

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF DONALD CHARLES O'ROURKE (First Respondent)
and DESMOND JOHN MCCARTHY (Second Respondent)

Upon the application of Geoffrey Hudson
on behalf of the Solicitors Regulation Authority

Mr R Nicholas (in the chair)
Mr P Housego
Mr R Slack

Date of Hearing: 6th October 2010

FINDINGS & DECISION

Appearances

Mr Hudson, solicitor, of Penningtons Solicitors LLP, Abacus House, 33 Gutter Lane, London EC2V 8AR, the Applicant, represented the Solicitors Regulation Authority ("SRA"). The First and Second Respondents were present and represented themselves.

The Application was made on 13th April 2010.

Allegations

1. They failed to keep accounting records properly written up to show their dealings with client money received, held or paid by them and/or failed to record appropriately all dealings with client money, in breach of Rule 32 of the Solicitors' Accounts Rules 1998 ("SAR");
2. They made improper withdrawals from client account, in breach of Rule 22 of SAR;
3. They made improper paper transfers of moneys held in client account from the ledger of one client to the ledger of another client and/or paid sums by way of private loans from one client to another out of funds held for the lender without the written authority of both clients, in breach of Rule 30 (1) and (2) of SAR;

4. They failed to remedy breaches of SAR promptly on discovery, in breach of Rule 7 of SAR;
5. They misused mortgagee client monies and/or failed to comply with mortgagee client instructions in breach of Practice Rule 1 (a), (c), (d) and (e) of the Solicitors Practice Rules 1990 (“SPR”) and Rule 1 of the Solicitors Code of Conduct 2007 (“SCC”);
6. They failed to fulfil undertakings given to lender clients in the course of their practice, contrary to 18.02 of the Guide to the Professional Conduct of Solicitors and Rule 10 of the SCC;
7. The Second Respondent acted in circumstances where there was a conflict of interest through acting for a lender and a borrower, in breach of Practice Rule 6 of SPR.

Factual Background

1. The First Respondent was born on 15th September 1932. He was admitted to the Roll of Solicitors on 30th May 1961 and his name remained on the Roll at the time of the hearing. The Second Respondent was born on 3rd April 1943. He was admitted to the Roll of Solicitors on 15th December 1973 and his name remained on the Roll at the time of the hearing.
2. At all material times the Respondents practised in partnership as O’Rourkes at 20 Baker Street, Middlesbrough TS1 2SW. At the time of the hearing both Respondents held practising certificates and continued to practise in partnership.
3. On 22nd July 2008 an inspection of the books of account and other documents of O’Rourkes was commenced by a Forensic Investigation Officer (“FIO”) of the SRA. The resulting report is dated 1st May 2009.

Findings of Fact and Law

4. Both Respondents had admitted all of the allegations and facts underlying those allegations without qualification. The First Respondent’s admissions were based on his position as a principal of the Firm. It was clear to the Tribunal that the First Respondent had had no direct dealings with any of the matters which had given rise to this application. There had been no reason for him to have known of the matters which had led to these proceedings and he thus had limited culpability. It was against this background that the Tribunal’s Findings against both Respondents should be noted. The Tribunal found, so that it was sure, that all the allegations had been proved against the Respondents. There had been multiple breaches of the SAR, the SCC, the Guide to the Professional Conduct of Solicitors and the SPR. All of the breaches arose from the Second Respondent’s practice in the field of conveyancing.
5. In the matters relevant to this case the Second Respondent had acted for approximately twelve clients who had been described in the papers as property “wheeler dealers”. This group of clients were sophisticated in buying and selling property, often for the “buy to let” market. For this small group of clients the Second Respondent had operated a client account ledger for each client, rather than in respect of each transaction. Accordingly, there were multiple transactions recorded on the client ledgers for some clients. This had led to incorrect accounting and the

application of mortgage monies to the wrong property. When combined with inadequate narratives to describe the various transactions within the client ledger, it had become impossible to follow a full audit trail of dealings relating to sale and purchase money and in particular mortgage funds.

