

IN THE MATTER OF ALAN KILSHAW, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr J C Potter (in the chair)
Mr J N Barnecutt
Lady Maxwell-Hyslop

Date of Hearing: 23rd July 2002

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of the Office for the Supervision of Solicitors ("OSS") by Gerald Malcolm Lynch solicitor and consultant with the firm of Messrs Drysdale of Cumberland House, 24/28 Baxter Avenue, Southend-on-Sea SS2 6HZ on the 11th April 2002 that Alan Kilshaw of Rushfield Road, Westminster Park, Chester, solicitor might be required to answer the allegations contained in the statement which accompanied the application and that such order might be made as the Tribunal should think right.

The allegations were that the Respondent had:-

- (A) Prior to 1st May 2000, the Respondent acted in breach of the provisions of Rule 3 of the Solicitors Accounts Rules 1991 and the Solicitors Accounts (Legal Aid Temporary Provision) Rule 1992 in that he paid into office account monies received in respect of unpaid disbursements in matters where he had acted as a solicitor.
- (B) From 1st May 2000, the Respondent acted in breach of the provisions of Rules 1, 7, 13 and 15 of the Solicitors Accounts Rules 1998, in that he failed to pay into clients account clients' money received in the form of unpaid disbursements in respect of matters in which the Respondent was acting as a solicitor, alternatively failed to

transfer from office to clients accounts monies received in respect of unpaid disbursements within 14 days of receipt.

- (C) Improperly utilised monies received for unpaid disbursements for his own benefit.
- (D) By virtue of each and all of the aforementioned had been guilty of conduct unbefitting a solicitor.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London EC4M 7NS when Gerald Malcolm Lynch appeared as the Applicant and the Respondent did not appear and was not represented.

(1) Application for a Private Hearing

The Respondent applied for the hearing to be conducted in private. The application was itself considered by the Tribunal in private.

The Tribunal had received a letter on 25th June 2002 from the Respondent dated 22nd June 2002 in which he said:-

"As you may be aware I am now a well known public figure for reasons unconnected with this case and the press and media take great interests in all aspects of my daily life and frequently distort any aspects that they can gather in such a way as to be part of their on-going campaign against any individual whom they so choose..... one also has to consider the likely effects of their actions on my family as a whole.... I have two very young children who have already suffered very greatly at the hands of unscrupulous reporters...they are being bullied at their school...I have been advised by the persons concerned that I should make every effort to try to keep matters well out of the public eye as any further adverse publicity could have damming effects as they try to rebuild their lives after a very turbulent time...

A further important factor in this case is the fact that there are ongoing proceedings against an expert... once again if the press and media are allowed access to the Tribunal hearing or receive any notice of this there could be press reporting of any comments which either I or Mr Lynch make about this aspect of the matter and this in turn could seriously prejudice the legal action being taken against Mr D. If the Tribunal refuses this application it will force me into the position of being unable to defend my case properly as I will be unable to mention the D dispute which is a major plank of my defence in this case."

The Applicant opposed the Respondent's application for a private hearing. The matters to be considered by the Tribunal had no connection with the other matters which had brought the Respondent into the public eye. The allegations concerned how the Respondent dealt with his professional responsibilities as a solicitor and in particular concerned the misuse of public funds. Those were matters of public interest. The Applicant pointed out that it was only in extremely rare circumstances that the Tribunal would agree to conduct its business in private. The proceedings said to be about to be commenced against the expert were not, as far as the Applicant was aware, ongoing but the Respondent had indicated an intention to institute them.

The Tribunal decided that the subject matter of the allegations was of interest to the public. There were allegations of breaches of the Solicitors' Accounts Rules and those Rules had been designed for the protection of the public and the improper handling of public funds. The Tribunal did not consider that the fact that the Respondent was or had been in the public eye for other wholly unconnected matters was a good reason for agreeing to hear the substantive matter in private. The Tribunal had to weigh the interests of the public and of the Solicitors' profession against the interests of the Respondent and it concluded that the importance of ensuring that the Tribunal was seen to deal fairly and openly with solicitors brought before it and to pay due regard to the interests of the public and the profession overrode the personal interests of the individual in this case. The Tribunal's written Findings and Order which would be promulgated shortly after the hearing were in any event documents of public record and the effect of a private hearing would be to postpone bringing the matter into the public domain rather than prevent that from happening. The Tribunal refused the application for a private hearing.

