No. 9322-2005

IN THE MATTER OF DONALD MARTIN CLITHEROE, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr P Haworth (in the chair)
Mr L N Gilford
Mr M G Taylor CBE

Date of Hearing: 11th May 2006

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of the Law Society by Geoffrey Williams of Queen's Counsel and partner in the firm of Geoffrey Williams and Christopher Green Solicitor Advocates, 2A Churchill Way, Cardiff, CF10 2DW on 15th August 2005 that Donald Martin Clitheroe whose address for service was c/o Messrs Garcia Martin Solicitors, formerly of Manchester Street, Marylebone, London W1U 7LL and subsequently of 1 Yorkshire Grey Place, Heath Street, London NW3 6UJ might be required to answer the allegations contained in the statement that accompanied the application and that such order might be made as the Tribunal should think fit.

The allegations against the Respondent were:-

(a) That he breached Rule 1(a) (Independence) and (d) (Repute) Solicitors Practice Rules 1990 by virtue of his use of his firm's client bank account for the particular and inappropriate purposes of a client, the client's associates and companies under control of the client;

(b) That he has been guilty of conduct unbefitting a solicitor by failing to disclose material information to a client;

(c) That he has been guilty of conduct unbefitting a solicitor by acting improperly in a conflict of interest situation;

(d) That he has breached Rule 1(d) Solicitors Practice Rules 1990 by virtue of his failure to correct misleading information given to solicitors;

(e) That he has been guilty of conduct unbefitting a solicitor in that he has given misleading information to solicitors.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London EC4M 7NS when Geoffrey Williams of Queen's Counsel appeared as the Applicant and the Respondent was represented by Mr Garcia of Garcia Martin Solicitors.

The evidence before the Tribunal included the admissions of the Respondent both as to the facts and the allegations.

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

The Tribunal Orders that the Respondent, Donald Martin Clitheroe c/o Messrs Metro Law Solicitors, Queens House, 1 Leicester Place, London WC2H 7BP, solicitor, be struck off the Roll of Solicitors and it further Orders that he do pay the Applicant's costs to be subject to a detailed assessment unless agreed between the parties to include the costs of the investigation accountant of the Law Society.

The facts are set out in paragraphs 1 to 24 hereunder:-

The Respondent's History

1. The Respondent, born in 1955, was admitted as a solicitor in 1978. At the times material to the application the Respondent practised as a solicitor in partnership under the style of Cox, Clitheroe & Bond at Dilke House, 1 Malet Street, London WC1E 7JN. The Respondent ceased so to practise on our about 5th December 2002.

The Background

2. The allegations arose from the Respondent's dealings with a client, MJ, his associates and companies over which he had effective control.

3. MJ was a property dealer. In that capacity he instructed Messrs Awoloye-Kio & Co ("Kio") Solicitors of Brixton to act on his behalf. It was common ground that Kio perpetrated mortgage frauds on behalf of MJ in particular through the activities of Sydney Toppin, a struck-off solicitor.

4. A practice developed that upon completion of the fraudulent transactions the funds realised would be sent by Kio to the Respondent's firm's client bank account. The Respondent, who acted in all relevant cases, would then pay out the funds upon the instructions of MJ.

Allegation (a)

5. This related to the generality of the Respondent's dealings with funds received from Kio on behalf of MJ.

6. Between 29th June 2001 and 15th May 2002 the Respondent received from Kio the total sum of £538,000 in seven tranches which funds were credited to the "MJ General" ledger. The Respondent's files did not identify the transactions (if any) to be funded with the sums.

7. Between 28th January 2002 and 24th June 2002 the Respondent received from Kio the total sum of £1,174,962.50 in six tranches which funds were credited to ledgers in the names of R Properties Ltd and B Holdings Ltd. These funds were said to be for specific purposes but they were never used (upon MJ's instructions) for those purposes.

8. When the Respondent was on holiday, MJ had attended his office and removed the General File. MJ had not returned the file to the firm when requested to do so.

9. In some cases there was no written confirmation from Kio to accompany the receipt of funds.

10. In several cases funds were credited by the Respondent to specific ledgers for specific purposes, but once the funds arrived MJ issued instructions to the effect that the specific purposes no longer applied. Upon MJ's instructions the Respondent then effected payments out of client bank account to various individuals and companies in circumstances where there were no underlying legal transactions in which the Respondent was involved.

