

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF DAVID MICHAEL GOLD, solicitor (The Respondent)

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

Mr J N Barnecutt (in the chair)
Mr A N Spooner
Mr R Slack

Date of Hearing: 28 September 2010

FINDINGS & DECISION

Appearances

George Marriott, solicitor and partner in the firm of Russell-Jones & Walker of 50-52 Chancery Lane, London, WC2A 1HL appeared for the Solicitors Regulation Authority ("SRA").

The Respondent appeared and was represented by Ms Susanna Heley, solicitor of RadcliffesLeBrasseur, 5 Great College Street, London, SW1P 3SJ.

The application to the Tribunal on behalf of the SRA was made on 19 February 2010

Allegations

The allegations against the Respondent were that he:

1. Failed to comply with s.3A of the Solicitors Introduction and Referral Code 1990 ("SIRC");
2. Failed to act in the client's best interest, contrary to Solicitors Practice Rule 1(c) ("SPR");
3. Failed to follow client's instructions, contrary to SPR 1(a), (c) and (d);

4. Continued to act in a conveyancing transactions where conflict of interests arose, contrary to SPR 6(3)(a)(i);
5. Failed to make disclosure that he was acting for the buyer, seller and institutional lender in a conveyancing transaction, contrary to SPR 6(2)(b)(ii).

Allegations 1-4 were denied. Allegation 5 was admitted.

Factual background

1. The Respondent, born in 1945, was admitted as a solicitor in 1968. His name remained on the Roll of Solicitors. At the material time he was, and continued to be a partner of John O'Neill & Co Solicitors of 1/2 Lansdowne Terrace East, Gosforth, Newcastle Upon Tyne, NE3 1HL. The Respondent was a fixed share partner in the firm and had been since December 2000 following the dissolution of his previous firm. At the time in question the Respondent was the only partner whose normal place of work was the Gosforth office.

Allegation 1

Homelease Scheme

2. Allegations 1 and 2 arose out of transactions relating to an equity release scheme. Homelease Limited ("HLL") advertised its scheme on its website, stating that the sellers, who would eventually become tenants of their homes, would be entitled to access 100% of the value of their property as well as enjoy the security of never having to move. Furthermore HLL would be responsible for all fees and charges linked with the sale. As the website put it "Your equity is all yours!". Specifically HLL stated:

- " • Raise your own locked up capital without borrowing
- Repay expensive loans
- Clear arrears/stop repossession
- Avoid all fees and charges

Equity Plus If you're settled in your home and wish to live there long term (or indeed indefinitely), then this is for you!
Now you really can "Sell your home and keep it"

EquityFast For those intending to sell their property as soon as possible but not live there long term"

3. In fact the properties were not sold to HLL but to AP who was the sole director and sole shareholder of that company. The scheme was aimed at individuals whose debt problems were so severe that they could not afford to continue to service the loans on their homes.
4. On 16 August 2008 the SRA wrote to the firm requesting further information regarding the firm's arrangement with HLL. The firm responded in a letter signed by the senior partner, John M O'Neill and dated 23 August 2007 and stated in terms:
 - " • The firm was introduced to HLL in January 2006 by another firm of solicitors, M;

- M acted for HLL when purchasing properties. HLL asked M to recommend a firm who could act for the seller.
 - Following the initial introduction HLL had sent clients directly to the firm rather than through M.
 - There was no written or oral referral agreement.
 - The firm was uncertain as to whether SIRC applied to their arrangement with HLL.
 - "We have never entered into agreements for referrals nor have we ever paid for referrals or received any payments for referrals. As part of the agreement between (HLL) and its customer (HLL) agreed to pay the clients' fees of £500 plus VAT. This was not part of any referral arrangement with this firm."
 - As of August 2007 the firm no longer accepted work from HLL."
5. The SRA submitted that the Respondent had failed to comply with s.3A of SIRC.
 6. The firm took the view that the referrals of clients in relation to HLL actually came from M, as a block referral, and not from HLL and therefore the provisions of SIRC did not apply. However, the files examined by the SRA showed no evidence of referrals coming from M and in fact the initial correspondence on a transaction was a matter summary sent by fax from HLL to the Respondent's firm.
 7. The firm acted in conveyancing matters for 35 clients where there was a proposed purchase of the clients' property by HLL. Of these the Respondent acted in 26 transactions, of which 23 completed. The firm ceased taking instructions in these matters when the Respondent passed various cases to another member of the firm, Mr J as the Respondent was to be absent on sick leave. Mr J formed personal reservations about the scheme and reported these to the senior partner who agreed. The last matter was completed in August 2007 rather than 2008 as set out in the Rule 5 Statement.
 8. The firm claimed that they had not received any payments for referrals. However during the matters HLL forwarded the firm monies to be utilised in respect of the purchases. They also forwarded funds in respect of the firm's costs of £500 plus VAT and disbursements for each transaction.

