

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF NICOLAS BARRINGTON PEACE, solicitor (the First Respondent)
and ALAN LAWRENCE WINTER, solicitor (the Second Respondent)

Upon the application of David Elwyn Barton
on behalf of the Solicitors Regulation Authority

Ms A Banks (in the chair)
Mr R Prigg
Mr M R Hallam

Date of Hearing: 13th and 14th September 2010

FINDINGS & DECISION

Appearances

David Elwyn Barton, solicitor of 13-17 Lower Stone Street, Maidstone, Kent ME15 6JX appeared on behalf of the Solicitors Regulation Authority (“SRA”).

Robert Forman, solicitor of Messrs Murdochs Solicitors, 45 High Street, Wanstead, London E11 2AA appeared on behalf of both of the Respondents.

The date of the application was 7th December 2009.

Allegations

At the opening of the hearing the Applicant invited the Tribunal to agree to the withdrawal of two of the allegations contained in his originating statement, the Respondents agreed and the Tribunal consented thereto. The numbering of the allegations below follows that contained in the Applicant’s originating statement. There was no allegation numbered 1.

2. The allegations against the First Respondent, Mr Peace, were as follows:-
 - (a) Withdrawn.
 - (b) Withdrawn.
 - (c) In breach of Rule 1 (c) of the Solicitors Practice Rules 1990 he failed to act in the best interests of his client Mrs S.
 - (d) He wrote a misleading letter to Wilkinsons Solicitors dated 20th August 2002 thereby compromising his integrity in breach of Rule 1 (a) of the said Rules.
 - (e) He wrote a misleading letter to the Public Guardianship Office dated 15th March 2006 thereby compromising his integrity in breach of Rule 1 (a) of the said Rules.

3. The allegations against both Respondents were as follows:-
 - (a) They have withdrawn money from client account in circumstances other than permitted by Rule 22 of the Solicitors Accounts Rules 1998 thereby creating a cash shortage.
 - (b) They have acted in circumstances where there existed a conflict between their interests and those of their mortgagee clients, in breach of Rule 6(3)(a)(i) of the Solicitors Practice Rules 1990. The Respondents were also dishonest although it is not necessary to establish dishonesty for this allegation to be proved.
 - (c) They have acted in circumstances where there existed a conflict between their interests and those of their purchaser clients.
 - (d) Contrary to Rule 1(c) of the Solicitors Practice Rules 1990 they have failed to act in the best interests of their lender and purchaser clients. The Respondents have also been dishonest although it is not necessary to establish dishonesty for this allegation to be proved.

The Respondents' admissions

The First Respondent admitted allegations 2 (c) (d) and (e) and both Respondents admitted allegations 3 (a) (b) (c) and (d) although both denied that they had been dishonest in relation to allegations (b) and (d).

The Respondents' background

1. The First Respondent was admitted as a solicitor in 1978 and the Second Respondent was admitted as a solicitor in 1976. The names of both solicitors remained on the Roll of Solicitors but the Second Respondent did not hold a current practising certificate and had not practised since the closure of the Respondents' firm. The First Respondent was acting as a consultant to the firm which had taken over the Respondents' firm and operated from its former offices employing a number of its

former employees. The Respondents had practised in partnership for some sixteen or seventeen years and at the material times were carrying on practice under the style of Alan Winter, Peace and Co at Ilford, Essex. For part of the material time there had been a third partner in the practice, Mr Williams. The three partners were equal equity partners.

The Factual Background

Allegations 2 (c) (d) and (e) relating to the matter of Mrs S and the sale of her East Ham property. These allegations were made against the First Respondent alone.

