

IN THE MATTER OF MARTIN FARRELL-BREWER, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr W M Hartley (in the chair)
Mr I R Woolfe
Mrs N Chavda

Date of Hearing: 13th August 2009

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of The Law Society by Ian Ryan a partner in the firm of Bankside Law Solicitors, Thames House, 58 Southwark Bridge Road, London SE1 0AS on 19th March 2008 that Martin Farrell-Brewer of 15 Dorking Road, Epsom, Surrey KT18 7JR, be required to answer the allegation contained in the statement which accompanied the application and that such Order might be made as the Tribunal should think right.

The allegations against the Respondent were as follows:-

1. That he acted in breach of Rule 9 of the Solicitors Practice Rules 1990 (as amended) ("SPR"), by entering into an arrangement with K Ltd, who solicited or received contingency fees in respect of personal injury clients.
2. That he acted in breach of the Solicitors Introduction and Referral Code 1990 (as amended) ("the Code") by making payments to claims management companies which constituted a reward for the introduction of work.

3. That he breached Section 2 (11) of the Code by failing to take steps to reduce the proportion of work referred to his firm by an introducer, K Ltd.
4. That he preferred introducer's interests to those of his clients.

Preliminary matters

The Applicant made an application to amend a typographical error in allegation 1 so that "the Solicitors Practice Rules 1999" read "the Solicitors Practice Rules 1990". The Respondent having no objection to this amendment the Tribunal permitted it to be made.

Evidence before the Tribunal

The evidence before the Tribunal included a Rule 5 Statement dated 19th March 2008, together with accompanying bundle consisting of three exhibits and the sworn oral evidence of The Law Society Investigation Officer, Mr Whitmarsh.

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

The Tribunal Orders that the Respondent Martin Farrell-Brewer of 104 Barnett Wood Lane, Ashted, Surrey, KT21 2LS (formerly of 15 Dorking Road, Epsom, Surrey, KT18 7JR), solicitor, do pay a fine of £3,000, such penalty to be forfeit to Her Majesty the Queen, and it further Orders that he do pay the costs of and incidental to this application and enquiry to be subject to a detailed assessment unless agreed between the parties to include the costs of the Investigation Accountant of The Law Society.

The facts are set out in paragraphs 1 – 22 hereunder:

1. The Respondent was born in 1951 and admitted as a solicitor in 1977 and his name remains on the Roll of Solicitors.
2. At all material times, the Respondent practised on his own account under the style of Farrell Brewer Solicitors at 7 Mulgrave Chambers, Mulgrave Road, Sutton, Surrey SM2 6LE. According to Law Society records, the firm ceased to trade on 30th September 2006.
3. An Investigation Officer of The Law Society, Mr Whitmarsh, ("IO") carried out an inspection of the Respondent's books of account and produced a report dated 1st February 2006. The report indentified that the books of account were in compliance with the Solicitors Accounts Rules 1998.
4. However, the IO noted a number of other matters of concern arising from the firm's relationship with introducers as follows:-

Allegation 1

5. The IO examined the files of twenty different clients and identified two files where contingency fees appeared to have been paid to introducers.

6. The IO wrote to the Respondent asking him to provide a list of matters where contingency fees had been paid to introducers following the issue of proceedings. The Respondent replied by letter dated 19th May 2005 providing a list as requested. Total payments made to introducers in respect of contingency fees totalled £58,906.49.

