

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF GEORGE TIERNEY and ADAM TIERNEY solicitors (Respondents)
and JULIAN TIERNEY solicitor's clerk (Respondent)

Upon the application of Peter Harland Cadman (the Applicant)
on behalf of the Solicitors Regulation Authority

Mr D Leverton
Mr S Tinkler
Mr S Marquez

Date of Hearing: 13th May 2010

FINDINGS & DECISION

Appearances

Mr Peter Harland Cadman, a partner in the firm of Russell-Cooke LLP of 8 Bedford Row, London WC1R 4BX appeared on behalf of the Applicant.

Jonathan Richard Goodwin of Jonathan Goodwin, Solicitor Advocate of 17E Telford Court, Dunkirk Lea, Chester Gates, Chester CH1 6LT appeared on behalf of the First Respondent, George Tierney and the Second Respondent, Adam Tierney.

George Marriott of Russell Jones & Walker, 50-52 Chancery Lane, London WC2A 1HL appeared on behalf of the Third Respondent, Julian Tierney.

The application to the Tribunal on behalf of the Solicitors Regulation Authority ("SRA") was made on 4th September 2009.

Allegations

1. The allegations against the Third Respondent, Julian Tierney, is that he, having been employed or remunerated by solicitors but not himself being a solicitor had been a party to acts or defaults in relation to a solicitor's practice which involved conduct on his behalf such that it would be undesirable for him to be employed or remunerated by a solicitor in connection with that practice and in particular:
 - (a) That he was responsible for the creation of a file entry which purportedly was a contemporaneous record but which was in fact created or altered after the event.
 - (b) That he was responsible for the creation of a copy letter purportedly sent to a lay client but which was in fact created or altered after the event.

(The allegation against the Third Respondent was that conduct with regard to allegation 1 (a) and allegation 1 (b) constituted dishonesty or behaviour that was consciously improper. For the avoidance of doubt even if dishonesty was not made out the matter was of such gravity that a Section 43 Order was appropriate.)

2. The following allegation was made against the First Respondent, George Tierney, and the Second Respondent, Adam Tierney, on behalf of the Solicitors Regulation Authority.
 - (c) That they failed to report the misconduct of an unadmitted fee earner promptly or at all.

Factual Background

1. The First Respondent, born in 1932, was admitted as a solicitor in 1966.
2. The Second Respondent, born in 1966, was admitted as a solicitor in 1995. The First and Second Respondents' names remained on the Roll of Solicitors.
3. The Third Respondent was an unadmitted conveyancing manager employed by the First and Second Respondents' firm in which they were partners.
4. The Respondents were instructed to act for MB and JM in the purchase of a property at Nottingham, which was duly completed. Subsequently MB and JM separated. They were in dispute as to the share of the Nottingham property to which each of them was entitled. In due course MB made a claim against the Respondent's firm asserting that he had not been properly advised at the time of the purchase and as a result had suffered a financial loss following a claim brought against him by JM. The claim by MB against the firm was settled by way of a payment of £25,000.00.
5. The Third Respondent had had conduct of the purchase of the Nottingham property. There was a dispute as to advice given by the Third Respondent to MB prior to the

purchase as to whether the property should be held by MB and JM as joint tenants or tenants in common.

6. The firm's file relating to the purchase of the Nottingham property contained a handwritten entry which on its face was dated 25th November 2000 and was in the following terms:

“25/11/00 saw [JM] aim for Friday – spoke re deposit. [MB] paying from business but still buy as joint tenants – said still speak to him she left to me.

26th spoke to [MB] Re T-in-loan. Sent him explanation to “garage” but too late in the day. Money already sent to us.”

The file also contained a letter addressed to MB bearing the date 26th November 1998 in the following terms:

“Dear [MB]
Re. Purchase of [the Nottingham property]

Further to our brief telephone conversation I enclose a copy of my “standard explanation” of differences between ownership as joint tenants and tenants in common.

One of the main objects of owning a property as tenants in common is to cover its ownership after the death of one of you but the other main object is to protect, as far as possible, any disproportionate input by either buyer.

If you need any further clarification please give me a ring but, bear in mind, completion is scheduled for tomorrow!”

