

Filing of Order with Law Society suspended for 14 days after filing of Findings

No. 7402/1997

IN THE MATTER OF MALCOLM FRANCIS TURNBULL, Solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr. J W Roome (in the Chair)
Mrs. E Stanley
Mr. D E Marlow

Date Of Hearing: 23rd December 1997

FINDINGS

of the Solicitors' Disciplinary Tribunal
constituted under the Solicitors Act 1974

An application was duly made on behalf of the Office for the Supervision of Solicitors by Roger Field, solicitor, of Inhedge House, 31 Wolverhampton Street, Dudley, West Midlands, on the 14th May 1997 that Malcolm Francis Turnbull, solicitor of Exeter, Devon 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.

At the opening of the hearing the applicant sought to amend one of the allegations and withdrew another. The allegations set out below reflect the allegations before the Tribunal at the hearing. The respondent agreed to the amendments and the Tribunal consented thereto.

The allegations were that the respondent had:-

- (i) failed in his duty to act in the best interests of lender clients by not providing material information to them;
- (ii) accepted instructions to act for two clients when there was a conflict or a significant risk of conflict between the interests of those clients;

- (iii) abused his firm's lending facilities by concealing from the lender the exact nature of the facilities sought;
- (iv) acted (other than in his professional capacity) towards his partner in a way which was deceitful or otherwise contrary to his position as a solicitor.

The application was heard at the Court Room, No.60 Carey Street, London, WC2 on the 23rd December 1997 when Roger Field solicitor and partner in the firm of Messrs. Higgs & Sons of Inhedge House, 31 Wolverhampton Street, Dudley, West Midlands appeared for the applicant and the respondent appeared in person.

The evidence before the Tribunal included the admission of the respondent as to allegations (i) (ii) and (iii) and a general admission as to the facts.

At the conclusion of the hearing the Tribunal ORDERED that the respondent Malcolm Francis Turnbull of _____, Hampshire (formerly of Exeter, Devon) solicitor be struck off the Roll of Solicitors and they further ordered him to pay the costs of and incidental to the application and enquiry to be taxed if not agreed.

Upon the application of the respondent the Tribunal agreed that the filing of the Order with the Law Society should be suspended for the period of fourteen days after the filing of the Tribunal's Findings with the Law Society. It was the Tribunal's intention that provided the respondent lodged his appeal within the specified period, then the effect of the Tribunal's Order would remain suspended pending the outcome of his appeal.

The facts are set out in paragraphs 1 to 16 hereunder.

1. The respondent, who was fifty two years of age, had been admitted a solicitor in 1973. In April 1984 the partnership in which the respondent practised was dissolved by mutual agreement and he took over the firm and continued to practise on his own account under the style of Turnbull Bell & Co. Later that year he employed Mr Williams as an assistant solicitor and that gentlemen entered partnership with the respondent upon the 1st May 1987.
2. Early in 1989 the firm opened an office in Bristol which Mr Williams ran and the respondent remained at the firm's office in Honiton. The Honiton office was the administrative base for the firm.
3. In July 1990 the name of the firm was changed to Turnbull Williams.
4. On the 30th April 1991 the partnership of Turnbull Williams was dissolved. Each partner pursuing his separate career elsewhere.
5. The respondent was adjudicated bankrupt following the filing of his own bankruptcy petition on the 15th October 1993. The Law Society had granted him a conditional practising certificate thereafter.
6. In November 1993 Mr Williams wrote to the Solicitors Complaints Bureau in complaint about the respondent's conduct.
7. The following specific matters were before the Tribunal:-

(a) Halifax Building Society and Properties in Cornwall

8. The respondent had been instructed by Mr W a property developer to act in relation to two properties. The agreed price in total for the two properties was £140,000 divided as to £97,500 for the first property and £42,500 for the second property. In relation to the second property Halifax Building Society had been informed that the purchase price was £52,500, a variation of £10,000. Mr W received £10,000 in cash following the transaction. Mr W and a Mr G had owned the properties jointly and Mr W had entered into contracts to buy both of them. The respondent had been unable to remember the reason that the transfer had been drawn of one property to Mr G and of the other property to Mrs G. After the respondent had been given the opportunity to examine the file he confirmed that the contract by Mr W for the purchase of the second property showed the purchase price to be £42,500. The respondent had noted on the file a conversation which he had held with Mr G to the effect that there was to be a sub-sale to Mr G's step daughter at a consideration of £52,500. There was a transfer on the file between the vendors of the second property to Mr W and by his direction to the step daughter of Mr G in which Mr W had acknowledged the receipt of £10,000. The respondent had been somewhat hazy in his recollection of the matter.

