IN THE COURT OF FACULTIES

IN THE MATTER OF ELLA ELIZABETH IMISON, A NOTARY

AND

IN THE MATTER OF THE NOTARIES (CONDUCT AND DISCIPLINE) RULES 2011

DECISION OF THE COURT

INTRODUCTION AND STANDARD OF PROOF

1. We announced our decision in this matter on Friday 9th May at the conclusion of the two day hearing and indicated we would give written reasons later. We were provided with documents which filled in excess of 16 lever arch files and which included skeleton arguments and submissions running to a very great number of pages in advance of the hearing. The Affidavits served by the Complainant ran to some 44 pages and from the Respondent to 100 pages of closely typed evidence.

2. We have always believed that the issues and the answers to them are rather simpler than the enormous amount of material might otherwise make it seem and, as a result, and whilst, we hope, doing justice to both sides, we can keep this ruling relatively short.

3. A preliminary issue which we had to consider was the standard of proof which we had to reach before finding misconduct. The Notaries (Conduct and Discipline) Rules 2011 is silent on the issue. However, Paragraph 26 of the "Guidance for Nominated Notaries issued by the Master of the Faculties" states that:-

> "The Court applies the criminal standard of proof when adjudicating on a complaint."

4. We were directed to a number of authorities which tended to support the proposition that the standard of proof in disciplinary tribunals was on a balance of probabilities but allowing for something of a sliding scale so as to apply the criminal standard of proof where what is alleged is tantamount to a criminal offence.

5. We note that the Solicitor's Regulatory Authority applies the civil standard of proof when it makes a disciplinary decision without referring it on to the Solicitor's Disciplinary Tribunal ("SDT"). The rules governing the SDT are silent as to the standard of proof to be adopted but seem to adopt the higher standard. The Bar maintains the criminal standard of proof.

6. The higher standard of proof adopted by Solicitors and Barristers has been the subject of considerable criticism but no authoritative guidance has been provided by the appellate courts on the issue. Neither counsel thought it should apply to these proceedings, although Mr Cropp advocated a sliding scale of proof depending on the allegation. We have decided on the balance of authority to apply the civil standard of proof in respect of the first two allegations, but in respect of the third allegation we have decided that the higher criminal standard of proof should be adopted.

7. We have taken that view in respect of the third allegation because the alleged actions or inactions may result not only in breaches of the Notaries Practice Rules 2009 but also in possible criminal offences.

8. The issue is somewhat academic in this case because we would have reached the same conclusion on the first allegation had we felt bound to apply the criminal standard of proof to all the allegations.

GENERAL AND ALLEGATION 1

9. The Respondent Scrivener Notary accepted instructions from The Insight Companies in respect of public investment which they sought in a crop growing scheme in Mozambique known as the "Moringa Miracle Tree Project". It offered quick and attractive returns on the investment and attracted, amongst others, a number of retired people to invest. Over the period which was substantially in 2010 and 2011 approximately 100 investors invested a total of $3 million. We understand that all the money has been lost.

10. There is no evidence of any crop growing having taken place or that the money was invested in any way in the scheme. Based on the obvious inferences which can be drawn from the facts as we know them to be and relying, as we judge that we can and insofar as we need to, on the decision delivered on 17th July 2013 by Mr Registrar Jones sitting in the High Court of Justice (Chancery Division) Companies Court, we conclude that this was a fraudulent scheme.

11. In coming to that conclusion we are not suggesting that the Respondent entered into the scheme dishonestly, but, against the background of the finding of fraud, we have to look at what steps she took to examine the scheme in which Imison & Co became embroiled.

12. Firstly we considered what services she was in fact providing to her client, Insight Commodities Limited ("ICL") or Insight Primary Industries Limited formerly known as Little River Trading 268 Limited ("LRT268/IPI") or The Insight Group Plc (together with Insight Financial Services Limited referred to as "The Insight Companies"). It was not a normal notarial transaction. She was not asked to notarise any documents for use abroad. In our judgment she was being used as little more than a post box for investors in this country to invest in the scheme in Mozambique. Imison & Co provided the agreement for sale and purchase of agricultural use rights, and its employees signing under a Power of Attorney on behalf of ICL or LRT268/IPI.

