No. 9752-2007

IN THE MATTER OF HORACE OKEROGHENE ONOBRAKPEYA, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr A G Gibson (in the chair)
Mr D Potts
Mr D E Marlow

Date of Hearing: 29th May 2008

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of The Law Society by David Elwyn Barton, solicitor, of 13-17 Lower Stone Street, Maidstone, Kent, ME15 6LE on 29th June 2007 that Horace Okeroghene Onobrakpeya of 213A Clapham Road, London SW9 0QH, 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 against Mr Onobrakpeya were:-

1. That he had been guilty of conduct unbefitting a solicitor in the following respects:-
   (a) he had made false and misleading statements in proposals for professional indemnity insurance;

   (b) contrary to Rule 1(c) of the Solicitors' Practice Rules 1990 he failed to act in the best interests of his lender client by ensuring that he held sufficient funds to enable him to perfect the security before releasing the loan.

Further allegations against Mr Onobrakpeya were:-

2. That he breached the Solicitors' Accounts Rules 1998 in the following respects:-

(a) contrary to Rule 7 he failed to remedy breaches of the said Rules promptly upon discovery.

(b) contrary to Rule 22(5) he had withdrawn sums of money from client account in excess of the amount held for the client on whose behalf the withdrawal was made;

(c) contrary to Rule 32(1) had failed to keep accounting records properly written up;

(d) contrary to Rule 32(5) failed to keep accounting records to enable the current balance on client ledgers to be shown;

(e) contrary to the requirements of Rule 32(7) had failed to carry out reconciliations of client account.

Further allegations against Mr Onobrakpeya were that:-

3. He acted in breach of Rule 22 of the Solicitors' Accounts Rules 1998 in that he drew money from client account in circumstances other than permitted by the said Rule and utilised the same for his own benefit or for the benefit of others. In so doing Mr Onobrakpeya had been guilty of conduct unbefitting a solicitor. It was further alleged that he had been dishonest.

4. He sent a false and misleading letter to Richards solicitors in the course of a conveyancing transaction and thereby had been guilty of conduct unbefitting a solicitor. It was further alleged that he had been dishonest.

5. He failed to comply with an undertaking given by him in the course of his practise as a solicitor and had thereby been guilty of conduct unbefitting a solicitor. It was further alleged that he had been dishonest.

6. He failed to keep books of account properly written up in accordance with Rule 32 of the Solicitors' Accounts Rules 1990.

The application was heard at The Court Room, Third Floor, Gate House, 1 Farringdon Street, London EC4M 7NS on 29th May 2008 when David Elwyn Barton appeared as the Applicant and the Respondent appeared in person.

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

The Tribunal Orders that the Respondent, Horace Okeroghene Onobrakpeya of Dartford, Kent, solicitor, be Struck Off the Roll of Solicitors and it further Orders that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £8,913.00.

The evidence before the Tribunal

The evidence before the Tribunal included the oral evidence of Mr Onobrakpeya.

Mr Onobrakpeya admitted the whole of the Forensic Investigation Officer's report dated 15th October 2007. He admitted allegations 1 and 2 but denied that he had been dishonest. He also admitted allegations 4 and 6. Again he denied that he had been dishonest.

The agreed facts are set out in paragraphs 1 - 16 hereunder:-

1. Mr Onobrakpeya was born on 18th April 1965 and was admitted as a solicitor on 17th January 2000. His name remained on the Roll of Solicitors.

2. Between 11th February 2005 and 10th October 2005 Mr Onobrakpeya and Mr Ayeni carried on practice in partnership under the style of South Bank solicitors at 213A Clapham Road, London SW9 0QH.

3. Between 1st April 2004 and 10th January 2005, and from 7th November 2005 to date Mr Onobrakpeya and Mr Ikoku carried on practice under the same style and from the same address.

