

IN THE MATTER OF ANDREW JOSEPH NULTY and MALCOLM JOHN TROTTER,  
solicitors

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

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Mr E Richards (in the chair)  
Mr D Glass  
Mr D Gilbertson

Dates of Hearing: 27<sup>th</sup> – 29<sup>th</sup> April 2009

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## **FINDINGS**

of the Solicitors Disciplinary Tribunal  
Constituted under the Solicitors Act 1974

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An application was duly made on behalf of the Solicitors Regulation Authority by Katrina Elizabeth Wingfield, solicitor and member of Penningtons Solicitors LLP, Abacus House, 33 Gutter Lane, London EC2V 8AR on 16th January 2008 that Andrew Joseph Nulty, solicitor of Avalon House, 47 Museum Street, Warrington WA1 1LD and Malcolm John Trotter, solicitor of 34 Ringshaw Drive, West Riverside, Gomersal, West Yorks BD19 4NZ (formerly of c/o 16-17 Ralli Courts, West Riverside, Manchester M3 5FT) 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.

The allegations against the Respondents were that:-

1. Contrary to Rule 1 of the Solicitors Practice Rules 1990 (“the Rules”) they did things in the course of practising as a solicitor (or permitted other persons to do such things on their behalf) which compromised or impaired or were likely to compromise or impair:
  - (a) their independence or integrity;
  - (b) a person’s freedom to instruct a solicitor of their own choice;

- (c) their duty to act in the best interests of clients;
  - (d) their good repute and the good of the solicitors' profession.
2. Contrary to Rule 3 of the Rules they accepted instructions and referrals of business from other persons in breach of and otherwise than in compliance with the Solicitors Introduction and Referral Code 1990 ("the Code") both prior to and post March 2004 when the Code was amended.
  3. Contrary to Rule 9 of the Rules they, in respect of claims arising as a result of death or personal injury, entered into arrangements for the introduction of clients, with, or acted in association with Sureclaim Ltd, (not being a solicitor) whose business or some part of whose business is to make, support or prosecute (whether by action or 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.
  4. Contrary to Rule 8 of the Rules they entered into arrangements to receive contingency fees not permitted under statute or by common law, for example, with Mrs D.
  5. Contrary to Rule 1(a) (c) and (d) and/or 15 of the Rules they failed to give adequate information to clients in accordance with the Solicitors Costs Information and Client Care Code ("the Client Care Code").
  6. Contrary to Rule 2 and the Solicitors Publicity Code 1990 the First Respondent identified on their notepaper an unadmitted person as "Managing Partner" and "consultant". This allegation was withdrawn against the Second Respondent with the consent of the Tribunal.

An additional allegation against the First Respondent only was that:-

7. The First Respondent acted in breach of Rules 1(a) and (d) and 17.01 in that he wrote a letter to the DTI dated 3<sup>rd</sup> March 2004 which was misleading. This allegation was pursued on the basis that the First Respondent acted dishonestly and with the intention to mislead the recipient of the letter.

The application was heard at The Court Room, Gate House, 3rd Floor, 1 Farringdon Street, London EC4M 7NS when Timothy Dutton QC appeared as the Applicant, the First Respondent did not appear but was represented by Gregory Treverton-Jones QC in relation to his application to stay or adjourn the case against him sine die, and was unrepresented for the remainder of the hearing. The Second Respondent appeared in person on 27<sup>th</sup> and 28<sup>th</sup> April 2009 but did not appear on 29<sup>th</sup> April 2009, and was represented by Victoria Butler-Cole throughout the hearing.

### **The Evidence before the Tribunal**

The evidence before the Tribunal included the admissions of the Second Respondent to allegations 1-5, witness statements from both Respondents and medical evidence provided by Dr Claire Sillince.

**At the conclusion of the hearing the Tribunal made the following Orders:**

The Tribunal Orders that the respondent, Andrew Joseph Nulty of Avalon House, 47 Museum Street, Warrington, Cheshire, WA1 1LD, solicitor, be Struck off the Roll of Solicitors.

The Tribunal Orders that the respondent, Malcolm John Trotter of 34 Ringshaw Drive, West Riverside, Gomersal, West Yorks, BD19 4NZ (formerly of:- c/o 16-17 Ralli Courts, West Riverside, Manchester, M3 5FT), solicitor, do pay a fine of £15,000, such penalty to be forfeit to Her Majesty the Queen.

The Tribunal further Orders that the Respondents do pay the costs of and incidental to this application and enquiry such costs to be subject to detailed assessment. After detailed assessment there be a deduction of one third to the costs. Andrew Joseph Nulty do pay 90% and Malcolm John Trotter do pay 10% of the balance of costs. Any contribution to costs by Malcolm John Trotter be capped at £10,000. Both Respondents to be severally liable for costs. Further, Andrew Joseph Nulty do make an interim payment towards his proportion of costs of £60,000, such amount to be paid within 28 days.

The First Respondent's application for his application to stay or adjourn to be heard in camera

Mr Treverton-Jones QC on behalf of the First Respondent confirmed he wished to submit an application that his application be heard in camera. The Tribunal noted a previous application had been made by the Respondents to strike out the proceedings or alternatively to stay the proceedings on 1st July 2008. An application had been made at that time for the matter to be heard in private and at that time the Tribunal had not been satisfied that the case involved exceptional hardship or prejudice to either of the Respondents nor was it one in which the interests of justice would be served by a private hearing. The Tribunal had found no reason on that occasion to hear the application in private. The Tribunal were satisfied that since the date of the previous application in July 2008 nothing had changed and therefore rejected the First Respondent's application for the application to be heard in camera.

The First Respondent's application to stay or adjourn the proceedings sine die

Mr Treverton-Jones QC submitted an application on behalf of the First Respondent that the proceedings against him be stayed or adjourned sine die. The Tribunal were referred to his Skeleton Argument dated 22<sup>nd</sup> April 2008.

