No. 8791/2003

IN THE MATTER OF ANTHONY GERALD BIEBUYCK

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr. J R C Clitheroe (in the chair)
Mr. I R Woolfe
Mrs. S Gordon

Date of Hearing: 30th October 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 (the OSS) by Iain George Miller solicitor and partner in the firm in the firm of Messrs. Wright Son and Pepper, 9 Gray's Inn Square, London WC1R 5JF on 17th April 2003 that Anthony Gerald Biebuyck of Chelmsford, Essex 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 unbefitting a solicitor in that:-

(i) He improperly withdrew funds from his firm's client account in respect of fees which he knew or ought to have known could not be justified;

(ii) He withdrew funds from client account contrary to Rule 22 of the Solicitors Accounts Rules 1998 ("the 1998 SARs") and/or Rules 7 and 8 of the Solicitors Accounts Rules 1991 ("the 1991 SARs").

(iii) That he failed to rectify breaches of the Rules on discovery contrary to Rule 7 of the 1998 SARs and Rule 11 of the 1991 SARs.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London EC4M 7NS on 30th October 2003 when Iain George Miller appeared as the Applicant and the Respondent appeared in person.

The evidence for the Tribunal included the admissions of the Respondent. Handed up at the hearing was a copy of the judgement in the Queen's Bench Division of the Divisional Court relating to the struck off solicitor Mr Tooley, a note of the Respondent's Court of Protection receivership costs dated 19th October 1998 and a schedule of dates prepared by the Applicant.

At the conclusion of the hearing the Tribunal made the following order:-

The Tribunal order that the Respondent, Anthony Gerald Biebuyck of Chelmsford, Essex, solicitor, be struck off the Roll of Solicitors and they further order that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £1,750.00 inclusive.

The facts are set out in paragraphs 1 to 17 hereunder: -

1. The Respondent (born in 1944) was admitted as a solicitor in 1990.

2. At all material times the Respondent practised on his own account under the name Biebuyck Solicitors. On 11th October 2002 The Law Society resolved to intervene into the Respondent's practice on the grounds of it having reason to suspect dishonesty on his part and breaches of the SARs.

3. On 5th August 2002 an Investigation Officer (the IO) employed by the OSS commenced an inspection of the Respondent's books of account. His Report was dated 13th August 2002 and was before the Tribunal.

4. During the course of his inspection the IO identified a shortfall of client funds amounting to £81,007.56. Of this amount £78,701.81 was caused by incorrect transfers from client to office bank account. The balance, £2,305.75, was caused by client funds being incorrectly retained in office bank account. Examples of the incorrect transfer of client funds included the matters of Mrs McN Deceased, Mr S Deceased and Mr B Deceased.

   <u>Mrs McN Deceased</u>

5. The Respondent acted for the executors of Mrs McN Deceased in connection with the administration of the estate. Mrs McN died on 2nd April 1998. A Grant of Probate was obtained on 21st May 1998.

6. After payment of debts and funeral expenses the net value of the estate was £75,946.07.

7. Between 24th July 1998 and the 2nd July 1999, 10 transfers from client to office bank account, varying in amount from £68.91 to £19,180.50 and totalling £75,758.90 were made purportedly in respect of the Respondent's firm's bills of costs and disbursements. When questioned by the IO, the Respondent agreed that the bills could not be justified and had not been delivered to his clients.

8. Subsequently there was a taxation of costs by the client and a final costs certificate was issued in the amount of £12,731.50.

9. As a result at the time of the IO's inspection there was a cash shortage of £61,899.40 (£75,758.90 minus £12,731.50 minus £1,128 (the costs of the taxation)).

Mrs S Deceased

10. The Respondent was the sole executor of the estate of Mr S who died on 29th December 1996. A Grant of Probate was obtained on 10th November 1997. The sole beneficiary of the estate was Mr S's sister-in-law, Mrs M D S, for whom the Respondent also acted as receiver under the Court of Protection.