Allegation 2

7. The IO further identified a number of matters where referral fees appeared to have been paid to introducers in breach of the Code. In seventeen of twenty client files examined where clients had been referred to the firm, payments varying in amount from £145 to £390 and totalling £4,584.40 had been paid in respect of agents' fees.
8. The Respondent denied that the payments were referral fees. The IO was concerned that these payments might in fact have been referral fees for the following reasons:
- (i) They appeared to be paid routinely to the introducer or a subsidiary of the introducer and might be considered to have been part of the price paid by the solicitor for the introduction of work. For example, in eight of the twelve matters where SF was the agent, the payment of the agency fees was made on settlement of costs and sent to K Ltd together with their insurance premium.
 - (ii) No specific authorities from the clients for the payment of such sums were found in any of the files reviewed.
 - (iii) The IO could not find any evidence in the client matter files examined that the firm had checked that the agents had, in fact, performed the service for which they were being paid.
 - (iv) The IO noted that in nine cases the client ledger account recorded a payment in respect of agents' fees but this payment was not claimed by the firm from defendants as part of their costs or disbursements and was paid by the firm out of profit costs.
 - (v) In respect of the matter of Mr H, the IO noted that the client matter file contained a letter, dated 21st March 2001, from the agent which stated, inter alia:

“We enclose our invoice in respect of the advance agency fee as agreed by you with K Ltd”.

The IO noted that the client matter file of Mr P contained a similar letter dated 8th October 2001.

9. In March 2004 the provisions relating to the payment of referral fees were relaxed. The Code was changed to allow solicitors to pay referral fees on the condition that they provide the client with all information relevant to the client concerning the referral before the referral took place and in particular, the amount of any payment.

10. In each of the seventeen matters examined by the IO in which agency fees were paid, the referral took place before March 2004.

Allegation 3

11. The IO noted that of 2,660 matters in the client matter listing at 31st March 2004, 56.9% involved K Ltd as either the insurer or the introducer.
12. During an interview on 13th October 2005, the IO read out the relevant section of the Code and asked, the Respondent:

“What steps, if any, had the firm taken to reduce the proportion of work referred to it by K Ltd?”

In response the Respondent said:

“The simple fact of the matter is that I haven’t”.

Allegation 4

13. The IO identified three matters, Mrs M, Mrs CA and Mrs BC, where the firm sent cheques for damages to introducers to enable them to deduct their fees before the damages were paid to the client.
14. The IO noted from a review of the client matter file of Mrs M that the firm had sent the damages cheque to K Ltd without advising Mrs M of the risks of doing so. The file contained a letter from the firm, dated 3rd June 2003, addressed to K Ltd that stated:
- “I write further to previous correspondence in this matter and attach herewith the Defendant’s cheque in the sum of £3,500 made payable to the client representing the agreed damages in this matter. Can I ask that you bank the enclosed cheque through your indemnity account and let me have a cheque made payable to the client representing the balance”.
15. The client matter file also contained a K Ltd compliment slip on which a handwritten note, dated 6th June 2003, stated, inter alia:
- “Herewith cheque for £2,625.00 as requested”.
16. The IO reviewed the client matter files of Mrs FC and Mrs BC. He noted that in each case there was an outgoing letter which evidenced that cheques received by the firm from Defendants in settlement of their respective claims were routed to the clients via the introducer.
17. The matters subject of the Forensic Investigation Report were considered by an Adjudication Panel of The Law Society on 20th June 2007 when a decision was made, inter alia, to refer the Respondent to the Solicitors Disciplinary Tribunal.

The evidence of Mr Whitmarsh, the Investigation Officer

18. Mr Whitmarsh confirmed the contents of his report as true. He went through the documentation of a number of cases which were exhibited to the Rule 5 Statement. In the two files examined, which related to a Mr C and Mr S, cheques had been sent out by the firm both in relation to what was said to be the 'Insurance Premium' and in respect of much larger debit notes raised by K Ltd. In one case the payment to the client was smaller than that to K Ltd and in the other the payment to K Ltd was 35% of the damages received.

Mr Whitmarsh also gave evidence that agents' fees had been paid to SF Ltd, a firm associated with K Ltd, and other organisations. In the case of a Mrs C agency fees of £308.44 had been paid but not claimed from the other side. In Mr D's case £195 had been paid to SF Ltd, the invoice having been raised before the firm was instructed. There were two payments to an agent in Mr H's case, but only one was claimed from the other side. A letter from the agent submitted an invoice referring to the fee as "the advance agency fee" and was dated before the client care letter. The IO also referred to 5 other cases presented in evidence where either the cost of the agency fee had not been claimed from the other side or had been invoiced prior to the firm being instructed.

