SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 10700-2011

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ANDREW JOHN FIELD Respondent

Before:

Mr J N Barnecutt (in the chair)
Mr A Ghosh
Mr J Jackson

Date of Hearing: 28th September 2011

Appearances

Jonathan Greensmith, solicitor of Russell Jones & Walker, 50-52 Chancery Lane, London WC2A 1HL for the Applicant.

The Respondent did not appear and was not represented.

JUDGMENT

Allegations

1. The allegations against the Respondent were that he:-

1.1. Failed to refer his clients to only independent intermediaries, contrary to Rule 9.03(6) of the Solicitors Code of Conduct 2007 ("SCC");

1.2 Allowed his independence to be compromised contrary to Rule 1.03 SCC;

1.3 Misled the Court and third parties and in so doing failed to act with integrity and behaved in a way that was likely to diminish the trust the public places in the profession, contrary to Rules 1.02 and 1.06 SCC.

2. The case was put against the Respondent on the basis that he was dishonest with regard to allegation 3. The allegation could be proved with or without the element of dishonesty.

Documents

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

Applicant:

- Application dated 25 January 2011;
- Rule 5 Statement and Exhibit JJG1 dated 25 January 2011;
- Statement of costs for the hearing on 28 September 2011.

Respondent:

- Copy emails between the Respondent and Mr Greensmith and his assistant dated 30 August 2011 at 10:44, 21 September 2011 at 12:00, 27 September 2011 at 15:41, 27 September 2011 at 12:56 and 27 September 2011 at 14:54;
- Copy letter dated 26 September 2011 from "ST" to the Respondent.

Preliminary Matter

4. Mr Greensmith told the Tribunal that there had been some difficulties in serving papers upon the Respondent. However it was clear from the emails received from the Respondent, particularly that of 30 August 2011 that he had received the papers as he denied the allegations. The Applicant had asked for a detailed statement from the Respondent showing the basis of his denials but that had not been forthcoming. The Applicant therefore applied under Rule 16 (2) of the Solicitors (Disciplinary Proceedings) Rules 2007 that the Tribunal hear and determine the application in the Respondent's absence.

The Tribunal's Determination on the Preliminary Matter

5. The Tribunal was satisfied that the Respondent was aware of the hearing today and of the allegations against him. The Tribunal had before it an email from the Respondent to Mr Greensmith dated 27 September 2011 at 14:54 which indicated that he would not attend today. In the circumstances the Tribunal was prepared to hear and adjudicate the case before it at this hearing.

Factual Background

6. The Respondent was born in December 1962 and was admitted as a solicitor on 2 December 1991. He does not hold a current practising certificate. At the relevant time the Respondent practised on his own account as Field & Co of Britannia House, 75 High Street, Sheerness ME12 1TX ("the Firm").

7. The Respondent had practised on his own account since 1997. In 2000 he acquired another firm of solicitors and made their offices the Firm's head office; he retained his previous premises as a branch office. In 2003 and 2008 the Respondent acquired other firms and also opened another branch office in Marlow; this office subsequently closed in 2009. The majority of the Firm's work was in the areas of matrimonial, conveyancing and wills and probate.

8. The SRA commenced an investigation into the Firm on 14 October 2009. This investigation continued with a second visit to the Firm's offices on 1 and 2 December 2009. The SRA had been informed that the Firm ceased trading on 31 October 2010.

9. The SRA's report ("the FIR") highlighted three matters where the Respondent had referred his clients to ST, a financial adviser and a partner/appointed representative of a wealth management service ("P"). ST was asked to provide financial advice to three clients with very different needs.

<u>Matter 1: JC</u>

10. The first of these matters concerned JC, who, in 1991, at the age of 4 was seriously injured in a road traffic accident and suffered brain damage. JC had been a client of the firm which the Respondent had acquired in 2000. As a result of that acquisition the Respondent was appointed receiver by the Court of Protection on 13 October 2000.

11. JC's money (approximately £1.6million) had previously been held on deposit with the Bank of England with regular monthly payments of approximately £3,000 being paid to JC's parents, as well as irregular payments made to cover extraordinary expenses such as a holiday or a new car.