11. The value of the net estate was £150,118.99. Between the 2nd September 1997 and 14th August 1998, 10 transfers from client to office bank account varying in amount from £187.70 to £5,572.11 and totalling £24,431.24 were made purportedly in respect of the Respondent's firm's bills of costs and disbursements. When questioned initially by the IO the Respondent said that the administration of the Mr S Deceased estate had been completed but that following her death, Mrs M D S's estate had become the subject of a dispute and that her estate was being dealt with by another firm of solicitors.

12. The Respondent later agreed with the IO that a final estate account had not been produced in respect of Mr S Deceased and that the transfers totalling £24,431.24 in respect of the Respondent's costs could not be justified. The Respondent said that his firm's total costs for this matter should not have exceeded £2,000.

13. Subsequently, in a letter to the OSS dated 14th October 2002 the Respondent stated:-

> "The figure of £2,000 for costs was an estimate I gave in conversation with [the IO] based on the size of the paper file that he showed to me. It was given to emphasis [sic] that the sums deducted appeared disproportionate. I will not know the correct figure until I have completed the account."

14. In his letter dated 14th October 2002, the Respondent informed the OSS that he intended to replace the shortfall. The OSS was not aware that such a shortfall had been replaced.

15. In addition to shortfalls in respect of matters which were in place at the time of the inspection, the IO also identified several matters in respect of which cash shortages on client bank account had arisen and where the shortage had been replaced prior to the inspection date. One example of this occurred in the matter of a client, Mr B.

Mr B

16. The Respondent acted for Mr B in connection with the administration of the estate of the late E B. The client ledger showed that between 22nd December 1997 and 31st December 2000, 14 transfers from client to office bank account varying in amounts from £360.50 to £11,515 and totalling £71,272.07 were made purportedly in respect of

the Respondent's firm's costs and disbursements. The final statement of account showed the firm's fees totalled £3,277.66.

17. Two payments into client bank account totalling £39,648.38 were made on 14th and 15th March 2001. The Respondent informed the IO that these were loans he had obtained partly to replace the cash shortage. The balance of the shortage was replaced by 10th September 2001, the final payment being a payment of £34,053.62 on that date.

The Submissions of the Applicant

18. The facts and the allegations had been admitted by the Respondent.

19. The allegations admitted by the Respondent were serious in their nature even without a finding by the Tribunal that the Respondent had been dishonest. However the applicant did put the case on the basis that the facts of the case demonstrated conscious impropriety on the part of the Respondent in his use of client funds.

20. Substantial sums of client money had found their way into office account. There had been a substantial shortfall of client funds at the time of the IO's inspection and the shortfall had been in place over a five year period. The size and nature of the breaches could not be described as administrative errors.

21. The Tribunal was invited to consider the definition of dishonesty contained in the case of Twinsectra -v- Yardley [2002] 2AC 164 as it was analysed in the case handed up, the appeal to the Divisional Court from the decision of the Tribunal by the struck off solicitor Mr Dooley, in which it was said that the Tribunal should be satisfied that the Respondent "must himself appreciate that what he was doing was dishonest by the standards of reasonable and honest men". The Divisional Court referred to the Tribunal's findings in the case of Dooley in which the Tribunal said "It was very apparent that [the Respondent] in this case vehemently asserted his honesty but this on its own is not sufficient to acquit him of the allegation. It might be so if he "did not know that what he was doing would be regarded as dishonest by honest people"." That was consistent with the statement by Lord Nicholls in Royal Brunei Airlines -v- Tann [1995] 2AC 378 when he said that "For the most part dishonesty is to be equated with conscious impropriety. However this subjective characteristic of honesty does not mean that individuals are free to set their own standards of honesty in particular circumstances."

22. Whilst the Applicant accepted that there was always the possibility of an explanation, on the information before the Tribunal it was difficult to see an honest explanation for the Respondent's conduct. The explanations advanced by him simply were not credible.

23. The Applicant said that on the face of it the Respondent had maintained a well-run practice and all his files had been properly dealt with save for the three in question. It was not a case where the administration of client account had broken down.