(2) Application for an Adjournment on Medical Grounds

On the morning of Tuesday 23rd July 2002 a message had been retrieved from the answerphone in the Tribunal's office. The caller, who did not leave a name, said that medical notes would be faxed to the Tribunal on that morning and to the Applicant. Mr Kilshaw was medically unwell and totally unfit to appear before the Tribunal and was therefore applying for an adjournment.

A faxed letter from a general practitioner was received by the Tribunal in which it was said:

"I have limited knowledge of (the Respondent's) psychological makeup as he only recently became my patient. On the meetings I have had with him and after psychiatric assessment I believe he would have difficulty in preparing his case at the present time. I have been able to establish some elements of depressive illness but have insufficient knowledge of him as a patient to say when he could undertake the rigours of a full Tribunal."

The Applicant opposed the application for an adjournment. There had been no earlier notification of the Respondent's medical problems. Mr Lynch had received extensive response and lucid correspondence from the Respondent throughout his instructions in the matter. It was Mr Lynch's opinion that there was no reason to believe that the Respondent was not able to deal with the matters alleged against him. Indeed hitherto the Respondent had dealt with the matter and had offered explanation. The Respondent had indicated to Mr Lynch that he would admit allegation (B) but did not admit allegation (A). He did not admit improper utilisation of clients' money.

The application to adjourn suggested that the Respondent had now developed anxiety and depression. There had been no in depth medical psychological examination. The medical report before the Tribunal stated only that the Respondent would have difficulty in preparing his case and it was clear that the Respondent had in fact already prepared his case.

Mr Lynch did not wish to appear harsh but it was not unusual for a Respondent before this Tribunal to feel depressed. The Tribunal had before it no evidence of clinical depression and indeed no medical evidence that was sufficient to interfere with the processes of the Tribunal.

The Chairman of the Tribunal referred the Applicant to the Respondent's letter dated 22nd June 2002 in which it was suggested that if the Tribunal were to reach a decision there was a possibility that legal action against a third party might be prejudiced. The Applicant pointed out that all the Respondent had done was indicate an intention to institute proceedings but in reality that amounted to a "red herring."

The Tribunal decided to refuse the application for an adjournment. The medical evidence placed before the Tribunal was insufficient to convince the Tribunal that the Respondent was not well enough to attend or to prepare or conduct his case. The letter from the Respondent's general practitioner had stated that he had difficulty in preparing his case. The Respondent had clearly been able to deal with all matters against him and he had not given any earlier indication that he was not well.

The Tribunal had taken into account the possibility of prejudice to a third party referred to by the Respondent in his letter but the Tribunal concluded that there was before them no evidence that such prejudice would occur.

The Tribunal recognised its duty first to protect the interests of the public and secondly to preserve the good reputation of the solicitors' profession. The Tribunal found it difficult not to conclude that the Respondent's last minute attempt to have the hearing adjourned was a delaying tactic and weighing the unsatisfactory medical evidence against the Tribunal's fundamental duties to the public and the solicitors' profession it concluded that it was right to proceed to the substantive hearing.

The Applicant had written to the Tribunal by letter dated 18th July stating that he was unwell and could not attend the hearing. He enclosed a letter from his doctor which stated:-

"I saw Mr Kilshaw today and found him to have some symptoms of anxiety and depression. As this was our first meeting I need to assess him further to decide on appropriate treatment."

After consultation with the Chairman, the Respondent had been notified that the doctor's note was considered to be insufficient and the Tribunal was not satisfied that he was unable to attend the hearing and declined the written application for adjournment.

At the conclusion of the hearing the Tribunal ordered that the Respondent Alan Kilshaw of Rushfield Road, Westminster Park, Chester, solicitor be struck off the Roll of Solicitors and they further ordered him to pay the costs of and incidental to the application and enquiry fixed in the sum of £3,731.50 inclusive.

The evidence included certain admissions made by the Respondent.