2. The First Respondent had conduct of this matter although other fee earners in the firm had had some input for various reasons from time to time to include the First Respondent's absence on holiday.
3. In February 2002 the First Respondent was instructed by Mr P and Mrs B, Mrs S's grandchildren, to prepare a general power of attorney in which Mrs S gave power to them. The First Respondent did not remember but believed he would have taken direct instructions from Mrs S who was then living at the East Ham property. The power was completed and dated 21st May 2002.
4. Subsequently it was understood that Mr P, in exercise of the power, obtained the deeds for the East Ham property from the firm of solicitors who was holding them on behalf of Mrs S.
5. Mr P had instructed the First Respondent to handle the sale of the East Ham property in May 2002. The proposed sale proved abortive in June. It appeared from notes on the file that Mrs S was then in a nursing home.
6. In June 2002 the First Respondent was instructed that the East Ham property was to be sold to L&CP Ltd for £140,000. The transaction proceeded in a routine way and contracts were exchanged on 26th June 2002. In July the First Respondent was notified that the transaction was to continue by way of a sale to Mr P for £100,000 and he would sell on to L&CP Ltd for £140,000. The First Respondent had sent an amended transfer to Mr P which had been returned apparently executed by Mrs S and Mr P and witnessed. Mrs S's signature had been witnessed by an employee of the nursing home. The First Respondent did not believe that he had had any indication of Mrs S suffering from mental incapacity at that time.
7. There followed correspondence with L&CP Ltd's solicitors about the structure of the transaction and their need to obtain insurance in respect of the under value intermediate sale, in which there was an element of gift, and to seek agreement to the restructured transaction by their client's mortgagees.
8. The First Respondent had addressed a letter to L&CP Ltd's solicitors on 31st July 2002 informing them that Mrs S was, "now incapable of signing any documentation" and referring to the power of attorney. The response mentioned that an Order of the Court of Protection might be necessary. The legal position was that the general power of attorney would have come to an end upon the mental incapacity of Mrs S, the donor of the power.

9. The proposed sale to Mr P at an under value had a gift element. It had not been possible to obtain insurance to cover the possibility in case of the donor's insolvency. In the event L&CP Ltd refused to proceed by way of sub-sale and required the matter to be completed in accordance with the terms of the original contract and threatened to serve notice to complete.
10. On 20th August 2002 the First Respondent wrote to L&CP Ltd's solicitors,

“Our client is quite happy to proceed in accordance with the contract as originally exchanged but the transfer will have to be executed by our client's attorney's (sic) namely [Mr P and Mrs B] as per the copy general power of attorney dated 21st May 2002. Please confirm this is acceptable to you.”
11. The transaction was completed in accordance with the original contract and the balance to complete the sale was received by the Respondent's firm on 4th September 2002. The First Respondent complied with Mr P's instructions to remit the net proceeds of sale, amounting to £138,952.12 to him.
12. In August 2005 the First Respondent received correspondence from the London Borough of Newham (Newham) about its claim against Mr P in relation to Mrs S's nursing home fees. On 9th November 2005 the Public Guardianship Office (PGO) (which had superseded the Court of Protection) sought an explanation as to the destination of the proceeds of the sale of the East Ham property and advising that Mrs S might have lost mental capacity early in 2002.
13. Letters of explanation were written by the First Respondent to the PGO which inaccurately described the structure of the conveyancing transaction relating to the East Ham property in particular on 15th March 2006 he wrote a letter saying,

“...with regard to the power of attorney in 2002 we can make no comments as regards to [Mrs S's] mental state at the time. [Mrs S] sold the property to her grandson for a sum of £100,000 and thereafter he sold the property on.”
14. It was the First Respondent's evidence that letters sent to the PGO, including that of 15th March 2006, had been drafted by an assistant solicitor who had been asked to check the file and prepare such drafts. The PGO had made complaint about this matter to the SRA.
15. There was a draft letter setting out the position and providing explanation in the firm's matter file before the Tribunal, but it was common ground that this letter had not been sent.
16. The First Respondent had admitted the allegations and had accepted that had he been more careful in his conduct of this matter he would not have been duped by Mr P, as he believed he had been, and he accepted that the PGO's enquiries were not handled well and that representations made to it were defensive and misleading. The First Respondent did not accept that he had at all times been personally directly involved in what had occurred. He did accept that he was responsible as the partner concerned. He had had no intention to mislead anyone.

17. It was understood that Newham proposed to seek a grant of letters of administration in the estate of Mrs S and proposed to seek the return of the proceeds of the sale of the East Ham property from Mr P. Should Newham not meet with success in this it was possible that a claim might be made against the Respondent's firm which had indemnity cover in place.

Allegation 3 (a) against both Respondents – Withdrawal of money from client account in circumstances other than permitted by Rule 22 of the Solicitor Accounts Rules 1998 thereby creating a cash shortage (charges made for searches which had not been carried out).