4. A Forensic Investigation Officer of The Law Society (the FIO) commenced an inspection of South Bank solicitors on 10th October 2007. A copy of the FIO's report dated 15th October 2007 was before the Tribunal. The inspection revealed a minimum cash shortage of £428,546.53 which arose following the misuse of client funds in a conveyancing transaction.

5. The FIO had been unable to calculate anything other than a minimum shortage because of the absence of accurate records and postings. His report indicated that the shortage could be as high as £1.7 million.

6. The firm had acted for Mr I in his purchase of a property at London SW1. Mr Ikoku told the FIO that the client file for this matter could not be located in the office and that the correspondence had been deleted from Mr Onobrakpeya's computer. There was no client ledger account as the relevant transactions had taken place in September and the firm's accounts had not been written up since 31st August 2007.

7. The seller's solicitors granted the FIO access to their file and during the investigation the firm's secretary was able to recover some relevant correspondence from her computer. The recovered documents did not record their original date but were all dated 10th October 2007.

8. The FIO was able to establish that Mr Onobrakpeya acted for Mr I in his purchase of the property for £3,950,000.00, with the assistance of a mortgage advance of £2,700,000.00 from the Lancashire Mortgage Corporation, which was represented by Richards solicitors.

9. On 18th September 2007, the mortgage advance of £2,717,994.25 was received into Mr Onobrakpeya's firm's client bank account. On 19th September 2007, payments of £870,549.00 and £617,482.60 respectively were made by telegraphic transfer from client bank account, with a reference to the client Mr I, payable to G Limited and WSF. Mr Ikoku said that the copy transfer instructions for these payments had not been kept in a folder as was the routine

10. On 20th September 2007, £50,000.00 was sent by telegraphic transfer to Fuglers solicitors. This was the agreed reduced deposit on exchange of contracts which took place on 19th September 2007. Completion was fixed for 10th October 2007.

11. On 26th September 2007 £1,000,000.00 was returned to Richards solicitors.

12. On 28th September 2007, the Client Reserve Account held a credit balance of £1,289,447.72. The matter had not been completed. The FIO pointed out that, allowing for the repayment of £1,000,000.00 to Richards, a minimum of £428,546.53 should have been held in client bank account on behalf of Mr I alone.

13. A copy letter indicated that the firm had written to Richards solicitors. The letter bore the reference 'HO'. The letter stated, "We write to confirm that exchange and completion for the above property has taken place on 21st September 2007. SDLT application has been lodged". If this letter had been sent to Richards solicitors it was misleading as completion had not taken place. A copy of an additional letter to Richards solicitors (with the reference 'HO') stated "I apologise for the non receipt of funds. I am requesting that your client give me till Friday 5th October to resolve this."

14. There was also a copy of a letter to Richards solicitors in the following terms, "We undertake to utilise the net loan proceeds for the purpose of completion, and if for any reason completion does not take place within 48 hours of funds being transmitted to you, to return the same (without deduction) via bank telegraphy to us or to our client, or as we may direct".

15. On 11th October 2007, the FIO received confirmation from Fuglers solicitors that completion had not taken place on the contractual date of 10th October 2007 and that they had served a notice to complete on South Bank solicitors.

16. Mr Ikoku had told the FIO that he was not in a position to replace the minimum shortage.

The Respondent's evidence as to the duress to which he claimed to have been subjected

17. Mr Onobrakpeya said that he had been compelled to act under duress on 19th September. Mr I had been introduced to the firm by brokers. The transaction in which the firm was instructed to act had been a straightforward one. Mr Onobrakpeya had not met the client on any earlier occasion. The client had come to the office three times and Mr Onobrakpeya had seen him personally. He went through the money laundering regulations and subsequently passed the file to a colleague to deal with the client's affairs. Solicitors had been instructed to act for the vendors and the lenders and the Respondent's firm had been instructed to act for the client, the purchaser. The colleague had informed Mr Onobrakpeya that all of the lender's conditions had been satisfied and he arranged for the funds to be released.

