1.4 to 1.6

11. A complaint was made to the Legal Complaints Service by C LLP, Solicitors ("C"), acting on behalf of Bradford & Bingley trading as Mortgage Express ("B & B"). The complaint was referred to the SRA for further investigation.

12. B & B had instructed the Respondent to secure a first legal charge over various properties where he was also acting for the borrower. C was subsequently instructed to act for B & B in respect of professional negligence claims against the Respondent arising from these property transactions.

13. C had requested the Respondent to deliver up to them the files for the B & B transactions on a number of occasions. The Respondent confirmed that his borrower clients had collected all the files in November 2006 and that he had not retained any copies. Consent had not been obtained from B & B for the release of their part of the file to the borrower clients, even though in the Council of Mortgage Lenders Handbook at 14.3.1 there was a requirement:

> "For evidential purposes you must keep your file for at least six years from the date of the mortgage before destroying it... It is the practice of some fraudsters to demand the conveyancing file on completion in order to destroy evidence that may later be used against them. It is important to retain these documents to protect our interests."

[Allegation 1.4]

14. C had also requested the Respondent to provide details of his professional indemnity insurers by letter dated 8 September 2009. In an email dated 26 October 2009, the Respondent responded to the SRA's enquiry as follows:

> "....I have not given my professional indemnity insurance details to C as I do not think it right to do so.
>
> I have informed the insurers of the claim and in fact I hope to have a meeting with those insurers within the next few days to discuss it further. I believe it is right that they, ie, the insurers, or solicitors appointed by them should reply to C's letter of claim. I have only replied to C to the extent of acknowledging receipt of their letter...."

[Allegation 1.5]

15. Based upon information provided by the Respondent and by C the FIO identified that the Respondent acted for B & B in thirteen transactions and noted the following:

- The amounts stated in the mortgage offers and the certificates of title totalled approximately £5.8m.
- Mortgage advances were released by B & B totalling £4.4m.
- The ledgers did not demonstrate that any deposits were received from or paid by the borrowers.
- Of the mortgage monies advanced of £4.4m only £2.9m was paid to vendors' solicitors leaving approximately £1.5m unaccounted for.
- Of this £342,335.03 was paid to a company IPAL.
- Further inter-ledger transfers of £913,714.26 were made according to the firm's ledgers from funds advanced by B & B either to accounts in the name of IPAL or CP which was a trading name of IPAL.
- The Respondent's clients Mr & Mrs D were the director and secretary of IPAL. Mr & Mrs D were also in their own personal capacity borrowers in respect of six of the property transactions.

16. The FIO calculated that £1,256,049.29 had been received by the Respondent from his lender client B & B but used other than in the payment of completion monies to the vendors' solicitors.

17. C submitted a letter of claim to the Respondent dated 8 September 2009 on behalf of B & B making allegations of breach of retainer and breach of fiduciary duty. For eight specified transactions C alleged that their client had suffered losses of £628,951.90.

18. C provided mortgage documents to the FIO that showed that the mortgage advances were standard buy to let mortgage products either for 75% or 85% of the purchase price so that a deposit of either 25% or 15% was required from the borrower clients.

The client ledgers did not show the names of the individual borrower clients. No deposits were provided by them. Across the 13 transactions there were five individual borrower clients including Mr & Mrs D. By way of examples:

Flat 5

- The Mortgage Offer and Instructions dated 15 July 2004 addressed to the Respondent recorded a loan of £296,730 based upon a purchase price of £395,000. Clause 8 of the Mortgage Offer stated that the mortgage product was a buy to let of 85% loan to value.

- The Certificate of Title dated 16 July 2004 signed by the Respondent confirmed the mortgage advance to be £296,730 and the price stated in the transfer to be £395,000.