Background to allegation 2

Failure to act in the clients' best interests

9. By way of example of how the scheme worked, in the case of Mr and Mrs B, the Respondent was instructed by them following a fax dated 11 September 2006 from HLL:

"Please accept this as our instruction to act for the following new client(s) with regard to the sale and subsequent Homelease tenancy of the undernoted property:"

The fax then gave the details of the property, the amount of a bond to be retained from the purchase price by the purchaser and the amount of "1st month rent".

10. A letter dated 15 September 2006 from the Respondent on the notepaper of his former firm to Mr and Mrs B stated that the property was to be sold for £80,000 to AP. Notwithstanding the claims on the HLL website that sellers could remain in their homes on an indefinite basis, the letter stated that AP would grant Mr and Mrs B a tenancy with a fixed term period of three years. The letter also stated that 30% of the purchase price would be retained as a bond as well as the first month's rent of £425, notwithstanding the fact that the HLL website stated that the EquityPlus scheme allowed sellers to access 100% of the value of their property. The property was subject to three mortgages and a Charge linked to litigation. The matter completed in February 2007 and the matter ledger recorded the receipt of £56,298.50, the purchase price plus the firm's costs, less the retention and the first month's rent. On the same day the various charges were paid off and an amount in the region of £8,000 was sent to the clients. On the same day as completion Mr and Mrs B also signed a tenancy agreement. Clause 2.1 of the agreement stated that the term of the agreement was 12 months not the three years mentioned in the letter of 15th September and not the indefinite period mentioned on the HLL website. Mr and Mrs B also signed a covenant in relation to the bond referred to as "the retention" in the amount of £24,000. Clause 2.4 of the covenant stated that if Mr and Mrs B ceased to occupy the property within the first ten years of the agreement then the landlord/owner would be entitled to keep all of the retention. The SRA were unable to find written evidence on the file to show that the Respondent had advised the clients on the Homelease arrangement.

Background to allegations 3 and 4

11. The Respondent acted for Mr BA in connection with his purchase of "land at the rear of 37 and 39 S... Road". On 26 January 2007 the Respondent also received instructions from the institutional lender, Standard Life Bank Limited ("SLB") to act on its behalf in accordance with the CML Handbook. A detailed mortgage offer was made on 24 January 2007 and stated that, based on a valuation of £600,000 SLB was willing to lend £390,000, the initial loan amount being £112,998.
12. The terms of the loan showed that conditions were in relation to construction taking place on the property. The money would be released in three stages related to progress with the construction. The mortgage offer also stated:

"We must have a first priority legal mortgage over land at the rear of 37 and 39 S... Road..... Any existing mortgages must be paid off."
13. On 8 May 2007 the Respondent wrote to Mr BA:

"There is no indication in the offer being made by (SLB) that they are being granted anything but a first legal charge. That being the case they will require the Charge in favour of Allied Irish to be discharged to enable their charge to be registered. This is clearly going to be difficult if we are going to have to register their charge before Allied Irish have received enough monies to discharge what is owed to them. Can you please clarify how much is owed to Allied Irish at this present point in time so that this can be looked at."

There was no evidence on file that Mr BA contacted the Respondent to discuss the matter; notwithstanding this the Respondent still went ahead and completed.