18. A Forensic Investigation Officer of the SRA (the FIO) had conducted an investigation of the Respondents' firm. The FIO's report dated 14th December 2007 was before the Tribunal.
19. During the course of his investigation, the FIO examined client ledgers and found 205 matters where transfers had been made from client to office bank account purporting to be in respect of local authority search fees. Such fees had not been paid, although clients had been charged for them. Those transfers totalled £28,725.44.
20. The Respondents accepted that in some conveyancing transactions relating to new build properties block searches had been provided by the vendors and individual searches had not been undertaken by the firm on behalf of their purchasing clients. It was accepted that clients had been charged for the searches which had not taken place.
21. It was the First Respondent's evidence that the majority of the transactions where it appeared that search fees had been charged to the client but had not been incurred had been conducted by an unadmitted fee earner, SS. An assistant solicitor had been responsible for some and the First Respondent had been responsible for 22 of those cases. None of the matters related to work of which the Second Respondent or their former partner, Mr Williams, had conduct.
22. The causes of these charging errors included the actions of members of staff and confusion that arose when the firm did not instigate searches direct with local authorities on behalf of individual clients but instructed an agency to conduct blocks of searches on their firm's behalf (and where the individual clients were not identified in the agency's invoice) in connection with a high volume of matters in which expedition of the work was essential. Improved internal procedures enabled the problems to be addressed and such mistakes did not subsequently occur.
23. When the FIO drew his concerns to the Respondent's attention money was transferred from office to client account to cover the shortfall. Some searches for which a charge had been made were carried out retrospectively but the bulk of the charges were repaid to the clients concerned. It was the Respondents' position that a substantial proportion of the monies refunded to clients represented monies properly obtained to pay for searches actually made, but the Respondents had not been in a position to prove that. The Respondents assured the Tribunal that they had formed no intention to claim money from clients to which they were not properly entitled and where that

had occurred it was the result of muddle and error and considerable steps had been taken to put matters right.

Allegations 3 (b) (c) and (d) – namely that the Respondents acted in circumstances where there existed a conflict between their interests and those of their mortgagee clients in respect of which it was alleged the Respondents had been dishonest. They acted in circumstances where there existed a conflict between their interests and those of their purchasing clients and they had failed to act in the best interests of their lender and their purchaser clients and in this respect the Respondents had also been dishonest.

24. The FIO had carried out an extensive investigation and a substantial part of his report related to his concerns upon which these allegations were founded.
25. It had been explained by the Respondents that all of the transactions concerned had been conducted by SS, for whom the First Respondent was responsible for supervision although during the course of the evidence it became apparent that other partners had some responsibility for supervision. The firm was a small one and any partner might be approached by a member of staff for assistance. It was believed that the majority of certificates of title and requests for advance monies made to the firm's lending clients had been signed off by the Respondents' former partner, Mr Williams, as for a number of reasons he had been most readily available in the office to undertake this task. It was also clear that Mr Williams had expressed a number of concerns about the way in which SS dealt with her work and bad feeling about this had been generated within the firm.
26. SS had been introduced to the First Respondent. It appeared that she was a competent and experienced conveyancer who had a wide experience of acting for purchasers of new build properties and their lenders where such purchasers were negotiating favourable deals with the selling builders and were purchasing as investors. SS had attracted a volume of such work to the Respondents' firm and had generated a high level of fee income for the firm. Her salary package included a fixed salary and a payment calculated in accordance with the work she introduced and/or the fees she generated.
27. The Respondents expressed themselves to be aware of the warning cards issued by the Law Society warning solicitors of their possible implication in mortgage fraud, banking fraud or money laundering and they were also fully aware of the requirements of the handbook produced by the Council of Mortgage Lenders (CML).
28. The Tribunal had before it details of a large number of transactions where the firm acted for the purchaser and the purchaser's mortgage lender. In these transactions the purchaser paid either nothing or a nominal sum towards the purchase price. The amounts paid to the vendors' solicitors were below the contractual purchase prices so that the difference between the purchase price and the mortgage advance was paid to the purchaser. Substantial discounts had been negotiated with the builders which had the effect in reality of reducing the purchase price and those features were not reported to the mortgage lenders. This omission constituted a failure to heed the Law Society's warning on mortgage and property fraud and a failure to act in the best interests of the firm's lender clients.

29. In paragraph 79 of the FIO's report reference was made to properties purchased in developments known as V, N, BC, P and C. 75 properties were involved. The main mortgage lenders were Northern Rock and Bradford and Bingley (through its subsidiary, Mortgage Express).

