

IN THE MATTER OF DAVID FYALL HENDERSON, Solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr. A H Isaacs (in the chair)
Mr. J N Barnecutt
Lady Bonham Carter

Date of Hearing: 31st October 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 (the "OSS) by Katrina Elizabeth Wingfield, solicitor and partner in the firm of Penningtons of Bucklersbury House, 83 Cannon Street, London, EC4N 8PE on the 30th July 2002 that David Fyall Henderson, Solicitor of Seaton Gray Bell & Bagshawe, 38 Flowergate, Whitby, North Yorkshire, YO21 3BB 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 been guilty of conduct unbecoming a solicitor, namely:

- (i) that his books of account were not in compliance with the Solicitors Accounts Rules;
- (ii) that he misused client funds;
- (iii) that he made improper transfers from client to office bank accounts;
- (iv) that he failed to lodge his Accountant's Report for the period ending 31st July 2001 due initially by 31st January 2002 extended to 31st March 2002;

- (v) by virtue of each of the aforementioned he has brought the solicitors' profession into disrepute and is 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 Katrina Elizabeth Wingfield, solicitor and partner in the firm of Penningtons of Bucklersbury House, 83 Cannon Street, London, EC4N 8PE appeared as the Applicant and the Respondent did not appear and was not represented. The evidence before the Tribunal included admissions made by the Respondent in correspondence. The Tribunal had received a letter from solicitors representing the Respondent dated the 30th October 2002 confirming that the Respondent did not contest the proceedings but stating that they were not instructed to agree costs.

At the conclusion of the hearing the Tribunal ordered that the Respondent David Fyall Henderson of Whitby, North Yorkshire, solicitor, be struck off the Roll of Solicitors and they further ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £5,167.87.

The facts are set out in paragraphs 1 to 26 hereunder: -

1. The Respondent, born in 1946, was admitted as a solicitor in 1971. At the relevant times the Respondent practised on his own account under the style of Seaton Gray Bell & Bagshawe at 38 Flowergate, Whitby, North Yorkshire, YO21 3BB.
2. On 13th March 2002 an inspection of the Respondent's books of account was commenced by Investigation Officers of the OSS. A report of that inspection signed by Mr M J Calvert, Head of Forensic Investigations in the OSS dated 28th March 2002 was before the Tribunal.
3. The Report revealed that the books of account were not in compliance with the Solicitors Accounts Rules. A decision was taken on 18th March 2002 to intervene into the practice of the Respondent by reason of his suspected dishonesty. At that time a minimum cash shortage of £154,182.75 had been identified. By the time the inspection had been completed the minimum cash shortage was calculated to be £203,021.57 (as at 31st January 2002).
4. The books of account were not in compliance with the Solicitors Accounts Rules as they contained numerous transfers between apparently unconnected clients.
5. There was a misuse of client funds totalling £175,831.93 together with improper transfers from client to office bank accounts totalling £27,189.64. These sums together made up the minimum cash shortage of £203,021.57.
6. The Forensic Investigators' Report set out examples of the use of client funds for the benefit of other unconnected clients. One such matter was that of S. Deceased. The Respondent was instructed by the three executors of S. Deceased to obtain a grant of probate and administer the estate. Probate was granted on 23rd November 2002 with the net estate stated as being £469,269. Under a Will dated 1st November 1979 the three executors were named as beneficiaries of the estate in equal shares. A Deed of Variation dated 21st September 2000 provided for a gift to be made by one of the

executors to her fellow beneficiaries of a sum equal to the nil rate band for Inheritance Tax purposes.