The Tribunal reminded Mr Treverton-Jones QC that the issue of delay had already been dealt with at the previous hearing on 1st July 2008 and that arguments submitted on that date could not be re-argued. The Tribunal invited Mr Treverton-Jones to address them on any points of prejudice that had arisen since the previous hearing as that could be the only basis for the First Respondent's application.

Mr Treverton-Jones QC confirmed the application was mounted on the basis that in July 2008 the First Respondent could take an active part in the proceedings but, subsequently, as the medical evidence from Dr Sillince demonstrated, the First Respondent's mental health would be put less at risk if he removed himself from the proceedings. Dr Sillince had confirmed in her medical report dated 25<sup>th</sup> September 2008 that the First Respondent was so distressed by his situation that he was totally incapable of facing up to and dealing with the large volume of

written material required to prepare an adequate defence and he was frightened that addressing these issues would cause a catastrophic drop in his mood. He had told Dr Sillince that he was completely unable to attend a court hearing and that “he would be so over aroused that he might feel very aggressive in the witness stand and behave inappropriately”. Subsequently in November 2008, it was stated that the First Respondent had inexplicably driven his motorcycle off the edge of a steep incline falling 50 metres. Mr Treverton-Jones QC accepted at the previous hearing in July 2008 whilst the Tribunal had found there had been unreasonable delay, it had not found any prejudice.

Mr Dutton QC on behalf of the Applicant objected to the medical evidence provided by Dr Sillince. The First Respondent had been asked to attend for an appointment with the Applicant’s psychiatrist by a letter dated 27th February 2009. It was made clear to him that if he intended to rely on any medical evidence, he should make himself available to the Applicant’s medical expert but he had failed to do so.

### The Oral Evidence of Dr Claire Sillince

Dr Sillince took the oath and confirmed the medical reports before the Tribunal dated 25th June 2008, 2nd September 2008 and 25th September 2008 were reports prepared by her. She had initially met the First Respondent in June 2008 and had found him to be pleasant and cooperative although he had rapid speech and seemed anxious. The details of her interview with him in June 2008 were contained in her first report of 25th June 2008. She had subsequently produced a supplementary report dated 2nd September 2008 which dealt with some questions that had been raised by the Applicant.

Her third report dated 25th September 2008 related to the final time she had interviewed the First Respondent which had been on 19th September 2008. Dr Sillince said the First Respondent was very tearful during that interview and she had been concerned about him admitting to suicidal thoughts. She had concluded there was a significant risk that the First Respondent would be unable to prepare himself for the court proceedings and that he was so distressed he might kill himself. Dr Sillince stated that she had found the First Respondent to be very genuine and had been struck by the amount of distress he had exhibited.

On cross-examination Dr Sillince confirmed she had not had any contact with the First Respondent since her meeting on 19th September 2008 with him. She had no personal knowledge of his current medical condition and said she was not sure whether she would recognise him if she saw him again outside of her consulting room.

Dr Sillince also confirmed she had never seen the First Respondent’s GP records as she had been informed that there were no, or very few GP notes as the First Respondent had never consulted his GP. She had been instructed to prepare the first medical report a few days before the hearing in July 2008 and therefore had been under huge pressure to complete it quickly. Dr Sillince had not been given the First Respondent’s GP details as he said he was living a peripatetic lifestyle and he disliked doctors. Dr Sillince had recommended the First Respondent undertake treatment but believed he had not done so. She believed the First Respondent was a very wealthy man and was now a tax exile but she stated that whilst he had not lost everything in relation to money, he had lost everything else such as his career, his marriage and his life, which were more important things.

Dr Sillince stated that in June 2008 she had been of the view that the First Respondent was capable of taking an active part in the proceedings. By the time she had seen the First

Respondent in September 2008, the Tribunal had ruled the substantive hearing should proceed and the First Respondent had appeared to be more visibly distressed. Dr Sillince at that time had been of the view that whilst the First Respondent could have instructed solicitors, she doubted he would have been able to go through the large bundles of evidence. Dr Sillince would have preferred to have seen the First Respondent within the last few days as she was unable to comment on his current condition as she had not seen him for seven months. She understood that he was so concerned about how he might behave at the hearing that he had decided not to attend. This was information that had been given to her by the First Respondent's solicitor.

Dr Sillince confirmed that on both occasions when she had seen the First Respondent, she did not test his cognitive function. In June 2008 there was no need to do so as the First Respondent was able to give a reasonably coherent account. At the second interview in September 2008, the First Respondent had been extremely distressed but there was nothing to indicate that cognitive functions needed to be tested. During the second interview in September 2008 the First Respondent had said he did not want to take part in the Tribunal proceedings and had indicated suicidal thinking but she had concluded that there was no obvious cognitive impairment. She stated that the First Respondent had found it so upsetting to deal with the large amount of written material that his way of coping was avoidance. She believed that just because cognitive functions were not tested, this did not mean that the First Respondent would have been able to deal with challenging and difficult documents without some difficulties himself. The First Respondent had told her he found the press interest very intrusive and had felt unsafe in his own home. She was unable to say whether facing up to the proceedings would have a cathartic effect on the First Respondent.