30. These transactions had the following common features.

With regard to the Northern Rock cases:-

- (i) significant sums of money had been paid by Ashkey Property Investment Limited (Ashkey) a property investment club to the firm in respect of the purchasers' deposits.
- (ii) The clients' ledger recorded that the purchaser clients provided relatively small sums of money as deposits, being sums significantly smaller than those provided by Ashkey.

With regard to the Bradford and Bingley cases:-

- (iii) The loans were structured as "remortgages" in circumstances where the properties were newly built and did not have existing mortgages.
- (iv) The "remortgage" advances were in excess of the actual sum paid to the vendors (in the developments of V, P and C).
- (v) Substantial amounts had been paid to the firm's "remortgaging" clients from funds provided by the lenders.
- (vi) The vendors had given substantial discounts which had not been reported to the lenders.

With regard to both Northern Rock and Bradford and Bingley:-

- (vii) Stamp Duty Land Tax had been paid on the full (i.e. without the deduction of a discount) purchase price.

With regard to the Northern Rock Transactions the properties were all purchased during the period from July to December 2005 and in each case the deposit was paid by Ashkey which appeared to be an unconnected third party.

- 31. It had been claimed that payments from Ashkey were not loans or deposits but rather represented funds paid to Ashkey by the purchasers for onward transmission to the firm. The invoices and completion statements provided by the Respondents' firm indicated that these monies represented bridging loans and were accordingly payments made by a third party.
- 32. The CML Handbook contained an express requirement that borrowers were to be asked how they were providing the balance of the purchase price and should the solicitor having conduct of the conveyancing transaction become aware that the

borrower was not providing any balance of monies required from his own funds that was a matter to be reported to the lender.

33. In relation to the Bradford and Bingley transactions the properties had been purchased between November 2005 and February 2006. Ashkey also participated in these transactions.
34. In eleven transactions where properties were purchased using monies advanced by Ashkey the properties were immediately “remortgaged” to Bradford and Bingley and the advances returned to Ashkey. The mortgage advances were greater than the actual price paid and the difference between the actual purchase price and the mortgage advance was returned to the purchasing client. The eleven property transactions produced such surpluses totalling £70,070.63 from monies advanced by one lender during a period of three months.
35. With regard to the development, BC, bridging loans were made by Fasttrack Lending Limited (Fasttrack). The FIO ascertained that Fasttrack had advanced £2,475,069.60 to purchasers through the firm’s client bank account and had been repaid the same amount. The FIO had ascertained that the Second Respondent was company secretary of Fasttrack and the First Respondent was a director of the company.
36. Each purchaser client was charged £1,500 as a fee for the bridging loan made by Fasttrack. In addition the firm charged its purchasing clients £400 for additional work undertaken in connection with the bridging loans. This charge was in addition to the average conveyancing fee of £750.00. It had been the FIO’s concern that the Respondents themselves had a financial interest in these transactions in which they were acting as solicitors both for the purchasing clients and the lending clients. The lender client, Bradford and Bingley, had not been informed of the Fasttrack bridging finance.
37. The Respondents had not reported all material facts, including the fact that a borrower had not provided the balance of the purchase price, to their lending client.
38. With regard to the development of P the firm had acted both for purchasing clients and their lender, Bradford and Bingley, in connection with the purchase of twelve properties. Ashkey had provided deposits in these transactions. The FIO had made reference to letters addressed to the Respondent’s firm by Ashkey in which it was confirmed that Ashkey had been in receipt of deposits from prospective purchasers and would be forwarding the same to the firm and referring to the facilitator’s fee that Ashkey required. The FIO had been provided with a copy of a letter that the First Respondent had written to Ashkey dated 8th November 2005 requiring Ashkey to note that the firm could not receive monies from third parties directly. Any monies sent on completion would have to come from accounts set up by Ashkey’s own bank with the particular purchasing client’s name. The firm also required individual clients to confirm in writing that the monies were sent to the firm on their behalf. There had been correspondence between the Respondents’ firm and Ashkey about the inaccurate use of the term “bridging loan” by Ashkey in these circumstances.
39. The Respondents explained that all of these “new build” transactions were not standard purchases by individuals who were buying the property with the intention of