24. It was a factor in each of the cases, details of which had been placed before the Tribunal that the client account ledger balance had been reduced to nil. It was difficult

to think of an honest explanation as to why the client account balance should be reduced to nil by the production of a bill of costs. It would be necessary to know what money remained in client account before doing that.

25. There had been a substantial level of overbilling. The Applicant accepted that solicitors sometimes could get their costs figures wrong but again the Respondent's explanations were incredible given the wide variation of figures. The improper transfers of money had taken place over a wide period of time. Solicitors were required to reconcile client account every five weeks. Bearing in mind the other requirements of the SARs there was little prospect of such matters going unnoticed over a long period of time.

26. In the normal run of events any honest solicitor should have been caused to wonder what was going on. What had happened was readily apparent from the client account records. The Respondent was the sole signatory on client bank account.

27. The Respondent's statement had been received by the Applicant only on the day before the hearing and in his submission parts of it put a wrong gloss on the true state of affairs.

28. The Applicant had concluded and invited the Tribunal to reach the same conclusion that money held in connection with the three estates exemplified had been held on client account for a long time and had been seen by the Respondent as an obvious source of capital and he had replaced such capital when the time came for him to make payment out. That was deliberate dishonest conduct.

The Submissions of the Respondent

29. The accounting errors to which the allegations referred were not disputed.

30. The Respondent had rectified breaches of the rules on discovery in respect of one of the three files to which reference had been made.

31. The OSS held funds that were sufficient to rectify the shortfall in the other two cases and meet the costs of the intervention.

32. The three matters identified by the IO were the only matters where breaches had occurred. No other matters arose from the investigation.

33. In the matter of Mr B the shortfall was replaced ten months prior to the IO's investigation and thirteen months prior to the intervention.

34. The Respondent had not been dishonest: he had not acted with conscious impropriety.

35. The Tribunal was invited to take the following matters into account:- The value of the these three matters was small when compared with the high value of business transacted through client account over the relevant period.

36. In the case of Mr B, the position had been corrected long before the IO's investigation. The opportunity for correction arose because the Respondent had been required to pay

money to beneficiaries and had therefore caused full accounts to be prepared. He identified the shortfall and replaced it. No client had suffered any loss as a result of his failure to carry out a check procedure in this matter that he did in every single other case.

37. The other two matters had not reached that advanced stage and the Respondent had not had the requirement or opportunity to identify the shortfall. He would have corrected the position as he did in the only other case. The shortfall could now be corrected from funds held by the OSS on behalf of the Respondent.

38. The shortfall could not be identified except by close examination of the files. The transfers took place over a period of three years during which time the Respondent's office account turnover was approximately £1,000,000 and his client account turnover approximately £150,000,000. It was only when the IO devoted himself to that close examination over a week that the situation was discovered.

39. When questioned as to how the amount of the improper transfers had been arrived at, the Respondent said he had simply guessed the appropriate amounts.

40. The Respondent confirmed that he had drawn bills of costs in relation to the amounts transferred. This had meant that his reporting accountant had been satisfied that his client account had been in order and had been able to supply the Respondent with unqualified accountant's reports.

41. The Respondent said that the monies paid from client office account had not represented any personal gain to him.

42. The investigation did not arise from any complaint by a client. The Respondent believed that a disgruntled former member of staff had suggested to the OSS that the Respondent's accounts should be investigated.

43. The Respondent recognised the seriousness of his errors and did not seek to minimise them. The real error lay in his allowing a successful practice to outstrip his personal ability to cope.

44. No client had suffered any financial loss. No client had complained.

45. The Respondent's response to the IO's report was immediate and realistic. He let most of his staff go immediately and reduced his practice. The Respondent recognised with hindsight that he should have come to that conclusion himself and taken action. It would have been better if he had referred existing work on an orderly basis to other firms, but that was difficult because of the Respondent's personal commitment to individual clients.

46. After enjoying a successful academic career the Respondent began practice at the Bar at the age of forty. He set up in practice as a solicitor ten years before the date of the disciplinary proceedings at the age of fifty. The Respondent qualified for both professions by study entirely on his own. He had not had the benefit of teaching, college life, a training contract or articles or the camaraderie possible through the usual

routes to admission to the professions. For many practitioners these relationships were an important support throughout their professional life. The Respondent's family responsibilities also required time and attention.