14. The ledger did not record any monies being sent to redeem the Allied Irish loan. Instead the monies stayed on the ledger for two weeks until 1 June 2007 when they were transferred to another ledger held regarding Mr BA in relation to the purchase of a different property.
15. The completion statement confirmed that the purchase price of £150,000 was met using £112,500 "Received in connection with the mortgage on land at rear of 37/39 S.... Road" and a further £37,500 from Mr BA.
16. The Respondent admitted that the charge in favour of Allied Irish was not redeemed and a first legal mortgage in favour of SLB was not registered on the property.

Background to Allegation 5

17. The Respondent also acted for Mr BA in relation to the sale of 142 S.... Road. In the same transaction the firm also acted for the purchaser, Mr ZI and the institutional lender Unity. The matter completed in February 2007. The matter file showed that the purchaser, Mr ZI did not contribute any monies towards completion.
18. The purchase price was agreed at £155,000 of which £123,000 was being provided by Unity in the form of a mortgage. The balance, in excess of £32,000 due from the client was provided as a deposit by Mr BA by way of an unconditional gift.

Applicant's submissions

Allegations 1 and 2

19. The firm and the Respondent had conceded that if the Tribunal found referrals had come from HLL rather than M then SIRC applied and had not been complied with. All clients were referred to the Respondent by HLL direct via a fax including the words "please accept this as our instruction to act for the following new client(s)". HLL paid the vendor/client fees direct to the Respondent.
20. The Applicant submitted that if the Tribunal did find that SIRC did not apply, then it would still need to look at allegation 2 about whether the Respondent had acted in the clients' best interest. It was submitted that although at the time the clients were referred to the Respondent they had decided to grant an option to HLL to purchase their property, the Respondent still had a duty to advise them on the suitability, advantages and drawbacks of the scheme. There was no evidence that he had done that. The deed of covenant was complex and seemed to say that it did not affect the shorthold tenancy which the vendor was entering. That granted considerable rights to the landlord, for example the landlord was permitted to deduct from the retention any arrears of rent and then to sue in order to top up the retention. The assured shorthold tenancy only covered the first of the ten years referred to in the deed of covenant and there was no indication of what the terms of any subsequent tenancies would be. There was clearly inequality of bargaining powers. It was submitted that the structure and inter-relationship of the documents was such as to ensure that the retention money would never be handed back to the vendor.

21. It was submitted that the inescapable conclusion was that clients who were admitted by the Respondent to be uneducated and unskilled had not been provided with the advice that they needed and that the Respondent had not acted in their best interests. Having regard to the file note which the Respondent prepared for his colleague, it appeared clear that many of the detailed terms of the transaction had not been fully explained to the clients in a timeous or comprehensive manner and it was far from clear what advice the clients were actually receiving from the Respondents. There were also concerns about the stage at which the Respondent appeared to have met with the clients. It seemed to have coincided with or just preceded completion in cases where clients needed the most trenchant advice about the complex arrangements they were about to enter into.

Allegations 3 and 4

22. SLB's letter of instructions required the Respondent to act in accordance with the CML Handbook. The Applicant rejected the Respondent's interpretation of the mortgage offer that, in the absence of a first legal charge, an additional interest charge would be made. It would leave SLB with an unsecured loan.
23. The Applicant contended that the mortgage offer meant that subject to the maximum loan to value ratio, SLB was prepared to lend up to an additional 2% of the first draw down of £112,998 in order that any existing mortgages could be paid off and their loan could be secured by a first legal charge. Save for the exhortation in the letter to his client, BA of 8 May 2007, there is no indication of the Respondent taking steps to resolve the situation. He was operating under a massive conflict of interest. From that letter it was clear, the Applicant submitted, that the Respondent was aware that Mr BA would not be able to redeem the Allied Irish charge using the monies from SLB. He preferred the interest of one client, Mr BA over another SLB. Furthermore, the SRA submitted that the distinction between whether the monies from SLB were a mortgage or a secured loan development facility was irrelevant. The SLB's instructions were that the loan/mortgage had to be secured by way of first charge over the property and all other loans secured on the property had to be redeemed. This was not done.
24. The mortgage money from SLB was transferred to another ledger relating to the purchase of a different property. The Applicant rejected the Respondent's contention in his witness statement "I do not believe it was the condition of SLB loan that those monies had to be applied in any particular direction..." This statement was wholly inconsistent, it was submitted, with the terms of SLB's loan document.