- The client ledger showed the receipt of mortgage monies of £296,250 on 20 July 2004 into client account. There was no corresponding credit for the balance of the purchase monies of £98,750. The only record of completion monies being paid was on 21 July 2004 when £249,478.91 was paid to S & Co against a stated purchase price of £395,000, a difference of £145,521. The only credits to client account were the mortgage advance of £296,250 and a payment of £440 for a registration fee.

- Stamp Duty was paid in the amount of £11,850.00 being 3% of £395,000.

- The client ledger for this property showed an internal transfer on 1 April 2005 of £32,882.38 to another IPAL client ledger relating to a different property.

Flat 16

- The Mortgage Offer and Instructions dated 20 July 2004 addressed to the Respondent recorded a loan of £296,730 based upon a purchase price of £395,000. Clause 9 of the Mortgage Offer stated that the mortgage product was a buy to let of 85% loan to value.

- The Certificate of Title dated 21 July 2004 signed by the Respondent confirmed the mortgage advance to be £296,730 and the price stated in the transfer to be £395,000.

- The client ledger showed the receipt of the mortgage monies of £296,250 on 28 July 2004 into client account. There was no corresponding credit for the balance of the purchase monies of £98,750. On 21 July 2004 £233,230.22 was paid to CHH for completion monies and on the same date a payment of £14,500 was paid to S & Co marked completion monies. Total completion monies were therefore paid of £247,730.22 against a stated purchase price of £395,000, a difference of £147,269. The only credit to client account was the mortgage advance.

Flat 30

- The Mortgage Offer and Instructions dated 13 February 2004 addressed to the

Respondent recorded a loan of £300,000 based upon a purchase price of £375,000. Clause 10 of the Mortgage Offer stated that the mortgage product was a buy to let of 85% loan to value.

- The Certificate of Title dated 26 March 2004 signed by the Respondent confirmed the mortgage advance to be £300,000 and the price stated in the transfer to be £375,000.

- The client ledger showed the receipt of the mortgage monies of £300,000 on 30 March 2004 into client account. There was no corresponding credit for the balance of the purchase monies of £75,000. There were debit entries on client account for stamp duty and for Land Registry fee. The mortgage monies remained in client account until 30 September 2004 when £287,976.54 was transferred to another client ledger by way of internal transfer. The only credits to client account were the mortgage advance of £296,250 and a payment of £440 for registration fees.

19. C identified that the transactions had proceeded by way of sub-sale. By way of example for two transactions (Flat 29 and Flat 30) the position was revealed as follows:

Flat 29 - two transfers took place on 2 April 2004. The first transfer was from F Limited to IPAL for the purchase price of £230,000. The second transfer on the same day was from IPAL to Mrs D at the price of £375,000.

Flat 30 - two transfers took place on 2 April 2004. The first transfer was from D Limited to IPAL for a price of £230,000. The second transfer on the same day was from IPAL to Mrs D for a price of £375,000.

These transfer documents also demonstrated that the transactions did not proceed at arms' length as Mrs D signed each of the transfers on behalf of IPAL as company secretary.

Witnesses

20. The Respondent gave sworn evidence. There were no other witnesses. The Respondent confirmed his statement dated 4 May 2011. He testified that none of the accounts for his firm while he practised as a sole practitioner had ever been qualified, and that he had not been subject to any previous investigation or disciplinary proceedings. In cross-examination the Respondent confirmed that he had met the particular borrower clients in 2003 and acted for them until some time in 2005, a period of around 18 months. They had explained to him at a meeting how they carried on their business. They obtained mortgage offers and had set up their company in such a way that they could use the money so obtained. They had not mentioned anything about funding transactions other than by mortgage advances. The way they operated their business did not require the provision of deposits. The Respondent also confirmed that the price set out in the Certificates of Title and the transfer documents was never paid over, and that the benefit of so operating to his clients was their cash flow system. He had explained to them that they could obtain the same result by purchasing the properties and shortly thereafter remortgaging them, using mortgage offers which they had already obtained. The Respondent confirmed