12. In May 2008 ST produced an investment report for the Respondent on how she recommended JC's money be invested. ST's Report recommended that the funds should be split so that £250,000 remained deposited at the Bank of England, as readily available cash deposit for the purposes of maintaining payments to JC's family; that £675,000 should be utilised in P's Unit Trust, including a tax-free ISA; and that

£675,000 should be deposited in P's International Investment Bond. The proposals were described as a mixture of low to medium and medium risk investments.

13. On 12 September 2008 the Respondent invested £1.45 million pounds in P products, on behalf of JC. A file note dated 12 September 2008 stated that the Respondent signed three cheques; one for £7,200 to P UTG (Unit Trust Group), £721,400 to PTG and £721,400 to P Investments. £150,000 remained on account for regular payments.

14. The SRA's report stated that the P Investment Bond recommended for JC contained a life insurance element.

Matter 2: PS

15. By a Will dated 5 March 2001 PS appointed his daughter (YS) and a solicitor (KS) as joint executors and trustees of his estate. The Respondent acquired KS's firm in 2008 and appeared to have taken over as trustee and executor from KS. The estate set aside £300,000 for investment.

16. In January 2009 ST produced an investment report for the Respondent. The report stated that the Trustees of a discretionary trust in relation to PS's estate were KS and the Respondent. The report recommended that the £300,000 be invested in an Investment Bond.

17. By letter dated 6 August 2009 addressed to the Respondent and YS, ST confirmed the advice following discussions on 27 July 2009. ST's recommendation was to invest the full £300,000 in a P Investment Bond, with regular payments out of the investment of £1,000 per month to PS's wife.

18. The P Investment Bond which ST recommended was linked on a joint life basis; the first life being YS, and second life being PS's daughter.

Matter 3: NM

19. The Respondent was detailed as attorney under an enduring power of attorney, registered with the Court of Protection in 2006.

20. The advice from ST, in a letter dated 7 July 2008, was that NM's funds, £300,000, was to be invested in the medium to long term, with capital growth invested for at least five years. ST recommended that the full £300,000 be invested in P's Investment Bond.

21. The P Investment Bond which ST recommended was linked on a single life basis, that being NM.

22. The Key Facts document in relation to NM stated that the investments consisted of medium to long term investment with an anticipated capital growth requirement of at least 5 years. NM was aged 101 and without mental capacity to manage her own affairs.

23. Using the Respondent's figures initial commissions on both NM and PS's investments would have been £9,000 and commission of over £43,500 in relation to JC. Furthermore even if the funds made no gains the expected annual commission payable on all three matters, at 0.5% would total over £10,000.

24. In all three cases the investments recommended by ST and undertaken involved a P Investment Bond with a life insurance element.

25. Partners/appointed representatives of P are tied agents and can only recommend and sell P products.

26. The Respondent did not refer his clients to independent intermediaries for the purpose of obtaining independent financial advice in relation to life insurance policies. The Respondent explained that he advised all of his clients to seek advice from an IFA but that he was often asked to recommend a financial adviser. The Respondent said that at this stage he would provide the client with a list of three advisers. Two of these advisers (one of whom was ST) were partners/appointed representatives of P and were therefore tied agents.

Loan to the Respondent by ST

27. A ledger, held by the Respondent, showed a loan from the company run by ST. This ledger recorded that on 29 July 2008 the Respondent received £18,000 from that company followed by a further £7,000 on 30 July 2008.

28. The SRA was provided with an agreement between the Respondent and ST dated July 2008 by which ST agreed to loan the Respondent £25,000. Under the agreement the Respondent agreed to pay the loan back, over 36 monthly instalments, starting on 1 August 2008 with 9% interest. This equated to a monthly figure of £794.99.

29. The Respondent defaulted on the loan but there was no evidence to show that ST took any steps to secure further repayments. No evidence was provided by the Respondent to show that he disclosed ST's loan to any clients when referring them to her.

30. On 21 May 2010 the SRA disclosed its report to the Respondent and asked for his comments on issues in relation to the relationship between ST's company and P and the matters of JC, PS and NM.