11. In one matter such payments were made by the Respondent after part of the funds credited to the specific ledger had been used to fund a deposit on a property purchase. The subsequent payments out produced a situation where there were no funds available on the ledger to complete the purchase. MJ did not appear to complain that his deposit had been forfeited. A similar scenario existed in another case.

12. On one occasion the Respondent allowed his firm's client bank account to be used to receive funds which were to then be sent on by the Respondent directly to another firm of solicitors.

Allegations (b), (c) and (d)

13. These allegations arose from a conveyancing transaction where the Respondent acted for the initial purchaser, R Properties Ltd - an MJ company, the ultimate purchaser, Mrs JCS, an MJ associate who stepped into the transaction when R Properties Ltd either could not or chose not to complete, and Mortgages plc, Mrs JCS's mortgagee which was advancing £498,665 on mortgage.

14. The contractual purchase price was £450,000 in the contract with R Properties Ltd. When that company failed to complete, Mrs JCS was to purchase the property for £720,000. The difference in price i.e. £170,000, was to be paid not to the vendor but to R Properties Ltd. There was no evidence that it was ever paid.

15. The Respondent had confirmed that the only aspect of the transaction reported to Mortgages plc was the assignment of the contract at a higher price.

16. The Respondent did not report the following matters to his mortgagee client, as was his duty:-

    i. The fact of the association between R Properties Ltd (via MJ) and Mrs JCS;

    ii. The fact that at the same material time R Properties Ltd had been able to acquire the property for £450,000. R Properties Ltd was due to complete on 8th March 2002. Mrs JCS completed on 5th April 2002. By making such disclosure the Respondent would have told his mortgagee client of the specific amount of the higher price being "paid" by Mrs JCS, and the fact that Mrs JCS was not contributing any of her own funds towards the purchase price. Such information would have been relevant to the decision of Mortgages plc whether or not to make a mortgage advance and if so how much to lend.

17. Had the Respondent fulfilled his duty of disclosure to Mortgages plc he would have been prejudicing the position of Mrs JCS and MJ. There was a conflict of interest between them and Mortgages plc. In such circumstances the Respondent should not have acted for all parties in the transaction.

Allegations (d) and (e)

18. These allegations arose out of cases where the Respondent had completed purchases for MJ or one of his companies where the purchasers quickly became subject to mortgage possession proceedings.

19. In one transaction, by 11th May 2001 the Respondent had completed the purchase of an apartment on behalf of Mr H.

20. By a letter dated 15th November 2001 Messrs Glenisters, solicitors acting on behalf of the mortgagee (for whom the Respondent had quite properly also acted), wrote to the Respondent with notice that possession proceedings were to be taken. Subsequently Glenisters wrote a reminder and the Respondent replied to the effect that the earlier letter had not been received. That was not the case. The Respondent said that he had only subsequently found the first letter in his office. He did not fulfil his duty in conduct to correct what he said in his letter.

21. On another transaction the Respondent acted for the purchaser, Ms D, the girlfriend of MJ. The purchase was completed on 11th May 2001. Kio ultimately took over conduct of the matter on behalf of the vendor, an MJ company. Possession proceedings were initiated. When a sale was negotiated the agents believed that the Respondent was acting for the original vendor.

22. On 16th April 2002, the Respondent wrote to the solicitors acting in the possession proceedings but, contrary to his assertion, contracts had not been exchanged. On the basis of the Respondent's letter, the warrant of possession had been withdrawn.

23. On 7th May 2002, the Respondent wrote to a firm of solicitors confirming that Ms D had agreed to sell the property subject to contract. It was clear that by 17th May 2002 contracts had still not been exchanged and the possession proceedings had been revived.

24. When the FIO inspected the file he found that it contained contract documents, but these were not complete and had not been exchanged. The Respondent sought to rely on a contract that he disclosed to the Law Society but this document was incomplete

and could not have been exchanged. It bore a signature and was dated 16th April 2002 i.e. the same date as the Respondent's offending letter.

The Submissions of the Applicant

25. Where funds had been realised as the result of fraudulent transactions they were sent by Kio to the Respondent's firm's client account. To a degree this practice facilitated the frauds and gave MJ protection from discovery of his activities. The Applicant did not suggest that the Respondent was complicit in the mortgage frauds. He had reported the situation in August 2002. The Applicant did not suggest that the Respondent had behaved dishonestly. In the submission of the Applicant the Respondent had however fallen short of the standards of conduct which were reasonably to be expected of solicitors.