7. MB did not accept that such advice had been given nor that any such letter had been received. The firm had referred MB's claim to its indemnity insurers, AON. The Second Respondent dealt with this aspect of the matter. In a letter of 4th December 2001 addressed to AON he said:

“As you are aware my brother Julian is away at present due to ill health. He is likely to be for some time. I have had the opportunity to discuss the matter with him briefly however. It appears that the letter to [MB] and it's (sic) purported enclosed document are not genuine.

Credibility is of course undermined but I am conscious of your comments that this perhaps has little bearing on the outcome of the matter ultimately. Julian does clearly recall speaking to [MB and JM] about the co-ownership, a fact acknowledged by them both in correspondence I believe”

8. MB issued proceedings against the firm. A defence dated 23rd February 2005 and signed by the Second Respondent was filed. Paragraph 4.10 of that defence was as follows:-

“For the avoidance of doubt, the Defendant does not rely on the attendance note dated 26 November 2000 (sic) or the letter to the Claimant dated 26 November 1998. These documents were produced after the event, and the letter dated 26 November 1998 was never sent out. The Defendant apologises for their actions in this regard, but this should not detract in any way from the fact that it was always the Claimant’s intention to purchase the property as joint tenants with [JM]”

9. In subsequent correspondence between the Third Respondent’s legal representative and the SRA the Third Respondent explained that the attendance note, which on its face was dated 25th November 2000, was a contemporaneous note. When he was checking the file the Third Respondent had noticed that the date written on the note was 25th November but the year had been omitted. He had filled in the year. He had written “2000” in error. It was the Third Respondent’s case that the note had been drawn in 1998.
10. With regard to the letter of 26th November 1998 it was the Third Respondent’s assertion that the letter had been written upon that date but he could not prove that MB had received it.

Preliminary Matter

11. The Tribunal was told that the Third Respondent was prepared to submit to an Order pursuant to Section 43 of the Solicitors Act on the basis that he made limited admissions, namely those covered by the explanations given to the SRA set out in paragraphs 9 and 10 above. The Applicant took the view that he sought a Section 43 Order and there would be no public or professional reason to incur costs in seeking to prove the disputed facts. Agreement had been reached on the question of costs.
12. The First and Second Respondents were prepared to admit the single allegation made against them on the basis, with the benefit of hindsight, they should possibly have reported the conduct of their unadmitted fee earner, such conduct being the subsequent addition of a date (the year) to a contemporaneous document, but had felt at the time that that was not sufficiently serious to justify a report.
13. The Applicant did not accept the First and Second Respondents’ admission on such basis. It was fundamental to his case to establish what they knew at the material time.
14. It was submitted on behalf of the First and Second Respondents’ behalf that the Tribunal should not accept the Third Respondent’s limited submissions and then proceed to determine the case against them on a different basis.

The Tribunal's Decision on the Preliminary Matter

15. The Tribunal noted that the Third Respondent accepted that the Section 43 Order should be made in respect of him and the Tribunal accepted that little was to be gained by an argument as to the basis of such Order, the purpose of which was to regulate the Third Respondent's employment within the solicitors' profession.
16. The Tribunal was of the view that it was clear that the matter should proceed to a full hearing against the First and Second Respondents. It was important to establish what they knew at the material time in order to ascertain the seriousness of their failure to report or, indeed, whether they were in the circumstances under a duty to report.
17. The Tribunal was told that the hearing would proceed without any oral evidence being called.

The Applicant's case

18. The Applicant relied on the documents he had placed before the Tribunal.
19. It was for the Tribunal to make a finding of fact as to what the First and Second Respondents knew at the material time.
20. The Applicant drew the Tribunal's attention to certain documents placed before it in particular a letter addressed by the Second Respondent to the firm's insurer, AON, dated 4th December 2001 in which he said,

"It appears that the letter to [MB] and its purported enclosed document are not genuine".

On 5th December 2001 AON wrote to Nelsons, [MB]'s solicitors stating,

"we now advise that our insured will not be contending that the documents you were proposing to have forensically examined were prepared contemporaneously. We therefore do not think there is any point in the forensic examination proceeding."

21. On 7th December 2001 AON addressed a letter to the Second Respondent in which it said,

"I enclose a copy of Rule 19.04 from the Guide to Professional Conduct. In order to make sure that this is not a situation such as is outlined in paragraph 2 of that Rule you might like to speak informally and on a "no names" basis with the Ethics Division of the Law Society. I am afraid that there is a rather real risk that Nelsons might decide to refer matters to the OSS."