Cross – examination by the Respondent

19. Mr Whitmarsh confirmed that there was no suggestion that the Respondent's clients had suffered financially and no allegation of dishonesty made against the Respondent. No accounts issues had arisen from his inspection. He was, however unable to make any comment upon the contents of a letter from the Professional Ethics Division of The Law Society dated 2nd June 2000 to another firm of solicitors. Mr Whitmarsh also confirmed, on cross examination, that he had found no executed written agreement with K Ltd, nor was there any Indemnity Account.
20. Mr Whitmarsh accepted that when clients were geographically widespread as in these cases, it might be easier and cheaper for local agents to obtain statements and/or exhibits. He also accepted that the schedule headed "Payment of Agency Fees" presented in the Applicant's exhibit bundle might not illustrate that a blanket fee was being charged by the agents, as the amounts differed. He agreed that the majority of payments were not made in advance.
21. It was also put to Mr Whitmarsh during cross-examination that, in regard to allegation 4, if the client had previously given an authority from, say, the RSPCA to pay money out of damages before the transmission of the damages to the client then this would not be a breach of the Rules. Similarly if that payment was made to an insurer there would be no breach of the Rules. Mr Whitmarsh responded that there would not be.
22. Mr Whitmarsh was also asked whether he could find any more than three examples on the files that he examined where damages were sent to a third party first. Mr Whitmarsh replied that he could not and that it was at least possible that the client might have requested that it be done in this way.

Submissions of the Applicant

23. The Respondent denied all four of the allegations against him.

Allegation 1

24. In relation to allegation 1 the Applicant submitted that this was a breach of Rule 9 SPR on the basis that an arrangement had been entered into with K Ltd. It mattered not that there was no written agreement, although it was clear from the evidence that an agreement was in place. K Ltd fell into the definition in Rule 9:-

“...any person (not being a solicitor) whose business or any part of whose business is to make, support or prosecute (whether by action of otherwise, and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury and who in the course of such business solicits or receives contingency fees in respect of such claims.”

25. The term “contingency fee” was defined in Rule 18 (2) (c) of the SPR as:

“any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution or defence of any action, suit or other contentious proceedings.”

26. The Applicant referred to a letter dated 19th May 2005 written by the Respondent to the IO in response to a request for information concerning introducers where proceedings had been issued and the introducer paid a percentage of the damages award. In that letter the Respondent had said, amongst other things:

“I enclose herewith a list of those cases where proceedings had been issued and the introducer paid a percentage of the damage award....The situation is that in each case K Ltd were the After the Event Insurers and in each case the client had entered into an agreement with K Ltd both as to an Insurance Premium, and a percentage of the damages, prior to our instruction”.

27. In addition, the matter of guidance from the Professional Ethics Division of The Law Society issued in a letter dated 2nd June 2000 to another firm of solicitors had been raised by the Respondent. This concerned guidance on a conditional fee arrangement linked to an insurance policy and whilst it was acknowledged by the Applicant that K Ltd were insurers, the Applicant submitted that it was clear from the IO’s evidence that insurance premiums were paid separately from other fees. Indeed, a list of such fees had been received from the Respondent himself. In any event, The Law Society letter could not be relied upon in these proceedings. The case of FSA – v – Fox Hayes [2009] EWCA Civ 76 said at paragraph 41:

“Regulators may often find themselves in a somewhat difficult position when they are expressly asked for advice or guidance. It cannot be a legitimate criticism of a regulator that he decides not to give advice or guidance. It is the duty of the authorised person to comply with any relevant rule not the duty of a regulator to advise whether conduct of a particular kind does or does not constitute compliance with or contravention of a rule... any advice or guidance

given can only be relied on if the full facts are before the regulator when the advice or guidance is given”