residing in it. All of these transactions represented transactions where the purchasers were buying the properties as investments. SS, the unadmitted member of staff engaged by the firm, had had a wide experience of this type of work and it was she who attracted a lot of such instructions. Property investment exhibitions had been held and the First Respondent had attended some of them and had been introduced to a number of persons who were involved in the conduct of such commercial transactions. He had been made aware that bodies, such as Ashkey, had been set up to put together “packages” for prospective purchasers. Such organisations were sometimes known as “property clubs”. These bodies identified prospective new build properties which were usually a few properties remaining when the main part of the development had been disposed of or the first properties in a development to be sold with a view to providing cashflow to the developer. In either case the developer’s desire to dispose of the properties led to the negotiation of discounted purchase prices which were favourable to purchasers. It might be that the discounts were negotiated on the basis that several properties would be disposed of rather than a single individual negotiating a discount on a single property. The package put together by Ashkey would include the arrangement of a mortgage advance by a lender and such a lender recognised that its lending had a commercial basis and it was not lending money to enable an owner occupier to purchase the home in which he would reside.

40. Mr Alexander gave evidence on behalf of the Respondents. Mr Alexander was a co-founder of The Money Centre in 1990. Up until November 2009 The Money Centre (either as The Money Centre (UK) plc or The Money Centre Limited) arranged commercial finance and buy to let mortgages. It was not tied to any particular lender but it did have a packaging contract with Mortgage Express in or about the years 2003 to 2008. Mortgage Express had been one of a number of lenders who provided what became known as the “same day remortgage”. The purchase would proceed at below open market value, possibly with the assistance of bridging finance and then remortgaged to Mortgage Express or a lender with a similar product on the same day. Mortgage Express had been aware of the structure of this transaction and had advertised their product for such use and had employed a team of people to promote this “quirk” in their lending criteria to mortgage brokers. Mortgage Express had employed an underwriter to work from The Money Centre’s offices specifically to handle such arrangements. The Money Centre had also employed a former Mortgage Express head underwriter as an operations director who was experienced in the same day remortgage product. Considerable efforts had been employed by The Money Centre to ensure FSA compliance. The Mortgage Centre had placed an average of 1000 mortgages each month with Mortgage Express and possibly over 100 of those each month would have been same day remortgages. The Money Centre had dealt with about 2000 firms of solicitors who acted in such transactions.
41. Mr Alexander had queried the nature of the same day remortgage suggesting that it would make more sense simply to agree to lend 85% of the valuation on purchase upon payment of a fee but the response had been that the product was the result of “policy” or “just the way things were done”. Mr Alexander had formed the impression that Mortgage Express had been target driven and that the same day remortgage product was offered to capture a specific sector of the market. In the early days Mortgage Express was not the only lender to provide such a product.

42. Mortgage Express had withdrawn the same day remortgage product and had taken pre-action steps against The Money Centre arising from problems experienced with that product. The Money Centre had entered a defence to such claims but had not heard further from Mortgage Express.
43. Mr Akibogun also gave oral evidence. He confirmed that he was a landlord and had a substantial portfolio of “buy to let” properties. He said he had instructed the firm in connection with other business and had been satisfied with the service provided to him and that was his reason for instructing the firm in connection with the conveyancing matters the Tribunal was required to consider. He had learned about the Mortgage Express “lending product” from The Money Centre. He said that he knew that Fasttrack, as part of a package, would provide monies for the purchase of the property and that such monies would be repaid to Fasttrack upon the completion on the same day of a mortgage advance from Mortgage Express. He understood and agreed the payment of £1500 to Fasttrack and he understood and agreed all of the charges made by the Respondents’ firm. He confirmed that at the conclusion of the transactions the monies advanced to him by Mortgage Express were greater than the price he paid for the property and that the balance of monies so available at the end of the transaction had been paid to him. He confirmed that he had thereby purchased investment property without the use of any of his own money, an outcome which he found entirely satisfactory. He confirmed that he still owned the properties concerned and they had been let and formed part of his property portfolio. Mr Akibogun confirmed that he was aware at the material time that the Respondents were officers of Fasttrack and he was entirely content with that arrangement.
44. With regard to Fasttrack, the Respondents explained that the general ill feeling in the firm concerning the unadmitted conveyancer, SS, had continued. Mr Williams had left the partnership and SS had resigned from the firm when she had been employed there for about thirteen months. It had been recognised that the high volume of lucrative work that SS had attracted might not continue to come to the firm. In particular it appeared that the work that involved Ashkey left the firm with SS. The partners had considered how they might improve their situation. They had concluded that if they could find a way of replacing Ashkey then instructions in the purchase of new builds for investment might continue. The Respondents knew a very wealthy man, Mr R, and they approached him and explained the nature of Ashkey’s input and invited him to enter this field of business. He agreed on the basis that the Second Respondent would be the company secretary and the First Respondent would be a director. They agreed. Mr R made money available for the “bridging loans” and such money was deposited in Fasttrack’s bank account. The Respondents held a cheque book for that account in their office. It was the Respondents’ position that Mr R trusted the firm to utilise the monies for the purchase of property in circumstances where a same day remortgage had been negotiated and to return the money loaned (together with the loan fee) to Fasttrack. Neither Fasttrack nor Mr R was a client of the Respondents’ firm. The Respondents confirmed that monies belonging to Fasttrack used in conveyancing transactions were held at all times in client account. They explained that sometimes rather than a repayment being made to Fasttrack in one matter with a new loan being drawn down in another unrelated matter on the same day, inter ledger transfers were made with the authority of Mr R, although it appeared that such authority was not in writing. The Respondents’ firm had made a charge for dealing on the purchasing client’s behalf with Fasttrack but, save for their