#### The further submissions of the First Respondent

Mr Treverton-Jones QC confirmed the First Respondent relied on the evidence of Dr Sillince and that it was against the public interest to proceed further with this case at this time. In any event the public interest was limited as the First Respondent was not practising at the moment, he had no practising certificate in any event. Mr Treverton-Jones QC submitted that the First Respondent was plainly unable to take part in the proceedings without risking a deterioration to his mental health and there could be no risk to the public in staying the proceedings sine die against him. Mr Treverton-Jones QC referred the Tribunal to the case of Brabazon-Drenning -v- United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] HRLR6. In that case an appeal had been allowed by the Queen's Bench Division on the basis that the hearing should have been adjourned. Mr Justice Elias had said

“Save in very exceptional cases where the public interest points strongly to the contrary, it must be wrong for a committee which has the livelihood and reputation of a professional individual in the palm of its hands, to go on with a hearing when there is unchallenged medical evidence that the individual is simply not fit to withstand the rigors of the disciplinary process ..... Even if the inability of the appellant to appear was, in part, as a consequence of her failing to take pills which had been prescribed for her, it is not suggested in any way that that was done deliberately so as to avoid the hearing or anything of that kind. We have no idea why she failed to take these pills; maybe they had unpleasant side effects. But in any event, in my view none of this is to the point. She clearly was unable to attend this hearing because she was too ill to do so. In those circumstances, I do not think there were any overriding public interest considerations which should have deprived her of a basic right to be present when the case was put against her, and to be in a position where she could either

cross-examine herself, or have a representative with whom she could communicate cross-examine on her behalf.....” and

“..... In addition I think it must be recognised that when an individual is suffering from what may be a rather bleak and black depression, as the appellant appears to have been in this case, it is perhaps unrealistic to expect her to show the normal courtesies that she might, no doubt, show if she were fully fit. She may simply be unable to face up to her situation.”

Mr Treverton-Jones submitted this was strong authority making it clear that the Tribunal must balance the medical position against the public interest. He submitted the public interest in this case did not require proceedings to be concluded. The media interest had evaporated since autumn last year when other miner’s cases had been heard. This was a case where the First Respondent had attracted enormous publicity due to the amount of money he had made and whilst there had been great interest in 2006, this had now evaporated. Indeed there were no media present at the hearing today. Mr Treverton-Jones QC submitted if ever a case demonstrated money could not buy happiness, this was one. The First Respondent had lost everything that was important to him, his marriage had fallen apart, he did not see his family and friends. Mr Treverton-Jones QC submitted the First Respondent should not be tried and the matter should be adjourned sine die.

### **The submissions of the Applicant**

Mr Dutton QC submitted the First Respondent had chosen not to take part in these proceedings. The First Respondent was not medically so unfit that he could not take part in the proceedings and nor was he likely to do anything so harmful that it was not in the public interest to proceed. The medical evidence provided by Dr Sillince did not come close to establishing either of these facts. Indeed, in June 2008 Dr Sillince was of the view that the First Respondent could take part in the proceedings. The Tribunal had rejected his application to strike out at that time and he had then returned to see Dr Sillince again in September 2008. The First Respondent had provided no evidence or material to indicate he was unable to give instructions to his solicitors. If he was genuinely concerned about his medical position, Mr Dutton QC submitted he would not have avoided being examined by the Applicant’s expert and would have made himself available for such an examination. Mr Dutton QC submitted that the Tribunal could draw an adverse inference from this. Nobody knew where the First Respondent was. There was evidence from a psychiatrist relating to an interview in September 2008 but no further corroborative evidence other than a reference to a motorcycle accident which had been presented extremely thinly. It was not known where the accident took place, on what date and, remarkably, there was no medical report giving any indication of any injuries sustained as a result of the accident. Mr Dutton QC submitted the First Respondent could take part in proceedings and indeed, his solicitors had written detailed letters on his behalf concerning the allegations.

Regarding the case of Brabazon-Drenning -v- United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] HRLR6, Mr Dutton QC reminded the Tribunal that in that case there had been unchallenged medical evidence which was not the case today. Furthermore, the First Respondent today was seeking an indefinite adjournment and he had made a positive decision not to take part in the proceedings. Each case turned on its own facts. In this case there was not sufficient medical evidence to render it unjust to continue with the proceedings. The First Respondent had chosen not to participate in the proceedings even with some support. Mr Dutton QC referred the Tribunal to the case of Sushant Varma -

v - The General Medical Council [2008] EWHC 753 (Admin) in which an application had been made to adjourn sine die due to the claimant's health problems. In that case it had been decided that a fair trial was possible. Mr Dutton QC referred the Tribunal to the judgment of Mr Justice Forbes where he had stated

“... the Panel was right to bear in mind, as it did, that it had to balance Dr Varma's private rights against the public interest in having serious allegations properly investigated and adjudicated upon. I also accept that it is clear that the Panel had very much in mind its power to regulate the proceedings so as to ensure fairness. As Mr Shaw pointed out, the Panel cited and applied the judgement of the Divisional Court in R (TP) – v - West London Youth Court (2005) EWHC 2583 (Admin) (thereafter “TP”).....which states;

*“The first port of call is not to prevent the court from hearing the case but to grapple with the difficulties. A trial should not be abandoned before all practical steps to overcome the difficulties have been exhausted.....”*

“Mr Shaw referred to paragraph 26 of the judgement in TP, which gives examples of practical steps that can be taken to promote a fair hearing, such as the use of simple language, taking regular breaks and explaining the proceedings.”

Mr Justice Forbes further went on to say

“In my judgement, the Panel was clearly entitled, at that stage, to conclude that Dr Varma had *“voluntarily chosen to waive his right to be present and give evidence and be represented”*”.

Mr Dutton QC submitted that in this case the First Respondent had chosen some months ago not to take an active part in the proceedings. On 6th April 2009 he had instructed his solicitors to apply for a stay and had absented himself from the jurisdiction. The medical evidence before the Tribunal was from September 2008 and Mr Dutton QC submitted it was wholly inappropriate for these proceedings to be stayed. The public interest lay in bringing the investigation to a conclusion and whilst the press interest had abated, the public interest had not. Mr Dutton QC also reminded the Tribunal that the First Respondent still remained on the Roll of Solicitors and although he had no practising certificate at the moment, he could apply for a practising certificate. These were serious matters that needed to be brought to a conclusion so that the reputation of the profession and indeed the public interest could be protected.