6. In making the application the SRA had relied in particular on eight transactions which exemplified the breaches of the SAR, SCC and SPR. The Second Respondent had acted for Mr and Mrs B in respect of a number of transactions between 2004 and 2007 and for a Mr and Mrs H between August 2003 and June 2008.

Sale of 22 SC, Middlesbrough

7. In this transaction the Respondents' firm acted for the purchaser, Mr C, whilst the vendor, Mrs H, was not separately represented. Mrs H was a client of the Respondents' firm in other transactions. O'Rourke acted for Mr C and agreed to act for the lender under the terms of the CML Handbook. In dealing with the transaction the Respondents failed to advise the lender that part of the purchase monies were passed from Mrs H to Mr C at the beginning of the transaction. The Respondents' firm failed to register the interests of the lender and the purchaser in the property on completion. The Respondents failed to honour an undertaking to discharge Mrs H's mortgage on the property. There were therefore a number of breaches of the Respondents' duty to the purchaser and lender clients.

Sale of 5 HS, Middlesbrough

8. On this occasion, Mrs H sold the property to a Mr A. The Respondents acted for Mr A and the lender. The Respondents failed to advise the lender that Mrs H's title to the property had been registered for less than six months. After completion, the Respondents failed to register the purchaser's and the lender's interests in the property. The Respondents failed to honour the undertaking given to Mrs H's mortgagee to discharge her mortgage on the property.
9. In both of the above transactions, the Respondents had remitted sums to Mrs H for her own purposes instead of using those sums to discharge Mrs H's mortgage. There had been significant delay in rectifying the breach, but the Respondents had by January 2009 paid £166,000 from office account to the lenders in respect of sums which should have been remitted to those lenders in respect of the sale of 22 SC and 5 HS. The Second Respondent had admitted the breaches alleged in respect of these transactions in the course of the FIO's investigation.

7/9 PS, Middlesbrough

10. O'Rourke acted for Mrs H in the purchase of 7/9 PS from a Mr H (a relative of Mrs H) and Mr S. A mortgage advance was made for Mrs H to purchase this and another property, in the total sum of £234,500. Of this total amount, £175,000 was transferred to the ledger account of Mr S on 8th August 2006. That sum included £45,500 advanced by the lender in respect of a proposed purchase of another property. The Second Respondent had admitted, and the Tribunal found, that this had been a misuse of mortgage funds as sums which should have been allocated towards the purchase of one property had been used in the purchase of another.

87 US, 257 US, 48 PS and 4 WS, Middlesbrough

11. In May 2006 the Respondents were instructed by Mr B and his lender bank in respect of the purchase and remortgage of the above properties, together with four other properties. The lenders advanced £444,000 on 30th May 2006. In respect of both of the US properties, O'Rourke's were to complete a remortgage. However, the remortgages failed to complete and the Respondents were in breach of an undertaking to use the sum of £94,000 of the total advanced for that purpose. A total of £62,000 of the £94,000 had been paid by the Respondents to Mr B, in breach of the undertaking to the lender. The Respondents had made good the deficit of £94,000.
12. In about February 2006 O'Rourke's acted for Mr B in his purchase of 48 PS. On completion, O'Rourke's failed to redeem the prior mortgage, in breach of the undertaking to the new mortgagee. When that mortgage was redeemed, it was only possible to do so using money which had been held for another client, Mr S. Otherwise, there would have been insufficient funds. This inter client transfer was not authorised and was a wrongful transfer. Thereafter O'Rourke's had failed to register the new mortgagee's Charge over the property. When the property was subsequently sold by Mr B the Respondents acted for a company of which Mr S was a director. The purchase price of the property was £65,000 and that sum was received from a lender on 9th March 2007. However, only £60,000 was transferred to Mr B's client ledger account in respect of this property.
13. With regard to 4 WS, instead of redeeming the prior mortgage for Mr B on this property, the sale proceeds were used to discharge his mortgage on another property.