Allegation 5

25. The SRA therefore submitted that the Respondent had breached Rule 6(3)(b) SPR. There was no evidence on file to show that Unity had been informed that the firm was acting for seller, purchaser and the institutional lender. Nor was there any evidence on file to show that Unity was informed that the purchaser and seller, Mr ZI and Mr BA, were brothers. This allegation was admitted.

Submissions on behalf of the Respondent

26. Having regard to allegations 1 and 2, the Respondent's representative rejected the contention that the only security which the vendors had in respect of the purchaser

was a shorthold tenancy, she contended that the tenants had a right to occupy under the deed of covenant for ten years by virtue of clause 3.1. She also contended that the deed of covenant provided for a sum equal to 30% of the open market value of the property to be returned to the tenant less the amount of the retention should the tenancy be determined by the landlord during the initial period other than by reason of breach of covenants. It was also her contention that should the landlord/purchaser seek to terminate the tenancy it was unlikely that the court would allow this to happen during the ten year period having regard to the Protection from Eviction Act. The tenant also had the option to buy during the ten year period. Having regard to advice given to the clients, the Respondent's representative submitted that the file note left for his colleague by the Respondent assumed a level of knowledge on the part of the colleague in the giving of advice in the client's best interests.

Witness

27. The Respondent gave sworn evidence relying on his witness statements of 28 September 2010.

Allegations 1 and 2

28. In respect of these allegations the Respondent maintained that he had no contact whatsoever with HLL save for receiving faxed instructions. In the case of Mr and Mrs B given as an example by the Applicant, he saw Mr B several times between September 2006 and February 2007. There was a particular issue regarding their conveyancing transaction. He disputed the schedule extracted from his diary and sent by the firm to the SRA on the basis that it did not represent all the meetings that he had had with clients. He regarded it as impossible that he only saw them on or about completion day. He had no recollection of having been consulted about the schedule. He accepted that other than the pro forma which he had left for a colleague to use in his absence there were no other documents on the file which gave any indication of the advice which he had given to individual clients. He confirmed that he had taken no contemporaneous notes.
29. In cross-examination the Respondent maintained that he had attached no significance to the word "instructions" in the faxes from HLL and in spite of their request in each fax for him to acknowledge the instructions, no acknowledgement had ever been sent. He also pointed out that when the arrangement came to an end it was terminated by correspondence with M rather than with HLL. He accepted that he knew generally that the seller clients were at the bottom end of the market from the prices which were being paid for their properties but he did not consider that what HLL was doing constituted an equity release scheme. He looked at each transaction on its merits. Nor did he agree that they were vulnerable people.
30. The Respondent accepted that he understood that part of the equity release would be retained by the buyer. He had not looked at the buyer's website, only at the documents which he felt could be complex by virtue of being legal documents. He confirmed that he had accepted the documents in the form provided by M at the beginning of the arrangement. He stated that he had made some amendments at that stage but he would not know where to look for those amendments now. He saw each client for a minimum of an hour and the paragraph of his pro forma regarding housing benefit had taken him some two and a half hours of telephone research with the DSS to put together. The Respondent was unable to explain why Mr and Mrs B's assured

shorthold tenancy changed from three years in the faxed instructions at a rent for the first month of £425, to one year at a rent for the first month of £400 in the actual tenancy agreement. He assumed this was a quid pro quo for the reduced period. The Respondent disagreed with the suggested interpretation that the deed of covenant gave precedence to the tenancy agreement and therefore the landlord could gain possession of the property from the seller at the end of the first year of the assured shorthold tenancy. He accepted that such tenancies gave substantial rights to the landlord to regain possession at the end of the term. The Respondent claimed that he categorically advised clients that the landlord could not summarily determine the tenancy other than for a good cause. He could not say that he went through the detail of the documents with clients including that they could be evicted at the end of year one but he did tell them if that happened they would get their 30% retention back and that if they failed to pay even one month's rent they would lose the retention. Having regard to the fact that there was no provision for interest on the retention during the ten year period, the Respondent stated that it had never occurred to him to amend the documents to provide for interest. The clients came to him with the terms agreed and these were what they could get in the circumstances. He regarded the suggestion that he should have made amendments to provide for interest as a counsel of perfection.

