

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF PETER HARRY WILLIAM EDWARD LAZARUS, solicitor
(First Respondent)

- AND -

and WYN ROSSER, solicitor's clerk (Second Respondent)

Upon the application of George Marriott
on behalf of the Solicitors Regulation Authority

Mr K W Duncan (in the chair)
Mr D Potts
Mrs V Murray-Chandra

Date of Hearing: 16th March 2010

FINDINGS & DECISION

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

Appearances

Mr George Marriott of Gorvins, 4 Davy Avenue, Knowlhill, Milton Keynes, MK5 8NL for the Applicant.

Mr Christopher Childs of MLM Cartwright Solicitors, Pendragon House, Fitzalan Court, Fitzalan Road, Cardiff, CF24 OBA for the Second Respondent, Mr Rosser.

The matter against the First Respondent, Mr Peter Harry William Edward Lazarus, was adjourned to 15th and 16th June 2010.

The application was dated 3rd July 2009.

Allegations against the Second Respondent, Wyn Rosser

1. He acted in circumstances of a conflict of interests.

2. [Withdrawn]
3. He failed to act in the best interests of his client, contrary to Rule 1(c) Solicitors Practice Rules 1990 ("SPR") and Rule 1.04 Solicitors Code of Conduct ("SCC").
4. He failed to provide client care and costs information to clients, contrary to Rule 15 SPR and Rules 2.01, 2.02 and 2.03 SCC.
5. He failed to maintain his duty of confidentiality.
6. He failed to maintain a proper standard of work contrary to Rule 1(e) SPR and Rule 1.05 SCC.
7. He sought to influence a client's choice of solicitor, contrary to Rule 1(b) SPR. [breach of Rule 10.01 SCC withdrawn].
8. [Withdrawn]
9. He misled a third party and another solicitor, contrary to Rule 1 SPR.

The evidence before the Tribunal included the admissions of the Second Respondent, Mr Rosser to the allegations.

Factual Background

1. At the material time the Second Respondent was employed by Peter Lazarus & Co at 28 Llandeilo Road, Cross Hands, Llanelli, Dyfed, SA14 6NA.
2. In August 2005, the Second Respondent was instructed to act for G and J through their company, GDL, in relation to the purchase of land which G had discovered he might be able to develop. The land was to be purchased from G's mother. The land was situated to the rear of his mother's home ("No 66") under a separate Land Registry title. G and J owned and lived in the neighbouring property ("No 68") which they had had valued at £140,000.
3. The land was held in trust following the death of G's father whose will was not proved following his death and in respect of whose estate letters of administration had not been extracted. The executors and trustees of the will were G, his mother, and G's brother.
4. At the time of instruction G's mother and G's brother agreed to the trust being broken in order for the land to be conveyed to GDL. GDL intended to demolish the existing property at No 68 and to redevelop the land, which had the benefit of planning consent, together with the space previously occupied by No 68 (referred to as "the site").
5. G's mother instructed R Solicitors to act for her in relation to the transaction. G and J instructed the Second Respondent after being advised that they needed to be independently advised. Some details about the transaction had not been agreed.