13 CS, Wolverhampton

14. In August 2006 O'Rourke's were instructed in connection with the purchase of 13 CS by Mr S from Mr B for £70,000. Mr S obtained an advance of £70,000 for the purchase and O'Rourke's were instructed to act for the lender in accordance with the CML Handbook. O'Rourke's undertook to utilise the funds solely for the purchase of this and one other property. Having received funds from the lender, an inter ledger transfer was made in the sum of £10,000 from Mr S's client ledger account to Mr B's client ledger account and thereafter an inter ledger transfer was made in the sum of £60,000 from Mr S's client ledger account to Mr B's client ledger account. Although mortgage funds for the purchase of 13 CS had been received in August 2006 the mortgage on 13 CS had not been repaid breaching the undertaking to the lender.

41 BS, Middlesbrough

15. O'Rourke's acted for Mr B in the purchase of 41 BS from Ms N, who was a client of the firm but not separately represented in this transaction. The agreed purchase price was £50,000 for which purchase Mr B obtained a mortgage of £44,500. O'Rourke's were instructed to act for the lender in accordance with the CML Handbook. The mortgage advance was made on 11th November 2005. Subsequently £48,000 was credited to Ms N's client account ledger but the balance of £2,000 was not paid through the firm's accounts. O'Rourke's did not report to the lender that the £2,000 shortfall was to be paid directly from Mr B to Ms N. In February 2006 Mr B agreed to remortgage the property in the sum of £48,380 and O'Rourke's were instructed to act for the new lender. The mortgage advance was made on 27th February 2006 but

was not used to redeem the prior mortgage. The prior mortgage was in fact discharged on 1st June 2006, but using sums which had been allocated by a lender for other properties. There had in any event been a failure to redeem the prior mortgage. When the prior mortgage was redeemed, this had been done using funds which should have been allocated for other purposes and there was therefore a misuse of mortgage funds.

16. Further to the above transactions, there had been a number of inter client loans made without written authority by the clients. In particular, on 31st January 2005 there was an inter ledger posting of £100,000 from the client ledger account of a Mr Sh to the client account ledger of Mrs H. On 16th January 2006 there was an inter ledger posting of £5,000 from the client account ledger of Mr Sh to the client account ledger of Mr B. On 11th August 2006 there was an inter ledger posting of £63,000 from the client ledger account of Mrs H to the client ledger account of Mr Sh. On 16th November 2006 there was an inter ledger posting of £15,000 from the client ledger account of Mr S to the client ledger account of Mr B. The clients had authorised the firm's accounts department to make the transfers, but no written authorities had been obtained. The Respondents had had a duty to act within the SAR in respect of inter client loans and had not done so.
17. Dishonesty had not been alleged in respect of any of the allegations and there was no finding of dishonesty.

Mitigation

18. Neither Respondent had made any personal gain from the breaches of the SAR, SCC or SPR. The Respondents had repaid approximately £325,000 from their own funds to the mortgage lenders to make good the losses which had been identified. No claim had been made on the Respondents' insurance or on the Compensation Fund.
19. The First Respondent was now 78 years old and had approximately 55 years experience in the law. He did not wish to criticise the Second Respondent, who had been working long hours for little reward at the time of the breaches. The property market had been very busy and in the First Respondent's view the Second Respondent had been overwhelmed by the pressure of work. The First Respondent had not known that the Second Respondent was in difficulty in this way.
20. The Second Respondent, who was now 67 years old, accepted full responsibility for the breaches. The First Respondent had had no active part in any of the transactions and had at all relevant times been working from a branch office. The First Respondent dealt almost exclusively in his practice with probate and wills, not conveyancing. The firm had had routine accounts monitoring but no problems had been identified on the accounts.
21. All of the problems which were the subject of these proceedings had occurred in transactions relating to the firm's property dealing clients. At the relevant time, mortgage lenders had been very keen to lend without specifying against what property the Charge should be registered. The banks had been happy to do this until the "credit crunch" started. In some cases the banks had not specified the property in respect of which a loan was made or if it had been specified in writing, the instructions had later

been changed by telephone. The local bank manager for one bank in particular had been happy to do this.