The Tribunal's decision on the First Respondent's application to stay/adjourn the proceedings sine die

The Tribunal had listened carefully to both parties and had taken into account the fact that the medical evidence provided on behalf of the First Respondent was somewhat out of date, and that evidence was not corroborated by any General Practitioner records. Further, Dr Sillince had not carried out any cognitive tests on the First Respondent.

The Tribunal drew adverse inference from the First Respondent's failure to attend the medical appointment arranged by the Applicant. The Tribunal took into account the First Respondent was currently out of the country. On the papers before the Tribunal, however the First Respondent appeared to visit his children in the UK on a regular basis, although he had

vowed more recently not to return. The Tribunal noted the First Respondent had not sought an adjournment so that he could attend at a later date. The Tribunal were mindful that the case of Brabazon-Drenning -v- United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] HRLR6 related to medical evidence that was unchallenged, which was not the case in the matter before the Tribunal today. The Tribunal considered it was in the public interest to hear these very serious allegations to ensure the proper protection of the reputation of the profession and accordingly, the Tribunal dismissed the First Respondent's application.

#### Costs relating to the First Respondent's application

Mr Dutton QC wished to apply for the costs of the First Respondent's application. Mr Treverton-Jones QC indicated that he would leave this issue to the discretion of the Tribunal as he was not instructed to provide any further assistance to the proceedings.

#### The Second Respondent's application to strike out the proceedings/adjourn the case

The Tribunal reminded the Second Respondent that there would be no re-argument of the issues that were dealt with at the previous hearing on 1st July 2008 relating to the application to strike out.

Ms Butler-Cole on behalf of the Second Respondent confirmed that his situation had changed in that he was now under no illusion that the First Respondent intended to play any part in the proceedings. The Tribunal was referred to the Second Respondent's witness statement dated 24<sup>th</sup> April 2009. In July 2008 the Second Respondent had anticipated the First Respondent would provide a defence and as he was the person with the highest level of control over the matters, the Second Respondent had anticipated he would be able to rely on the First Respondent's explanations and evidence contained in his defence. The other critical element was that the Second Respondent had been relying on the First Respondent for an indemnity for costs which was not now materialising. It was now a certainty for the Second Respondent that he would not have the benefit of any input from the First Respondent in these proceedings. A conflict of interest had not been identified in July 2008 but in April 2009 the Second Respondent had recognised and accepted that the First Respondent was not going to do anything further.

Ms Butler-Cole submitted that whilst there had been a finding of unreasonable delay in July 2008, there was now prejudice in that the Second Respondent would have to deal with these proceedings without any input from the First Respondent regarding both the defence and the costs of the action. Further since July 2008 the Second Respondent had lost his job and could not now obtain work at remuneration which was commensurate with his level of experience due to these outstanding proceedings. The Second Respondent would not have been in this position if the delay had not taken place and matters had been dealt with a lot sooner. Furthermore, as the First Respondent was playing no role in the proceedings, there was a risk that the Second Respondent would be seen as having had more responsibility than he actually had. The financial benefit and contrast between the First and Second Respondent was extreme. There was a real risk that the Second Respondent's position would be inflated and furthermore, late evidence had been served in April 2009 suggesting that the Second Respondent was at fault for failing to comply with the directions and failing to file a defence. The Second Respondent had not been able to apply for an adjournment as he was not in a financial position to do so. The Applicant had served evidence late which could have been obtained and served much sooner. The Tribunal were provided with details of the evidence

served late. Ms Butler-Cole submitted that this was another example of where the First and Second Respondent had been lumped together and where it was not fair for this to happen.

In the alternative Ms Butler-Cole submitted that if the Tribunal did not grant the Second Respondent's application to strike out/adjourn the case, then the Tribunal was asked to Order that the Applicant could not rely on the evidence that had been served late as this would cause a breach of Article 6 of the European Convention, in that the Second Respondent had not been given sufficient time to consider the additional new evidence.

#### The submissions of the Applicant on the Second Respondent's application

Mr Dutton QC submitted that the Second Respondent had chosen to be represented by the same solicitors as the First Respondent and therefore had the same knowledge as they did. He had taken no active steps in these proceedings, beyond the application to strike out the proceedings in July 2008. His Counsel had consented to the directions and thereafter the Applicant had been trying to fathom out whether or not the Second Respondent intended to defend the action.

Mr Dutton QC submitted the Second Respondent had engaged very experienced solicitors who regularly dealt with disciplinary proceedings. Witness statements had been requested by the Applicant as the case was document intensive and it had been hoped that if a defence was filed, the issues between the parties could be identified. The case against the Second Respondent had been brought as he was a partner in the practice and the case against him related only to documents that concerned him where he was the relevant fee earner. The medical evidence provided by the First Respondent was dated June and September 2008 and as the same solicitors had acted for both Respondents, the Second Respondent had been aware since that time that the First Respondent did not intend to participate in these proceedings. Mr Dutton QC submitted it must have been obvious to the Second Respondent by then that if he wanted to take an active part in these proceedings he must do so. Mr Dutton QC gave the Tribunal details of the letters that had been sent to the Second Respondent's solicitors and the disclosure that had been made together with reasons for the late disclosure. Due to the lack of reply from the Second Respondent, further witness evidence had had to be taken but there was nothing in those statements that would have been of any surprise, as they were supportive of documents which had been previously served and of which the Second Respondent had been aware. Against the background of total non cooperation by the Second Respondent, it was not fair to submit that the Applicant had not complied with directions and served evidence late. The Applicant did not know what the Second Respondent's position today would be. Mr Dutton QC reminded the Tribunal that both the First and Second Respondent were litigation solicitors and had refused to cooperate with the orderly conduct of this case. No specific prejudice had been alleged in respect of the late disclosure of documents and all the documents were in the trial bundles which had been prepared and served ten days ago. The Second Respondent must have been aware of the First Respondent's wife's involvement in Sureclaim Ltd as there was evidence from the Second Respondent's files that referral fees had been paid to Sureclaim Ltd.

