

IN THE MATTER OF SHANE STEVEN HENSMAN, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr. A. G. Ground (in the chair)
Mr. R. B. Bamford
Mr. M. G. Taylor CBE DL

Date of Hearing: 23rd July 2009

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of the Solicitors' Regulation Authority (SRA) by Gerald Malcolm Lynch of Cumberland House 24-28 Baxter Avenue, Southend on Sea, Essex, SS2 6HZ on 11th December 2008 that Shane Steven Hensman whose address for service is c/o of Ian Ryan of Finers Stephens Innocent of 179 Great Portland Street, London, W1W 5L3 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 the Respondent were that:-

1. Contrary to the provisions of practice Rule 1(a)(d)(e) of the Solicitors Practice Rules 1990 the Respondent acted in circumstances which were contrary to the good repute of both himself and of the solicitors' profession and compromised or impaired his integrity and his proper standard of work.
2. He acted in a way which was contrary to his position as a solicitor and utilised that position to take unfair advantage either for himself or others.

3. Contrary to the provisions of Rule 13 of the Solicitors Practice Rules and of Rule 5.01(1)(a) of the Solicitors Code of Conduct 2007, he failed to exercise appropriate supervision over an employee of his firm.

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London, EC4M 7NS on 23rd July 2009 when Gerald Malcolm Lynch appeared as the Applicant and the Respondent appeared and was represented by Ian Ryan.

The evidence before the Tribunal included the Respondent's admissions to allegations 1 and 3, together with a number of references concerning the Respondent's character.

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

The Tribunal Orders that the Respondent, Shane Steven Hensman of c/o Mr I Ryan, Finers Stephens Innocent, 179 Great Portland Street, London, W1W 5LS, solicitor, do pay a fine of £3,000.00, such penalty to be forfeit to her Majesty the Queen, and it further Orders that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £5,851.60.

The facts are set out in paragraphs 1-12 hereunder:-

1. The Respondent aged 36 years old was admitted as a solicitor on 15th October 1997. His name remained on the Roll of Solicitors. At all material times he was a partner in the firm of Heptonstalls LLP Solicitors of 9/11 Ropergate End, Pontefract, West Yorkshire.
2. Messrs Heptonstalls Solicitors ("the firm") were instructed by JW in connection with an alleged claim for personal injury against the Local Authority and the Tribunal was provided with copies of all relevant documents. JW alleged he had suffered injury tripping over an unrepaired hole in the road. The matter was fully defended and set down for hearing at the County Court on 18th June 2007. At the material time the file was dealt with by Ms Ellie Cartwright, an unadmitted Clerk conducting the case for another principal of the firm.
3. On 25th May the firm wrote to their client and witnesses confirming the hearing date. There was no suggestion of any difficulty in the attendance of any party. On 30th May Ms Cartwright received a telephone call from the client, JW to say that he had been lying about the circumstances of the accident and that it was caused when his dog pulled him over. At 14.38 pm, the same day, she sent an e-mail to the Respondent because the other principal, whose case it was, was absent due to illness. The Respondent was out of the office when the email was sent. She told the Respondent of the telephone call. She suggested that it was necessary to advise the Insurance Company (who had provided an after the event legal expense insurance policy ("LEI")) and asked the Respondent what she should do.
4. The same day the Respondent sent an email to Ms Cartwright saying that the insurance policy would be invalidated if the lie came to light and she was to see if a deal could be done with the Defendant's solicitors and she was to try to get Counsel to give negative advice and to "pull" the case.