The facts are set out in paragraphs 1 to 6 hereunder: -

1. The Respondent, 47 years of age, was admitted as a solicitor in 1979. At all material times he was engaged in sole practice at Whitehouse Farm, Whitehouse Chambers, Well Street, Buckley, Conwy.
2. Pursuant to formal statutory notice, an Officer of the Forensic Investigation Unit of The Law Society inspected the books of account of the Respondent commencing on 5th February 2001. His Report dated 6th March 2001 was before the Tribunal.
3. The Report revealed the following relevant matters:-
 - (a) as at 5th February 2001, there was a single office account overdraft in the sum of £35,095.72. The current overdraft limit stood at £35,000.
 - (b) since 1999, the Respondent had not maintained a client bank account as it had been his view that the type of work he undertook did not involve the holding of client funds.
 - (c) Professional expert's fees received in payments between December 1999 to August 2000 by the Legal Services Commission which had not been paid out had been lodged in Office Account and totalled £17,625. This money should have been held in client account and a cash shortage accordingly existed of this amount at 5th February 2001.
4. The Respondent said that he was in dispute with the expert whose fees this sum represented.
5. In correspondence with the OSS the Respondent had indicated that the improper retention in office account had arisen "through drift rather than by deliberate choice." The Respondent did not believe that monies held for unpaid disbursements should be regarded as client money until the relevant provisions had been pointed out by the FIU Officer.
6. On 26th November 2001, the matter was considered by an adjudicator acting under delegated power, and who resolved to refer the conduct of the Respondent to the Solicitors Disciplinary Tribunal. On 11th December 2001 the Respondent wrote in respect of a review of the said decision setting out his reasons therefor. The matter was considered by the Compliance and Adjudication Panel at a review session on 12th February 2002 but it resolved to dismiss it.

The Submissions of the Applicant

7. The Rules permitted a payment from the Legal Services Commission, which represented a disbursement to be paid out by a solicitor, to be held in office account for 14 days only. Should the disbursement not be paid within that period of time then the money must be transferred to client account.
8. The Respondent said that he was undertaking housing disrepair cases in respect of which it was necessary to obtain an expert's report. The whole of the sum of £17,625 related to the expert's fees in relation to a number of these cases in respect of which each individual fee was in the region of £200.
9. During the period when the Respondent had retained this sum in office account he had enjoyed the benefit of that money and had enjoyed it for a period of between six and

fourteen months. To retain and utilise that money was wholly inappropriate and wholly improper. There had been a deliberate withholding of payments from the expert. Despite the Respondent's assurance that he would place the monies on a separate deposit account he had not done so. The Respondent had been adjudicated bankrupt on 12th March 2002. The Applicant was unaware of any application having been made to The Law Society's Compensation Fund.

10. The money retained by the Respondent in his office account clearly was retained for his own benefit when it should either have been returned to the Legal Services Commission or paid to the appropriate third party, or if neither of those events had taken place speedily, should have been held in client account as the money did not belong to the Respondent.

The Findings of the Tribunal

11. The Tribunal found all of the allegations to have been substantiated. The reality was that the Respondent had retained over £17,000 of public money to which he was not entitled. The Respondent had been adjudicated bankrupt which meant that he was not in a position to pay that money back. This was, of course, precisely the type of circumstance which the Solicitors' Accounts Rules were designed to prevent. The Respondent had made a deliberate decision to retain these monies in his office account. It could not be said that the money had been paid in and he had been forgetful. This was an improper utilisation of money which did not belong to him by the Respondent. There is a heavy duty on a solicitor to act at all times with integrity, probity and trustworthiness and this includes a duty to maintain a proper stewardship over monies entrusted to him. The Respondent had been seriously in breach of those duties.
12. The Tribunal was aware that the Respondent had been in the public eye in relation to other matters which had no bearing on the disciplinary proceedings. The Tribunal wished to make it clear that those other matters had no bearing on its decision.
13. The Tribunal considered that in this case there had been a number of aggravating factors. First the Respondent had withheld money from a third party which had been paid to him by The Legal Services Commission for that third party; the money so withheld by the Respondent did not belong to him and yet he had retained the benefit of it. The money so retained should have been held on client account if not paid to the third party or returned to The Legal Services Commission. The Respondent had improperly retained over £17,500 of money which had come from the public purse. The Respondent had collected and retained that money on a systematic basis. The monies related to a substantial number of claims over a substantial period of time.
14. The relevant Solicitors' Accounts Rules had been designed to protect the public from exactly the mischief blatantly perpetrated by the Respondent.
15. Although dishonesty had not been alleged against the Respondent, The Tribunal was charged with the imposition of vigorous tests relating to the personal integrity and trustworthiness of solicitors brought before it. The Respondent had fallen woefully short of the standards required of a solicitor and the Tribunal considered it right that its duty to the public and its duty to maintain the good reputation of the solicitors'

profession would be met only by the imposition of the ultimate sanction. The Tribunal ordered that the Respondent be struck off the Roll of Solicitors and further ordered that he should pay the costs of and incidental to the application and enquiry in a fixed sum.

DATED this 30th day of September 2002

on behalf of the Tribunal

J C Potter
Chairman