There had been no other letter produced in evidence giving advice about the way in which the property might be held even though a letter giving such advice might have been expected after the Third Respondent's first meeting with MB and JM. It was noteworthy that the Second Respondent indicated to the insurers that he accepted that the Third Respondent's documents were not genuine when a forensic examination of those documents had been required by the solicitors handling MB's negligence claim.

22. In the firm's defence statement made by the Second Respondent which was dated 23rd February 2005 and in which the Second Respondent stated that he believed the facts stated therein to have been true, paragraphs 4.9 and 4.10 were as follows:-

“4.9 On 25th November 1998, Ms [M] contacted the Defendant and said that the Claimant would be paying the deposit of £20,000 from his business. Notwithstanding this, she said that the Property was still to be held as joint tenants. As a result of this, Julian Tierney believes that he would have telephoned the Claimant and have him affirm his instructions, although he cannot specifically recollect doing so. Had the claimant given instructions at this stage that the Property was to be held in a different way, the Transfer Form would have reflected this.

4.10 For the avoidance of doubt, the Defendant does not rely on the attendance note dated 26 November 2000 [sic] or the letter to the Claimant dated 26 November 1998. These documents were produced after the event, and the letter dated 26 November 1998 was never sent out. The Defendant apologises for their actions in this regard, but this should not detract in way from the fact that it was always the Claimant's intention to purchase the property as joint tenants with Ms [M]”

That was an important document lodged with the Court which the Second Respondent had confirmed was a Statement of Truth.

23. During the course of correspondence between the First and Second Respondents' legal representative and the SRA the assertion was made that the Third Respondent had made the limited alteration to the date outlined in paragraph 9 above. Had that been the case, there was no reason why that assertion could not have been adopted during the course of the negligence litigation. It was not so adopted. The Tribunal was invited to take the view that admissions made in the formal defence could be relied upon and the later assertions carried little weight.
24. It was the Applicant's case that the First and Second Respondents believed that the Third Respondent had created a false entry and had created a letter which had never been sent out. As principals in a solicitors' practice they knew and understand that they were obliged to report the Third Respondent's behaviour to their professional regulatory body.

The First and Second Respondents' Case and Mitigation

25. The Tribunal was reminded that the First and Second Respondents had made a limited admission. Appearing before the Tribunal was the worst day of their professional lives. The First Respondent had been qualified as a solicitor for 42 years. Both of these Respondents had served their clients and their profession in an exemplary manner.
26. What these Respondents believed informed their decision whether or not to report the Third Respondent to the Law Society.
27. The Tribunal must in making findings of fact apply the highest standard of proof.
28. The Guide to the Conduct of Solicitors at the material time required them to report any serious misconduct. It was a matter for them to determine whether the Third Respondent's conduct had been serious enough to require the making of a report.
29. The Tribunal made reference to a letter from the solicitors subsequently acting for JM in which it was said:-

“Certainly your Mr Julian Tierney appeared to have no doubt about his instructions. He prepared the Transfer Deed for the purchase of the property on the basis that our clients would hold the beneficial interests as beneficial joint tenants. The Transfer Deed that he prepared, and which both clients signed, clearly states that our clients “are to hold the property on trust for themselves as joint tenants”. Our client recalls that she and your client visited your Wickersley office one evening to discuss the mortgage offer that they had received. She recalls that Mr Julian Tierney took the opportunity of going through the Transfer Deed with them. She recalls that Mr Tierney described the concept of equitable joint tenancy in terms totally devoid of ‘legalese’ and in terms that any person with no legal background would find difficult to misinterpret. If proceedings become necessary, our client will confirm the precise terminology that Mr Tierney used on that occasion.”

30. In a letter dated 11th January 2008 it was pointed out that MB had raised his complaint in January 2007 when the negligence proceedings had concluded early in 2006. He had been well aware of the issues concerning the letter and the attendance note. The obligation to report misconduct was on all solicitors and MB's solicitors had not made a report themselves when had they considered that the conduct alleged warranted such report they should have met their own obligation. There was concern that it was in fact MB's motive to attempt to re-litigate a claim that he had chosen to compromise.
31. It was pointed out that had MB's allegations of misconduct/fabrication of documents advanced by MB been made in 2001 the recollection of the First and Second Respondents would have been much better. They had been asked to deal with the matter by the SRA in 2007 and 2008. Not only that, at the time, the action complained of had taken place 10 years earlier.