26. There were several indicators which would have put a solicitor acting prudently and carefully upon clear notice of potential problems associated with the funds in question. The Respondent should not in the circumstances have allowed himself to be used by MJ as he was. By so doing he compromised his own reputation and that of the solicitors' profession. The indicators of fraud included the fact that Kio on a regular basis was sending substantial sums of money to the Respondent, usually round sums. When dealing with a conveyancing transaction in a routine manner the firm having conduct of the conveyancing transaction would distribute the proceeds. It was unusual for substantial proceeds of a sale simply to be sent to another firm of solicitors for distribution.

27. When Kio sent the funds to the Respondent the accompanying communications were informal and often vague. An example of this was a fax communication from Kio to the Respondent dated 28th January 2002 in the following terms:-

> "Please note that we have today arranged for the transfer of £250,000 in respect of R Properties Ltd".

and on another occasion a fax was sent by Kio to the Respondent dated 17th May 2002 stating:-

> "We confirm that we have remitted to your account at Barclays the sum of £114,000 in respect of the above."

28. It was accepted that these funds may have represented a relatively small proportion of the total funds received from or on behalf of MJ during the course of the Respondent's dealings on his behalf. Nevertheless the amounts in question were substantial and usually in round sums. In the submission of the Applicant MJ was indulging in mortgage fraud at Kio and then money laundering the proceeds through the Respondent.

29. The Respondent should not have acted for MJ as he did. The situation called for the closest scrutiny and investigation. The potential for money laundering was clear. The Respondent allowed his firm to be used by MJ for improper and inappropriate purposes. He did as he was asked and failed to apply the appropriate degree of independence of thought or action required of him. It was as a result of this that the Respondent's position within the firm became untenable.

30. With regard to allegations (b) and (c) in the submission of the Applicant the transaction involving Mrs JCS was a mortgage fraud being perpetrated by MJ. The element of £170,000 was inserted into the transaction so as to justify the amount of

the mortgage advance. With regard to allegations (d) and (e) the facts spoke for themselves.

31. The Respondent allowed money to be held on his client account for no discernible purpose.

32. The Respondent had been familiar with The Law Society's Blue Card warning on money laundering and he had been guilty of a failure to heed those warnings and such failure facilitated the nefarious activities of MJ.

33. In the submission of the Applicant the Respondent had put his perceived interests of clients above his duties as a solicitor and an officer of the court. To that extent the Respondent brought the disciplinary proceedings upon himself.

34. The Applicant invited the Tribunal to award The Law Society the costs of and incidental to the application and enquiry. The Applicant explained his calculations to the Tribunal. His figures included not only the legal costs but the costs of the Investigation Accountant of The Law Society and said that he would find the round sum of £19,000 acceptable.

The Submissions of the Respondent

35. The real culprits were two persons employed by Kio and MJ who were fraudsters. They had created an aura of honesty and respectability even though they had been thoroughly dishonest behind the scenes.

36. The Respondent had been taken in and was grateful that no allegation of dishonesty had been made against him. The Respondent had eventually reported the activities of MJ and Kio. He had not been complicit in their nefarious activities. The reality was that he himself had been the victim of their fraud.

37. The Respondent nevertheless accepted that he was responsible for what had occurred and he had admitted the allegations.

38. The Respondent had not made an application for a Practising Certificate since 2002. In effect he had been suspended from practice for some 2½ years. It was thought that a lengthy period of suspension would be an appropriate sanction and the Tribunal was invited to take this 2½ year period into account.

39. Hitherto the Respondent had been a capable and successful solicitor. The effect of what had happened had been devastating to him both in terms of his loss of status and in financial terms. He had been required by his partners to resign from the partnership. The Respondent had been adjudicated bankrupt and, although his house had been put in his wife's name twenty years earlier, the trustees had decided to pursue the Respondent for a 50% interest in it.

40. Save for the subject matter of the allegations there had been no other complaint against the Respondent.

41. Although looked at alone the Respondent's involvement with MJ and Kio might appear to be reprehensible, the Tribunal was invited to take into account the fact that the Respondent's actions took place when he carried a considerable burden of work, for instance it was not unusual for him to handle twenty conveyancing completions on a single Friday. The fraudsters' transaction might well have been one of many of which the Respondent had conduct at any one time.