Mr Dutton QC further submitted that given the Tribunal had made a finding of unreasonable delay in July 2008, it was imperative that this case should be concluded as soon as possible. The recent statements disclosed did not cause any prejudice. The Second Respondent could still participate in the proceedings and had the litigation skills to be able to do so.

The Tribunal's decision on the Second Respondent's application to strike out the proceedings/adjourn the case

The Tribunal had listened carefully to the parties and did not find there had been any prejudice to the Second Respondent. Whilst the Tribunal were sympathetic to the Second Respondent's position, it noted he had not complied with the directions. The Tribunal had considered the three issues raised in the Second Respondent's witness statement and commented as follows:-

- (a) Prejudice with regard to the Second Respondent's financial position; the Tribunal did not consider this to be a valid reason to strike out the case.
- (b) Prejudice with regard to the failure of the First Respondent to take an active part in the proceedings. The Tribunal found this was not an uncommon situation. The Second Respondent could still have filed a defence. The Second Respondent had a good indication in July 2008 and certainly by September 2008 that the First Respondent did not intend to take an active part in the proceedings. The Tribunal did not find that this was a valid reason to strike out the proceedings.
- (c) Thirdly, with regard to the impact on the Second Respondent's health and family, the Tribunal were sympathetic to this but that was also a common feature of appearing before the Tribunal and it may be that these issues could be relied upon by the Second Respondent in the matter of mitigation at the appropriate time.

Accordingly, the Tribunal dismissed the Second Respondent's application for the proceedings against him to be struck out.

Regarding the Second Respondent's application to adjourn due to prejudice caused by the late service of further evidence, this was also dismissed and the Tribunal commented on the late disclosure of documents as follows:-

- (a) The partnership accounts would have been seen by the Second Respondent prior to their disclosure and therefore he was not prejudiced.
- (b) The Tribunal noted new lay witness evidence as to process of files at Avalon Solicitors had been disclosed but felt that the Second Respondent could deal with these issues in the time given and therefore there was no prejudice.
- (c) The witness statement of Mr Duerden (FIO) related to statistical information concerning the success rates of claims generally and the Tribunal were of the view that it would not have been reasonable for the Second Respondent to be able to deal with this in the time given. The Tribunal did consider this statement to be prejudicial and therefore would not permit the Applicant to rely upon it at the substantive hearing.
- (d) The company searches attached to the statement of Ms Wingfield were a public record and therefore were not prejudicial to the Second Respondent.

## **The substantive hearing**

### **The facts are set out in paragraphs 1 – 52 hereunder**

1. The First Respondent, Andrew Joseph Nulty, was born in 1967 and was admitted to the Roll on 16th September 1966. His name remained on the Roll.
2. The Second Respondent, Malcolm John Trotter, was born in 1973 and was admitted to the Roll on 15th October 1997. His name remained on the Roll.
3. The First Respondent set up the firm of Avalon Solicitors of Avalon House, 47 Museum Street, Warrington, WA1 1LD in July 2001 as a sole practitioner, prior thereto he had been a partner at the Mainman partnership. The Second Respondent was employed by the First Respondent as a salaried partner between July 2001 and June 2002 and became an equity partner in the firm of Avalon Solicitors from July 2002 until October 2004.
4. An inspection of the books of account of Avalon Solicitors was commenced on 11th October 2004 and a copy of the Forensic Investigation Report dated 9th June 2005 was before the Tribunal. During the inspection the firm notified The Law Society that it had opened a branch office as 3 Winwick Street, Warrington.

### **Mining Health Claims**

5. The British Coal Corporation was the defendant in two separate High Court group actions and was found liable in both. The Department of Trade and Industry (“DTI”) as successor to the British Coal Corporation, accepted liability for two types of medical condition, namely, respiratory disease (“RD”) and vibration white finger (“VWF”). Following admissions of liability and under the supervision of the High Court, complex Claims Handling Agreements (“CHAs”) relating to these conditions, (RD and VWF), were settled. All claims were to be considered within the framework of the CHAs as a court approved scheme.
6. There were time limits for bringing claims under the CHAs. In respect of VWF the claims had to be made by 31st March 2003 and in respect of RD by the 31st March 2004. The schemes had therefore now closed but claims continued to be processed.

### **Claims Handling Agreements (“CHAs”)**

7. The CHAs stipulated that all claims must be made through a firm of solicitors appointed to the Panel by the DTI, save that the Union of Democratic Mineworkers (“UDM”) was an exception in that it was permitted to prosecute claims under its own CHA.
8. The DTI appointed AON IRISC (“IRISC”) to administer the schemes under their supervision. The CHAs covered, inter alia;
  - (a) medical evidence required to support a claim;
  - (b) the way in which a claim would be processed;

- (c) the amount of damages to be paid on a successful claim;
  - (d) the costs payable to the solicitors for prosecuting the claim;
9. The CHAs deal in detail with the payment of the solicitors' costs;
- (a) As regards RD claims details were set out within Schedule 17 of the relevant CHA as amended (the CHA made between DTI and the British Coal Respiratory Disease Litigation Claimants Solicitor Group dated 24th September 1999). In summary the solicitor received costs based on the type of RD claim and further costs dependent upon factors, such as whether was it a posthumous claim, was probate required or was there an additional claim for special damages. No costs were payable to the claimant's solicitors if a claim was unsuccessful.
  - (b) Paragraph 14 to Schedule 17 of the above referred to CHA stated the following:
    - “14. The DTI anticipates that these agreed fees will represent the total sums payable to Claimant's Representatives in relation to a claim. The DTI will not be liable for any additional fees or disbursements, howsoever they might arise, which have been paid to the Claimant's Representative”.
10. The arrangements provided for medical assessments and reports without charge to claimants.
11. Regarding VWF claims, details were set out at Section 9 of the relevant CHA (the CHA made between the DTI and the Vibration White Finger Solicitors Group dated 22nd January 1999). In summary the solicitor received costs based on the type of VWF claims which were categorised in the above referred to CHA.