31. The Respondent replied by letter dated 18 June 2010 and stated in terms that:

- He did not refer clients to ST solely; when clients required financial advice they were advised to seek independent financial advice from an independent financial adviser;

- If clients required further assistance he would provide them with details of three financial advisers. When he provided these details it was explained that they were not independent but were tied advisors. He had made enquiries with the SRA and Law Society enquiring whether the advice given to clients was satisfactory and had been told on three separate occasions that the advice given was appropriate;

- In relation to JC he had previously sought advice from an independent financial advisor in East Sussex in 2000. He made these earlier enquiries in light of the amount of money involved and wanted to be confident in the advice provided, given his position as Deputy, since he would be personally liable in relation to JC's monies. He had contacted three independent IFAs with regard to JC's matter and believed that in the light of his investigations the advice given by P was by far the most superior;

- The recommendations of ST were placed before the Court of Protection for their approval. The Court agreed that the proposed investment was appropriate;

- In relation to NM he was the Attorney and therefore had no obligation to take advice in relation to the investments he made. The monies invested with ST were appropriate and in his view in the best interests of NM;

- NM was 101 and it was envisaged that the investment would not be long term. It was appropriate to place the monies in an investment rather then leave them in a bank.

- The commission payable on NM and PS's investments was 3%;

- The Trustees of PS's estate were his daughter and KS, however the Respondent was added at the behest of the daughter;

- The daughter of PS was advised by him to seek and did actually seek the advice of an independent financial advisor but still chose to instruct ST;

- PS's daughter chose to contact ST and arranged a meeting;

- P would take an upfront commission of between 3%-3.6% as well as a yearly commission fee of 0.5% of the total value of the fund;

- The loan from ST was in respect of a new business venture that he was considering. He stated that in the present economic climate finance was not available from the bank and therefore ST and his parents provided him with working capital;

- ST was a personal friend of his and the loan was completely unrelated to any work which she carried out as a result of instructions from the Respondent.

Individual Voluntary Arrangement

32. On 4 January 2010 the Respondent had entered into an Individual Voluntary Arrangement ("IVA").

33. The effect of entering into the IVA was that, by agreement, creditors accepted a percentage of the monies owed to them in exchange for a promise from the

Respondent to pay the agreed percentage. The payments were to be made over a fixed period. The purpose and effect of the IVA was to avoid the need for the Respondent to file bankruptcy, following which the creditor would be likely to receive less money.

34. Under the Respondent's arrangement he agreed to pay unsecured creditors 41.8p for every pound that he owed to them.

35. The IVA proposal from the Respondent was dated 3 November 2009 and was submitted to Medway County Court. Included with the proposal was a statement, signed by the Respondent, which stated that his attention had been drawn to s262A of the Insolvency Act 1986 which stated that it was a criminal offence for the debtor to make any false representation, or to fraudulently do, or omit to do, anything in relation to his proposal.

36. The Respondent's IVA proposal contained a section which stated that if certain circumstances arose the IVA would be considered failed. Failure of the IVA would mean that creditors would be able to petition for the Respondent's bankruptcy. The first circumstance on the list under that section stated "Failure by me (the Respondent) to give full and frank disclosure of my assets and liabilities..."

37. The proposal also contained a schedule of the Respondent's assets and liabilities, of which £228,592 was in the form of unsecured creditors. The schedule of unsecured creditors contained 28 entries. However, the loan from ST was not disclosed in this schedule, nor was a loan from the Respondent's parents. The inclusion of these loans would have increased the Respondent's total liabilities to unsecured creditors to at least £252,797.01.

38. The proposal also stated at its conclusion:-

> "I hereby confirm that this document fairly sets out my proposal to my creditors for a voluntary arrangement and that to the best of my knowledge, all statements are true. I further acknowledge that although I received assistance in drafting the proposal, its contents remain my sole responsibility."

39. In his explanation to the SRA the Respondent stated that ST was aware of his financial situation. He also stated that it was agreed that the loan from ST to the Respondent would not be included as she was not interested in pursuing any claim for the shortfall in relation to the repayment of the loan via an IVA paying 44p in the pound:-

> "also as it made the IVA viable which with her loan may have made it non-viable, given the size of the debt leading to the IVA ...My parents' loan to me also is not within the IVA for similar and obvious reasons."