firm's proper fee, the Respondents had no financial interest in Fasttrack itself and derived no personal financial benefit from the individual transactions in which Fasttrack was involved. The Respondents considered that there was nothing wrong or unprofessional with the constitution of Fasttrack and its business and that a conflict of interest did not arise because they were officers of the company, positions adopted to meet the requirements of Mr R, the beneficial owner of the company, and where their positions were not hidden from purchasing clients of the firm.

45. The First Respondent said that the majority of the payments made by Fasttrack were paid into his firm's client account by telegraphic transfer. Some were made by cheque. The property purchases were completed using Fasttrack's money and Fasttrack was repaid from the mortgage advance monies. It was his view that even where Fasttrack's payment in had been by cheque then the purchase monies had been drawn against uncleared funds and it was not the mortgage lender's money which had been used to complete the initial purchase. That would have been abundantly clear had a separate ledger account been opened for the lender client. In all of these circumstances they rejected the assertion that they had been dishonest. The First Respondent explained that his firm had always exercised great care to comply with the requirements of the CML Handbook. However, in many of the cases which caused concern to the FIO the lender in question had been given information which was material to its lending decision and it had in some circumstances ignored it and in others had indicated that it was not concerned about such matters.
46. The First Respondent said that he had formed the general view that the lenders in these commercial transactions had knowledge of the structure of the transactions and had decided to base their loans on the valuation which they had obtained. They were not concerned with variations in the purchase price arising as the result of incentives given by the vendors or how the initial purchase had been structured, possibly with funds being raised by a purchaser from a third party. It had also appeared to him to be the case that the lender was not concerned that the sum advanced was greater than the actual purchase price and that the balance of funds would not be utilised for the purchase of the property but paid to the purchaser/borrower.
47. It was understood that in the packages negotiated the vendors required their initial asking price to be the figure included in the conveyancing documents and for the discount to be treated as a separate matter. The First Respondent said that he believed that the correct calculation of stamp duty land tax was made on the figure contained on the face of the transfer to the purchaser. He had come to accept that it might well have been that the correct amount of tax was that calculated on the valuation of the property.
48. It had been explained that the Respondents had not regarded Fasttrack as a client and continued to believe that that was the case, similarly Ashkey had not been a client of the firm. The Respondents invited the Tribunal to have regard for the state of the property market and the anxiety of commercial lenders to lend monies on a commercial basis, in particular in the buy to let market.
49. Neither the Respondents nor the SRA had received any complaint from any of the clients involved in these transactions whether purchaser/borrower clients or lender clients. Further it was likely to have been part of the package negotiated that the

transactions be brought to a very speedy conclusion. Where attempts had been made to draw material factors to the attention of the lenders involved the attempts had been ignored or rejected. There had been cases where, in the belief that the lenders did not require it, such information had not been provided. It was accepted that the certificates of title contained an undertaking that CML requirements had been met.