7. The client bank account had been charged with five payments, one in the sum of £25,539.99 in favour of the Order of Hospitals of St John, and four in the sum of £13,900.00 each purportedly to the beneficiaries. The payment to the Order of Hospitals of St John had nothing to do with the affairs of S. Deceased.
8. The four payments of £13,900.00 were final distributions in the estate of C. Deceased. The Respondent agreed that the payments had been made from the account of S. Deceased as there were insufficient funds held on the C. Deceased matter owing to improper transfers and misuses in that matter. The names of the beneficiaries of S. Deceased were shown as recipients on the client ledger card in an attempt to disguise the misuse of client funds.
9. There was a consequent shortage on client bank account of £81,139.99 in respect of S. Deceased.
10. The Respondent was retained by the executors of C. Deceased to obtain a grant of probate and administer the estate.
11. From a review of the relevant account in the clients' ledger, it was noted that the client bank account had been charged with the following payments which had nothing to do with the affairs of the estate of C. Deceased, creating a cash shortage of £8,242.07.

27/11/2000	North Yorkshire Law	£3,768.07
27/03/2001	Halifax Estate Agencies	1,586.25
30/03/2001	Transfer (inter client)	2,887.75
		<hr/>
		£8,242.07
		=====

12. The deceased held an account at Scarborough Building Society for which there was no corresponding receipt of £39,313.14 on the relevant ledger account in connection with the closure of the account.
13. Scarborough Building Society indicated that the closing cheque had been made payable to the Respondent's firm and that although they issued the cheque on 8th September 2000 the cheque had not cleared through the banking system until 8th November 2000, some two months later. It was then established that the monies had been credited to an account in the clients' ledger in the name of Mr DMB and Ms EM in connection with their purchase of a cottage, a matter unconnected with C. Deceased.
14. The Respondent acted for Mr DMB and Ms EM in their purchase of a cottage at the price of £42,000. Exchange of contracts and completion took place contemporaneously on 27th November 2000.

15. No client ledger card could be found in respect of this matter. The client bank account cash book revealed the following transactions:-

		<u>Debit</u>	<u>Credit</u>
06/11/00	Scarborough Building Society		39,313.14
13/11/00	“You”		8,000.00
17/11/00	FH	£16,060.00	
27/11/00	Halifax Plc – mortgage advance		17,000.00
27/11/00	Scarborough Borough Council	42,000.00	
04/12/00	(no narrative) *	3,710.00	
08/12/00	Transfer to office account	380.00	
08/12/00	Transfer to office account	449.75	

*Transfer to office account

16. The payment on 17th November 2000 to FH of £16,060.00 had nothing to do with this conveyancing transaction.
17. In three matters the Respondent had improperly transferred monies from client bank account to his firm’s overdrawn office bank account purportedly in respect of the firm’s costs.

(a)	C. Deceased	£10,305.73	
(b)	Ms E – sale of H. Cottage	12,344.16	
(c)	Mr DMB and Ms EM	4,539.75	

		£27,189.64	
		=====	

Ms C. Deceased - £10,305.73

18. In the matter of C. Deceased, the following amounts had been transferred from client bank account to the overdrawn office bank account purportedly in respect of the firm’s costs:

01/08/2000	£4,278.00
08/09/2000	745.50
08/09/2000	511.00
19/09/2000	2,100.00
18/12/2000	2,470.00
12/02/2001	2,400.00
05/03/2001	2,265.00

10/04/2001	931.50
08/06/2001	15.36

	15,715.36
Less disbursements included	(82.00)

Profit costs taken	£15,634.36
	=====

19. The estate accounts for C. Deceased prepared by the Respondent were submitted to the executors for their approval. They showed costs of £5,328.63.

Ms ES – sale of H Cottage - £12,344.16

20. The Respondent's firm acted for Ms ES in her sale of H. Cottage for £68,000 with exchange and completion taking place on 11th October 2000.
21. The property had been subject to an improvement grant from the local council which was repayable if the property was resold within five years. In a letter to his client dated 12th October 2000 the Respondent stated:-

“As explained to you yesterday, I am having to retain the original amount of the renovation grant until the Council decide whether or not it requires the Council to be repaid”.