42. The Tribunal was also invited to take into account the fact that the Respondent's instructions came from another firm of solicitors. The Respondent had acted for MJ on about thirty occasions and the transactions conducted involved substantial sums and MJ had acted honestly in those transactions.

43. MJ was a property dealer and developer and it was far from unusual for proposed property schemes not to reach fruition. The Respondent did not become suspicious when he learned that proposed deals had become abortive. As was customary when a solicitor acts for property dealers, there was a great deal of pressure brought to bear on the Respondent.

44. MJ had removed papers from the Respondent's possession and had disappeared.

45. With regard to allegation (c) the Respondent was aware that the property had a high value and saw nothing wrong with the substantial mortgage advance. The Respondent was aware that the other party to the transaction owned other properties in the building: he was aware that the property was about to be repossessed. The Respondent thought he had been given genuine instructions and that an arm's length transaction was to be completed, giving all concerned a good deal. When questioned by the Tribunal whether the Respondent did indeed admit the allegation or whether he had a defence to the allegation, it was confirmed on behalf of the Respondent that he made his admission, and stood by it, as he believed he had fallen below the standards required, even though he did believe he had held a signed contract.

46. Many people had been taken in and fooled by a clever but fraudulent man who had disappeared.

47. With regard to the Applicant's application for costs the Tribunal was aware of the Respondent's bankruptcy. The Law Society had instructed Queen's Counsel to conduct the disciplinary proceedings. The Respondent questioned whether representation at that level was necessary. A number of allegations indicated by The Law Society's investigator had not been pursued. The Tribunal was invited to make an order for costs some 50% less than those sought by the Applicant.

The Tribunal's Findings

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

Previous Findings

49. Following a hearing on 11th September 2001 the Tribunal found the following allegations to have been substantiated against the Respondent. The allegations were that the Respondent had been guilty of conduct unbefitting a solicitor in that:-

(i) by virtue of the matters set out in the Reports of the Monitoring & Investigation Unit dated the 24th June 1999 and the 10th March 2000 his professional conduct was such that it compromised or impaired or was likely to compromise or impair any of the following namely his independence or integrity as a solicitor, his duty as a solicitor to act in the best interests of his client, his good repute or that of the solicitors' profession and his proper standard of work contrary to Rule 1 of the Solicitors' Practice Rules 1990;

(ii) he utilised clients' funds for his own benefit or alternatively for the benefit of other persons not entitled to the funds;

(iii) he failed to honour four professional undertakings given in the course of his practice;

(iv) he accepted instructions which involved his breaching principles of professional conduct;

(v) he failed to ensure that the firm Cox Clitheroe of which he was a partner was properly supervised in accordance with the minimum standards required contrary to Rule 13 of the Solicitors' Practice Rules 1990.

50. On that occasion the Tribunal said:-

"The Tribunal found all of the allegations to have been substantiated, indeed they were not contested. The Tribunal accepts the Respondent's explanation that the shortfalls which occurred on his client account were caused by error and/or mistake and there had been no deliberate misuse of client's funds. The shortfalls reported by the ICOs were corrected by the Respondent. It was, of course, an inevitable result of a shortfall on client account relating to one individual client's account that moneys held on behalf of other clients were utilised when payments were made as if such a shortfall was not in existence.

The Respondent accepted that he had failed to honour four professional undertakings given by him in the course of his practice. He himself had been deeply concerned about that failure and it was clear that he had been unable to honour the undertakings because another firm of solicitors on whose undertakings he had placed reliance had been in breach of them. The Tribunal noted that no payment had been made in this regard in reliance upon the Respondent's own indemnity cover, but payment had been made in reliance upon the indemnity cover relating to the other firm of solicitors. Ultimately no clients of the Respondent had suffered loss. The matter had caused the Respondent a great deal of anxiety. He had very properly at an early stage admitted his breaches.

The Respondent had accepted instructions which involved him breaching principles of professional conduct when he had received into client account US$2,000,000 when he was not instructed in any underlying transaction. The Law Society had issued clear written warnings about the dangers of a solicitor becoming involved either in bank instrument fraud or money laundering and to behave in the way that the Respondent had was, to say the least, very unwise.