#### High Court Deeming Provisions

12. Regarding RD actions, pursuant to paragraph 3.2 of the High Court Order dated 1st October 1998 claimants were deemed:
- “(a) to be a Plaintiff on the writ herein the date of commencement of that Plaintiff's action being the date of notice of the claim and interest on general damages shall run from such date;
  - (b) to have served proceedings upon the Defendant on the next day on which the Register is reviewed (as provided for at paragraphs 3.2 above) subsequent to the entry of that Plaintiff's details upon the Register”.
13. Regarding VWF actions the High Court Order (Newcastle Upon Tyne District Registry Division) dated 25th August 1994 stated:-
- 2.1.1 “British Coal Vibration White Finger Litigation (“WFL”) shall be the name given to the procedural arrangements for the disposal of the plaintiffs' actions

more particularly defined by the directions prescribed by this Order and any subsequent Order(s).....

4. Parties
  - 4.1. Those plaintiffs listed as Schedule 2 hereto are those plaintiffs whose actions are the subject of WFL at the date of this Order.
  - 4.2 Any plaintiff whose action is the subject of the Practice Note shall join the WFL upon: (a) complying with the terms of the Practice Note, and; (b) notifying the Steering Committee of intention to join the SG, or; (c) by Order of the Court”.

Any claims under the British Coal Litigation were therefore contentious.

#### Avalon’s work in relation to RD and VWF claims

14. The First Respondent was a partner in the Mainman partnership until June 2001 and set up Avalon Solicitors from 1st July 2001. The firm commenced with 20 employees but expanded rapidly over the next 3-4 years. Some CHA work had been undertaken by the First Respondent while at the Mainman partnership and some transferred with him when Avalon was set up.
15. The firm received introductions in respect of mining health claims from The Miners Welfare & Compensation Recovery Limited; Sureclaim Ltd; and Miners and General Workers Compensation Recovery Unit. At the time of the inspection 99% of the firm’s caseload was British Coal related work.
16. The work of the firm was divided between a number of teams, one of which, the Epsilon team, was set up in 2001, and dealt with common law industrial disease work and some DTI scheme work. The Sigma team was set up in August 2003 and dealt with the majority of the firm’s work relating to the DTI scheme. There were other teams undertaking other work.

#### Success fees

17. Although the CHAs made specific provision for the payment of claimant solicitors’ costs in successful cases, the Respondents entered into agreements with clients which were described as Conditional Fee Agreements (“CFA”) as a result of which they obtained further monies from claimants, by a deduction of 15% plus VAT from the claimants’ damages received (in excess of £500). This share was described in the CFA as a “success fee” but in a true Conditional Fee Agreement a “success fee” must be calculated as a percentage of costs, not damages.
18. During the inspection the firm produced a schedule, setting out all success fees deducted by the firm which at that time had not been repaid to clients. The total sum including VAT was £264,499.42. Arrangements were subsequently made for the repayment of these sums to clients.
19. When asked by the Forensic Investigation Officer (“FIO”) why deductions had been made in respect of success fees, the First Respondent indicated that he had been led to

believe, by other solicitors and referrers, that it was “the done thing”. He indicated that as a result of adverse publicity towards the end of 2003 and the beginning of 2004, it had been decided that no further deductions would be taken from clients’ damages. He indicated that a letter was sent to all VWF and RD clients in January 2004 stating, inter alia, “you will now receive 100% of your compensation”.

20. The schedule produced by the firm showed that, of the total sum deducted in respect of success fees, £221,241.30 was deducted between 1st July 2001, when the firm was set up, and 31st January 2004, the end of the month during which clients were informed that they would receive 100% of their damages. £43,258.12 was deducted between 1st February and 30th June 2004, after the firm had written to the clients.

21. The Compliance Board of The Law Society issued a policy statement in January 2004 indicating to members of the profession that making additional charges to the client were likely to give rise to:

- “(i) a finding of inadequate professional services;
- (ii) in some cases, a finding of misconduct where there is also evidence of taking unfair advantage of the client by overcharging;

unless full information was given to the client at the start of the matter, and unless the additional charge involved was itself reasonable”. The Policy Statement indicated that in assessing whether sufficient information was given the following would be considered:

“whether the client was informed that, in addition to costs the client had agreed to pay to the firm, the solicitor would be receiving costs from the Government Scheme:

whether (in an agreement entered into after April 2000) the client was informed that most other firms of solicitors did not make additional charges”.

Factors in assessing whether the additional charge was reasonable would be whether it amounted to more than 100% of the costs recoverable from the DTI, or more than 25% of the damages recovered and/or whether the firm considered the particular risk of the client’s claim being unsuccessful in determining the level of additional charges.

22. During the inspection the firm provided the FIO with a list showing success fees which had been repaid, totalling £30,495.90. These were being repaid on receipt of a complaint.