50. The Tribunal reviewed the following documents submitted by the Applicant:-
- (i) The relevant Practice Rules and the relevant parts of the CML Handbook.
 - (ii) The documents appended to the Applicant's originating statement which included in particular the FIO's report with appendices.
 - (iii) An example of a certificate of title.
51. The Tribunal reviewed the following documents submitted by the Respondents:-
- (i) The Respondents' statements with documents attached.
 - (ii) The statement of Mark Alexander.
 - (iii) A testimonial handed up in support of the First Respondent.
52. The following persons gave oral evidence
- (i) Mr Williams
 - (ii) Mr Alexander
 - (iii) Mr Shaw, the FIO
 - (iv) The First Respondent
 - (v) Mr Akibogun
 - (vi) The Second Respondent

Findings as to Fact and Law

53. The Tribunal noted that the First Respondent had admitted allegations 2 (c) (d) and (e). He had explained to the Tribunal that the failures about which complaint had been made were not deliberate but were the result of an unsatisfactory handling of the matter or the result of mistake. He had expressed regret that his handling of the matter had not been satisfactory. It was on that basis that the Tribunal found these allegations to have been substantiated.
54. With regard to allegation 3(a) the Tribunal noted that both Respondents had admitted this allegation which related to the transfer of search fees from client to office account when such fees had not in fact been incurred. The Tribunal noted the Respondents' explanation and their admission and found that allegation to have been substantiated.
55. With regard to allegations 3 (b) (c) and (d) which related to the Respondents' handling of a number of conveyancing transactions where they acted for purchasers and mortgage lenders the Tribunal noted that they had admitted these allegations and the Tribunal found them to be substantiated.

56. The Tribunal was required to consider whether in relation to allegation (b) (acting where there existed a conflict between the interests of the Respondents and those of their mortgagee clients) the Respondents were also dishonest. Further in connection with allegation (d) where it was alleged that the Respondents failed to act in the best interests of their lender and purchaser clients, the Tribunal had to consider whether the Respondents had been dishonest in that respect.
57. Both sides agreed that the appropriate test to be applied by the Tribunal when considering the question of dishonesty was that contained in the case of *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12.
58. The Tribunal found that even though the Respondents had not complied with the CML Handbook, the lending clients were fully aware of the circumstances of the transactions, including the substantial discounts and the “same day remortgage” arrangements. In some matters the lender client had rejected or ignored the submission of such information. The Tribunal did not therefore find that the Respondents’ conduct was dishonest by the standards of reasonable and honest people. It appeared from the evidence before the Tribunal that the supervision of the employee mainly charged with the handling of such work could not be described as close. Ultimately the Respondents were responsible for any failures which she perpetrated.
59. For broadly similar reasons, because of the knowledge of the lenders and purchasers about the nature of the transactions, in particular the “bridging loans” received from Ashkey and Fastrack, and because the transactions had been pre-negotiated and packaged with both borrower and lender clients being fully aware of the structure of the transactions, the Tribunal did not find that the Respondents’ conduct was dishonest by the standards of reasonable and honest people.
60. Because the Tribunal had found the Respondents not to have been dishonest by the standards of reasonable and honest people it had not been necessary for it to consider the second subjective part of the test in *Twinsectra Ltd v Yardley*, but the Tribunal accepted that the Respondents had an honest belief in all the circumstances that their conduct was not dishonest.

Previous appearances before the Tribunal

61. The Tribunal noted that the First Respondent had appeared before the Tribunal in 1989 when a fine had been imposed upon him. In view of the passage of time since the Tribunal’s earlier finding the Tribunal had given it little weight when considering the sanction to be imposed upon him.

Mitigation

62. No separate plea in mitigation was made on behalf of the Respondents whose explanations and evidence had made reference to all of the mitigating factors, in particular the fact that they had found it necessary to close their firm.

Costs

63. On the subject of costs the Applicant requested a fixed costs order in the full amount claimed. His own costs together with those of the FIO came to a figure approaching £55,000. Such costs were sought on the basis that the complaint had been properly brought and it would not be appropriate for the Tribunal to make a costs order against the SRA. The Respondents' representative asked for a reduction to reflect the failure to prove the dishonesty part of the allegations and the fact that the length of the hearing had been extended because of the need to establish the lack of dishonesty on the part of the Respondents. The Tribunal was invited also to take into account the fact that certain documents had been served late upon the Respondents.