5. The LEI policy provided that a claim would not be covered if the client provided evidence in relation to the claim to the solicitor that was untruthful. The client was required to give full, proper and truthful information and instructions. The firm were not a party to this contract. There was also a Conditional Fee Agreement (“CFA”) dated 23rd March 2005 between the firm and the client. This required the client not to deliberately mislead his solicitors and provided that if the client lost his case he would not have to pay basic costs but would be responsible for disbursements and the costs of the opposition but he would hold insurance (the LEI policies) against these amounts. The CFA also provided that the firm could end the agreement if the client did not keep to his responsibilities. The firm could then decide if the client should pay costs and disbursements. If there was discontinuance on proper grounds, then disbursements could be claimed.
6. On 31st May Ms Cartwright wrote to the Defendant’s Solicitors offering to settle the case on a withdrawal by both sides (i.e. a Part 36 claim) with each side being responsible for their own costs. There was no mention of the client’s confession of fraud. On the same day a letter was sent to the client “as agreed” saying that a Part 36 offer had been made. Prior to this, on 30th May at 12.50 pm, Counsel for the client emailed the firm giving negative advice which was on the basis that the crucial witness who lived at the site of the accident was no longer available and appeared uncooperative. This was the first indication of any such difficulty and without this witness the defendant’s expert evidence could not be challenged. Counsel suggested the matter should not proceed. The LEI policy insurers were not informed and the CFA was not repudiated.
7. The Defendant’s solicitors telephoned to refuse the offer to settle. There was no evidence of any further consideration or action on the part of the Respondent in relation to the confession of fraud by the client or his duties to the LEI insurers.
8. On 5th June in a telephone conversation with Ms Cartwright, the Respondent suggested speaking to the Defendant’s solicitors to seek to agree discontinuance on a basis which would relieve the client of liability. The Notice of Discontinuance would be drafted by Ms Cartwright and on the Respondent’s instructions she was to “inform the Insurers of the outcome”. In other words the Insurers were to be advised that there was discontinuance on merits and which would confirm that company’s liability in costs.
9. On 6th June there was a note on the file that the Defendant’s solicitors would not settle. Ms Cartwright then informed them on instructions from the Respondent that the case could not continue due to the loss of a relevant witness. She prepared a Notice of Discontinuance and was told to advise all parties. The client was told not to attend the hearing and a letter was sent to the crucial witness telling him not to attend. There was no evidence that this witness had gone away or repudiated his evidence or taken any other action which would go to his credibility in the case.
10. On 7th June the firm wrote to the Defendant’s solicitors saying they were making an application to be removed from the Court Record “due to withdrawal of indemnity insurance”. There was no evidence that the LEI insurers had been told the true position. On 23rd July there was a letter from the firm to the LEI insurers stating that the reason for discontinuance of the action was due to the strength of the defence, that

the firm had lost contact with a crucial witness (which was the witness they had written to on 6th June) and advising the negative advice received from Counsel. The letter gave details of disbursements which the LEI insurers were required to pay. On 20th September the firm wrote to the Defendant's solicitors confirming the reason for withdrawal was that the "client was found to be disingenuous".

11. The LEI insurers sought inspection of the file, which was sent to them, and as a result learned that the true reason for discontinuance of the case was the client's fraudulent instructions. Accordingly on 17th August 2007 they wrote to the Solicitors Regulation Authority ("SRA") alleging the Respondent had sought to make a claim on the policy in circumstances where the Claimant had lied and suggesting that a solicitor's duty in such circumstances was to notify the Insurer which would lead to cover under the policy being withdrawn.
12. The SRA wrote to the Respondent on 7th September seeking his observations and on 4th October 2007, the Respondent's solicitor replied submitting the Respondent was under no obligation to advise the Insurers of the client's dishonesty, as there was no contract between the LEI insurers and the firm but only with the client. This was accepted by the SRA. It was further submitted that the Respondent was trying to act in the client's best interests and to assist a junior colleague. His email giving instructions to Ms Cartwright was in informal terms written in some haste whilst out of the office and the Respondent now accepted that the email was misguided. The letter claiming disbursements had been written by Ms Cartwright who had had no involvement with the matter after the 6th June. She had acted out of a misguided belief that this was appropriate. The Respondent had not known of the letter seeking payment of disbursements.

The Submissions of the Applicant

13. The Applicant confirmed allegation 1 had been admitted by the Respondent on a limited basis and that allegation 3 had also been admitted. Therefore, the only disputed allegation was allegation 2.
14. The Tribunal were referred to the email dated 30th May 2007 from the Respondent to Ms Cartwright. In this email the Respondent had replied:

"....will invalidate policy if lie comes to light... see if deal can be done with defs and try to get counsel to give negative advice and then pull it".

The Applicant submitted that the use of the word "lie" showed that the Respondent knew this was a situation of fraud and by using the words "try to get counsel" this meant he wanted Ms Cartwright to persuade Counsel to give negative advice. Even after the facts were clear, and the matter was not going to settle, the Respondent wrote to the LEI insurers on 23rd July 2007 seeking to recover disbursements and advising the LEI insurers that the trial did not take place due to evidence provided by the Defendant's solicitor, loss of contact with an independent witness and negative advice from Counsel. The Respondent did not seek to withdraw this letter at any time and the Applicant submitted the Respondent had no duty of confidentiality to his client once the client had declared that he had lied.