23. The FIO examined the file relating to a “next of kin” claim by a Mrs D in respect of the late Mr E. This claim had been commenced whilst the First Respondent was a partner at the Mainman partnership. A number of key issues arose from examination of that file:

- (a) Instructions were received direct from Miners Welfare & Compensation Agency;

- (b) The client was informed (albeit by the Mainman Partnership) that the conduct of the claim would “not cost [you] a penny”;
  - (c) Following receipt of confirmation of instruction a further letter was sent enclosing a further form for signature which was stated to have been “mistakenly omitted” from the previous letter. This further form was the “CFA”, which referred to a success fee of 15% of basic costs;
  - (d) A letter was sent to Mrs D notifying her of the change from Mainman Partnership to Avalon on 29th June 2001;
  - (e) Three months later on 9th October 2001 Mrs D was sent a further “CFA” for signature stating that the original one was no longer valid and that “due to recent changes in the law and our recent change of name” Avalon Solicitors were now asking her for a “contribution of 15% of your final damages towards our costs”;
  - (f) This second “CFA” referred to a “success fee” of 15% plus VAT of damages. No copy of this second CFA signed by Mrs D was found on the client file;
  - (g) In August 2003 a settlement offer was made in the sum of £13,068.64;
  - (h) In August 2004 two bills were raised by the firm one being costs payable by the DTI, £3,285.73 inclusive, and the other being in respect of the “success fee” in sum of £2,303.35 inclusive. There was no evidence on the file of either bill being sent to Mrs D who confirmed she did not receive them. The sums were transferred to office account.
  - (i) This post dated the letter sent to clients confirming they would receive 100% of their damages.
  - (j) In October 2004 the firm repaid the “success fee” following a complaint from Mrs D.
24. The FIO reviewed 29 files relating to claims under the British Coal CHAs, 10 handled by the Sigma team (from August 2003) and 19 by the Epsilon team (from July 2001). Of the Epsilon files two did not contain a “CFA” although a “success fee” was deducted. A pattern regarding progress of each matter emerged and examples of the standard letters were before the Tribunal.
25. Although the first letter to the client purported to give client care information it failed to address the issue of costs. On receipt of a signed form confirming instructions a further letter was sent to the client enclosing a further form for signature, this being the “CFA” which was stated to be “mistakenly omitted from previous correspondence”.
26. From her review of files the FIO noted that the “mistakenly omitted” letter appeared on 17 Epsilon files reviewed where there was a “CFA” and not on the other 2. The earliest of such letters was dated 14th February 2001 and was sent from the Mainman Partnership and the latest, from Avalon, was dated 29th January 2003. An examination of the files showed that on some occasions the “mistakenly omitted”

letter was sent by one Andrew Taylor and on others by Mark Cookson, both of whom were unadmitted staff.

27. When questioned regarding whether the use of the “mistakenly omitted” letter was a systematic attempt to mislead clients regarding funding, the First Respondent denied this stating that he thought the fee earner concerned, Andrew Taylor, had forgotten to do his job properly and made an error. Mr Taylor later told the FIO that he did not join the firm until January 2002. He also indicated that the letters used were standard letters.
28. On 9th November 2004 the FIO suggested to the First Respondent that the “Conditional Fee Agreement” in relation to Mr A was in reality a contingency fee agreement. At that time the First Respondent agreed but did not accept that proceedings were deemed to have been issued pursuant to the CHA.
29. However at a subsequent meeting in February 2005, the First Respondent indicated that he was not the drafter of either contingent or conditional fee agreements and would not wish to comment on whether or not the document issued by his firm was a conditional fee agreement. He indicated that he was not sure who had drafted it. At the time Mr A was sent a “CFA” the First Respondent was the sole principal of Avalon. Subsequently, a differently worded “CFA” was used on common law claims and there the success fee was expressed as a percentage of basic costs.

Letter written to DTI in response to letter from Nigel Griffiths MP

30. In December 2003, the Parliamentary Under-Secretary of State for Coal Health, Mr Nigel Griffiths, MP, wrote to the senior partners of all firms of solicitors acting for clients under the CHAs indicating that he considered it was unacceptable for firms to charge clients and then receive payments from the DTI, asking for confirmation that the firm had not done so or, if they had, that they were willing to return the non DTI fee to the client. At a meeting in October 2004 the Respondents indicated to the FIO that they had not received that letter but had received a follow up letter in February 2004 which stated:

“On 18th December last year I wrote to you in my capacity as the Minister responsible for Coal Health Compensation regarding concerns over the apparent double-payment of fees to some solicitors. I asked that you reply by 23rd January confirming that your firm had not taken a fee from clients as well as receiving a fee from the DTI in respect of the same case. I also asked you to confirm that had you done so, that you were willing to remit the non-DTI fee to the client...”

31. The First Respondent had replied by letter dated 3rd March 2004 stating inter alia:

“we can confirm that our British Coal Scheme was instigated in August 2003 and confirm that no monies whatsoever are to be deducted from the client and as a practice we rely solely upon receiving the fees set by the DTI”.

As already indicated the firm deducted success fees between July 2001 and 30<sup>th</sup> June 2004. This meant that they continued to deduct fees, despite the letter to the DTI, for at least a further four months.

32. At a meeting on 3rd February 2005 these issues were discussed between the FIO and the First Respondent. The First Respondent indicated that he did not recall writing the letter of 3rd March 2004 although he accepted it was in response to a letter addressed to the senior partner, namely himself. The letter did not bear either his reference or that of the Second Respondent. A copy of the signed version of the letter appeared to have been signed by the First Respondent.
33. It was pointed out to the First Respondent that by the time the Sigma team was set up in August 2003, success fees totalling some £95,552.04 had been received and that by the date of the firm's letter (3rd March 2004) success fees totalling £190,856.01 had been received, and yet the letter had stated that "as a practice we rely solely upon receiving the fees set by the DTI". The First Respondent indicated that the letter was written only in relation to the Sigma team and that therefore it was a "sincere reply" although "not as accurate as it could have been".
34. The Second Respondent denied that the letter had been written by himself.
35. The Respondents acknowledged that they had received a letter from Janet Paraskeva in January 2004 enclosing a copy of The Law Society's Compliance Board policy statement, and stated that that had coincided with the letter sent to all clients informing them that they would receive 100% of their damages.