13. The money invested by the purchaser was paid through the Imison & Co bank account and was then sent abroad to accounts nominated by their client, The Insight Companies. The accounts into which the monies were paid by Imison & Co were not always in the name of the entity with which the buyer had contracted.

14. The Respondent claims that she was providing conveyancing services to her client. To do so, there would have to be something to convey. Even to someone with a basic knowledge of contracts it would have been obvious that the contract conferred no rights on the buyer in respect of the crop scheme. Paragraph 5.1 of the contract (File 3, Ex 5, p.114) read

> "The seller shall use reasonable endeavours to procure that the Leasehold Owner acquires, as soon as practicably possible, a lease of 50 years from the Term Commencement Date over the Land."

15. The contract, in our view, was not worth the paper it was written on; it commits the seller to nothing. The Respondent who must have applied her mind to the contract, should, we judge, have realised that straight away.

16. In addition the Respondent was in possession of the purported Agreement of Lease Payment Structure and Agreement of Lease documents between the lessor of the land, Eko Turismo Gorongosa Limitada, and the Insight Group Plc (File 5, Ex 31, pp.3304-3325). One of her two employees who spent time working on this project for Imison & Co realised the potential risks involved when in an email dated 17th May 2010 he wrote to the Insight Group Plc as follows:

> "We consider entering into agreements with buyers without first establishing a good link to the legal owner of the land very risky. Therefore not to expose you and anybody involved to such a risk, we need to see a sign off from the Mozambique lawyer that all is above board."

17. We mention in passing that some of the signatories on the Agreement of Lease were unknown to the Respondent and she was in no position to verify that they even existed or that they were their true signatures.

18. There is a typed note (File 5, Ex 30, p.3301) of a telecon between Joe Upright and others, and Imison & Co and dated 14th May 2010. Handwritten notes (Correspondence File p.5236) which seem to be the origin of the typed notes were produced in their unredacted form after a successful application made to us to lift privilege. It is clear to us from those notes that Imison & Co were advising Insight on contractual terms and that the Respondent was a party to those discussions:-

    (a) In the handwritten note (p.5236 under the date 27th April), at the end of the notes of a discussion on the contract, it sets out that for "Reviewing of "Agreement for Sale and Purchase of Agricultural Use of land"" Imison & Co were charging for 14 hours.
    (b) On the same page in the handwritten note it reads "Ella advised them not to send the contracts, not to expose themselves".
    (c) The reference on the typed note of the Telecon (File 5, Ex 30, p.3301), "Ella highlighted that we need the copies of the "search report" and "Agreement with John" to finalise the contract" shows the extent of the Respondent's involvement in giving that advice.

19. What purports to be a firm of South African lawyers, Niël Schoman, sent a letter dated 18th May 2010 confirming due diligence (File 5, Ex 32, p.3327). This was found in the Respondent's files. Also found was another version of that letter of the same date (p.3328) and which has within the body of the letter questions that needed answering. Those questions included matters such as "Please cite who Graystone Holdings are. Are they Mr Zyl's or Graystone's lawyers?" and "Who is the owner [of the land]?"

20. We have concerns about the version at p.3328; not only is the letterhead different because the symbol of the tree is not mirrored when compared to p.3327, but the umlaut is missing from "Niel" and the footer setting out formal details about the firm is missing altogether.

21. We do not fully understand why the Respondent should have a copy of such a letter, but we are quite sure in our minds that it should have put Imison & Co on notice to make more thorough enquiries before accepting due diligence at the least and, we imagine, it would have been enough to make many notaries and lawyers walk away from the rôle they were being asked to perform.

22. We have concerns as to the rôle the respondent played in respect of the Mozambique lawyers. We do not understand why there should be an entry "Draft a letter for Mozambique lawyer" (File 5, Ex 26, p.3281) with a reference to "Josh will do the letter" (p.3282), "Josh" being a reference to Coskun Yorulmaz, the Respondent's employee. It was suggested by Ms Maher on behalf of the Complainant that this was a reference to the letter dated 31st May 2010 (File 5, Ex 34, p.3331) which purports to come from the Mozambique lawyers, DDJ Law. This was denied in the strongest terms by the Respondent.