(b) The Halifax Building Society and the First Property

9. The respondent had acted for Mr W in the purchase of the first property in Cornwall from Mr G for whom the respondent had also acted. The consideration was represented as £85,000 and Halifax advanced £65,000. Of this sum £11,500 was paid for the benefit of Mr G and £13,159.06 was used to repay Mr G's bridging loan at Barclays Bank, Honiton which had been arranged by the respondent. £9,000 had been placed in a joint account for Mr W and Mr G. Various small payments were made to settle architect's fees owed by Mr G, to pay Stamp Duty, mortgage arrears, Land Registry fees and legal fees. Of the balance of £42,596.20, £24,000 had been paid to Mr. W and/or Mrs W at a time when Mr W owed the respondent's firm approximately £185,000. The balance was held by the respondent and used to pay the monthly mortgage payments to Halifax for some months with further small payments being made to Mr G's architects. After arrears had built up, Halifax repossessed the property in April 1992, and sold it in September 1992, making a loss of just over £41,000. The Halifax advance had been made to convert the property which work had not been carried out.
10. The respondent's position was that he had disbursed the monies on his client's instructions. Stamp Duty on the transfer of the first property was paid from the advance upon the second property. The deposit on the sale of the second property was £9,600 of which £2,600 was used to pay part of the bridging loan and a balance was transferred as part of the deposit on the first property.
11. The balance of £86,400 was used to repay in part the bridging loan on the second property and the bridging loan on the first property which left of £13,159.06 of the original bridging loan outstanding.

(c) Miss S

12. Miss S was a client of the respondent. She had lent money to Mr W secured by a Second Charge upon the home of Mr W. Mr W's home was re-mortgaged and Miss S's Charge was relegated from a Second to a Fourth Charge. There was no equity remaining in Mr W's home so that there was no, or virtually no, chance of Miss S being repaid. Miss S had died in November 1993.
13. The respondent had been asked by Miss S to invest moneys for her. On the respondent's advice she had lent monies to Mr and Mrs W secured by a Second Charge. Later there had been a re-mortgage by Mr and Mrs W to Bristol and West Building Society, and it had been arranged that Miss S's Charge that would rank as a Third Charge behind Bristol & West and Midland Bank. Although it had been envisaged that Miss S's loan would be repaid she subsequently agreed that it could be left outstanding. The respondent denied that he was aware of any default on the part of Mr and Mrs W upon any superior mortgage. The respondent had discussed the matter with Miss S. who, because of falling property values, had agreed to "mark time and wait".

(d) The Borrowing of Monies from Barclays Bank Honiton

14. The respondent acted on behalf of Mr W in the purchase of S Farm at the price of £185,000. The respondent approached Barclays Bank ("Barclays") who agreed to lend £185,000 to the respondent's practice. The money was used to fund the purchase of S Farm. The respondent borrowed further monies from Barclays in order to pay Mr W's legal fees, Land Registry fees and Stamp Duty. The respondent did not disclose the bank borrowing to Mr Williams, his partner, for almost two years. Mr Williams was not made aware of the borrowing until April 1991 when he learned that the indebtedness had grown to £300,000.
15. The respondent had not sought repayment of the monies from Mr W and had not secured the lending by taking a charge over S Farm. He had paid Mr W (or to his family) the sum of £24,000 as set out above. Barclays had issued proceedings against the respondent and Mr Williams and, although Mr Williams had obtained a charge over S Farm the eventual realisation proceeds were £100,000 less than the purchase price. The bankruptcy of the respondent had left Mr Williams facing a claim from Barclays for £250,000.
16. The respondent accepted that it was wrong to borrow monies in the way he did but at the time it seemed to him an acceptable transaction. He did not think that he had informed Barclays of the precise nature of the bridging. He did not think that he had told Barclays that there was no current mortgage offer. He accepted that he had not informed Mr Williams of the arrangement.

The Submissions of the Applicant

17. The matter had taken some time to come before the Tribunal as the Solicitors Complaints Bureau had undertaken a lengthy investigation and the matter had been passed to the applicant for him to carry out a more detailed investigation.

