

IN THE MATTER OF ROY HUNT, solicitor's clerk

- AND -

IN THE MATTER OF THE SOLICITORS' ACT 1974

Mr A H Isaacs (in the chair)
Mr J C Chesterton
Lady Bonham-Carter

Date of Hearing: 28th February 2002

FINDINGS

of the Solicitors' Disciplinary Tribunal
Constituted under the Solicitors' Act 1974

An application was duly made on behalf of The Law Society by Ian Christopher Bonney-James solicitor employed by The Law Society at Victoria Court, 8 Dormer Place, Leamington Spa, Warwickshire, CV32 5AE on 23rd August 2001 that an Order be made by the Tribunal pursuant to Section 43 (as amended) of the Solicitors Act 1974 in respect of the Respondent Roy Hunt being a person who was or had been a clerk to a solicitor.

The allegations against the Respondent were:-

- (i) that he breached the Solicitors' Investment Business Rules 1990 and 1995 in that he conducted Investment Business whilst not being a qualified person;
- (ii) that he failed to comply with the safeguard provisions of the Solicitors' Investment Business Rules 1990 and 1995;
- (iii) that he breached the terms of the Solicitors' Practice Rules 1990 in that commissions in excess of £20 were received by the firm.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London EC4M 7NS on 28th February 2002 when Andrew Miller solicitor employed by The Law Society at Victoria Court, 8 Dormer Place, Leamington Spa, Warwickshire, CV32 5AE

appeared on behalf of the Applicant and the Respondent did not appear and was not represented.

On 9th October 2001 the Tribunal made an order for substituted service. Prior to the substantive hearing the Applicant gave details of substituted service upon the Respondent namely that an advertisement regarding the proceedings had appeared in a newspaper with a circulation in Wales in December 2001 and a further advertisement had appeared in Le Monde in France on 19th February 2002. Having heard the submissions on behalf of the Applicant in relation to service the Tribunal declared itself satisfied that service had been effected.

At the conclusion of the hearing the Tribunal ordered that as from 28th February 2002 no solicitor shall, except in accordance with permission in writing granted by The Law Society for such a period and subject to such conditions as the Society may think fit to specify in the permission, employ or remunerate in connection with the practice as a solicitor the Respondent Roy Hunt of c/o Bridge Lane, Stockport, Cheshire, being a person who is or was a clerk to a solicitor and the Tribunal further ordered that he do pay the costs of and incidental to the application and enquiry fixed in the sum of £1,240.85 inclusive of advertising costs and VAT.

The facts are set out in paragraphs 1 to 18 hereunder: -

1. The Respondent, who was not a solicitor, was between January 1995 and August 1997 remunerated in connection with a solicitor's practice namely the firm of Hill Jones solicitors ("the firm") (formerly James Hill & Co). The Respondent operated a financial advice business under the umbrella of the firm and operated for tax purposes as a contractor.
2. The Respondent was currently believed to be residing in France.
3. On 5th and 12th August 1998 and 26th October 1999 an Investment Business Officer, Mr R, visited the firm of Hill Jones solicitors to conduct an investigation into the firm's investment business. His report detailed widespread breaches of the Solicitors' Investment Business Rules 1990 and 1995, breaches of the Solicitors' Practice Rules and breaches of the Financial Services Authority's Statement of Principles relating to clients of the firm during the period from early 1995 until mid 1997.
4. The following matters were identified in the report of the Investment Business Officer.

The "execution only disclaimer"

5. The Investment Business Officer wrote that upon examination of the client files a clear pattern emerged. On every file was an attendance note, stating that the client wished to receive no advice from the firm and wanted to proceed on an execution-only basis. On some occasions, no reasons for the client wishing to proceed on an execution-only basis were offered in the attendance note. In other instances, an explanation was offered. Every file also contained an "execution only disclaimer."
6. The opinion of the Investment Business Officer was that from the number of transactions undertaken by Mr Hunt it would have been highly unusual to find more than a handful of execution-only transactions. Execution-only transactions did not

constitute discrete investment business ("DIB"), but inappropriate reliance on the exception would result in the firm conducting DIB. It was submitted by the Investment Business Officer that on the evidence of the client files examined most, if not all of the clients should have been treated as advisory clients requiring compliance with those of the Solicitors Investment Business Rules ("SIBR") which were applicable to DIB.