15. Whilst it had been conceded the firm did not have any contract with the LEI insurers, it was still the case that the client was bound by the CFA with the firm and the client's admission of fraud changed the whole procedure.
16. The Applicant submitted Counsel's opinion should not have had any real bearing on how the case progressed and the Respondent should have taken over the file rather than leaving it to be dealt with by an unadmitted member of staff. There should have been no communication whatsoever without the Respondent's knowledge and the Respondent was effectively protecting his client by his course of action otherwise the client would have been obliged to pay the disbursements. The Applicant submitted the Respondent had a duty to be fair to third parties and the LEI were a third party.
17. When the Respondent wrote his email dated 30th May 2007, he had referred to "negative advice" from Counsel and he had not even seen Counsel's advice. The Applicant referred the Tribunal to a file note dated 5th June 2007 stating Ms Cartwright discussed the matter with the Respondent and was told "inform own insurer of the outcome". It was not at all clear what the insurers were to be told but it was not that the case was now based on a fraud. Immediately after this file note, letters were sent to all of the witnesses telling them not to attend the trial, and in particular to a crucial witness who Counsel had already said in his advice could not be contacted.
18. Even after attempting to pursue a claim for recovery of the firm's disbursements, the Respondent did not inform the insurers of the true position and they realised what had happened only once they received the file. The Applicant confirmed that dishonesty was not alleged against the Respondent but that the Respondent's conduct was incorrect. The proper course of action should have been to inform the client immediately upon being told by the client that he had pursued a fraudulent claim, that the firm no longer had any duty of confidentiality towards the client. That would then have released the firm to give the LEI insurers the true and proper information. The Applicant submitted there was no other course available to the Respondent and whilst the Applicant accepted the Respondent had tried to protect his client, this was a situation where the client was a fraud and should therefore not have been provided with any protection.
19. The Tribunal was referred to the Respondent's witness statements in which the Respondent admitted that sending the email to Ms Cartwright was an error of judgment and that his approach to the case after he had been told the client had lied was misguided. The Applicant submitted that advantage had been taken of the insurers, even if this was only by a failure to tell them the truth and indeed Ms Cartwright had specifically raised the position of the insurers in her email of 30th May 2007 to the Respondent. She was clearly concerned about advising the LEI insurers and they should have been told about the true position. The Applicant submitted there was sufficient evidence before the Tribunal that the Respondent had acted contrary to his position as a solicitor and had used that position to take unfair advantage either for himself or others.
20. The Applicant requested an Order for his costs and confirmed these had been agreed at £5,851.60.

The Submissions of the Respondent

21. The Tribunal was referred to the Respondent's witness statement dated 25th June 2009. The Respondent admitted allegation 1 on the basis that his email to Ms Cartwright had been misguided and should not have been sent. He accepted he had failed to advise the insurers and that this was an error of judgement on his part and he also accepted he should have taken over the case from Ms Cartwright. However, whilst the Respondent accepted his proper standard of work had been compromised, he did not accept his integrity was impaired and did not accept he had taken unfair advantage of the insurers which was the substance of allegation 2.
22. Allegation 3 was admitted by the Respondent and he accepted that the letter of 23rd July 2007 to the LEI insurers should not have been sent.
23. It was submitted that allegation 2 did not make it clear exactly what was alleged and indeed, the Applicant had accepted the letter of 23rd July 2007 sent to the LEI insurers by Ms Cartwright had been sent without the Respondent's knowledge. It was submitted that this in itself was not a breach. The Respondent was called to give evidence.

The Oral Evidence of the Respondent

24. The Respondent affirmed and confirmed his full name and address. He confirmed allegations 1 and 3 were admitted.
25. The Respondent accepted that he should not have sent the email dated 30th May 2007 to Ms Cartwright and that this had been sent with a view to helping her in a difficult and complex situation to try and resolve the matter as quickly and painlessly as possible. He was also trying to assist the client in a messy scenario and had thought Ms Cartwright would speak to the Defendant's solicitors and see if the prospect of a "drop hands" with no costs and discontinuance of the claim could be agreed. It was then intended that the insurers would be notified and that would be an end to the matter. The client in this case would not have benefited from the LEI policy, he had no financial means and indeed lived in local authority housing.
26. The Respondent confirmed that at the time he had written the email at 8.20 pm he had been on holiday. The Respondent confirmed that he would not have dealt with the matter in the same way now, and that this email had been sent at 8.20 pm in the evening from home. The Respondent confirmed he no longer dealt with emails from home and would not do so again in the future. Nor would he leave it to a junior, or even senior colleague to deal with should the situation arise again, he would most certainly take it over himself and deal with the issues on his return from holiday.
27. The Respondent would not have pursued a "drop hands" approach and accepted that the Defendant's solicitors had a right to know what had happened and decide what to do. The client in this case had not been pursued for costs as he had no financial means so it would have been pointless to pursue him.
28. The Respondent confirmed that the firm did have built in tolerances to deal with these types of cases where the costs would be written off and indeed, disbursements up to

£10,000 per month could be written off. This case would have fallen within one of those categories.

