

IN THE MATTER OF DAVID BURKE, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr D J Leverton (in the chair)
Mr P Haworth
Mr M C Baughan

Date of Hearing: 16th January 2003

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 George Marriott, solicitor and partner in the firm of Gorvin Smith Fort of 6-14 Millgate, Stockport, Cheshire, SK1 2NN on 15th April 2002 that David Burke of Valley Gardens, Wellness, Tyne and Wear, 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.

Subsequently the Respondent's address was notified to be Victoria Mews, Blyth, Northumberland.

The allegations were that the Respondent had been guilty of conduct unbecoming a solicitor in each of the following particulars namely that he had:-

- (i) acted as a solicitor without there being in force a current practising certificate contrary to Section 1 of the Solicitors Act 1974;
- (ii) falsely misrepresented that he had a current practising certificate and/or was renewing his practising certificate;

- (iii) failed to deal promptly and substantively with correspondence from the OSS;
- (iv) by reason of the allegations set out above compromised and impaired his good reputation or that of the solicitors' profession contrary to Practice Rule 1(d) of the Solicitors Practice Rules 1990.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London, EC4M 7NS on 16th January 2003 when George Marriott appeared as the Applicant and the Respondent appeared in person.

The evidence before the Tribunal included the oral evidence of the Respondent. He admitted allegation (i) but denied allegations (ii) and (iii).

The matter had been listed for hearing before a division of the Tribunal [not that listed above] on 9th January 2003. Mr Burke had not been present at 10.00 a.m. when the Tribunal decided the order in which to hear the matters listed for that day.

At 1.20 p.m. on 9th January 2002 the Tribunal heard an application by Mr Burke for an adjournment of the substantive hearing. He said he had not understood Rule 16 of the Solicitors Disciplinary Proceedings Rules 1994 and he wished to consider serving a counter-notice under the Civil Evidence Act. Mr Burke said he wished to challenge the result of enquiries made with regard to his practising certificate status at the time when his employer was renewing professional indemnity. In August 2000 he had made application for a practising certificate. The Law Society had informed him that his old practising certificate was still valid. Mr Burke's documents were stored at his parents' home and he did not want to disturb his mother until after 15th January 2003 for personal reasons. He said that all his correspondence with The Law Society was in a sealed box in storage. Mr Burke believed he had come to appear before the Tribunal to put the factual situation to the Tribunal, but he needed to consider his position generally. The application was resisted by Mr Marriott. Mr Marriott had not simply served the notice pursuant to Rule 16 but had written a careful explanatory letter. The Respondent had ignored it.

The Tribunal had taken the view that the Respondent had had plenty of time and every opportunity and had helpfully been guided by Mr Marriott and simply had done nothing. His application for an adjournment was considered by the Tribunal to be a delaying tactic. The Tribunal would hear the matter on 9th January 2003.

It subsequently transpired that the case with which the Tribunal was dealing in the early part of the afternoon of 9th January 2003 took much longer to reach a conclusion than the time estimates had indicated.

Mr Burke appeared before the Tribunal to explain that he had to be at London Victoria in order to catch his last connection back to Northumberland. The Tribunal pointed out that it would not rise without hearing his matter and the Tribunal was prepared to sit late rather than send Mr Burke away with his matter unheard. Mr Burke was adamant that he was not prepared to spend a night in London and if he could not catch his connection home he would be in great difficulty.

The Tribunal agreed that it would not deal with the matter on 9th January 2003. It recognised that Mr Marriott, the Applicant, would be in London to represent other cases before the

Tribunal on 16th January 2003 and directed that this matter be listed for substantive hearing on 16th January 2003. In view of the fact that there was already a settled list for that day, the Tribunal would commence the hearing at 9.30 a.m.

At the conclusion of the substantive hearing on 16th January 2003 the Tribunal ordered that the Respondent David Burke of Victoria Mews, Blyth, Northumberland, (formerly of Valley Gardens, Wellness, Tyne and Wear solicitor be struck off the Roll of Solicitors and they further ordered that he pay the costs of and incidental to the application and enquiry fixed in the sum of £4,437.75.

In a letter sent by fax to the Applicant by the Respondent on 8th January 2003 the Respondent indicated that he intended to request the Tribunal to conduct the hearing in private. The Respondent did not pursue that application at the hearing.