18. It was well established that where in a conveyancing transaction there was a disparity between the purchase price actually paid for a property and the price as declared to a lending institution client then the variation in purchase price had to be disclosed. The respondent himself agreed that a variation in purchase price in those circumstances was a material matter. A solicitor who acted for both a buyer of a property and a lender must consider his position carefully should there be any change or variation in the agreed purchase price. The solicitor was required to impart knowledge of any change to the lender. The solicitor might find himself in difficulty because he had a duty of confidentiality to his purchaser client. That did not however affect his obligation to act in the best interests of both clients. The proper way for a solicitor to handle such a matter was tell the buyer that he was obliged to disclose the variation in purchase price to the lender and if the buyer did not agree to that course of action, then a solicitor had to refuse to continue to act. It was wholly wrong and improper for a solicitor to withhold relevant information from a lending institution client.
19. In connection with the matter under the heading (a) above Mr Field did not put it as one of dishonesty on the part of the respondent but accepted that the respondent had made a considerable error of judgement. He also accepted that in 1989 when that matter occurred "mortgage fraud" had not received the high profile which it had since that time, nevertheless the duty to inform a lender of a price variation was well known and established practice at the time.
20. In connection with the second matter (under heading (b) above) the institutional lender might well have felt disadvantaged when the respondent disbursed part of the advance monies for a purpose other than to secure the property which in turn was to stand as security for the loan. The respondent was, in the submission of the applicant, under a particular duty to take care and deal with matters entirely properly in view of the bizarre circumstances of that transaction. The respondent himself accepted that he was under a duty to disclose what had happened at the time. The applicant accepted that the respondent had not been motivated by any possibility of personal gain and he had not acted dishonestly. He had however clearly been in breach of his professional obligations. He had been guilty of a serious error of judgment which amounted to conduct unbecoming a solicitor but which fell short of dishonesty.
21. In the matter of Miss S's loan to Mr W, under the heading (c) above, the respondent knew or ought to have known the way in which the property market was moving at the time. It should have been within his contemplation that Miss S might stand to lose if the priority of her mortgage was being made to rank behind the priority of others which were subsequent to hers in time. It was absolutely clear that in that situation where the respondent was acting for both parties he should have required Miss S to take independent advice. The applicant did not allege that the respondent had been dishonest in the matter but in his submission the respondent had a fiduciary duty to Miss S and a conflict of interest had clearly arisen. The respondent should not have acted for Miss S at the same time as he acted for Mr W. Again the respondent had been guilty of a serious error of judgment. He should have realised his position and should have applied the appropriate professional principles.
22. With regard to the borrowing from Barclays Bank, under heading (d) above, again the applicant did not allege that the respondent had been guilty of dishonesty. His contention was that the respondent would have to have known that what he was doing was wrong in order for an allegation of dishonesty to lie. In the submission of the

applicant it was right that the allegation should reflect the fact that there was a conflict of interest and the respondent ought to have realised that he should not act. The applicant said he could not suggest that the respondent did not act in good faith. He had not chosen to do something wrong; again he had made a substantial error of judgment.

23. The respondent had suggested that the matter of the borrowing from Barclays Bank represented a civil matter between himself and his former partner and was not a professional conduct matter which should have been brought before the Tribunal. The applicant had been content to amend the allegation so that he did not suggest that the respondent acted in his capacity as a solicitor in failing to disclose the Barclays Bank loan to his partner. Misconduct of a solicitor need not necessarily relate to the way in which he carried out his duties as a solicitor. A solicitor was an officer of the Court and certain standards of behaviour were required of a member of that profession both in business and in any other activities. A failure to disclose a matter that would so closely affect his partner and indeed to take a deliberate decision not to disclose the true nature and consequences of such a transaction was in the submission of the applicant sufficient to make out allegation (iv). The respondent's partner had suffered greatly as a result of the respondent's failure. The respondent's relationship with his partner should have been one of absolute trust and confidence.

The Submissions of the Respondent

24. The respondent told the Tribunal that he had gone over the events in respect of which the allegations had been formulated many times in his own mind. At the time he overlooked his duties to institutional lending clients unwittingly. He had made a mistake which was a genuine mistake possibly amounting to an error of judgement but in respect of which he was not culpable or guilty of any moral obloquy.
25. The respondent accepted, with the benefit of hindsight, that it would have been sensible for Miss S to have been independently advised in connection with her loan to Mr W and the postponement of her mortgage. He had come to accept that his professional duty was to have ensured that Miss S had obtained independent advice.
26. With regard to the allegation that he had concealed from Barclays Bank the exact nature of the facility sought, the respondent did not believe it was correct that the exact nature of the facility had been concealed from the firm's bank. The practice had a bridging facility for clients' use. When it was used for the benefit of Mr W it was at the time being employed legitimately, it had been only later that it was brought to the respondent's notice that the bank had intended to make loans only in a "closed" bridging arrangement. The respondent did not believe that had been stipulated previously. The respondent accepted that he had made a serious mistake and had been guilty of a grave error of judgment in allowing the facility to be used in the way that it had been. The applicant had accepted that the respondent had not been guilty of any deliberate dishonesty.
27. The consequences of using the facility as he did had been far reaching and devastating for Mr Williams, the respondent's former partner and his family. The respondent had not notified his former partner of the bridging loan at the time because his partner had been actively and busily engaged in building up the Bristol office of the practice and he did not wish to burden him further. In the submission of the respondent the allegation

that he had acted towards his partner in a way that was deceitful was not a matter with which the Tribunal should concern itself, the matter effectively was a dispute between former partners and did not fall within the jurisdiction of the Tribunal. The respondent admitted that he had acted in an exceptionally stupid manner in this connection.