6. At his initial meeting with G and J on 27th July 2005 the Second Respondent noted that the site was very saleable and made a record in his file note that he would "need to mention this matter to N" (a third party and one of "lots of people" whom the Respondent considered would be interested in his new clients' instructions).
7. Following a row between G and J and G's brother on 3rd August 2005, the Second Respondent decided on 4th August that he could no longer act for G's brother. Accordingly G's brother instructed another firm, JFD, to represent him.
8. A client care Terms of Engagement letter was sent to G and J on 8th September 2005 stating a rate of £130 per hour but giving no estimate of the total cost. No client care letter was sent to GDL or referred to GDL.
9. In November 2005 G and J decided to purchase the land from G's mother for £100,000 and to develop the site themselves. The Second Respondent was alerted to the Capital Gains Tax implications for G's mother as trustee of such a sale by the trust, in his conversation with her solicitors on 29th January 2006 but dismissed this as a reason to delay the transaction as it was not a matter for G and J to worry about.
10. Due to a restriction in the title it was necessary to appoint an additional trustee to convey the legal state and to give a valid receipt for the completion monies. The Second Respondent prepared the transfer documents and sent them to G's mother's solicitors on 7th April 2006.
11. On 27th March 2006 the Second Respondent noted that he had not estimated the firm's costs to G and J but that he "expect[ed] it to be in the region of £1,500 plus VAT". On 10th April 2006 the Second Respondent met with G and J and told them his bill was "likely to be £2,000 plus VAT" and that he intended to "take it out of the mortgage".
12. The land was independently valued for G's mother by JF Limited instructed by her solicitors. The valuation was of a part of one title and of the whole of another title and took into consideration planning consent for the development of the site. The planning consent required construction of a new access road through No 68, without which the land could not be developed. By the time of the valuation, G and J had demolished their property and were living on site in a caravan. The Second Respondent did not dissuade G and J from demolishing their house, despite knowing that to do so was not in their best interests because the property remained subject to an outstanding mortgage.
13. Sold for development purposes together with access over No 68 the land was valued at £100,000. Without the benefit of this access the land could not be developed and was valued at only £12,000. Because the full valuation of the land could not be realised for development purposes without the coincidental sale of No 68, the valuer noted that No 68 represented a ransom strip and attributed an open market value of £100,000 for G's mother's interest in the land and of £150,000 for G's interest in No 68. Accordingly the open market value of the site as a whole with planning permission was considered to be £250,000, being the total value of both sets of interests. In apportioning the total value of the site in this way, the valuer attributed two-fifths of the total value of the site to G's mother (i.e. the land) and three-fifths of

the total value of the site to G (i.e. No 68) on account of the ransom strip. Accordingly part of the development value of the land would be payable to G and J in recognition that the development of the trust's land could not go ahead without their cooperation.

14. G and J were anxious to make progress to complete the transaction to enable development. As completion seemed imminent, G's mother's solicitors raised a legal issue with the mechanics of the transfer which related to G's brother's interest in the land. The Second Respondent advised G and J to encourage G's mother to instruct another solicitor on the basis that he thought there was nothing to stop G's mother from selling the land "provided she keeps the money on trust".
15. The Second Respondent sought Counsel's Opinion upon the matter on behalf of GDL. Counsel advised that the vendors should be all of the executors of the will including his brother and that G's mother would need to be a vendor in her capacity both as the holder of her own beneficial interest and also in her capacity as executor and trustee of the estate's interest. G's mother's solicitors wrote to the Second Respondent on 8th May 2006 in terms that they were in agreement with Counsel but the Second Respondent rejected Counsel's Opinion as bad advice. He spoke at length to another firm of solicitors, TRS about the matter and faxed confidential documents to them with a view to them representing G's mother.
16. On 24th May 2006 G's mother's previous solicitors ceased to act and the Second Respondent wrote to TRS and asked them to contact G's mother and secure her instruction on 26th May 2006 stressing the urgency to complete quickly.
17. On 20th June 2006 the Second Respondent learned from J that disagreements had broken out between the trustees and potentially litigious correspondence was being exchanged. He was aware that the trustees were no longer in agreement.
18. In July 2006 the Respondent noted that the fees for the time that he had spent on the matter were likely to be approaching £5,000 to £6,000, although he stated that he "hate[d] to think how much is on this file altogether".
19. On 28th July 2006 J told the Second Respondent that they would be unable to afford to pay the trust £100,000. Under the terms of the will G's mother could only sell the land in exchange for fair market value to be held on trust otherwise she would be in breach of her duties as a trustee and executor under the will.
20. In August 2006 the Second Respondent learned through J that TRS had sought opinion from Counsel on whether the matter could proceed. He noted in August 2006 that he needed to secure a covenant and an easement from G's mother in favour of G and J to facilitate full access to the development and that he would have to notify TRS that G and J would not be able to give a first charge over the land. He sent the relevant documents to TRS but no progress was made and completion did not go ahead in October 2006. TRS did not complete the transfer for G's mother as they had concerns with the transaction.
21. The Second Respondent provided details of the proposed development to another client, ERW. The Second Respondent later told J that ERW may be interested in

purchasing the land for £450,000 and that he would be unable to represent both sides of the transaction.