22. In a letter dated 14th March 2001, Scarborough Borough Council wrote to the Respondent's firm indicating that the repayment of the grant was not required.
23. The client ledger card showed that following the deduction of the firm's costs the following further amounts were also charged to the ledger account purportedly in respect of the firm's costs which eliminated the residual balance of £12,344.16 retained ostensibly in respect of the improvement grant:

31/10/00	£1,760.00
17/11/00	3,600.00
22/12/00	2,350.00
11/01/01	2,150.00
22/02/01	1,790.00
05/03/01	694.16

	12,344.16
	=====

Mr DMB and Ms EM - £4,539.75

24. There was no evidence to suggest that bills of costs or other written intimations had been delivered to the firm's clients in respect of three transfers, one dated 4th December and two dated 8th December 2000.

25. The transfer on 4th December 2000 of £3,710 to the firm's office account was included within a total transfer of £4,010 and that this transfer was lodged in office bank account the day prior to the payment from office bank account of an amount of £6,965.06 in respect of the Respondent's VAT.
26. The OSS investigators had discussed the matters with the Respondent who had accepted responsibility for what had taken place and had accepted that he had behaved dishonestly.

The submissions of the Applicant

27. The facts spoke for themselves and the position was clear cut. The Respondent had made admissions. The Applicant put the allegations before the Tribunal on the basis that she was alleging dishonesty against the Respondent which, indeed, he had himself admitted.

The submissions of the Respondent

28. Messrs Marquis Hewitts, solicitors representing the Respondent, had addressed a letter to the Law Society dated the 13th May 2002 dealing with the matter raised in the Forensic Investigators' Report.
29. The Respondent had been unable to comment on the specific balances referred to but he was able to confirm that he had two office accounts, one of which was the operating office account with an overdraft limit of £10,000 and another account which had a much higher debit balance which was not truly an office overdraft account at all. For many years Mr B had been the sole proprietor of the firm and he had used an office account as an extension of his personal account and that had continued notwithstanding the fact that the Respondent had joined him as a partner. Mr B had died in 1994 when this account had a debit balance of some £30,000. The Respondent considered that that account should not have been used as a trading account since the death of his former partner.
30. The Respondent had accepted that a cash shortage had been identified and at that time he was not able to replace it.
31. The Respondent accepted that his running of his practice had been disorganised and chaotic.
32. At first the Respondent had been very surprised at the figures set out in the Forensic Investigators' Report. At first he believed them to be wide of the mark and that although there was a problem financially it was much smaller than that outlined. He had inevitably concluded that a rather more substantial sum of money had been involved than he had believed and the misuse of clients' money on non related matters was rather greater than he had believed. The Respondent was distraught at discovering the full extent of his business shortcomings.
33. The principle of the problem had been established and was accepted by the Respondent.

34. It was, however, worthy of note that the Respondent had received an unqualified Accountant's Report every year in the past and that his accountants carried out a monthly reconciliation of client account. The scale of the problem came as a surprise to the Respondent but he was equally surprised that the problem had escaped the attention of his accountant.

The Findings of the Tribunal

35. The Tribunal find the allegations to have been substantiated, indeed they were not contested. The Respondent had made a clear admission of dishonesty and the Tribunal wished to make it plain that such behaviour on the part of a solicitor would not be tolerated by the profession or the Tribunal which had a duty to protect the interests of the public and the good reputation of the solicitors' profession.
36. Although the Tribunal was aware that the Applicant's costs had not been agreed by the Respondent, the Tribunal was conscious of the need not unnecessarily to increase costs and took the view that the Applicant's costs had been properly calculated and were indeed realistic.
37. The Tribunal ordered that the Respondent be struck off the Roll of Solicitors and they further ordered that he pay the costs, to include the costs of the Forensic Investigators of the OSS, fixed in the sum of £5,167.87.

DATED this 13th day of December 2002

On behalf of the Tribunal

A H Isaacs
Chairman