that he had not advised his lender clients of the borrower clients' non-contribution to the transactions. He attributed this to the fact that the valuations relied on by the lender clients were their own, and the money came through based on those valuations. He regarded the stated price, which had never been paid, as the amount in the sub-sale transaction. He had not considered that using this price constituted misrepresentation. In respect of the money which had been paid away in excess of the amount required to fund the purchase, the Respondent explained that his borrower clients owned the company, and his instructions were to send such monies to the investment company IPAL, rather than to them as individuals. The individual borrower clients acted as a partnership although the Respondent had not seen a formal partnership deed, and only two of them owned shares in the company. He did not deliberately conceal from his lender clients the fact of the sub-sale, and had not considered at the time whether they would have given permission if asked. Having regard to one particular IPAL ledger where no mortgage monies were ever received, and the property was funded by internal transfers from other mortgage ledgers where there was a surplus of funds, the Respondent's view was that these were essentially transfers between the same client. He emphasised that at no point was his client account overdrawn in respect of the various ledger cards for IPAL. The Respondent stated that he believed it was perfectly permissible for there to be no contribution from the borrower, and that the purchase price had been correctly stated every single time. It was his case that he had advised the clients that the transfer must state the correct [higher] purchase price, and it always did, and that they must pay Stamp Duty Land Tax on that price. He also advised them to seek tax advice as there might be tax implications for the company through the significant increase in the price on the sub-sale. The Respondent had ensured that Stamp Duty Land Tax was paid on that price. He had completed the forms which one of the clients signed and the Respondent sent them to HMRC on that basis. The Respondent stated that he had made a mistake in terms of the price, and he now realised that. The clients went elsewhere in November 2006 and he did not know the company's current status. He had no idea how the transaction price had been treated within the company's books.

Findings of Fact and Law

21. Allegation 1.1: Withdrawals were made from client account in excess of monies held on behalf of clients in breach of Rule 22(5) of the Solicitors Accounts Rules ("SARs 1998");

21.1 This allegation had been admitted and the Tribunal found it to have been proved.

22. Allegation 1.2: Costs were transferred from client to office account without first delivering a bill or written notification fo costs to clients, contrary to Rule 19(2) of the SARs 1998;

22.1 This allegation had been admitted and the Tribunal found it to have been proved.

23. Allegation 1.3: Client funds were incorrectly held in office account in breach of Rule 22(1)(b) of the SARs 1998;

23.1 This allegation had been admitted and the Tribunal found it to have been proved.

24. Allegation 1.4: He failed to deliver up to his lender client the part of the original files to which the client was entitled or otherwise failed to hold them to the client's order contrary to Principle 12.13 of the Solicitors Practice Rules 1990;

24.4 This allegation had originally been pleaded on the basis that there was a joint retainer of the Respondent by the borrower and lender clients, rather than two separate retainers. The Tribunal found the amended allegation based on the premise that the lender was entitled to that part of the file relating to its business, which the Respondent had admitted, to have been proved.

25. Allegation 1.5: He failed to disclose details of his professional indemnity insurers upon request in breach of Rule 18 Solicitors' Indemnity Insurance Rules 2008 and 2009 ("SIIR").

25.1 This allegation had been denied. It was submitted on behalf of the Applicant that this allegation was not put as the most serious of allegations, but what the Respondent had done constituted a breach of the rule which it was submitted required professional indemnity insurance information to be provided on request. It was submitted on behalf of the Respondent that the pre action protocols gave a substantial period of time for the insurers to respond to a claim and this supported the argument that the Respondent had not been in breach of his duty. The Tribunal had found in the special circumstances of this case that the allegation had not been proved. The Respondent had notified his insurers of C's claim, and correctly anticipated that the insurers would take it up with the claimants.