47. The Respondent started his solicitor's practice in October 1993 only three years after qualification, the minimum period allowed. At that time his practice experience was limited to litigation. From employing only one staff member the Respondent had generated a broad general practice with fifteen staff and an annual turnover of £300,000. His work included residential and commercial conveyancing, probate and wills, personal injury, matrimonial, construction disputes, professional negligence and employment tribunals. The Respondent had an almost unblemished record with regard to complaints and claims for professional negligence.

48. The fact that the Respondent abandoned a successful academic career reflected the fact that financial reward was not a priority for him. He did not see legal practice as a way of generating wealth. He had always led a modest lifestyle. He took a pride in service, enjoyed an interest in law in all its variety and felt a deep personal concern to help people who came to him with their problems. He valued a happy and co-operative staff group. The Respondent hoped that he would work together with his colleagues so that they would all benefit on a co-operative basis. The Respondent had assumed that hard work would be rewarded in the end.

49. The strain inevitably damaged the Respondent's health. Details of the Respondent's physical and mental health were before the Tribunal. The Respondent also had significant personal demands with five children at home. The Respondent was an only child; his mother had died a fortnight before the intervention.

50. The Respondent had no partner. The whole burden of practice management fell on his shoulders. He was meticulous that every bill that went to his clients included a full schedule showing how the bill was calculated with attendance notes to show what work had been done and set out in full their rights to independent assessment. The three probate cases cited by the IO were outside his usual line of work. At the time he was too distracted, too ill, too tired and working too hard on other matters to do the calculations that he had done in every other case out of the seven thousand matters with which his firm dealt during the period.

51. At the time of the hearing the Respondent had a decade of business and professional experience, hard won. He believed that he could use that experience to continue to provide a service to the public and to the profession. That service would have a narrower focus and be on a smaller scale than previously. He did not minimise the seriousness of his errors but the true problem was the way he allowed his business almost to destroy him. The Respondent felt sure that he would not allow that to happen again. Apart from the three cases before the Tribunal the Respondent's practice administration had not been criticised, either within the profession or by clients. He had successfully protected his clients from any loss arising from these errors.

The Decision of the Tribunal

52. The Tribunal found the allegations to have been substantiated, indeed they were not contested.

53. The Tribunal applied the test as to whether or not the Respondent had been dishonest set out in Twinsectra -v- Yardley. The Tribunal found that test to have been satisfied and found the Respondent had been guilty of dishonesty. The Tribunal reached that conclusion because the sums of money improperly transferred from client to office account had on occasions been substantial sums. The Respondent was solely responsible for the management of client account and operating transfers from client to office account. He must have been aware of those transfers and their size. The improper transfers had been made over a long period of time. When asked how he arrived at the appropriate figures the Respondent told the Tribunal that he had guessed. In the cases reported by the IO the effect of the transfers had been to reduce the client ledger balance to nil. This did not accord with the Respondent's assertion that he had guessed the amounts. The Tribunal noted the Respondent's contention that he had achieved no personal gain. The Tribunal found that the Respondent had used clients' money for the purpose of funding his practice. That, of course, was a personal use by the Respondent of client funds.

54. Solicitors must uphold the highest standards of probity, integrity and trustworthiness. The Respondent had not behaved as an honest solicitor would. The Respondent must have appreciated that his actions were dishonest by the standards of honest and reasonable men. It was not open to the Respondent to set his own standards of honesty and the Tribunal found that the Respondent knew that what he did would offend the normally accepted standards of honest conduct within the solicitors' profession.

55. Having made that finding, mindful of its duty to protect the interests of the public and the good reputation of the solicitors' profession, the Tribunal ordered that the name of the Respondent be struck off the Roll of Solicitors. The Tribunal further ordered him to pay the costs of and incidental to the application and enquiry in the agreed fixed sum.

DATED this 22nd day of December 2003
on behalf of the Tribunal

Mr J R C Clitheroe
Chairman