23. We see why the Complainant makes this allegation and we, too, have concerns over the way in which a lawyer practising in Portuguese law should be using expressions which we would expect to be used by a lawyer practising in this country. Further it is of concern that a line from that letter,

> "There is a legally established link starting from the legal owner of the land..."

should also be found in similar terms in an email sent by Coskun Yorulmaz to Joe Tucker, Renée Muir and Joseph Upchurch two weeks earlier (File 5, Ex 31, p.3303),

> "We consider entering into agreements with buyers without first establishing a good link to the legal owner of the land very risky."

24. Whilst we have our concerns about this aspect of the evidence, we have not concluded that the Respondent or her employees in fact drafted the letter from DDJ Law. We do, however, judge that it adds to our conclusion that the rôle taken by the Respondent went far beyond that which a Notary should undertake.

25. We do not understand why the Respondent did not question why Imison & Co's bank account was being used as a conduit for the monies on behalf of ICL when it was a company registered in this country. All lawyers are alert to guard against the possibility that they are being used to provide verisimilitude in respect of an otherwise shady or dishonest undertaking and we judge that it should have put her on notice to look further into the affairs of Insight before agreeing to be the conduit for a scheme which we judge, contrary to her own submissions to have the clear hallmarks of an investment scheme rather than a conveyancing transaction.

26. We remind ourselves that this was taking place in 2010 and 2011 which was a time when banks which had hitherto been thought to be solvent and upstanding found themselves the subject of considerable press interest and public condemnation. Someone in the Respondent's position should have been looking very carefully at such schemes as the one proposed by Insight.

27. In addition she had good reason to be wary of those involved with Insight. She had previously dealt with ALPIL which went into administration on 6th July 2010. Joseph Upchurch was involved with ALPIL (although he got out of it some months before it went into administration) and with Insight. She ought to have considered how it was that that Upchurch and others in the guise of Insight, which seems to have risen from the ashes of ALPIL, was able to begin again in business so soon after ALPIL went into administration. It ought to

have made her more cautious of having anything to do with the Insight's scheme.

28. Mr Cropp sought to persuade us that the Respondent could not be held responsible for her employees where appropriate delegation had taken place. He relied on John Pottage v. The Financial Services Authority [2013] Lloyd's Rep FC 16**.** In that case the Financial Services Authority ("FSA") had imposed a penalty for misconduct on Mr Pottage who was the CEO of UBS, a vast organisation. We do not find the decision of that Tribunal dealing with a business of an entirely different nature and size and circumstances where under its own rules the FSA would not discipline approved persons on the basis of vicarious liability, providing appropriate delegation has taken place, assists us.

29. The Respondent was operating as a sole practitioner with a very limited staff. As the Notary, she is responsible for the conduct of her firm's business.

30. Mr Cropp sought to argue that the Complainant had failed to prove that the manner in which the Respondent had conducted herself compromised or impaired or was likely to compromise or impair the good repute of the notarial profession. We do not agree. Firstly we judge that we are entitled to form our own view without the need for evidence of whether the Respondent's conduct would have that effect on the notarial profession, and we judge that it would. Secondly, whilst recognising the possibility that those witnesses who invested in the scheme who were directed to comment specifically on it, are likely to overstate the effect it has had on their confidence in notaries, we are able to make allowance for that when considering what they have said. Having done so, we judge that investors could have felt aggrieved by the Respondent's conduct in such a way as to affect their opinion of the profession as a whole.

31. As a result of these and other issues we find that the Respondent did between the relevant dates specified in the allegation provide services on behalf of

Insight group of companies in connection with purported agreements with the public for the alleged sale and purchase of rights in the Moringa Miracle Tree Project in circumstances which led to the public trust reposed in the office of notary being undermined.

ALLEGATION 2

32. Allegation 2 centres on the requirements of the Notaries Accounts Rules 1989 ("NAR"). In the NAR, "Client" is defined as "any person on whose account a notary holds or receives client's money" and "Client Money" as "money held or received by a notary on account of a person for whom he is acting in relation to the holding or receipt of such money either as a notary or, in connection with his practice as a notary, as agent, bailee, stakeholder or in any other capacity;".