22. On 18th December 2006 an invoice dated 24th April 2006 was issued to GDL in the amount of £4,500 plus VAT. The Second Respondent sent the new invoice to G and J and stated that he "could easily justify a bill of £5,500 plus VAT".
23. The Second Respondent noted that "G was angry at the size of his bill. I (the Second Respondent) snapped at J and told her that.... I could probably justify at least six [thousand pounds]" whereupon J apologised.
24. On 8th February 2007 G and J instructed the Second Respondent to sell the site including the land which belonged to the trust and was not theirs to sell. They instructed BJP to advertise the property for sale. However the Second Respondent had already disclosed information about the site to a third party, EC Limited. They offered to purchase the site for £400,000 on 13th March 2007 from G and J.
25. In an extensive file note dated 13th March 2007 recording his discussions with J following EC Limited's offer, the Second Respondent noted that the transaction was now a "genuine cash sale" in respect of which G's mother would be paid £100,000 which would go "into the estate to be placed on trust for the two boys" (i.e. G and G's brother). The Second Respondent recorded that G's brother would not be told of the transaction until it had taken place.
26. In a file note dated 16th March 2007 recording a conversation that the Second Respondent had with TRS, the Second Respondent wrote that there was "no reason" why he was unable to "act for everyone, including G's mother, on the proviso that £50,000 changes hand (sic) and [is] placed in trust for G's brother..... which is his share". The Second Respondent appointed Mr Lazarus as additional trustee to convey the legal estate in the land to EC Limited in order to conceal the transaction from G's brother. The firm represented G's mother from or around 15th March 2007. No retainer letter was delivered by the firm.
28. On 14th March 2007 the Second Respondent met with J and gave advice concerning the division of the purchase price for the site between the land and No 68. The Second Respondent noted that "the figure we can put in there..... is £100,000 for the whole of the land. This will mean that No 68 is worth £300,000 and as it is their main residence there is no question of capital gains tax". The Second Respondent stated that G and J's property had been "valued at £300,000" when no such separate valuation was obtained.
29. No new valuation was obtained in 2007 when EC Limited agreed to purchase the site from G and J for £400,000, a substantial uplift upon the 2006 valuation. The sale to EC Limited also included a further part of G's mother's land, which had not been included in the 2006 valuation. The Second Respondent apportioned the whole of the uplift over the original valuation to G and J's interest which leapt from £150,000 to £300,000. The Second Respondent did not consider that the increased sale price in any way altered the trust's interest, which remained unchanged from the original valuation at £100,000, notwithstanding that it was 12 months old and did not take into

consideration the full extent of all of the land which was transferred from G's mother even though he knew that the transfer included part of her garden.

30. The Second Respondent determined that the proceeds should be split between G and J and G's mother in this way because G and J sought to engineer the transaction in such a way that they avoided any Capital Gains Tax liability. By buying and then selling on the land at the £100,000 price quoted on the 2006 valuation and attributing the rest of the sale price to No 68 (being their principal residence) G and J were able to maximise their profit from the transaction and avoid any CGT liability.
31. Conversely, the trust's sale of the land attracted not only a 2006 sale price rather than 2007 market value but also attracted a future CGT liability in respect of which G's mother was forced to set aside £20,000 to cover that potential liability. In a conversation with G's mother the Second Respondent dismissed G's mother's likely CGT "problem" as something for her (G's mother) to "face some time in the future". He preferred the interests of G and J over those of G's mother, and acted where their respective interests conflicted. The higher sale price was not disclosed to G's mother and she was not informed of the onward sale to EC Limited.
32. Mr Lazarus was appointed as an additional trustee in order that certain of the titles (being those which were subject to the will) could be properly conveyed and the Second Respondent noted "I need to prepare a transfer from G's mother plus [Mr Lazarus] as the additional trustee to G and J] and they can send it all on to [EC Ltd] for £400,000 to give it all a good title. The transfer has already been drawn up, which can be amended". The Second Respondent then confirmed in a letter dated 15th March 2007 that the consideration for the land of £100,000 was to be split as to £50,000 to G's mother for her interest in the land and the other £50,000 to be held on trust by G's mother and by Mr Lazarus under the will. In fact the proceeds of sale belonged to the trust.
33. On 19th March 2007 J instructed the Second Respondent that she and G would split their legal costs, including those that they already owed, with G's mother. The Second Respondent did not confirm this instruction with G's mother and she did not confirm her agreement to splitting the bills with G and J either orally or in writing.
34. The Second Respondent recorded on the file that "They..."i.e. G and J "...want the costs split 50/50 between themselves and G's mother. I am therefore going to let those two bills stand and do another bill to G's mother. I am not going to give a detailed summary on it - I am just going to do a straight bill". The Second Respondent sent an invoice to G's mother on 18th April 2007 in the sum of £5,000 plus VAT without any detailed summary.
35. BJP submitted an invoice in respect of their commission due having provided information about the site to EC Limited on 19th March. The Second Respondent disputed the invoice claiming that he had introduced EC Limited to the purchase despite having placed the site on the open market through BJP and despite EC Limited having received details of the site from BJP. BJP agreed to reduce their commission on the sale to £4,000 plus VAT.
36. The Second Respondent met with G and J on 21st May at which time he obtained a