18. Mr Onobrakpeya had been at an Asylum and Immigration Tribunal hearing when he was told that gentlemen were waiting for him. Mr Onobrakpeya had made his way back to the office where he saw his client together with two other men. One he knew as the introducing broker. The men told Mr Onobrakpeya that they were aware that

the advance money had been transferred to him. Mr Onobrakpeya invited them into his office and said that he needed to check. The men sat in his office and waited. They said they were aware that the money had come from the lender. The money received was £2.7million. Mr Onobrakpeya checked with his bank and found that the funds had been received and he confirmed that fact to the men. They said "This is how we want to dispose of the money". They had brought with them and handed to Mr Onobrakpeya a list.

19. Mr Onobrakpeya had told them that there was a problem because the money had been paid to him for a particular transaction namely the purchase of the London property. He said that he had told them that there are serious people here and we have serious business to do.

20. At the time Mr Onobrakpeya had a photograph of his daughter on his desk. The men told him his daughter's name and told him also the name of the school that she attended. Mr Onobrakpeya asked them how they had come by that information and their response was that they thought they might need it when these matters arose. They made it plain that they were prepared to cause harm to Mr Onobrakpeya's daughter. Mr Onobrakpeya explained that these three men clearly knew details about his only child.

21. Mr Onobrakpeya asked the men what they wanted him to do. They seemed to be aware of the office procedure. Mr Onobrakpeya signed an authority form to NatWest Bank authorising telegraphic transfers and that form was faxed to the bank. Mr Onobrakpeya explained that the forms would have been partially completed, for instance with details of client account number, and at the time he did not have time to think about what he was doing or take any evasive action.

22. Mr Onobrakpeya explained that the second letter about which complaint had been made had been prepared while he and the men were waiting. That letter confirmed that completion had taken place. Under cross examination Mr Onobrakpeya did not have a clear recollection of the way the letter was prepared but believed he had asked a secretary to type the letter.

23. Mr Onobrakpeya said that when the men were in his office the office door was shut but not locked. He could not recall if he had left the room at any time. He said he did not leave the room to go to the toilet. The fax machine was not in his room. He said he could have left the room to fax the bank instruction. He did not seek to leave the building and go to the police station because he did not wish to place his daughter's safety in jeopardy.

24. Mr Onobrakpeya said that he went home and discussed the matter with his wife. He was too concerned about the welfare of his daughter to take any other step but he did call the police on the following day. Mr Onobrakpeya said he had been concerned not to expose his daughter to that sort of situation. Also Mr Ikoku had said that he would deal with the matter and he would inform the police. Mr Ikoku had reported that when the men came to the office, he saw them but said that he was not Mr Ikoku and then ran out of the building.

25. Mr Onobrakpeya said that he did not return to the office. He had believed that there was a genuine threat to his daughter and if there had merely been a threat to him he

would have acted differently. He could not risk his daughter's life. He decided to protect her.

26. Mr Onobrakpeya had no idea to whom the money was sent. The men had given him full details of the receiving bank account, those details being given to him there and then while he was at his desk.

27. Mr Onobrakpeya had checked the identity of the client and the broker. He had not subsequently been able to reach those gentlemen either using the names which he had been given or at the addresses supplied.

28. Mr Onobrakpeya accepted that at the time when he transferred the money and when he wrote the second letter saying that completion had taken place and an SDLT application had been lodged he was doing something improper. By the time the letter was created the monies had been transferred from the firm's client account.

The Submissions of the Respondent Re: Duress and Dishonesty

29. Mr Onobrakpeya had not made an attendance note of what had occurred. He was in no fit state. He was a solicitor and he knew that he had been the victim of serious crime.

30. Mr Onobrakpeya had taken steps to ascertain the whereabouts of the money. The broker had called Mr Onobrakpeya to say that the receiving parties were trying to invest the money and then return it to Mr Onobrakpeya. Mr Onobrakpeya was assured that the money would not be lost forever. Mr Onobrakpeya informed the broker that he had to go to the police.