Allegation 2

28. At the time of the inspection the Code as at March 2004 applied and solicitors were not allowed to pay introducers by payment of commission or otherwise. Such payments would constitute referral fees as set out in Guidance on S2 (3) of the Code, where it was stated that any payment to an introducer:
- “(a) Must be for genuine services provided to the solicitor and not services provided for the benefit of the client.....;
 - (b) Must not include any element of reward....for the services provided;
 - (c) Must not generally be calculated by reference to the volume of referrals or the solicitor’s fee income from the source of work....;
 - (d) Must not generally be calculated on the basis of a fixed fee per case where the amount of work actually undertaken per case may vary....;
 - (e) Must not be imposed on the solicitor as a condition of joining the scheme so that the solicitor has no choice but to buy the services.”
29. It was submitted that the payments were not disbursements but were referral fees and that this had been proved on the evidence. The evidence was that there were two matters where payments had been made in advance and three matters where payments made had not been claimed back from the other side.

Allegation 3

30. Since the Respondent had made the point that allegation 3 was not in line with the wording of the Code the Applicant offered no evidence on the allegation and invited the Tribunal to dismiss it.

Allegation 4

31. Client money should have been held in client account for payment to the client. However the K Ltd agreement recommended that Panel members had an “indemnity account” which allowed them to bank cheques made payable to a client or make some other arrangement so that monies due to K Ltd would be discharged prior to client payment.

The Respondent denied having an indemnity account but did agree that monies were deducted for K Ltd pursuant to a client authority. Examples had been given by the IO where this had happened.

32. The Applicant also submitted that there was clear evidence that settlement cheques had been sent to third parties and their fees were withdrawn before onward

transmission to the client. The Applicant submitted that in acting in this way, the Respondent preferred the interests of the introducers to those of his clients.

Submissions of the Respondent

33. The Respondent denied allegation 1. He submitted that there was no evidence of any agreement between him and K Ltd and no “indemnity account” had been set up. Furthermore there had been nothing in writing signed by him with K Ltd. If the Tribunal was against him on that point then he further submitted that K Ltd was an accepted insurer and underwriter. The payments made by the firm to K Ltd were insurance premiums paid on a contingency basis. This methodology was accepted by the Professional Ethics Division of The Law Society in a letter to another firm of solicitors dated 2nd June 2000:

“The view we reach is that a premium for a bona fide insurance policy is not a contingency fee for the purposes of Practice Rule 9, notwithstanding that the premium is calculated on a contingency basis.”

This was also accepted by the Solicitors Regulation Authority and the Respondent referred the Tribunal to paragraph 36 of the SRA’s Rules and Ethics Committee Guidance on referral arrangements dated 16th July 2009:-

“Whilst no change is therefore being proposed for the Rule at this time, the committee is asked in the meantime to consider whether additional guidance is appropriate to clarify the interpretation of these provisions in respect of two specific points:-

- Firstly, some concerns have been raised about whether or not the prohibition restricts access to justice in terms of funding a claim for personal injury. It has been queried whether or not an insurance premium which is payable by the client only in the event of success would constitute a contingency fee and so would be prohibited. The recommended wording is proposed to clarify the insurance premium would not normally constitute “fee” for the purposes of Rule 9.01.”

The Respondent further submitted that this methodology had been accepted by the Senior Costs Judge in the case of Pirie – v – Ayling in the Supreme Courts Costs Office on 18th February 2003.

34. In regard to the second allegation, this was denied by the Respondent. The IO in his evidence had accepted that the agency bills were submitted during the currency of the matter thus indicating that these were genuine payments. In addition the payments were made in varying sums which would indicate the payments for work done rather than sham payments. In some cases there had been more than one payment on the same case and more than one agent acting on the same case. The Respondent referred to The Accident Group cases and The Law Society’s published guidance. The invoice could be for future work, after the solicitor had been retained, even though it was submitted as soon as the solicitor had accepted the case. He had never paid introductory fees. The IO had in his evidence accepted that the Respondent had a

national spread of cases and that in some cases it would be cheaper to employ agents in order to obtain evidence. The payments were made for work actually done.