further £1,175 of client funds "to enable [Mr Rosser] to pay the bill [from BJP] in the sum of £4,000 plus VAT. At that time the client ledger was £53,310.51 in credit. However, he advised BJP on 22nd June that he had "only just cleared our client's cheque to enable your costs to be paid". He did not settle BJP's account until 26th June 2007.

37. Exchange and completion took place on 20th April 2007 when £400,000 was received on behalf of EC Limited and credited to G and J's ledger. No separate client ledger was maintained for G's mother. On the same date £57,229.93 was sent to Alliance & Leicester to redeem G and J's mortgage and a further £9,010.04 was sent to Barclays Bank to redeem a loan held by G and J. On 23rd April 2007 payment was made to G and J in the sum of £30,279.32.
38. G and J agreed to purchase another property in March 2007 using the profit anticipated in their sale of the site. The ledger showed that in total out of £400,000 received, by 24th April G and J had benefitted from £316,521.29 whereas even on the Second Respondent's figures their benefit was restricted to £300,000. Land Registry records showed that G and J purchased a property on 27th April 2007 for £192,500 and these monies were utilised on behalf of G and J prior to payment for the land being made to G's mother or to G's brother.
39. The completion statement prepared for G's mother recorded her "share" of the proceeds of sale of the site as being £100,000 rather than the sale price to G and J as being £100,000. Her completion statement showed deductions for half of the Second Respondent's charges, namely £5,000 plus VAT and for half the costs of BJP, which had been incurred on behalf of G and J leaving G's mother's proceeds of sale at £42,102.50. In December 2008 G's mother expected a tax liability of up to £20,000 in respect of the transaction further reducing her proceeds from the sale. £50,000 was recorded on her completion statement as being "monies on deposit" but no such sum was ever placed on deposit. The firm also charged his mother a telegraphic transfer fee of £25 when it was not incurred on her behalf. The payment of the balance of funds following the sale was paid by cheque, which the Second Respondent gave to J to deliver to G's mother rather than include the cheque with his letter to G's mother. 50% of BJP's fees and TRS's fees were deducted from G's mother without her agreement. There was no separate file or ledger for G's mother and the file contained no records of meetings or correspondence with G's mother.
40. Upon learning that the transaction had been completed without his prior knowledge, G's brother instructed TLP to raise concerns about the transaction in correspondence with the firm. G's mother telephoned the Respondent on 30th April 2007 and requested that the £50,000 held on trust for G's brother be released to him. The Second Respondent advised G's mother that he was only prepared to release the money if G's brother arranged to attend his offices and "sign a document acknowledging receipt of the £50,000 and confirming that he [had] no further claims on his father's estate and also confirming that he [had] taken independent legal advice in relation to the matter." The Second Respondent was not a trustee or adviser to the trustees of the estate.
41. On 11th May 2007 the Second Respondent received a telephone call from G's brother's solicitor, TLP, who had just learned that the sale had completed. The Second

Respondent told TLP that "everyone had had independent advice" and that he [Mr Rosser] "was not paying out anything to G's brother until G's brother had taken advice." The Second Respondent noted that he intended to "tell G's brother what was what and send him down to see his solicitor". This was despite the telephone call being with G's brother's solicitor.