26. Allegation 1.6: He failed to disclose material facts to lender clients in conveyancing transactions that bore the hallmarks of fraud contrary to Rules 1(a) and 1(c) and 1(d) of the Solicitors Practice Rules ("SPR 1990"). Dishonesty was alleged in relation to this allegation but it was not necessary to prove dishonesty for the allegation to be made out.

26.1 The facts of this allegation had been admitted but dishonesty had been denied. On behalf of the Applicant it was submitted that this was the most serious of the allegations. It was submitted that the Respondent had failed to report to his lender client the following material facts:

- The transactions were proceeding by way of sub-sales;
- The transferor of each of the properties had been the registered proprietor of each property for less than six months;
- The sales were not at arms' length;
- The transactions involved properties which were being sold by other parties on the same dates for substantially less than the prices set out in B & B's mortgage instructions and more particularly lower than the B & B mortgage advances; and
- The consideration recorded in the transfer documents as being paid for each property, and upon which the mortgage advance was based, was not the consideration actually paid by the Respondent's clients.

26.2 When the Respondent had signed the various Certificates on Title he had made no reference to anything of which the lender might need to be aware. This was the point at which he should have notified his lender clients of the material facts. C's letter of claim dated 8 September 2009, which was before the Tribunal, recited the duty of care of a solicitor acting for a lender client. The duties were set out in the Council of Mortgage Lenders Handbook which was enforced by Rule 6 of the Solicitors Practice Rules. It obliged the solicitor to follow the guidance of the Law Society's Green Card on mortgage fraud. Particularly the solicitor was required:

"1.14 The standard of care which we expect of you is that of a reasonably competent solicitor or licensed conveyancer acting on behalf of the mortgagee.

1.15 If there is any conflict of interest, you must not act for us and must return our instructions.

2.3 If you need to report a matter to us, you must do so as soon as you become aware of it so as to avoid any delay...

3.1 You must follow the guidance in the Law Society's Green Card (mortgage fraud)....

5.1.1 Please report to us if the owner or registered proprietor has been registered for less than six months or the person selling to the borrower is not the owner or registered proprietor....

5.1.2 If any matter comes to the attention of the fee earner dealing with the transaction which you should reasonably expect us to consider important in deciding whether or not to lend to the borrower (such as whether the borrower has given misleading information to us or the information which you might reasonably expect to have been given to us is no longer true), and you are unable to disclose that information because of a conflict of interest, you will cease to act for us and return our instructions stating that you consider a conflict of interest has arisen.

5.9 You must ask the borrower how the balance of the purchase price has been provided. If you become aware that the borrower is not providing the balance of the purchase price from his own funds and/or is proposing to give a second charge over the property, you must report this to us if the borrower agrees...., failing which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest.

6.3.1 The purchase price of the Property must be the same as set out in our instructions. If it is not you must tell us....

6.3.2 You must report to us.... if you will not have control over the payment of all of the purchase money (for example if it is proposed that the borrower pays money to the seller direct), other than a deposit held by an estate agent or a reservation fee if not more than £500 paid to a builder or developer.

....

10.1 You should not submit your certificate of title unless it is unqualified or we have authorised you in writing to proceed notwithstanding any issues you have raised with us."

It was submitted that central to the solicitor's duty was the requirement at 6.3.1 that if the purchase price of the property was not the same as set out in the lender client's instructions, the solicitor must tell them. The Tribunal's attention was directed to the Green Card on mortgage fraud as current at the time of these transactions. Particularly it stated:

- "Misrepresentation of the purchase price - ensure that the true cash price actually to be paid is stated as the consideration in the contract and transfer, and is identical to the price shown in the mortgage instructions and in the Report on Title to the lender....

- Unusual transactions - transactions which do not follow their normal course or the usual pattern of events;

    - Client with current mortgage on two or more properties....