7. The Investment Business Officer further wrote in his report that:-
 - (i) It was clear that the vast majority, if not all, of these transactions effected by the firm were not genuine execution-only transactions as the clients clearly needed expert financial advice. The Respondent merely used his attendance note and "execution only disclaimer" as a methodical device to attempt to make it appear that the firm was not conducting DIB and therefore could avoid the need for compliance with the detailed and rigorous client safeguards within the SIBR 1990 and 1995 and associated rules. Such conduct had resulted in the firm committing the widespread and serious breaches detailed in the report.
 - (ii) In addition, the "execution-only disclaimer" stated that "You [the firm] also have my/our permission to retain all commissions generated from my/our transaction." This, even if seen and signed by clients, was not sufficient to satisfy Rule 10 of the Solicitors' Practice Rules 1990 which required the amount of the commission to be disclosed in writing before consent to retain was sought.
8. Breaches of Rule 10 were detailed in the Report. In relation to only one particular client, CJ, had the Respondent written on the pro forma, "Commission estimate approximately £1,100 gross."
9. Enquiries with clients

On examination of the client files the Investment Business Officer had concerns regarding the authenticity of several signatures purporting to be those of clients on the "execution only disclaimer." The Investment Business Officer interviewed Mrs R, a client of the firm. Mrs R stated to the Investment Business Officer that she had never seen any "execution only disclaimer" let alone signed one. She stated to the Investment Business Officer that if she had seen such a document she would have raised many pertinent questions about its content with the Respondent not least a statement that she was not relying on him to provide her with investment advice. When Mrs R was shown by the Investment Business Officer a copy of the "execution only disclaimer" form with what purported to be her signature on it, she stated that she most definitely did not sign any form like that. Her husband whose signature also appeared on the copy form could not remember whether he had seen the form before or whether he had signed such a form.
10. The Report of the Investment Business Officer further stated that the SIBR required that no firm conduct any DIB without having in place a person who was a qualified person for the type of DIB being conducted. Neither the Respondent nor anyone else in the firm was ever a Qualified Person.

11. The Report set out further breaches of the SIBR allegedly committed by the firm arising from the conduct of the Respondent.
12. The Report alleged further breaches of Rule 10 of the Solicitors' Practice Rules 1990 which stated that solicitors should account to their clients for any commission received of more than £20 unless having disclosed to the client in writing the amount or basis of calculation of the commission or an approximation thereof, they had the client's agreement to retain it.
13. The firm received commission from the policies arranged by the Respondent which appeared from entries in the firm's ledger accounts to exceed £47,000. This commission was paid into a Nat West Business Account entitled "Mr James Michael Hill trading as James Hill & Co, Financial Services Account." The commission was retained by the firm.
14. The "execution only disclaimer" contained a sentence which read "You have also my/our permission to retain all commission generated from my/our transaction." Assuming that this document was seen and signed by clients it did not disclose the amount of any commission. The firm had failed to disclose the amount of commission in writing to clients before seeking consent to retain. The Investment Business Officer considered that the firm had thereby committed breaches of Rule 10 of the Solicitors' Practice Rules 1990 in all matters where commissions were received.
15. A complaint was received by the Office for the Supervision of Solicitors from a former client of the firm on 11th March 1999 relating to a personal pension policy arranged by the Respondent.. The matters were formally put to the partners of Messrs Hills Jones solicitors by way of letter under warning on 26th June 2000. The firm duly responded on 24th July 2000 with a detailed response to the Monitoring and Investigation Unit Report. The client subsequently withdrew the complaint against the firm after successful negotiations. The Investment Business Officer stated in his Report that in this connection the firm had committed breaches of the SIBR 1990 and 1995 relating to the suitability of investment recommendations for the client.
16. A letter was sent to the Respondent on 7th August 2000 enclosing a copy of the Monitoring & Investigation Report and informing him of the possibility of disciplinary proceedings. This letter was not returned.
17. On 30th October 2000 the Caseworker's report was referred to the interested parties for their comments and on 21st December 2000 the relevant parties were notified of the decisions of the Compliance & Supervision Committee on 9th December 2000.
18. Notifications to the Respondent dated 30th October 2000 and 21st December 2000 were returned.