Witnesses

40. Mr Robert Copeland who was at the time of the FIR an Investment Business Manager at the SRA gave oral evidence.

Findings of Fact and Law

41. **Allegation 1.1. Failed to refer his clients to only independent intermediaries, contrary to Rule 9.03(6) of the Solicitors Code of Conduct 2007 ("SCC");**

41.1 The Respondent denied this allegation.

41.2 In Mr Greensmith's submission the wording of Rule 9.03 (6) was such that the Respondent could "only refer them to an independent intermediary authorised to give investment advice" when a client needed an endowment policy or similar life insurance within an investment element. The purpose of the Rule was to allow full access to the market. In the Applicant's submission all three of the illustrated cases had involved the purchase of an investment bond with a life insurance element which was illustrated at AP40, AP52 and AP58 of the exhibit bundle. In the final paragraph of the first page of the SRA's Guidance on the meaning of "Independent Intermediaries" (at AP61 of the exhibit bundle) there was a strong steer that Independent Intermediaries were different from tied advisers who could only advise on the products of one provider. It could be seen from paragraph 30 of the FIR that the Respondent had been asked whether he was aware of this guidance and had replied that he was. The Respondent was an experienced solicitor, admitted in 1991 and well able to interpret the Rule and the SRA Guidance.

41.3 Mr Robert Copeland told the Tribunal that although the policies in this case had been the subject of a single premium they provided life cover and investment and were similar to an endowment policy. The insurance element was provided by P themselves as well as management of the investments.

41.4 The Applicant had put forward evidence to show that in each of the three cases the bond provided a death benefit. ST was not an independent intermediary as she was tied to the products of P.

41.5 The Tribunal found this allegation to have been proved beyond reasonable doubt on the documents and facts before it. Rule 9.03 (6) of the SCC stated that:-

> "If a client is likely to need an endowment policy, or similar life insurance with an investment element, you must refer them only to an independent intermediary authorised to give investment advice."

The Tribunal was satisfied that the three products sold had consisted of life insurance with an investment element both from looking at the documents before it and from the evidence given by Mr Copeland. The explanations given by the Respondent did not address the specific point. It was clear that ST was not an independent intermediary and that therefore the Respondent had breached Rule 9.03(6).

42. **Allegation 1.2. Allowed his independence to be compromised contrary to Rule 1.03 SCC.**

42.1. The Respondent denied this allegation.

42.2 Mr Greensmith told the Tribunal that the Applicant alleged that the Respondent had compromised his independence by entering into a loan arrangement with ST, at a time before she was arranging investments for his clients. He took the Tribunal to paragraph 39 of the Forensic Investigation Report at AP11 of exhibit JJG1 and the ledger payments shown on AP68 of that exhibit which confirmed that two payments totalling £25,000 had been made on 29 and 30 July 2008. The Respondent had confirmed on 2 December 2009 to the SRA's Investment Business Officer who was conducting the investigation that these monies were a loan from ST. The formal Agreement for the loan was shown at pages AP67 and AP69 of the exhibit bundle.

42.3. The Respondent had said in his letter of 18 June 2010 that he took out a loan from ST, a long term friend, in respect of a new venture that was being considered when financing was not available from the bank. His parents had provided him with some working capital and ST, his friend, had provided him with other working capital.

42.4 In Mr Greensmith's submission the timing of the loan was important as it was proximate in time to the advice given concerning the investments. The investments had generated commission for ST as illustrated at e.g. AP64 of the exhibit bundle. The key facts document in relation to JC illustrated that ST was likely to receive commission of over £70,000. When this was put to the Respondent he had replied that "any Financial Adviser would receive that commission". The commission in respect of the investments for PS would have been £18,144.00 and a similar amount for NM. In his letter dated 18 June 2010 to the Investigation Officer at the SRA the Respondent had provided a reply to the allegations made against him in the FIR. He had said at point 2 of his letter "I understand that [P] taken up front commission between 3 and 3.6% dependent upon product type and I also understand that the renewal commission fees paid yearly are restricted to 0.5% of the value of the fund." Whilst he had said in his letter that the issue of commission and the loan were unrelated, in the Applicant's submission the Respondent could not help but have his independence impaired in these circumstances.