35. In relation to the third allegation, this was also denied by the Respondent, Section 2 of the Code stated that:-

“where, so far as can be reasonably ascertained, more than 20% of a firms’ income during the period under review arises from a single source of introduction of business, the firm should consider whether steps should be taken to reduce that proportion.”

Since the allegation did not reflect the wording, and all that was required was a consideration of whether steps should be taken, it was now accepted by the Applicant that it should be withdrawn.

36. In relation to the fourth allegation this was denied by the Respondent. The Respondent had asked the IO during the course of his cross-examination whether he had accepted that if a client had requested that a payment be forwarded to a third party that would be acceptable and the IO had agreed it would be. The Respondent submitted that the IO had only found some three out of four thousand cases where this had happened and that these cases should therefore be viewed as exceptional. He did accept that if this had been done without the client’s authority it would have been a breach. However, that had not been the case and there was no evidence that it was done without the authority of the client in any of the three cases.

The Tribunal’s Findings and reasons

37. The Tribunal had considered most carefully all of the documents before it, the evidence given by the IO and the submissions of the Applicant and the Respondent.
38. In so far as allegation 1 was concerned the Tribunal found this not proven. It found that there had been a course of conduct whereby the major part of the terms and conditions of K Ltd had been adopted by the Respondent. However, all of the payments to K Ltd appeared to be insurance premiums. There were numerous debit notes from K Ltd to illustrate this. The Applicant had provided no evidence to show that any of the fee notes were a sham. The Tribunal was of the view that a bona fide insurance premium is not a contingency fee for the purposes of Rule 9, notwithstanding that it was calibrated on a contingency basis; it found The Law Society letter of 2nd June 2000 persuasive on this point. The Tribunal found that although the letter was not binding it was persuasive, despite the warning in FSA – v – Fox Hayes.
39. The Tribunal found that allegation 2 had been proved. It was inconceivable that collection of a proper disbursement would not be sought from the other side, which was what had occurred in this case. In one instance, an invoice was raised by an introducer nine days before the first letter was written by the Respondent to the client and there was no satisfactory explanation as to why this had occurred.
40. Allegation 3 was dismissed.

41. In relation to allegation 4 the Tribunal found this was not proven. It was not satisfied that there was sufficient evidence to support the allegation. Although in very few cases cheques had been issued in favour of third parties this may very well have been a practical way around the difficulties highlighted by the Respondent in these particular cases.
42. The Tribunal found that a fine was the most appropriate penalty in this case. The Respondent had outlined his very difficult financial circumstances and the Tribunal had taken into account the recent guidance in the case of D'Souza – v – The Law Society (2009) in the Divisional Court on 27th July 2009. However, it regarded allegation 2 as serious enough to merit a fine of £3000. In so far as costs were concerned, the Tribunal noted the length of time to bring the proceedings, the incorrect drafting of allegation 3 and the large volume of cases produced to the Tribunal. It therefore agreed that costs were to be assessed if not agreed and the Tribunal invited the relevant Costs Judge to take into account the following points:-
1. The length of time between the inspection (20th May 2004), the report (1st February 2006), the adjudicators decision (20th June 2007) and the Rule 5 Statement (19th March 2008).
 2. The inaccurate drafting of allegation 3.
 3. The huge volume of cases produced which could have been summarised and made more user friendly for all parties, and the photocopying costs that were involved in producing them.
43. The Tribunal Ordered that the Respondent Martin Farrell-Brewer of 104 Barnett Wood Lane, Ashted, Surrey, KT21 2LS (formerly of 15 Dorking Road, Epsom, Surrey, KT18 7JR), solicitor, do pay a fine of £3,000, 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 to be subject to a detailed assessment unless agreed between the parties to include the costs of the Investigation Accountant of the Law Society.

Dated this 7th day of December 2009
On behalf of the Tribunal

W M Hartley
Chairman