    - Client buying several properties from same person or two or more persons using same solicitor;

    - Client reselling property at a substantial profit, for which no explanation has been provided"

The transfer documents stated a price which had never been paid over, which it was submitted made the transfer document inaccurate. The Tribunal was reminded that the fact that some of the properties had been repossessed and sold at a loss was not relevant. Crucial were the warning signs which had clearly had the hallmarks of fraud, and of which the Respondent had been aware.

26.3 Dishonesty was alleged in respect of this allegation, and the two-limbed test for dishonesty as set out in the case of Twinsectra Ltd v Yardley and Others [2002] UKHL 12 had to be satisfied if dishonesty was to be found proved. It was submitted that the objective test had been satisfied in that the Respondent had breached his duty in three ways. He had a contractual duty to disclose material facts under the terms of his retainer as set out in the Council of Mortgage Lenders Handbook. He had a professional duty under Rule 6 of the Solicitors Practice Rules as extended by the Green Card Warning on property fraud. He also had a fiduciary duty because he was in a fiduciary relationship as a solicitor to his lender client to provide information and to act in that client's best interests. Misrepresentation of the true purchase price, it was submitted, in breach of these three duties satisfied the objective test for dishonesty. The true purchase price had been misrepresented on all the documentation, particularly the Certificate of Title and the Transfer document. The wording of the standard clauses on the Transfer document set out that the transferor had received from the transferee for the property a stated sum of money. This had been fed through into the payment of Stamp Duty and Land Registration fees by reference to the higher price. Registration of the properties at the inflated price placed figures on the register which would be taken for subsequent valuations. The scheme would not have succeeded without the manipulation of the price. It was submitted

that this was a key part of the scheme as the method of operating for all the transactions had been the same. In terms of satisfying the objective test for dishonesty, it was submitted on behalf of the Applicant that this was a scheme to defraud lender clients in which the Respondent had paid a key part. Without his co-operation the purchase of the properties could not have proceeded in the way that it did. Objectively there had been dishonesty both on the narrow basis of the misrepresentation of the purchase price and on the wider basis of the part played by the Respondent in a scheme to mislead and defraud lender clients.

26.4 In respect of the subjective test, it was submitted on behalf of the Applicant that the Respondent had acted without any regard for the interests of his lender clients as if he had no duty to them as clients at all. Rather he had treated them as a cash machine from which money could be withdrawn without any security being given. The Respondent was an experienced solicitor specialising in property and conveyancing work. He had operated the firm for 16 years. The Respondent had clearly been notified within the mortgage instructions that these transactions were buy to let mortgages at 75% or 85% loan to valuation. The lender had made a commercial decision to lend on the basis of the price stated. Those were the lender's clear instructions to the Respondent. It followed from the buy to let principle that a contribution was required by the borrower clients and the Respondent had not collected any deposits. It was further submitted as evidence of satisfaction of the subjective test that the Respondent had misrepresented to his lender clients in all 13 transactions as the cash price paid was not even close to the price stated on the documents, including the Certificate of Title which he had signed. The Respondent had undertaken a course of conduct. This was not one isolated example where a client misled a solicitor on one transaction. Here there were 13 interconnected transactions. It was submitted that further evidence of satisfaction of the subjective test was the diversion of mortgage funds. The Respondent did not use the mortgage advances in respect of each transaction for that particular transaction. Some monies were paid away to the investment companies in some transactions. In another instance, monies from the mortgage for one property had been used to fund another transaction. The Respondent had been entrusted with £4.4 million of mortgage monies but had not allocated the monies to the transactions for which they were intended. The Respondent was well aware that these transactions were not at arm's length. Mr & Mrs D were variously the Director and Secretary of IPAL and in some transactions, borrowers in their own capacity. All the ledgers had been held in the name of IPAL or its trading name CP, rather than in the individual borrower clients' names. It was submitted that the Respondent's explanation for his actions was inadequate, showing a lack of appreciation of his role in these transactions. In his letter of 9 October 2009 to the SRA, the Respondent had said:

> "In fact, this matter is complicated. My clients persuaded not only B & B but also other banks to give mortgage advances of higher value than prices they had agreed to pay for numerous properties."