The Respondent admitted that he had failed to ensure that his firm was properly supervised in accordance with the minimum standards required by Rule 13 of the Solicitors Practice Rules 1990. The Tribunal accepted that the breach that occurred over a period of a fortnight and on the days when the Respondent's partner had been present in the office there had been no breach at all. The Tribunal also noted that the Respondent was readily available on the telephone and he had indeed made a great many telephone calls himself to his office. Although it was very important that a solicitor's office should be properly supervised, the Tribunal did not consider the Respondent's breach to be at the most serious end of the scale.

In all of the circumstances there could be no doubt that the Respondent had been in breach of Solicitor's Practice Rule 1 and in this regard the Respondent had admitted allegation (i).

The Tribunal gave the Respondent credit for his early admissions and the prompt and punctilious way in which he dealt with the concerns expressed by his own professional body and the detailed explanations which he gave at the earliest opportunity. In all of the circumstances the Tribunal considered it right to mark its disapproval by the imposition of a substantial fine. In respect of allegations (i) and (ii) the Tribunal imposed a fine of £3,500. In respect of allegation (iv) the Tribunal imposed a fine of £5,000. Although the Tribunal found allegation (ii) to have been substantiated and recognises that the breach of professional undertaking by a solicitor is a grave matter, the circumstances in this case were such that the Respondent had perhaps been somewhat naïve in accepting another solicitors undertaking but he could not truly be said to have been culpable in finding himself in a position where he was unable to comply with his own undertakings because of the default of other solicitors. That position had been recognised by the Solicitors Indemnity Fund and during the course of litigation surrounding the matter a Master of the High Court and a High Court Judge had both exonerated the Respondent. The Tribunal consider that the Respondent's behaviour in accepting instructions and receiving into client account US$2,000,000 when he had not been instructed in any underlying transaction was very unwise and verged on being exceedingly foolish. The Respondent himself accepted that he had been aware of the guidance given by The Law Society to solicitors to ensure that they did not become involved in or associated with bank instrument fraud or money laundering. The Tribunal found allegation (iv) to have been substantiated and imposed upon the Respondent a fine of £5,000 in that respect.

The Tribunal find that the Respondent had not ensured that his office was properly supervised in accordance with Practice Rule 13 for a two-week period while he was away on holiday in France, on those days when his partner was not in attendance. As the Respondent readily admitted his breach and there had been no complaint from any client about the matter the Tribunal did not consider it necessary to impose any further financial penalty upon the Respondent. The Tribunal therefore ordered that the Respondent should have imposed upon him a financial penalty in the total sum of £8,500.

After listening to the submissions of the applicant and the Respondent, the Tribunal agreed that the Respondent should pay all of the costs incurred by the Investigation & Compliance Officers of the Office and he should pay two-thirds of the costs of and incidental to the application and enquiry together with the whole of the disbursements incurred in that connection. The total sum which was agreed between the parties relating to costs was £12,449.87 and the Tribunal ordered the Respondent to pay those costs to the applicant in the said fixed sum."

The Tribunal's Decision and its Reasons

51. Despite the warnings given by The Law Society and the wide publicity given to money laundering schemes the Respondent had allowed his client account and his firm to be used in circumstances where there were many indications that the clients of the firm were engaged in money laundering and/or mortgage fraud. Not only was this reprehensible but the Tribunal was astonished to learn that the Respondent had already appeared before the Tribunal and had similar allegations substantiated against him. On that occasion the Tribunal said that the Law Society had issued clear written warnings about the danger of a solicitor becoming involved either in bank instrument fraud or money laundering and to behave in the way that the Respondent had was to say the least very unwise. The Respondent extraordinarily had ignored the very clear warning given to him by this Tribunal.

52. In the circumstances the Tribunal concluded that the Respondent was not fit to be a solicitor. In order to fulfil its high duty to protect the public and maintain the good reputation of the solicitors' profession the Tribunal ordered that the Respondent be struck off the Roll of Solicitors. In view of the fact that the quantum of costs sought by the Applicant was set at a high figure and the Respondent had not agreed that figure, the Tribunal considered that it was right in the circumstances of this case that the Respondent should bear the whole of the costs of and incidental to the application and enquiry but it ordered that such costs should be subject to a detailed assessment unless an agreement as to quantum could be reached by the parties.

Dated this 12th day of June 2006
On behalf of the Tribunal

P Haworth
Chairman