The Submissions on behalf of the Applicant

19. The Respondent was for tax purposes an independent contractor in relation to the firm. It was difficult to operate as an independent contractor within a firm and the nature of advice giving was a personal service.
20. It was submitted that the status of the Respondent was to be construed as that of an employee.

21. The Respondent was working from the firm's offices and the perception of the public would have been that he was an employee.
22. The essential point which the Report of the Investment Business Officer was seeking to make was that an inference could be drawn from the high number of files apparently conducted on an execution only basis.
23. The critical thrust of the Report was that a pattern emerged. From approximately 60 clients it would not be expected that so many would be seen on an execution only basis.
24. The notepaper of the firm created an expectation that investment advice was being given. This had also been the opinion of Mr Hill who was best able to gauge the clientele of the firm and to take a view.
25. Although the complainant in relation to the personal pension scheme had withdrawn his complaint against the firm he had described the Respondent as the adviser.
26. Mrs R was categorical in her firm recollection that she had not signed the execution only disclaimer and her husband had no recollection of the occasion. Other clients contacted by the Investment Business Officer had not replied.
27. It was submitted that the matter needed to be looked at as a whole. The Tribunal was asked to consider whether there was a pattern in the conduct of the Respondent particularly in relation to the first two allegations which were the most serious.
28. In relation to the third allegation a clerk should be aware of rules relating to commission generated by the work on which he was engaged and he had a responsibility to seek to ensure compliance with those rules.

The Findings of the Tribunal

The Tribunal found allegations (i) and (ii) not to have been substantiated. The Tribunal found allegation (iii) to have been substantiated.

The Tribunal had to apply the criminal standard of proof to the allegations. On a form signed by a husband and wife, the wife had denied that it was her signature on the execution only disclaimer. But her husband had been unable to recall whether it was his signature or not. Apart from this one case, the Tribunal was invited to infer that the disclaimers signed by clients were false. The Tribunal considered that stronger evidence would be needed to satisfy the Tribunal that the Respondent was not conducting execution only transactions. The evidence did not therefore demonstrate beyond reasonable doubt that DIB was being carried out. Those parts of the allegations which related to the conduct of DIB were therefore not substantiated.

The Tribunal was however satisfied that the Respondent had facilitated and assisted in the receipt by the firm of commissions in a manner which breached the terms of the Solicitors' Practice Rules 1990. Orders made under Section 43 were regulatory in nature and the Tribunal was satisfied that the Respondent's conduct regarding the commissions was such as to justify the making of the Order sought.

The Tribunal therefore ordered that as from 28th day of February 2002 no solicitor should, except in accordance with permission in writing granted by The Law Society for such period and subject to such conditions as the Society might think fit to specify in the permission, employ or remunerate in connection with the practice as a solicitor the Respondent being a person who was or had been a clerk to a solicitor. The Tribunal further ordered that the Respondent pay the costs of and incidental to the application and enquiry fixed in the sum of £1,240.85 which for the avoidance of doubt was inclusive of the advertising costs and of value added tax.

DATED this 22nd day of May 2002

on behalf of the Tribunal

A H Isaacs
Chairman