42. Following the conversation, TLP wrote to the Second Respondent on 16th May expressing concern that G's mother's share in the site had been sold for 25% of the total sale price whilst she had not had separate legal representation, that the Second Respondent had acted in a clear conflict of interest in acting jointly for G and for G's mother and that no information had been provided to G's brother who was an executor and trustee under the will.
43. The Second Respondent responded on 28th June 2007 and stated that the land was valued by BJP at £100,000 and transferred from G's mother to "our clients", [i.e. G and J] who "subsequently sold it on. That £100,000 is in trust". It was misleading for the Second Respondent to state that the land was valued at £100,000 in the context of the sale of the site for £400,000 as the valuation by BJP had been based upon an entirely different proposal and in any event did not take account of the increase in the size of the plot transferred to G and J or of the general house price inflation. No monies were placed in trust.
44. The Second Respondent's letter to TLP went on to state that G's mother "was independently advised in relation to this matter and it was only when she was happy with everything that this firm agreed to act for her as well as the remainder of her family in, what was in essence, a simple conveyancing transaction" although Mr Lazarus later described the matter to the SRA as a "very difficult and protracted conveyancing matter". G's mother was not separately and independently represented throughout the transaction.
45. TLP replied on 23rd July 2007 indicating G's brother's acceptance of £25,000 plus interest "in full and final settlement of any claims he had against the land you sold under the estate of the late Mr G" provided that it was paid within seven days. On 11th September 2007, the Second Respondent requested his Practice Manager to calculate the interest that was due to G's brother and then sent payments to TLP more than ten weeks after payment was first offered on 28th June 2007.
46. The Land Registry raised a requisition of title on 16th May 2007 due to three of the title numbers within the site being in the ownership of G's late father and G's mother. The Second Respondent failed to inform EC Limited's solicitor that a requisition had been raised and they learned of the issue directly from the Land Registry. They wrote to the firm on 30th May requesting confirmation that the issue was being dealt with as a matter of urgency as they were unable to register the transfer to their client. The Second Respondent did not reply to them or to the Land Registry. On 12th June the Land Registry wrote a letter to the firm warning that the application would be cancelled on 19th June 2007 because it had not received a reply to its 16th May requisition. The firm requested an extension of time within which to respond which was granted until 25th June, although in the meantime a further requisition was raised due to an error on a deed that the Second Respondent had prepared. The Second Respondent sent the amended documents to the Land Registry on 21st June 2007.

47. On 31st August 2007 the Land Registry noted that part of the land remained registered to G's late father and G's mother and that no transfer had been received or was pending in respect of it. EC Limited's solicitors expressed their dissatisfaction with the position in a fax of 5th October 2007 in which they noted that, despite the passage of time "all that has occurred so far is a transfer of some of the title from G's mother to G and J". The Second Respondent submitted the documents to the Land Registry on 23rd October 2007. Even then they were returned by the Land Registry as "substantially defective", those defects being set out in a more comprehensive manner on 5th November 2007. The Second Respondent responded to the Land Registry on 16th November which he copied to EC Limited's solicitors under cover of a letter in which he referred to the matter as "turning into one of 'pro-bono' work" and suggested that the work that he had done merited thanks from their client. Despite this, the Land Registry raised further requisitions on 21st November.
48. On 23rd November EC Limited's solicitors advised that the delay in registration was now such that it threatened their client's funding for the development of the land, which was likely to be withdrawn on 10th December. The Second Respondent resubmitted amended documentation to the Land Registry on 26th November and informed EC Limited's solicitors that he was "thoroughly fed up" with the matter.
49. The application was again rejected by the Land Registry and returned on 27th November, this time because the Second Respondent had failed to answer one of the Land Registry's questions. The Land Registry stated that the application could only be accepted once the Second Respondent responded to all of the points raised in previous correspondence. The application was rejected for the last time on 4th December 2007 and was finally completed and the registration documents forwarded to EC Limited's solicitors on 10th December 2007.
50. The Tribunal reviewed all the documents submitted by the Applicant which included: The Rule 8(1) Statement together with enclosures.
51. The Tribunal reviewed all the documents submitted by the Second Respondent which included:
- A letter dated 10th March 2010 from Morris Roberts' solicitors.