22. The wrongly applied funds had been repaid to the mortgage lenders so either the bank or the clients would now have the benefit of this. It had taken some time to establish the losses and the property valuations since the property market had collapsed from 2008.
23. The Second Respondent had realised that the way he was dealing with property transactions, in particular by having multiple transactions on one client ledger, was creating problems but had not appreciated how serious this was until the FIO's inspection. He had been very busy with work at the relevant time. The firm had charged only £250.00 plus VAT and disbursements for each transaction.
24. The Respondents' practice had for the first time had to enter the Assigned Risks Pool as they had been unable to obtain insurance on the open market. The firm at one point had about 25 employees but had had to make redundancies in the last three years and closed an office with the result that there were now about 9 employees. Both Respondents wished to continue in practice. The Second Respondent reported that he was undertaking training with regard to accounts and the First Respondent had bought the latest Law Society book on solicitors' accounts. Both Respondents had conditions on their practising certificates which had been imposed on 14th July 2010. The conditions included provision of half yearly accountants' reports, undertaking accredited courses on the SAR and work on money laundering/anti fraud strategies, all of which training needed to be carried out by about mid November 2010.

Costs Application

25. The Applicant requested an Order for payment of the total costs of these proceedings in the sum of £38,143.36. Of this sum, £600 was for the SRA fees, the Applicant's fees of £7,628.98 (including VAT) and the FIO fees of £29,914.38.
26. The Respondents had indicated that they would agree the costs in full.

Previous Disciplinary Sanctions Before the Tribunal

27. None.

Sanction and Reasons

28. This case involved a large number of breaches of the SAR, SPR and SCC and multiple breaches of undertakings over a period of three years.
29. The First Respondent had limited culpability and this arose because he was in partnership with the Second Respondent. There had been no reason for him to know of the breaches being committed by the Second Respondent. Several accountants' reports in the relevant period had been produced and had not raised any concerns. The Tribunal was satisfied that the First Respondent had had no active involvement in the matters which had given rise to these proceedings.

30. The Second Respondent's conduct revealed a cavalier and reckless disregard for the interests of both institutional lenders and the firm's clients, together with systematic breaches of the Rules and Regulations, as set out in the allegations.
31. The Respondents had made early and full admissions. There had been cooperation from both partners in the firm with the SRA investigation. There had been no ultimate loss to lenders, clients or any other member of the public. The Respondents had paid £325,000 from their own resources to rectify shortfalls on mortgage advances.
32. It was clear to the Tribunal that whilst there had been very serious breaches, there was no dishonesty nor had there been any claim on the Solicitors Indemnity Fund nor the Respondents' professional insurers, and there had been no claim on the Solicitors Compensation Fund.
33. The Tribunal noted that both Respondents had been required by the SRA to complete certain training courses by the middle of November particularly with regard to the SAR.
34. The Tribunal was satisfied that there should be an apportionment of responsibility in this case which should be reflected in both the sanction and costs orders.
35. Taking into account all of the circumstances of the case the Tribunal considered it appropriate to Order that the First Respondent should be Reprimanded and the Second Respondent should be required to pay a fine of £10,000.

Decision as to Costs

36. To reflect the apportionment of culpability in this matter, the Tribunal considered it appropriate to make no Order for costs against the First Respondent and to Order the Second Respondent to pay the SRA's costs in full in the sum of £38,143.36.

Orders

37. The Tribunal Ordered that the Respondent DONALD CHARLES O'ROURKE of 20 Baker Street, Middlesbrough, TS1 2SW, solicitor, be REPRIMANDED and made no Order for costs against the said Respondent.
38. The Tribunal Ordered that the Respondent, DESMOND JOHN MCCARTHY of 20 Baker Street, Middlesbrough, TS1 2SW, solicitor, do pay a fine of £10,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £38,143.36.

Dated this 2nd day of December 2010
On behalf of the Tribunal

R Nicholas
Chairman