42.5 The Respondent had also failed to disclose the loan or his personal financial relationship with ST to his clients.

42.6 The Tribunal found this allegation to have been proved beyond reasonable doubt on the documents and facts before it. A loan had been made to the Respondent by ST which was not disclosed to his clients. ST had gone on to make commissions from investment products taken out by the Respondent on behalf of his clients. The Respondent had thus allowed his independence to be compromised.

43. **Allegation 1.3. Misled the Court and third parties and in so doing failed to act with integrity and behaved in a way that was likely to diminish the trust the public places in the profession, contrary to Rules 1.02 and 1.06 SCC.**

43.1 The Respondent denied this allegation.

43.2 This allegation concerned the IVA taken out by the Respondent on 4 January 2010. In the Applicant's submission the Respondent had omitted both the loan from ST and a loan from his parents in his IVA proposal which he had signed and dated 3 November 2009 and submitted to the Medway County Court. In his proposal he had

stated that the document fairly set out his proposal to his creditors and that to the best of his knowledge all statements were true and the contents were his sole responsibility. The statement of affairs was at pages AP151 and AP152 of the exhibit bundle and it did not include the two loans within the unsecured creditors listed at schedule 2 of that document at AP153 to AP155 of the exhibit bundle.

43.3 The Respondent had addressed this point at paragraph 9 of his letter to the SRA dated 18 June 2010 in which he had said:-

> "[ST] was aware of my financial situation and as a friend, is not interested in pursuing any claim for the shortfall in relation to the repayment of the loan via an IVA which is paying 44 pence in the pound. It was agreed with [ST] would not be included also as it made the IVA viable which with her loan may have made it non-viable, given the size of the debt leading to the IVA. My parents' loan to me also is not within the IVA again for obvious and similar reasons."

43.4 The Respondent had also addressed the question of the loan in his email of 27th September 2011. In that email he had confirmed that the debt had been written off in October 2009, prior to the swearing of his affidavit in support of his IVA. He had had no intention of trying to pay off the loan which had been written off. He had sought clarification from his trustee in bankruptcy who had confirmed that if any debt was written off before the application for the IVA it was not a debt. The comment about money owed to his parents was perhaps foolish in hindsight and just referred to the general debt owed by a child to his parents. The Respondent found the accusation that he intended to mislead the court repulsive; no question had ever been raised as to his integrity over his 25 years as a legal executive and solicitor

43.5 The Tribunal had before it a letter addressed to the Respondent from ST. In that letter, which was dated 26 September 2011, ST said:-

> "Dear Andrew
>
> I am so shocked and sorry to hear that you are still experiencing difficulties and stress around the monies I lent you in 2008. I am truly appalled to note that in the grand scheme of things that a personal loan to a friend has caused you so much scrutiny and anguish. For the record for those that seem to want to continue to pry I reiterate again that I lent you money as a friend in a time of hardship and out of the kindness of my heart I agreed to write this off in October 2009 as it was clear to see that you were in extreme difficulties."

Mr Greensmith asked the Tribunal to note that there was no Statement of Truth attached to this letter. It could not be tested as ST was not present to give evidence and therefore he asked the Tribunal to attach the appropriate weight to it.

43.6 Mr Greensmith directed the Tribunal to exhibit page AP68 (B) which showed the ledger relating to the loan. The report of the ledger was dated 1 December 2009 when a total of £14,871.70 was said to be outstanding on the loan. The date of this report was after the schedule of unsecured creditors had been signed by the Respondent. In the Applicant's submission it was inconceivable that a loan which had been formalised in writing and which was shown on the ledger system as being outstanding

on 1 December 2009 was written off without having been formally written off. In the Applicant's submission the true position was that stated in the Respondent's explanation in his letter of 23 June 2010; he had not said in that letter that the amount had been written off. In addition the Respondent's statements in that letter dealt with his motive for not declaring the loans. In the Applicant's submission the Respondent knew that the monies had been loaned to him but omitted to include them on the list so that he could evade bankruptcy. It could be seen from exhibit AP129 that proceedings for bankruptcy had already been issued on 3 November 2009 and the IVA was the last chance that the Respondent had to avoid bankruptcy. It was therefore the Applicant's submission that in this respect the Respondent had been dishonest. He had made a conscious and deliberate omission of the loans to make the IVA viable because if it was not he faced bankruptcy. In that respect both his creditors and the County Court had been misled and the Respondent had failed to act with integrity and behaved in a way that was likely to diminish the trust the public places in the profession.