It was submitted that this statement did not bear close analysis or scrutiny. It was for the Respondent to ensure that the lender clients were apprised of all the relevant facts in each transaction. It was also submitted that there had been a blatant preference by the Respondent for one client's interests over that of another. His role as solicitor for the lender client should have been to act as guard for that client. He had not fulfilled his duties. His non disclosure of material facts was so extensive that it was not

credible that he was not obliged to report to the lender client the misrepresentation of the true price. Rather, he dishonestly withheld material facts from the lender client to allow the investor/borrower clients to profit. It was submitted that the Respondent's actions in respect of the lender client satisfied the subjective test for dishonesty.

26.5 On behalf of the Respondent it was submitted that he accepted that he had made a misjudgement, and that this was a serious allegation even without dishonesty. The Respondent had had to bear in mind his duty of confidentiality to his borrower client. While the Respondent was an experienced solicitor he had no experience of mortgage fraud and his experience had mainly been in commercial business, as he had set out in his statement. He had been introduced to these clients through a legitimate route and had met and discussed the transactions with them. The lender and valuers were reputable. It was submitted that the transactions bore all the hallmarks of a reputable package. The Respondent had not invented the scheme. This was not a case of clients vanishing. This was particularly true of one property which had been repossessed and then handed back to the client before being repossessed again. There was no indication that the clients wished to destroy the files once they obtained them. It was submitted that the Respondent essentially saw these transactions as a remortgage based on loan to valuation, although it was accepted that price could inform and influence value in subsequent transactions. The Tribunal was reminded that in every case a Charge had been registered on the property for the benefit of the lender client, and it was submitted that the fact that there was a course of conduct was less rather than more likely to point to dishonesty as it showed the Respondent's confidence in the transactions. Nothing had been hidden. The Respondent had taken steps to ensure the correct tax had been paid. He had advised his clients that there was an alternative way of achieving their objective by purchasing and remortgaging. The Respondent had always said that he did not appreciate the scheme was dishonest when judged by the objective standard. He had admitted his mistakes and apologised. However, he had consistently denied dishonesty in terms of the second limb of the test in Twinsectra. In summary, the Respondent had believed that he was dealing with established investors with a large portfolio, and with people who had money.

26.6 The Tribunal found that there had been a failure to disclose material facts to lender clients in conveyancing transactions that bore the hallmarks of fraud. It considered that the objective test for dishonesty had also been satisfied, in that the reasonable and honest person would think that if a solicitor prepared a document stating a price which was said to have been paid, which had not been paid, and which it was never intended should be paid, then the conduct was dishonest. As to the subjective test, the Respondent had 16 years' experience and had chosen to ignore the warning signs. The Tribunal had particularly noted that the Respondent had had an explanation from his borrower clients of their cash flow system, which involved the misrepresentation of the true cash price. He was also aware that IPAL or its trading organisation then sold at a substantial profit, for which no explanation was provided. The Tribunal did not consider the fact that the Respondent had less experience of residential conveyancing than commercial conveyancing to be relevant. He had prepared documents that stated a price which was not paid, and which he knew never would be paid. The Tribunal did not consider that the Respondent in giving evidence was convincing or plausible. The Tribunal found that the subjective test had been satisfied.

26.7 The Tribunal found that it had been proved to the higher standard that the Respondent had been dishonest.

27. Allegation 1.7: He failed to deliver an Accountant's Report for the year ending 31 March 2009 contrary to section 34 of the Solicitors Act 1974 and Rule 35 of the Solicitors Accounts Rules 1998.

27.1 On behalf of the Respondent it was pointed out to the Tribunal that the Respondent had properly closed down his client account. This allegation had been admitted and the Tribunal found it to have been proved. However, it was not unusual when a solicitor was closing down a business for them to find it difficult to fund a final accountant's report. In the circumstances of these facts the Tribunal regarded this as a not particularly serious breach.