Sanction and Reasons

64. The Tribunal took the view that the First Respondent's handling of Mrs S's matter fell seriously below the standard that might have been expected of him. The Tribunal gave him credit for admitting allegations 2 (c), (d) and (e) but he had seriously failed to act in the best interests of Mrs S and to afford her an appropriate level of protection bearing in mind that she was a particularly vulnerable client. In the light of his failures with regard to his client he appeared to have abdicated his responsibility as a partner in the firm and the solicitor responsible for the conduct of the matter in requiring responses to the PGO to be drafted by an assistant solicitor and allowing them to be sent off without being absolutely sure that the contents were accurate.
65. It was part and parcel of the First Respondent's failures that he appeared not to have attended upon Mrs S to obtain her direct instructions which might, of course, have alerted him to her mental health difficulties and the less than felicitous turn of phrase which he adopted when writing to Wilkinsons in August 2002 namely that "our client is happy" was deeply unsatisfactory.
66. The First Respondent considered that he had been duped by Mr P but if he had taken the elementary steps that a prudent solicitor would take when acting for an elderly and vulnerable client it would not have been possible for Mr P to act as he did.
67. The Tribunal regarded the First Respondent's failures in this respect to be very serious and concluded that it would be appropriate and proportionate to impose a substantial financial sanction upon the First Respondent and that he should have a fine imposed upon him of £7000 in respect of these allegations.
68. With regard to the allegations made against both Respondents, their failures to act at all times with complete frankness and openness and to handle client monies with punctilious accuracy could not be ignored. Although on their face the balance of the allegations were serious, in the light of the Respondents' explanation and in the knowledge of the extraordinary approach adopted by the lending institutions involved at the material time the Tribunal accepted that these allegations did not come at the highest end of the scale. Indeed, the conflict of interest where the two Respondents were officers of a non client company from which they derived no financial benefit and where their clients were aware of the situation was a technical conflict only.

69. The Tribunal also accepted that to a certain extent the purchaser and borrower clients did not wish to be notified of what might be considered to be material matters. The reality was that the Respondents had allowed themselves to be swept along in a commercial helter skelter with the assistance of a newly employed member of staff who appeared to be generating a great deal of this work and who, against the advice of their former partner who was seen to be interfering, they entrusted client matters without a full and complete scrutiny or consideration.
70. It was, in the Tribunal's view, incumbent upon the Respondents to explain the structure of the transactions to both purchasing and lending clients, to point out any pitfalls or anomalies and for those clients to confirm full acceptance of the matters drawn to their attention before the Respondents were in a position to proceed to completion. This was the solicitor's duty and the CML requirement. Alternatively the Respondents should have obtained the lenders' confirmation that the provision of the CML Handbook did not apply. The Tribunal does, however, recognise that these were commercial transactions entered into by sophisticated parties and the Respondents' failures were not to be regarded as seriously as they would have been if a lender had been making a loan to a purchaser buying the home in which he intended to reside where the transaction had not been the subject of a "packaged" deal.
71. The Tribunal noted Mr Alexander's evidence that his company had been the subject of action by Mortgage Express arising out of problems experienced with the "same day remortgage" product. It appeared that the Respondents had not received complaint from any source as at the date of the hearing.
72. In all of the particular circumstances the Tribunal concluded that the imposition of a financial sanction on each of the Respondents would be appropriate and the respective level of the fines imposed reflected the Respondents' individual culpabilities. The Tribunal ordered the First Respondent to be fined £10,000 (making a total of £17,000 in all) and for the Second Respondent to be fined £7,000.
73. With regard to the question of costs the Tribunal considered the submissions made to it and the quantum sought. The Tribunal concluded that it would fix the Applicant's costs in the sum of £45,000 and that the proportion to be paid by each of the Respondents was to reflect the level of his culpability so that the First Respondent would be required to meet £25,000 of the Applicant's costs and the Second Respondent would be required to meet £20,000 of the Applicant's costs. The Tribunal rejected the suggestion that the Applicant should pay part of the Respondents' costs as this was contrary to authority which provided that it was not appropriate for costs to follow the event where a regulator had properly brought allegations.

The Orders

74. The Tribunal Ordered that the Respondent, NICHOLAS BARRINGTON PEACE of 11 Hogarth Reach, The Lindens, Loughton, Essex, IG10 3HT, solicitor, do pay a fine of £17,000.00, 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 £25,000.00.

75. The Tribunal Ordered that the Respondent, ALAN LAWRENCE WINTER of Newbury House, 890-900 Eastern Avenue, Ilford, Essex, IG2 7HY, solicitor, do pay a fine of £7,000.00, 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 £20,000.00.

Dated this 29th day of October 2010

On behalf of the Tribunal

A Banks
Chairman