Witnesses

No oral evidence was given.

Findings as to fact and law

1. The Tribunal found all the allegations to have been substantiated against the Second Respondent, indeed they were admitted by him.

Mitigation

2. Mr Childs on behalf of the Second Respondent confirmed that the Second Respondent had been practising as an unqualified conveyancer since 1980. He was now employed

by Morris Roberts Solicitors who were fully aware of the allegations and had supported the Second Respondent. Indeed, they had provided the Tribunal with a reference. The Second Respondent accepted that with hindsight he had taken his eye off the ball when the circumstances of the transaction had changed. G and J had demolished their house without his knowledge and he had failed to appreciate the significance of an increase in the value of the house.

3. The Second Respondent accepted his shortcomings and provided the Tribunal with some further background relating to the circumstances of the allegations. The Tribunal was referred to a statement from G's mother confirming she was fully aware of the circumstances of the transaction and that she did not believe the Second Respondent had taken advantage of her. She had given her verbal agreement to pay the costs of G and J.
4. The Second Respondent had acted in the belief that he was acting in the client's best interests but this belief was mistaken and he had made misjudgements which could have been avoided if Mr Lazarus had supervised him properly.
5. Morris Roberts Solicitors were willing to continue employing the Second Respondent and the Second Respondent accepted an Order would be made by the Tribunal under s.43 of the Solicitors Act 1974 (as amended). There had been no complaints against the Second Respondent, he had been properly supervised in his new employment and the Tribunal was asked to make an Order which would allow the Second Respondent's current employers approximately 12 weeks in order to obtain The Law Society's permission to continue to employ the Second Respondent. The Tribunal was asked to implement any Order they made after 12 weeks which would allow sufficient time for an application to be properly processed by The Law Society.

Previous disciplinary sanctions before the Tribunal

6. None.

Sanction and Reasons

7. There had been a number of serious breaches of the regulatory rules existing to protect clients and their funds with which the Second Respondent had not complied. He had failed to act in the best interests of his client, he had breached his duty of confidentiality to his client and had misled third parties. As a result of the Second Respondent's actions, clients had suffered and the reputation of the profession had been damaged.
8. The Tribunal felt that the Second Respondent's employment within a legal practice needed to be monitored and that it was appropriate for an Order to be made under s.43 of the Solicitors Act 1974 (as amended). The Tribunal was mindful that the Second Respondent was currently in employment and that his employers were willing to continue to employ him subject to obtaining permission in writing from The Law Society. Such permission was likely to take approximately 12 weeks and accordingly, the Tribunal was prepared to make an Order under s.43 of the Solicitors Act 1974 (as amended) to commence from 8th June 2010. This was on the basis that Morris Roberts Solicitors had confirmed in their letter of 10th March 2010 that the Second

Respondent was properly supervised, his files were monitored and he had given them no cause for concern during his employment with them since November 2008.

Decision as to costs

9. The Tribunal had ordered that the matter of costs should be adjourned to 15th and 16th June 2010, which was convenient to all parties and which was the date that the case against Peter Harry William Edward Lazarus was due to be heard.

Order

10. The Tribunal ordered that as from 8th day of June 2010 no solicitor, Registered European Lawyer or incorporated solicitor's practice shall, except in accordance with permission in writing granted by The Law Society for such period and subject to such conditions as the Society may think fit to specify in the permission, employ or remunerate in connection with the practice as a solicitor, Registered European Lawyer or member, director or shareowner of an incorporated solicitor's practice Wyn Rosser of 14-15 Spilman Street, Carmarthen, SA31 1SR a person who is or was a clerk to a solicitor. Costs are reserved to the adjourned hearing on 15th and 16th June 2010.

Dated this 3rd day of June 2010
On behalf of the Tribunal

K W Duncan
Chairman