31. Mr Onobrakpeya acknowledged that the FIO's inspection had begun some two or three weeks after these events. He had not been in the office at the time when the inspection began but had been at home. Mr Onobrakpeya did not accept that the file relating to the purchase of the property at London SW1 could not be located and he denied that any documents had been deleted from his computerised records.

32. Mr Onobrakpeya said that he had wanted to minimise the damage. He had tried to get the money back. He accepted that he had a duty to report the matter to The Law Society but he had delayed in doing so because he considered that The Law Society would in the circumstances consider an intervention into his practice and the opportunity to get the money back would be lost.

33. Mr Onobrakpeya had not pocketed the money. He sent the balance of the money that had not been paid out back to Richards.

34. Mr Onobrakpeya explained that he knew when he did them that his actions were wrong. His concern had been not to put his daughter at risk. He wanted the nightmare to go away. He had not been in any fit state of mind to take evasive action or consider anything else that he could do to avoid being placed in the situation in which he found himself and to prevent his daughter from being put at risk.

The Applicant's submissions on the question of duress

35. The Tribunal was invited to consider the cases of R v Hassan [2003] EWCA Crim 191 [House of Lords] and the case of R v Hussain in the Court of Appeal EWCA Crim 1117 [2008]. In the case of Hassan it was said that the common sense starting point of the common law was that adults of sound mind are ordinarily to be held responsible for the crimes which they commit. To this general principle there has, since the 14th century, been a recognised but limited exception in favour of those who commit crimes because they are forced or compelled to do so against their will by the threats of another.

36. Duress affords a defence which if raised and not disproved, exonerates the defendant altogether. It does not, like the defence of provocation to a charge of murder, serve merely to reduce the seriousness of the crime which the defendant has committed.

37. Where the evidence in the proceedings is sufficient to raise an issue of duress the burden is on the prosecution to establish to the criminal standard that the defendant did not commit the crime with which he is charged under duress. The defence of duress operates within narrowly defined limits. To find a plea of duress the threat relied on must be to cause death or serious injury and the threat must be directed against the defendant or his immediate family or someone close to him. The relevant tests pertaining to duress had been largely stated objectively with reference to the reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions.

38. The defence of duress is available only where the criminal conduct which is sought to be excused has been directly caused by the threats which are relied upon.

39. In the case of Hussain it was recognised that the case of Hassan was definitive when dealing with the question of duress.

40. At paragraph 18 of the judgement in Hussain four questions were set out which needed to be asked when a jury was addressing the question of whether the defence of duress had or had not been negated.

    (i) Duress involves a genuine belief that if the crime were not committed the defendant would be at immediate or near immediate peril not simply of violence but of serious harm or death, alternatively that those very close to him would be.

    (ii) It is not sufficient that the defendant felt impelled to carry out the offence unless a reasonable person in his circumstances and of his age and background would have felt similarly.

    (iii) Could the defendant have avoided acting as he did without harm coming to him or to his nearest and dearest?

    (iv) A defendant is not entitled to rely on the defence of duress when as a result of his voluntary association with criminals he foresaw or ought reasonably to

have foreseen the risk of being subjected to compulsion by threats of violence to commit criminal offences.

41. The Applicant had not been given notice of Mr Onobrakpeya's defence of duress until the hearing of the allegations against the other two Respondents had taken place in October 2007. The Applicant was aware that Mr Onobrakpeya had taken legal advice about the question of duress.

The Applicant's submissions on the question of dishonesty

42. The Applicant invited the Tribunal to find that Mr Onobrakpeya could not avail himself of the defence of duress and to find that he had been dishonest. It was the Applicant's position that Mr Onobrakpeya self evidently was dishonest. He had written letters which on their very face did not tell the truth. He had received monies in connection with a mortgage advance to assist a client with a purchase of property and had disbursed those monies to other destinations and did not use them in connection with the client's purchase.