The evidence before the Tribunal

1. The Respondent, born in 1957, was admitted as a solicitor in 1985.
2. The Respondent's last practising certificate was for the practice year 1992/93. This was terminated on 24th August 1994 as he did not pay his practising certificate fee for the ensuing year (1993/94). The Respondent had not held a practising certificate since the termination of his last practising certificate.
3. The Respondent worked for Frearsons, a firm of solicitors at Skegness, Lincolnshire (from 28th February 2000 to 9th November 2000). He had been employed via the services of a recruitment agency and Frearsons paid to the Respondent an agreed daily rate.
4. Frearsons employed the Respondent as a private client/residential conveyancing locum. He represented to Frearsons that he was renewing his practising certificate and when challenged in November 2000 he left the firm immediately.
5. Frearsons in a letter addressed to the OSS dated 16th May 2001 said that initially the Respondent appeared to be competent but after a while they began to have some doubts about him and asked for his Roll Number which he produced. Frearsons made contact with The Law Society who confirmed that he was on the Roll. The Respondent had told Frearsons that he was in the process of renewing his practising certificate. They said they did press him once or twice about this, but he was full of excuses. They went on to say eventually they began to have concerns about his work and when challenged at the beginning of November 2000 "He put on his coat and ran out the door and we have not seen him since".
6. The Respondent said that Frearsons had spoken with The Law Society in August 2000 around the time they were applying to renew their professional indemnity insurance. The Law Society confirmed the Respondent's practising status to Frearsons.
7. The Respondent said he was originally requested to assist Frearsons for a period of six weeks during their recruitment process. He had always made it clear that he did not wish to stay. Following a number of difficulties in Frearsons' probate department, they had been keen to recruit a permanent solicitor. Following the non-renewal of

Frearsons' Civil Legal Aid franchise the Respondent had suggested that the person undertaking civil work should consider doing the probate work. He had been given notice that his contract would be terminated because the firm could not afford to continue to pay two salaries. He said the staff partner at Frearsons had joked that the Respondent had "talked his way out of a job". It had been through Frearsons that the Respondent had been referred to Bambridges.

8. The Respondent had been engaged by Bambridges, a firm of solicitors at Boston, Lincolnshire, as a consultant from 20th December 2000 to 31st December 2000. With effect from 1st January 2001 he became a full-time employee working in the firm's probate department. The Respondent had represented to Bambridges that he held a current practising certificate.
9. Towards the end of January 2001 Bambridges had pressed the Respondent as to his practising certificate position when he maintained that his inability to produce a current practising certificate was due to an administrative delay with The Law Society. The Respondent had assured Bambridges that not only had he had a practising certificate for the practice year ending 31st October 2000 but an application was pending for renewal of that certificate.
10. In a letter dated 28th March 2001 addressed by Bambridges to the OSS they said that towards the end of January 2001 they made routine enquiries with The Law Society about the Respondent's practising certificate. It was then that his full practice history had been revealed. They had learned that the Respondent had not had a practising certificate since 24th August 1994. They also learned that the Tribunal had made a recommendation that the Respondent should be granted only a qualified practising certificate.
11. When Bambridges learned of the accurate position the Respondent was dismissed.
12. As a result of the letters received from Frearsons and Bambridges, the OSS wrote to the Respondent by letter dated 1st May 2001 seeking an explanation. The Respondent replied on 8th May 2001 but he did not give an explanation. When pressed by the OSS by a reminder letter dated 4th June 2001 the Respondent responded in handwriting dated 11th June 2001 and referred to a letter which he had sent dated 25th May 2001. The OSS had not received such a letter. Two further letters were addressed by the OSS to the Respondent respectively dated 27th June and 27th July 2001. No response was received from the Respondent.
13. By letter dated 25th September 2001 the OSS wrote to the Respondent advising him that the matter was to be referred for formal adjudication. On 27th November 2001 the matter had been referred to an adjudicator when the Respondent's conduct was ordered to be referred to the Tribunal. The Respondent was notified of that decision by letter dated 29th November 2001.
14. In evidence the Respondent said he had replied to all letters which he had received from the OSS.
15. The Valley Gardens address had been that of his parents and they had moved. His parents had arranged for the Post Office to re-direct letters but he nevertheless did not

receive those to which it was said he had not responded. The Respondent said he had written on a letter his address as being Valley Gardens because he knew any response would be re-directed. He did not have a permanent address at the time.