43.7 The Applicant asked the Tribunal, in looking at dishonesty in respect of this allegation, to also pay careful attention to the explanations the Respondent had given in his letter to the SRA dated 18 June 2010 and to the faxed letter addressed to him from ST dated 26 September 2011.

43.8 The Tribunal found this allegation proved beyond reasonable doubt on the documents and facts before it. Although a faxed letter had been produced from ST indicating that the loan had been written off before the Respondent signed the statement of affairs for his IVA, they had given appropriate weight to it as ST had not been present to swear as to its truth or to be available for cross examination by the Applicant. The letter from ST was inconsistent with the written explanation the Respondent had given to the SRA; it was remarkable that the Respondent had not mentioned that the loan had been written off in his letter to the SRA of 23 June 2010. The explanation that he had given was that to have included it in the IVA would have made it non viable.

The Tribunal's determination on the question of dishonesty

44. The Tribunal applied the twin test of dishonesty laid down by the House of Lords in Twinsectra Ltd v Yardley and Others [2002] UKHL 12 in relation to this allegation. It was satisfied beyond reasonable doubt that the Respondent's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself had realised that his conduct was dishonest by those same standards. The Respondent had been aware of the loans and had not included them in his statement of affairs for the IVA which had been submitted to the County Court with a statement of truth. . The Tribunal had only been able to give limited weight to what the Respondent had said in his emails as he was not present either to give evidence or to be cross-examined upon it. The Tribunal noted that the Respondent had stated that he had omitted the loan from ST and that from his parents in his statement of affairs for the IVA as to have included them would have made the IVA non viable.

Previous Disciplinary Matters

45. None.

Sanction

46. The Tribunal had found each of the allegations against the Respondent to have been proved beyond reasonable doubt and also found that the Respondent had been dishonest in relation to allegation 3.

47. In the Tribunal's view this was a serious case where dishonesty had been proven. The Tribunal had found that the Respondent had misled the Court and third parties, had allowed his independence to be compromised and failed to refer his clients to only independent intermediaries. Whilst the second allegation was serious in itself, the third allegation and a finding of dishonesty against the Respondent meant that he was not someone who should be practising as a solicitor. The appropriate penalty in this case would be that the Respondent should be struck of the Roll of Solicitors.

Costs

48. The Applicant had asked for costs in the sum of £16,580.45 and had confirmed that copies of the costs schedule had been served upon the Respondent. The Respondent had been adjudged bankrupt on 7 April 2011. The Respondent had said in his email of 27 September 2011 to Mr Greensmith:-

> "My trustee has advised as the process was started before the bankruptcy then any cost or fine fall within the bankruptcy."

In Mr Greensmith's submission this was not the correct approach; he referred to the case of Casson and Wales v The Law Society [2009] EWHC 1943 (Admin) and sections 281 and 382 of the Insolvency Act 1986. Paragraphs 35 and 37 of Casson and Wales v The Law Society and the sections from the Insolvency Act clearly showed that any costs awarded today would fall outside the bankruptcy.

49. The Tribunal had listened carefully to what Mr Greensmith had had to say on behalf of the Applicant and had read the email from the Respondent on the question of costs. It was the Tribunal's view that the authorities and statute law on the subject of costs meant that any costs awarded today would fall outside the bankruptcy. The Tribunal had examined the costs schedule presented by the Applicant and whilst in general the costs stated appeared to be not unreasonable the Tribunal would adjust them slightly so as to award the sum of £16,000 to the Applicant in respect of costs.

Statement of Full Order

50. The Tribunal Ordered that the Respondent, ANDREW JOHN FIELD, 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 £16,000.00.

Dated this 4th day of November 2011
On behalf of the Tribunal

J N Barnecutt
Chairman