32. It was explained that a pragmatic decision had been taken and there seemed little point in incurring the costs of a forensic examination particularly after the First and Second Respondents had decided that they would not seek to rely upon the documents as evidence within any proceedings, a view having been taken that they were of little evidential value.
33. It was confirmed that the Third Respondent's position had remained consistent that the documents were contemporaneous, save for the addition of the date on the attendance note, but he could not prove that the letter had been received after such a lapse of time. It had remained open to the other side to have the documents forensically examined had they so wished. They did not pursue the matter.
34. It was explained that the Second Respondent acknowledged that he should not have signed the defence without correcting the inaccuracy therein but at the time he simply did not read the document carefully enough to spot the error. He conceded, somewhat embarrassingly, that he did not scrutinise the document as sufficiently as he should in part because he knew a concession had been made to the claimant and because it did not adversely affect the claimant's case in any way. The fact was that the defence had created a more adverse position for the firm than was in fact the true position.
35. It was explained that the Second Respondent asserted that there was nothing sinister in the Second Respondent's use of the words "not genuine" in his letter of 4th December 2001 or in his signing of the defence. He accepted that the phraseology used had been ill considered and could have been better.
36. The Respondents had not retained the original conveyancing file relating to the Nottingham property. It had been released to MB's solicitors. This had placed the First and Second Respondents in a position where they could only speculate and could not check the file. The First and Second Respondents' explanations had been consistent throughout. The Second Respondent had formulated no intent to mislead and had not acted recklessly.
37. The First and Second Respondents had been pursued by the SRA over a period of time and further allegations had been added to those made. Some allegations had not been pursued. The Respondents had given a considered response to the caseworker's case note provided to those dealing with the referral of the matter to the Tribunal.
38. The First and Second Respondents did accept and continued to accept the Third Respondent's explanation.
39. With hindsight and having reflected upon the matter closely the Respondents accepted that the fact that they were members of the same family did play some part and they accepted that they should have reported the conduct, as described by the Third Respondent, of the Third Respondent to the Law Society.

40. The Third Respondent had said that he did make the attendance note and upon reviewing the file at home in error added “2000” to the date on the note. The Tribunal was invited to take the view that had the document been fabricated then the matters that it then purported to contain would have been perfect. An error in the date was extremely unlikely. It was accepted that the Third Respondent’s behaviour had been sloppy and he had been in error.
41. A great deal of time had passed since the events in question and the matter had been hanging over the First and Second Respondents’ heads. The First Respondent did not enjoy good health.
42. The Tribunal’s decision would depend upon its interpretation of events. The SRA had placed the worst possible interpretation on the documents and that had been unfair and without merit where no extraneous evidence had been adduced.
43. The Respondents’ explanations had been consistent, persuasive and straightforward.
44. The First and Second Respondents were, however, grateful that no allegation of dishonesty had been made against them. The Third Respondent was grateful that the Applicant would not dispute the limited admissions made by him, which did not amount to dishonesty.
45. The Tribunal was reminded that it had to be sure that the attendance note and the letter had been fabricated by the Third Respondent. The Tribunal had already accepted the Third Respondent’s explanation and it had been provided with no extraneous evidence that would enable it to conclude that the attendance note and the letter had been fabricated.
46. The First and Second Respondents, believing the Third Respondent’s explanation, might not have considered it necessary to report such conduct to the Law Society indeed to have done so might have been regarded as a counsel of perfection.
47. The Tribunal was invited also to bear in mind the passage of time and the adverse effect that this had had upon the Respondents.
48. The Tribunal was invited to take into account the written testimonials submitted in support of the First and Second Respondents, all of which attested to their competence and integrity.
49. The First and Second Respondents had mitigated at this stage as they had already made a conditional admission.

Costs

50. On the subject of costs the Applicant and the Third Respondent had agreed that the Third Respondent would pay the Applicant’s costs fixed in the sum of £2000.00 inclusive. The

First and Second Respondents had agreed with the Applicant that they would pay the Applicant's costs fixed in the sum of £7,000.00 inclusive.