16. The Respondent had not been able to put his hands on paper copies of the responses which he made. He said he had prepared the responses on a laptop computer. That computer had been borrowed and since returned. He no longer had access to the laptop computer which he had used at the material time.
17. The Respondent said he had made an application for a practising certificate. He had not been asked to pay the practising certificate fee. He said he had not been prepared to accept a qualified practising certificate which made stipulations about his health. He had made one further application for a practising certificate before starting employment with Frearsons in February 2000. He obtained the application forms; he could not remember exactly when, but it was after he started work at Frearsons. He received a letter from The Law Society which gave him comfort that it was acceptable for him to continue in practice until the actual issue of his practising certificate. The Respondent was not able to produce a copy of that letter nor could he produce a copy of the letter that he wrote in response.
18. When the Respondent joined Bambridges, he accepted he did not have a practising certificate but again he relied on the comfort of the letter he had received from The Law Society indicating that he could continue in practice until the formal issue of a practising certificate.
19. In order to obtain a practising certificate the Respondent had to have the support of two referees. He had found one referee but had not found a second. He had found the matter of finding a referee highly embarrassing. As a result he had never sent in an application complete with referees and a cheque for the practising certificate. The Respondent accepted that he had delayed in dealing with his application but he had never formed an intention not to pursue it.
20. The Respondent said he had not deliberately told a untruth in order to secure employment.

The facts found by the Tribunal

21. The Tribunal found that the Respondent had acted as a solicitor without having in force a current practising certificate which the Respondent admitted.
22. The Tribunal accepts the evidence of Frearsons and Bambridges. Such evidence had been subject to Civil Evidence Act Notice served upon the Respondent to which he had not served any counter-notice. The Tribunal therefore admits those letters as evidence and accepts it. It does not accept the evidence of the Respondent which, in brief, was that as he had kept his employers fully apprised of his current practising status.
23. The Tribunal finds that the Respondent did not respond to all letters addressed to him by the OSS. The Tribunal does not accept the Respondent's evidence that those letters to which he did not respond had not in fact been received by him.

The submissions of the Applicant

24. The Respondent's practising certificate had been terminated because he failed to pay the requisite fee. He had represented to an employer that he had a practising certificate when in fact he had not held one for some years. His failure to have a current practising certificate, he had said, was caused by an administrative delay at The Law Society.
25. The OSS had received letters of complaint from two firms of solicitors, the details of which were before the Tribunal.
26. A letter of 20th May 2000 which the Respondent said he had written had never been received nor had it been disclosed in these proceedings. The Respondent admitted allegation (i). The Tribunal was invited to find allegations (ii), (iii) and (iv) to have been substantiated. For the avoidance of doubt, the Applicant told the Tribunal that he did put the matter before them as a matter involving dishonesty. The Applicant had referred the Respondent to the definitions of dishonesty referred to in the cases of *Royal Brunei Airlines v. Tan* and *Twinsectra Ltd v. Yardley*. The Applicant referred in particular to the part of the judgment in *Twinsectra Ltd v. Yardley* in which it was said:-

“...the courts should continue to apply that test ... that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty ...”.

27. In the submission of the Applicant, there could be no doubt that the Respondent's behaviour was such that it could serve only to impair his own good reputation and that of the solicitors' profession.

The submissions of the Respondent

28. The Respondent's position was that he accepted that he had been employed by Frearsons and Bambridges at a time when he did not have a current practising certificate in force and he was acting as a solicitor during the course of those two periods of employment.
29. The Respondent said he had not falsely misrepresented that he was renewing his practising certificate. He had received a letter from The Law Society which indicated to him that it would be acceptable for him to continue in practice until his practising certificate had been issued. He had not been able to produce that letter but he had at the time relied upon it.
30. The Respondent had used his parents' former address as his postal address and he believed that letters had been sent to that address after his parents had left and those letters had not been re-directed in accordance with instructions given by his parents to the post office. The Respondent had replied to all letters which he had received and those letters to which he appeared not to have responded had not reached him and he was unaware of them.