29. Since these events had taken place, supervision had been tightened up significantly, all junior staff letters were checked, signed and approved by either a case handler or the Respondent and if the letters had not been seen they would not go out. In relation to insurers, staff had been given strict instructions to report any fraudulent event immediately and to avoid any attempt to explain why a claim has been made on the policy. The insurers were to be provided with the full file and then they could decide for themselves how they wished to proceed.
30. The Respondent confirmed allegation 2 was denied. He did not intend to claim disbursements from the LEI insurers and indeed, the firm had a tolerance to cover those disbursements, which had been budgeted for. The Respondent had not known of the letter dated 23rd July 2007 sent by Ms Cartwright to the LEI insurers and the first time he became aware of this letter was when the insurers contacted him after they had reviewed the file and after they had referred the matter to the SRA. The Respondent did not know he could withdraw the letter and indeed, could not have withdrawn it because he was not aware of it until the matter had already been reported to the SRA.
31. The Tribunal were referred to a witness statement from Ms Cartwright in which she confirmed she had felt an urgent need to inform the insurers in the absence of the Respondent and the person who had conduct of the file and that she had done this previously without any problems.
32. When the file had been sent to the insurers, it was sent in full containing Counsel's advice and all correspondence. In May 2007, prior to these events taking place, the Respondent had had a meeting with the director of the LEI insurers and it had been agreed that the firm would notify the LEI insurers in writing when they had enough files for the LEI insurers to collect for review, the insurers would then take the files, review them and return them. The insurers did not want files to be sent through the post/DX as their director regularly passed the firm's offices and could easily collect and bring back files.
33. In this case, the file was sent in its entirety, no changes had been made and the insurers could see for themselves exactly what the client had said and what had happened. The Respondent did not take unfair advantage of the LEI insurers and whilst he accepted he would not have dealt with matters in this way again, it was also clear that nothing had been hidden from the insurers and the truth came to light when they reviewed the file which the firm had openly provided.
34. The Respondent confirmed he had learned his lesson, and he had suffered both professionally and personally as a result of the breaches. He had been worried about his career, worried about dealing with partners within his practice, the LEI insurers concerned and other insurers that the firm dealt with. He was extremely embarrassed, unhappy, upset and ashamed to be appearing before the Tribunal.
35. On cross-examination the Respondent confirmed that when he had received Ms Cartwright's email, it was not in his mind that he wanted to persuade the LEI insurers

to pay the disbursements. He accepted the firm would bear its own costs and wanted a “drop hands” deal. He had left the matter with Ms Cartwright subsequently that a Notice of Discontinuance should be served and the LEI insurers should be notified.

36. The Respondent accepted in hindsight that he should have told the client that the case could not be maintained and the LEI insurers should have been told of the situation. However, he knew the insurers would get the file so they would not lose out. The Respondent denied he had tried to take unfair advantage of the LEI insurers on the client’s behalf and indeed, confirmed that when Ms Cartwright had written to the Defendant’s insurers on the 31st May 2007, he had not been in the office, he had not known the letter had been sent and had thought she would simply speak to the Defendant’s solicitors on the telephone. The Respondent also confirmed that he did not become aware of Counsel's advice until he returned from holiday on 5th June 2007. When he had stated in his email “try to get counsel to give negative advice” he had simply meant advise the client of the situation, and pull the case with a Notice of Discontinuance. He was not asking Counsel to give advice on the merits but on what the client had said. The Respondent accepted that he had possibly been misdirected in his misbelief that Counsel’s advice was relevant at that stage. He had simply wanted Counsel to know what was happening as she had all the papers. He stressed again that his email was not well written, it had been written in haste while the Respondent out of the office on holiday, was rushing and indeed had been sent as part of a number of emails he had written.
37. On re-examination the Respondent confirmed that it had never occurred to him that the file provided to the LEI insurers should be altered in any way and, indeed, all the documents were filed in date order making it clear what the chronology and sequence of events was.

The Respondent’s further Submissions

38. The Respondent had accepted his errors, he accepted he had been misguided and should have acted differently. However he did not accept he had acted to gain unfair advantage and he could not have taken any steps regarding the letter sent to the LEI insurers dated 23rd July 2007 as he did not become aware of it until after the insurers had reported him to the SRA. He had not tried to claim disbursements from them and indeed, he himself had set up the system which enabled the LEI insurers to take the file and review it. He vigorously denied any attempt to defraud the LEI insurers and it was submitted allegation 2 had not been proved. Whilst the Respondent accepted he should have informed the LEI insurers immediately of the situation, this formed part of allegation 1 which the Respondent had admitted.