Sanction and Reasons

51. The Tribunal had indicated that it would make an Order pursuant to Section 43 of the Solicitors Act 1974 upon considering the preliminary matter raised.
52. With regard to the single allegation against the First and Second Respondents they had both made an admission in a letter addressed by their representative to the Applicant dated 23rd February 2010. That admission was made on a limited basis. It had been the Tribunal's task to find out what was the First and Second Respondents' knowledge between 2001 and 2004. They had exercised their right not to give oral evidence so that the Tribunal had given close consideration to the correspondence and documents placed before it. The Tribunal had also taken into account the submissions made by each side.
53. The Tribunal noted the contents of the defence in the negligence litigation signed by the Second Respondent and dated 23rd February 2005. The Tribunal also noted the letters written by the Second Respondent dated 4th December 2001 and 21st December 2001. In the earlier letter it stated that it appeared that the letter to MB and its purported enclosed document was not genuine. In the letter of 5th December 2001 the firm's insurers confirmed that the documents in question were not contemporaneous with events. The Tribunal noted that the firm's insurers had referred the First and Second Respondents to Rule 19.04 of the Guide to Professional Conduct and had suggested that they speak to the Ethics Division of the Law Society. They had not done so.
54. Having regard to the documentary evidence before it the Tribunal found the allegation to have been substantiated. The First and Second Respondents did have the requisite belief regarding the Third Respondent's conduct at the relevant time (as had been partially admitted) and should have made a report of these events to the Law Society.
55. The Tribunal had been asked to decide as a matter of fact if the Third Respondent had created the attendance note and/or the letter after the event. The Tribunal finds that the Second Respondent believed that this was the case as he set out in his defence statement. The Tribunal was not satisfied that the First Respondent also so believed, but accepted the admission of the First Respondent as to his belief that the attendance note had been altered as referred to in paragraph 9 above.
56. The nature of the conduct which the Tribunal finds to have been established should have been reported by the First and Second Respondents as principals in a solicitors' firm to the Law Society. They had a professional obligation to do so.
57. In failing to make that report they did not ensure that the best interests of the public and the solicitors' profession were served.

58. The Tribunal had paid careful attention to the submissions made in mitigation. The Tribunal took into account the long period of time which had passed from the happening of the events in question and, indeed, the correspondence which had taken place between the Respondents' representatives and the SRA. The Tribunal noted the previous unblemished history of these Respondents and their firm and had taken into account the excellent written references provided to the Tribunal and the oral evidence of Mr Dean as to the Respondents' good character and the esteem in which they are held in their local professional and wider community.
59. In all of these particular circumstances the Tribunal concluded that it would be both appropriate and proportionate to impose a reprimand upon the First Respondent. Similarly it was appropriate and proportionate to impose a fine of £1,500.00 upon the Second Respondent.
60. The Tribunal had been told that the First and Second Respondents had agreed to pay the Applicant's costs fixed in the sum of £7,000.00 and the Tribunal made such Order on the basis that the First and Second Respondents' liability for such costs be joint and several.
61. On 13th May 2010 the Tribunal Ordered that the Respondent GEORGE TIERNEY of c/o Jonathan Goodwin, 17e Telford Court, Telford, Chester Gates, Chester, CH1 6LT, solicitor, be REPRIMANDED and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £7,000.00 inclusive on a joint and several basis with Adam Tierney.
62. On 13th May 2010 the Tribunal Ordered that the Respondent, ADAM TIERNEY of c/o Jonathan Goodwin, 17e Telford Court, Telford, Chester Gates, Chester, CH1 6LT, solicitor, do pay a fine of £1,500.00, 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 £7,000.00 inclusive on a joint and several basis with George Tierney.
63. On 13th May 2010 the Tribunal Ordered that as from 16th day of August 2010 except in accordance with Law Society permission:-
- (i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor Julian Tierney of c/o Russell Jones & Walker, Solicitors, 50-52 Chancery Lane, London, WC2A 1HL;
 - (ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice the said Julian Tierney;
 - (iii) no recognised body shall employ or remunerate the said Julian Tierney;
 - (iv) no manager or employee of a recognised body shall employ or remunerate the said Julian Tierney in connection with the business of that body;
 - (v) no recognised body or manager or employee of such a body shall permit the said Julian Tierney to be a manager of the body;
 - (vi) no recognised body or manager or employee of such a body shall permit the said Julian Tierney to have an interest in the body;

And the Tribunal further Ordered that the said Julian Tierney do pay the costs of and incidental to this application and enquiry fixed in the sum of £2,000.00.

Dated this 9th day of June 2010
On behalf of the Tribunal

D Leverton
Chairman