Previous Disciplinary Matters

28. None.

Mitigation

29. On behalf of the Respondent, the Tribunal was asked to bear in mind that at the time when the accounts breaches, the subjective allegations 1.1 to 1.3 were carried out, his wife had been suspected to have a recurrence of a serious illness and he was under great pressure. The Respondent had identified the cash shortage as soon as he returned to work and had taken out a business loan of £25,000 in order to make good the shortfall. As soon as he had been made aware of the monies incorrectly held in office account, he had corrected that situation too, a few days after the investigation had been commenced. In respect of allegation 1.4, it was submitted that the handing back of the files in their entirety to the borrower clients had not impeded these proceedings. The Respondent had co-operated by producing all the ledger cards. He had thought of the files as one file and made the mistake of thinking that they belonged to the borrowers. In respect of allegation 1.6 it was accepted that the appropriate penalty would be strike off or suspension. If this had been fraud it had been a strange one involving clients who were involved in a quasi partnership where the fraud had been conducted in the open. No criminal charges had been brought. It was submitted that unadjudicated claims made upon the compensation fund were difficult to place weight on. Some of the repossessed properties had been sold for amounts in excess of the mortgage loan. There had also been an element of contributory negligence by the lenders. It was emphasised on behalf of the Respondent that this was the only charge of dishonesty among the allegations. It related to events some years ago, the relevant transactions had taken place in 2004 and 2005. The Respondent had ceased that sort of transaction and reverted to being a man of honest and good character. The Tribunal was asked to take into account the testimonials provided. He had co-operated with the SRA and made admissions wherever appropriate. He was no longer in practice. It could not be predicted whether he would ever be able to get insurance again. This was the only thing which had gone wrong in 16 years. The Respondent was now the subject of an IVA and verging on bankruptcy. The Tribunal was provided with information concerning his financial situation. As at July 2010 his debts exceeded half a million pounds. His position was to be reviewed this year. His wife was contributing £1,600 of her £2,200 per month income into the IVA. The Respondent had had to cease supporting his

student daughter. He had two properties, one of which was rented out, but both had substantial mortgages. Any surplus income that there was had to be set aside for his tax liabilities. In terms of sanction it was submitted that a long term suspension would be adequate to send a message in respect of someone who was no longer practising, and whose life was in every way dire.

Sanction

30. The Tribunal had considered whether this was one of the exceptional cases which fitted into those residual categories as set out in the case of Sharma where a strike-off was not appropriate. The Tribunal did not consider that this was such a case. The Respondent was an experienced solicitor. This had not been a momentary lapse. It was extremely important that solicitors should have proper stewardship of their clients' money and their obligations to lender clients must be fulfilled. Accordingly the Tribunal found that the Respondent should be struck off the Roll of Solicitors.

Costs

31. The Applicant sought costs in the sum of £28,762.87. Some allowance had to be made for the fact that the hearing had been estimated for two days but was being concluded in one. On behalf of the Respondent the Tribunal was asked to consider that even if a costs order went into the IVA there would not be enough money for any additional liability. It was submitted on behalf of the Applicant that an order not to be enforced without leave of the Tribunal would not be appropriate.

32. Having regard to costs, the Tribunal had considered carefully the detailed information about the Respondent's financial position which it had found most helpful. It had noted that his financial position was as yet unresolved and that he did have some assets. It had also been reminded that in appropriate cases the SRA would negotiate payment with a Respondent and the Tribunal did not consider that this was a case where an order not to be enforced without its leave was appropriate. It had considered the Costs Schedule carefully and assessed costs in the amount of £20,000.

Statement of Full Order

33. The Tribunal Ordered that the Respondent, Philip Luke Tarbuck, 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.

Dated this 20th day of May 2011
On behalf of the Tribunal

A. G. Gibson
Chairman