The Tribunal’s Findings

39. The Tribunal had listened carefully to the submissions of both parties and had considered all the documentary evidence. The Tribunal found allegations 1 and 3 to have been substantiated, indeed they had been admitted by the Respondent.
40. In relation to allegation 2, the Tribunal was not satisfied that on the basis of the evidence presented, the allegation had been proved. It was clear to the Tribunal that the Respondent had not removed his email to Ms Cartwright dated 30th May 2007

from the file of papers prior to the LEI insurers taking the file, and it was therefore evident that he had not tried to hide anything from the LEI insurers. The Tribunal was mindful that the Respondent had dealt with this email whilst he was on holiday, busy with his family and late in the evening. This was not an ideal time to be dealing with emails of any importance and indeed, the Respondent had accepted he no longer did so. In the circumstances, the Tribunal was not satisfied to the required standard that allegation 2 had been proved and accepted the Respondent's admissions to allegation 1 and 3 as they had been made.

The Respondent's Mitigation

41. The Tribunal was referred to a number of references provided regarding the Respondent's character. The Tribunal was also referred to the SRA caseworker's recommendation of 11th March 2008 that the Respondent should be reprimanded and that no further action should be taken for failing to supervise, as in the caseworker's view he had not been guilty of such an allegation. The Respondent's position from the outset, when facing very serious allegations of deception and misleading the insurers had not changed.
42. The Respondent was a good, well respected solicitor and indeed one of the references before the Tribunal was from his managing partner. The Respondent was an extremely pleasant person, he had given evidence before the Tribunal today and accepted he had not exercised proper judgment.
43. It was submitted his misconduct was at the lower end of the scale and his actions had been misguided rather than deliberate. It had been a one off error of judgment, the Respondent had had a clear disciplinary record, there had never been any complaint about him previously, he had taken steps to rectify matters and had co-operated fully with the SRA. The Respondent had learnt a salutary lesson, he was not a threat to clients in any way and had simply ended up before the Tribunal due to his attempts to assist his staff whilst on holiday. The Respondent assured the Tribunal he would not appear before the Tribunal again and it was submitted that a reprimand was the appropriate sanction in this case, indeed the SRA had been of that view.
44. In relation to the question of costs, whilst the costs had been agreed at £5,851.60, the Respondent requested the Tribunal order a one third discount on the basis that a great deal of work had been carried out relating to the contested allegation which had failed.

The Tribunal's decision

45. The Tribunal had considered carefully the submissions of the Respondent and the documents provided. This had been a case where the Respondent had made an error and had dealt with things in a manner which he now accepted with hindsight was inappropriate. The email he had sent Ms Cartwright on 30th May 2007 was very foolish and although the Tribunal had not found the Respondent's integrity had been compromised, the Tribunal was mindful that the Respondent did not take any action to follow up the matter on his return from holiday and nor did he check the file when he should have done. Whilst the Respondent may have been busy with his caseload, he did have a responsibility to follow up the way the staff member was dealing with

this particular case and, knowing the position, he should have ensured matters were being dealt with properly.

46. The Tribunal had been impressed by the testimonials provided and accepted the Respondent had learnt an expensive lesson about giving off-the-cuff advice to members of staff whilst he was on holiday.
47. The matter had come to the Authority's attention due to a complaint made by the Legal Expense Insurers based on what they perceived as the Respondent's intention to deceive them, taken from their interpretation of his email to Ms Cartwright. The Tribunal was not satisfied that there had been any intent to deceive but the Respondent had, albeit inadvertently, acted in a manner that was contrary to the good repute of the profession. In the circumstances, the Tribunal considered the appropriate Order was to fine the Respondent £3,000.
48. In relation to the question of costs, the Tribunal was satisfied that the case had been properly brought by the Applicant and in view of this was not prepared to order any reduction on the costs agreed between the parties. Accordingly, the Tribunal Ordered that the Applicant's costs be paid in the sum of £5,851.60.
49. The Tribunal Ordered that the Respondent, Shane Steven Hensman of c/o Mr I Ryan, Finers Stephens Innocent, 179 Great Portland Street, London, W1W 5LS, solicitor, do pay a fine of £3,000.00, 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 £5,851.60.

Dated this 5th day of February 2010

On behalf of the Tribunal

A G Ground
Chairman