43. It was the Applicant's submission that the Tribunal should when applying the two part test in the case of Twinsectra Ltd v Yardley and Others [2002] UKHL 12 find that both parts of that test had been satisfied.

The Tribunal's findings

44. With regard to Mr Onobrakpeya's claim that his actions had been the result of duress, the Tribunal concluded that, had his assertion been true, he would have retained a clear recollection of the events. Mr Onobrakpeya's purported lack of recall of the detail of these events was implausible. The Tribunal considered that all details would have been clearly etched on his memory.

45. The Tribunal found all of the allegations to have been substantiated. Because the Tribunal did not consider Mr Onobrakpeya to be credible it found that he did not hold a genuine belief that if he did not transfer the money as required by the men who attended at his office there would be an immediate or near immediate peril not simply of violence but of serious harm or death to his daughter. The Tribunal did not consider that a person of Mr Onobrakpeya's age and background, particularly the fact that he was a practising solicitor, would similarly have felt impelled to carry out the offence. The Tribunal believed that an experienced solicitor would have been able to take steps to avert this behaviour knowing his professional duty and the necessity to exercise a proper stewardship over client funds entrusted to him.

46. The Tribunal considered whether Mr Onobrakpeya could have avoided acting as he did without harm coming to him or his daughter. The Tribunal considered that Mr Onobrakpeya could. He could immediately have reported the matter to the police and required his daughter to have been protected. Mr Onobrakpeya could have secretly arranged for a member of staff to take steps if he felt he could not himself. The men appeared not to have checked the arrival of the telegraphic transfer, which is not usually immediate, and Mr Onobrakpeya could have pretended to give the instruction and then have explained to the bank what had happened. He could, for example, have given inaccurate information in the telegraphic transfer instruction that was not immediately obvious.

47. The Tribunal found that in giving untrue information to prospective indemnity insurers, in transferring money held in connection with a mortgage advance to be applied towards the purchase of property and in writing a letter to confirm that completion of that transaction had taken place when it had not Mr Onobrakpeya's conduct was dishonest by the standards of reasonable and honest people. Having heard and seen the Respondent give evidence and heard his explanation for his actions, in particular the disbursement of mortgage advance monies, and his assertions that he had acted under duress which the Tribunal did not believe, the Tribunal was satisfied so that it was sure that Mr Onobrakpeya did not have an honest belief that his actions were correct or could be excused by his being subjected to duress and therefore he knew that what he was doing was dishonest by those same standards.

The mitigation of Mr Onobrakpeya

48. Mr Onobrakpeya had made a mistake with regard to the professional indemnity successor rules. He had formulated no intention to mislead but he had misunderstood the provisions. He had come to learn what those provisions were and that his firm was to have been regarded as one continuous firm.

49. Mr Onobrakpeya found himself in very difficult circumstances. He expected to be rendered homeless in a few months time after his mortgagee had called in his mortgage. Both his personal and professional lives were in disarray. He accepted that he could not turn back the clock but he was not able to salvage much of his life. He expected to be adjudicated bankrupt within the ensuing four months as he could not pay the monies required of him. Mr Onobrakpeya's marriage had broken down and he and his wife were in the process of a separation.

The Tribunal's sanction and its reasons

50. Having made a finding that Mr Onobrakpeya had behaved dishonestly particularly where he had dishonestly handled clients' monies the Tribunal, in order to protect the public and the good reputation of the solicitors' profession, considered it both appropriate and proportionate to impose a striking off order upon him. It was understood by the Tribunal that Mr Onobrakpeya had agreed not only that he must bear responsibility for the Applicant's costs but had also accepted the quantum. The Tribunal ordered him to pay those costs fixed in the agreed sum.

Dated this 15th day of August 2008
On behalf of the Tribunal

A G Gibson
Chairman