Allegations 3 and 4

31. The Respondent explained that Mr BA invariably gave him verbal instructions by either telephone or in person. Mr BA had all his business with Allied Irish bank ("AIB") and wanted to ease away from them. Having regard to the interpretation of SLB's requirements and having heard the discussion in court today, he could appreciate the view that the reference to an increase of 2% related to an increased amount of the loan in order to clear any earlier charges rather than an increased amount of interest in lieu of a first legal charge being registered. He agreed that he had not written a letter to Mr BA setting out his own earlier interpretation. His explanation for not having pursued the issue of a first legal charge beyond his letter of 8 May 2007 was that he worked on the basis that Mr BA was affluent and even if there was no legal charge he would be in a position to pay the mortgage back. Having regard to the application of the SLB loan monies towards the purchase of another property, the Respondent did not regard this as a problem as he considered that SLB had no right of control over the way the money was used as it was expressed to be a development loan. He also explained that AIB would not be prepared to release their first legal charge on the S... Road property unless Mr BA cleared all his lending from them across his range of business interests.

Submissions by the Respondent's representative in relation to the allegations

Allegations 1 and 2

32. It was submitted that the purpose of SIRC is to prevent solicitors feeling pressured to act other than in the best interests of their clients. If the Tribunal did find that SIRC applied, it was submitted that where the solicitor did not consider there to be any relationship there had to be a question as to whether any mischief had been done. It was also submitted that the Applicant was mistaken in linking a failure to comply with SIRC to a failure to act in clients' best interests.
33. It was well established that it was not slavish compliance with the technical detail of the Rules which was important in assessing the conduct of a solicitor but rather

whether or not the spirit of the Rule has been breached. In support the Tribunal was referred to Sir Anthony May's comments on the SIRC in Reed v Marriott [2009] EWHC 1183 at paragraph 46.

34. As there was no way of knowing exactly what the Respondent had said to the clients in their individual circumstances, it was submitted that the burden of proof had not been discharged in respect of acting in their best interests. It was submitted that it was for the Tribunal not to replace a Respondent's judgment by its own judgment but to determine whether, where advice had been given, but there had been a failure to record it in writing, that fell so far short of what was expected of solicitors as to constitute a breach of the Code.
35. Having regard to allegations 3 and 4 the Respondent conceded that he had failed to follow the instructions of his client SLB. There was proof in the file that the monies owing to SLB had been repaid but it could not be established whether any penalty interest had been paid to them. The amounts paid back far exceeded the original draw down from SLB because further draw downs had been made in various tranches. The Respondent had not been involved in those transactions. It was submitted that these further draw downs had been permitted by SLB notwithstanding that they did not have a first legal charge.

Documents

36. The Tribunal took into account all the documents which had been submitted including the Rule 5 Statement with a Forensic Investigation Report attached (this Report was heavily redacted as significant elements of it related to other members of the Respondent's firm and matters which had been dealt with separately); the Respondent's witness statement; his representative's outline submissions on his behalf; a letter from M to the Respondent's firm dated 11 July 2008; a letter from the Respondent's firm to the SRA dated 7 September 2007 with enclosed schedule; a Determination by the Adjudicator of 7 September 2009 and a supplemental Decision of the same date (both these Determinations were considered only in respect of costs) and testimonials in support of the Application.

Findings as to Fact and Law

Allegations 1 and 2

37. Having carefully considered all the evidence both oral and written the Tribunal found allegations 1 and 2 proved to the higher standard. Generally the Tribunal had found the Respondent an evasive and unhelpful witness. The Tribunal was very concerned having regard to the nature of the clients and their difficult situation that there was no indication of the advice that had been given to them. The documents which the clients had been encouraged to sign were badly drafted and inconsistent and the Respondent should have advised them accordingly. The Tribunal did not feel that the file note which the Respondent had prepared for a colleague gave any indication that the advice given to clients in these matters had reached the required standard. The Tribunal regarded allegations 1 and 2 as very serious and took the view that the Respondent had abrogated his responsibility to his clients. The Tribunal found the scheme potentially at least, highly disadvantageous to the vendor clients. All were at risk of being put out of possession of what had been their properties after one year. They were required to release on bond some 30% of the equity of their homes and

were at risk of the total loss of this amount should they suffer any personal tragedy or difficulty which might prevent them paying their rent. These clients were not only vulnerable but recognised as needing extra care and attention. The Respondent in his own statement had described them as "unskilled and largely uneducated clients who did not and could not be expected to have a detailed grasp of business affairs and of fine technical detail".