28. Whilst he was not in any way attempting to minimise the scale of the indebtedness to the bank, the respondent believed it stood at £225,000 (rather than £300,000) by April 1991. The client, Mr W, had assured the respondent on countless occasions that the finance he was organising would be available given time. The respondent had employed a great deal of time and effort to try to arrange finance for his client once the client's own attempts to do so had failed.
29. The respondent readily accepted that he had been guilty of a huge error of judgment the consequences of which had been very serious. The respondent apologised to Mr Williams for what had happened and for the grave consequences which had flowed from it.
30. The matters before the Tribunal emanated from a complaint made by Mr Williams, the respondent's former partner as long ago as November 1993.
31. In the submission of the respondent the work which he had undertaken for his numerous clients over many years had always been carried out diligently efficiently and effectively.
32. No allegation whatsoever had been made against the respondent that he had been guilty of any financial dishonesty and no client monies had been placed in jeopardy.
33. The respondent had always viewed the allegations made against him with the utmost seriousness. He had responded fully and promptly to all correspondence and other communications addressed to him by the Office for the Supervision of Solicitors, its predecessor the Solicitors Complaints Bureau, and the applicant.
34. The respondent had ceased to practise as a solicitor in July 1996. He had not applied to renew his Practising Certificate. He had no intention of applying for a Practising Certificate in the future or of returning to work within the legal profession. The respondent had been fortunate to have the support of his family in difficult times.
35. At the end of the previous year the respondent and his wife had begun to run a small business which they hoped would prove profitable. His wife had other employment and was the principal breadwinner in the household. The respondent's own income was minimal.
36. Since the respondent's bankruptcy in 1993 he had no bank or other accounts in his sole name nor did he have any investments or savings. He and his wife shared a modest credit balance in a joint bank account.
38. The Tribunal was invited to adopt a lenient stand in the particular circumstances of this matter.

The Findings of the Tribunal

The Tribunal FOUND all of the allegations to have been substantiated. The respondent had failed to apply fundamental principles of professional conduct in the matters in which complaint had arisen. The respondent had not been able to advance any cogent reason for his behaviour. He accepted with hindsight that he had not been careful in his dealings with Halifax Building Society and had not looked after the interests of Miss S, indeed he appeared to have looked after the interests of Mr W at the expense of his lending institution clients and in particular at the expense of Miss S who had sought the respondent's advice assistance and protection in connection with the investment of her funds.

The respondent had said that at the material times he had been busy. He had not been bullied by Mr W although he had been a very persuasive gentleman. The respondent said at the time he had not recognised an actual or potential conflict of interest.

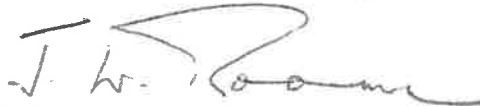
The respondent had borrowed substantial monies from Barclays Bank upon the assurance of a client that it would be repaid without discussing the matter first with his partner who clearly would be liable as a partner for any substantial debt so created and who in fact became liable when the client's assurances proved to be without substance.

No allegation of dishonesty had been made against the respondent and the Tribunal is not required to make a finding of dishonesty, but the Tribunal have found allegation (iv) established in that the respondent acted in a way which was deceitful towards his partner.

The members of the Tribunal were appalled by the respondent's extraordinarily cavalier attitude in his professional dealings and they were firmly of the opinion that the respondent had abandoned the duties and responsibilities that being a member of the solicitors' profession imposed upon him and they were unable to avoid the conclusion that he had not acted with the probity integrity and trustworthiness required of a member of that profession. The Tribunal considered that the respondent was not fit to be a solicitor. The Tribunal ordered that the respondent be struck off the Roll of Solicitors and further ordered him to pay the costs of and incidental to the application and enquiry, to include the applicant's lengthy investigation, such costs to be taxed by one of the Taxing Masters of the Supreme Court, quantum was not agreed.

DATED this 5th day of February 1998

on behalf of the Tribunal



J W Roome
Chairman

Findings filed with the
Law Society on the 11th
day of February 1998