33. It is clear that the effect of the Guidance letters and forms of Agreement sent by the Respondent's firm to Investors was that Investors regarded the Respondent's firm as acting for ICL or LRT268/IPI and not for them.

34. The Respondent's client account designated "Imison & Co. Insight Client Account" received monies transferred to it by individual Investors. At the point of receipt the Respondent's firm although not acting for an Investor was holding such money as agent or in some other capacity for an Investor and as such for the purposes of the NAR the money was therefore Client Money at that point.

35. The Complainant has argued that an effect of the Guidance letters and forms of Agreement was to impose a form of trust upon such Client Money such that it could only be transferred to ICL or LRT268/IPI as the case might be. However, we find that there is insufficient evidence to show that such a trust was agreed as being imposed rather than individual Investors regarding the money as belonging to ICL or LRT268/IPI once the form of Agreement was signed on behalf of ICL or LRT268/IPI.

36. As a result Rule 7(a)(iii) of NAR permitted money to be drawn on the authority firstly of the investor and then of ICL or LRT268/IPI. It would appear that the Respondent's firm then transferred money on the authority of its Client to an account of The Insight Companies.

37. The Complainant argued that the Respondent was unable at the time to say whether the small balance of funds still held in the Client Account belonged to ICL and that as such was in breach of Rule 11 of NAR, but no evidence from a relevant accountant of such breach, was produced to us.

38. Similarly, no evidence that the Respondent operated a client account in a manner that fell seriously below the standard of service reasonably to be expected of a public notary, was produced. The client account appears to have been operated with reasonable efficiency.

39. We therefore find Allegation 2 not proved.

ALLEGATION 3

40. Allegation 3 contains reference to three alleged actions or inactions, namely,

(a) Failing to take adequate due diligence and/or ongoing monitoring measures and/or

(b) Failing to take adequate steps to record such measures as she had taken to satisfy herself that it was appropriate or prudent by reference to The Guidance to accept instructions, and/or

(c) Failing to take adequate steps to satisfy herself that it was appropriate or prudent by reference to The Guidance to accept instructions and/or at least not without appropriate clearance from the Serious Organised Crime Agency or its successor to act and/or continue to act on behalf of the Insight Companies,

each of which, it is claimed, is in breach of Rule 3.2 of the Notaries (Prevention of Money Laundering) Rules 2008 by failing to follow The Guidance and/or Rule 5.4 of the Notaries Practice Rules 2009 by acting in a manner which fell seriously below the standard of service reasonably to be expected of public notary and/or in a manner likely to compromise and/or impair the good reputation of the notarial profession.

41. Rule 3.2 of the Notaries (Prevention of Money Laundering) Rules 2008 requires every notary to be familiar with and to follow The Guidance.

42. The Guidance refers to the Money Laundering Regulations 2007 ("MLR"). Regulation 5 of MLR defines customer due diligence measures. Regulation 8 deals with ongoing monitoring measures. Regulation 19 deals with record keeping. Regulation 20 requires the appointment of a Nominated Officer who must report as required by Part 7 of the Proceeds of Crime Act 2002.

43. Having heard all the evidence we find that the Complainant:

    a. Has not proved beyond reasonable doubt Allegation 3(a)
    b. Has proved beyond reasonable doubt Allegation 3(b)
    c. Has proved beyond reasonable doubt Allegation 3(c).

44. In the light of our finding in relation to Allegation 1, it is clear that during May 2010 information came to the Respondent in the course of business giving reasonable grounds for knowing or suspecting that a person was engaged in money laundering or terrorist financing as a result of which the Respondent as the Nominated Officer should have lodged a report as required by Part 7 of the Proceeds of Crime Act 2002 and obtained the clearance referred to.

45. These two proven failures are in breach of Rule 3.2 of the Notaries (Prevention of Money Laundering) Rules 2008. We also find that such failures are likely to compromise or impair the good repute of the notary or of the notarial

profession and are therefore contrary to Rule 5.4 of the Notaries Practice Rules 2009.

His Honour Judge Leonard QC

Mr Richard Frimston

Mr Ronald Watt.

22nd May 2014