Allegations 3 and 4

38. The Tribunal found these allegations proved to the higher standard. It was clear that the Respondent had failed to follow the instructions of one of his clients and he failed to protect that client's interests in that he did not secure a first legal charge on its behalf.

Allegation 5

39. This allegation was also found proved to the higher standard. It had been admitted.

Mitigation

40. The Tribunal was provided with testimonials. Having regard to allegation 1 and the Referral Code, it was submitted that the Respondent's belief was relevant to his conduct. The Code related to the whole firm but no allegations regarding it had ever been made against the remaining partners.
41. Having regard to allegation 2 it was submitted that the Respondent had been faced with clients in dire financial circumstances who seemed to have found a way out of their situation. He accepted that he should have placed the advice he had given in writing. He had met with clients although there was an issue over the dates upon which he had done so. The scheme required the clients to sign up before they came to the Respondent and there was nothing to prevent their transactions being dealt with swiftly. In some cases there had been substantial delays between instruction and completion which it was submitted added credence to the Respondent's evidence that it was something which the clients had carefully considered. It was accepted that the documents had been badly drafted but no expert evidence had been available to the Tribunal regarding this. The Respondent had been a conveyancer for around 41 years and this was the first time he had been in any kind of disciplinary trouble. He had never had a client complaint regarding any of these matters or any serious client complaint in any matter at any time in his career. This was quite an impressive record.
42. Having regard to allegations 3 and 4, the Tribunal was asked to bear in mind that notwithstanding that SLB had not secured their first legal charge they did go ahead and make further loan payments to Mr BA. The matter had been resolved quite promptly in that payment of the loan had been made in full to SLB and they had not suffered any loss.
43. Having regard to allegation 5 the Respondent had said from the outset that this had been an oversight. In the course of dictating a collection of letters, he had simply missed one out notifying the lender that he was acting for the buyer, seller and the lender. He fully accepted that he had done wrong but it had caused no loss to anyone.

44. The Respondent had been considering retiring after his 41 year career and he was devastated to find himself the subject of these proceedings. It had been very difficult for him to ask his professional colleagues for references. The proceedings had been hanging over him for some time and the SRA had not treated the matter urgently. An outline was given of the Respondent's financial position.

Costs

45. It was submitted on the Respondent's behalf that much of the work the Forensic Investigation Report had carried out related to other members of the Respondent's firm. The SRA accepted that the overall costs schedule submitted to the Tribunal should be reduced by £2,685. The Applicant's costs had been agreed.

Sanction and reasons

46. The Tribunal found allegations 1-4 which the Respondent had disputed proved on the evidence presented to it and allegation 5 had been admitted. The Tribunal considered the allegations to be serious, particularly in that the Respondent had abrogated his responsibility to his clients. Accordingly it imposed a period of suspension of six months to commence immediately. The Tribunal also recommended that at the expiry of that period the SRA should impose a condition upon the Respondent's practising certificate that he should be subject to supervision in his work.

Decision as to costs

47. Having regard to the fact that a considerable amount of the work carried out during the investigation had not been related to the activities of the Respondent, the Tribunal had decided to reduce the total amount of costs submitted by the Applicant and accordingly a costs order was made in the sum of £12,500.

Order

48. The Tribunal Ordered that the Respondent, David Michael Gold of John O'Neill & Co Solicitors, 1/2 Lansdowne Terrace East, Gosforth, Newcastle Upon Tyne, NE3 1HL, solicitor, be suspended from practice as a solicitor for the period of six months to commence on the 28 day of September 2010 and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £12,500.00.

Dated this 16th day of November 2010

On behalf of the Tribunal

J N Barnecutt
Chairman