31. The Respondent came to accept that he had foolishly relied upon the letter received from The Law Society which he believed encouraged him to practise while his practising certificate application remained ongoing.
32. The Respondent had considered that the restrictions placed on his practising certificate had been draconian. He accepted the condition that he practise only in approved employment but he considered that the requirement that he provide to The Law Society a psychiatric report was discriminatory and had serious human rights implications. He said that this fact made the disciplinary proceedings the more heinous. He accepted that he had not appealed against the imposition of those conditions.
33. The Respondent pointed out that at the first disciplinary hearing he was overseas. He had successfully applied for a re-hearing when he had been unable to return to the United Kingdom and the substantive hearing took place in his absence.

The Findings of the Tribunal

34. The Tribunal found all of the allegations to have been substantiated. Allegation (i) was admitted by the Respondent.
35. At a re-hearing heard on 25th June and 16th July 1996 the Tribunal found the following allegations to have been substantiated against the Respondent:-
 - (a) failed to make his books of account available for inspection by the Investigation Accountant of the Law Society when properly called upon to do so contrary to Rule 27 Solicitors Accounts Rules 1991;
 - (b) practised as a solicitor whilst there was no Practising Certificate in force in respect of such practice;
 - (c) practised as a solicitor whilst having failed to pay the contributions due from him to the Solicitors Indemnity Fund Limited notwithstanding the terms of Section 37 Solicitors Act 1974 and the rules thereunder;
 - (d) practised as a solicitor whilst in breach of a condition imposed on his Practising Certificate.
36. At the conclusion of that hearing the Tribunal found the allegations to have been substantiated, indeed they were not contested. The Tribunal considered the allegations related to regulatory breaches. It is important that solicitors comply strictly with the rules and regulations to which they are subject. The Tribunal considered it right to impose a financial penalty of £1,000 upon the Respondent and ordered him to pay fixed costs (which included the costs of the earlier hearing). This decision superseded the order of indefinite suspension made by the Tribunal at the first hearing.
37. The Tribunal recommended to The Law Society that the Respondent should be permitted to practise only in approved employment and further recommended that

The Law Society should require the provision of a satisfactory psychiatric report by the Respondent before it grants a practising certificate to him.

38. At the conclusion of the hearing on 16th January 2003 the Tribunal found the allegations to have been substantiated against the Respondent because having heard his oral evidence, they concluded that he was not a credible witness. The Tribunal did not believe the oral evidence of the Respondent. The Tribunal accepted the letters written by Frearsons and Bambridges which had been the subject of Civil Evidence Act Notices to which the Respondent had not served any counter-notice despite the helpful explanations given to him by the Applicant. The Tribunal did not believe the Respondent when he said he relied upon a letter of comfort received from The Law Society. Such letter had not been produced. The Tribunal does not believe that it exists. Such indications that the Respondent did give that he was renewing his practising certificate were not honest. He was required to supply two referees and to pay the practising certificate fee. The Respondent had not taken those steps and had not been open and frank with his employers as to his then current position.
39. The Tribunal does not believe that certain correspondence addressed to the Respondent by the OSS did not reach him. The Tribunal did not believe the evidence of the Respondent that he had used his parents' address while he was in temporary accommodation and that his parents had moved from the address given. The Tribunal notes in support of its finding that the Respondent himself had written a letter expressed to come from the Valley Gardens address on a date when he said his parents had left that address. The Respondent's evidence was not credible. The Tribunal has applied the tests in *Royal Brunei Airlines v. Tan and Twinsectra Ltd v. Yardley* and finds that the behaviour of the Respondent was dishonest. He was not an impressive witness; the Tribunal did not accept his version of events. The Tribunal had no doubt that the Respondent did deceive his employers. He had formulated no intention of obtaining a practising certificate and, indeed, had not held a practising certificate since 1994. The Respondent knew perfectly well that he had to hold a practising certificate before he could provide legal services. The seriousness with which the Tribunal regarded the Respondent's behaviour has been aggravated by the finding of a previous division of the Tribunal. The Respondent has not learned any lesson. The Respondent's conduct fell so far below the high standards expected of a member of the solicitors' profession that the Tribunal considered it right that he be struck off the Roll of Solicitors and that he should pay the costs of and incidental to the application and enquiry in a fixed sum.

DATED the 10th day of February 2003
on behalf of the Tribunal

D J Leverton
Chairman