#### Referral Fees

36. During the inspection the FIO noted that payments were made out of profit costs to referrers of claims, namely Sureclaim Ltd and Miners & General Workers Compensation Recovery Unit Ltd. Within a three month period, July to September 2004, the firm raised 128 invoices in respect of costs related to CHA claims of which 126 contained items annotated as referral fees and included within invoices as "disbursements".
37. Details of shareholdings and directorships in Sureclaim Ltd and Miners & General Workers Compensation Recovery Unit Ltd were before the Tribunal and showed that both the First Respondent, his brother and their respective wives have or had interests in these companies.
38. The First Respondent denied having any involvement in Miners and General Workers Compensation Recovery Unit Limited and denied that there was any link between that company and Sureclaim Ltd. It was pointed out to him that a document headed "Miners and General Workers Compensation Recovery Unit" made reference at various places to Sureclaim. The First Respondent said that the Miners and General Workers Compensation Recovery Unit was not the same as the Miners and General Workers Compensation Recovery Unit Limited.
39. None of the files reviewed by the FIO in respect of either common law cases or claims under the DTI scheme revealed any notification to clients that a referral fee would be paid or that the First Respondent had any connection with or interest in a company that would receive a referral fee or any other fee relating to the client's claims.

### Claims Assessors

40. The Respondents received referrals of claims from Sureclaim Ltd (referred to above) whose business or some part of whose business was to make, support or prosecute (whether by action or 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 solicited or received contingency fees in respect of such claims.
41. In common law personal injury cases Sureclaim Ltd entered into signed agreements with the firm's clients pursuant to which a sum, fixed or by way of percentage, was to be deducted from the client's damages. By way of example on 1st May 2003, Sureclaim entered into an "Agreement and Declaration" with AS (re W). This agreement provided that a service fee of £495 + VAT or 20% + VAT whichever was less would be deducted from the damages and paid to Sureclaim in the event that the claim was successful. There were other cases where similar Agreements and Declarations were entered into by Sureclaim providing that a service fee of 20% + VAT would be deducted and paid to Sureclaim in the event that claims were successful. The agreements provided that the case would be carried out by "nominated solicitors". The agreements were found on the firm's client files from which it was inferred that the firm was the nominated solicitor.

### Costs Information

42. From her examination of files the FIO ascertained that in some cases the Rule 15 letter sent to the client at commencement of the matter stated that payment of costs would be received from the Government. In the majority, however, this was not mentioned. In some cases there was no mention of costs in the initial Rule 15 letter, and these were only subsequently mentioned when the "CFA" was sent after instructions were received. Even then, the client was frequently not given information about the nature of the "CFA" in terms of its costs implications. Some clients were informed that the conduct of the claim would "not cost [them] a penny".

### Publicity Code

43. During the course of correspondence between the firm and the Law Society it was noted that a Mr Brandolani, an unadmitted member of staff, was described on the firm's letter head as "Managing Partner". After this was brought to the attention of the First Respondent Mr Brandolani telephoned the Law Society and explained the situation. He then wrote to the Law Society indicating that he had resigned and that his name would be removed from the letterhead. The First Respondent wrote to the Law Society on 9th December 2005 confirming that Mr Brandolani had resigned as Managing Partner and had taken the position of Consultant with the firm on that letter. Mr Brandolani's name was on the letterhead describing him as "Consultant".

### The Respondent's Position

44. The Law Society wrote to the Respondents and other solicitors involved with the firm Avalon, on 19th July 2005, requesting an explanation in relation to all these matters. The Respondents solicitors responded on 23rd August 2005.

45. It was stated on behalf of the Respondents that “the “spirit” of the CHA is entirely consistent with the charging of a success fee”. However, the First Respondent had taken a commercial decision to return all success fees.
46. It was stated that the letter of January 2004 (stating clients would receive 100% of their compensation) was only sent to clients whose matters were being dealt with by the Sigma team and that any further deduction of monies from compensation thereafter was made only in relation to clients whose claims were being dealt with by the Epsilon team, and who had not received such a letter.
47. The Respondents denied that the letter of 3rd March 2004 to the DTI was in anyway misleading, but accepted responsibility for it.
48. The Respondents denied that the casework undertaken under the CHA was contentious and consequently there was no breach of Practice Rule 8. They stated that the agreement, notwithstanding its title was a contingency fee agreement.
49. In relation to the “mistakenly omitted letters” the Respondents, albeit accepting their responsibility for junior staff, appeared to suggest that they were written by an untrained member of staff, Mr Cookson.
50. It was stated that payments to Miners & General Workers Compensation Recovery Unit Ltd were for services rendered by that company, submitting documents in support of that contention. It was denied that there was a breach of the “Code”, or that there was any link between the firm and the referrers which was inappropriate.
51. In a further letter dated 31st January 2006 from the Respondents’ solicitors it was stated that all success fees had been returned. Any suggestion of misleading, either the DTI or clients, was denied, and all breaches, “save only the very trivial breach in relation to Practice Rule 15” were denied.
52. According to figures supplied by Capita Insurance Service as at 31st March 2007 the firm of Avalon had been paid by the DTI costs, totalling £35.1 million in relation to miners compensation claims.

#### **The submissions of the Applicant**

53. The Applicant referred the Tribunal to his detailed written submissions which were before the Tribunal dated 17th April 2009. The Applicant confirmed that allegations 1 -5 were in relation to both Respondents and the Second Respondent had admitted all of these allegations. Allegation 6 was against the First Respondent only and the Applicant sought leave from the Tribunal to withdraw this allegation against the Second Respondent. The Tribunal granted leave. In relation to allegation 7, this was only against the First Respondent.
54. Mr Dutton QC formally made an application to the Tribunal asking the Tribunal to exercise its discretion to proceed with the substantive hearing in the First Respondent’s absence. He had had every opportunity to attend and had chosen not to do so. Furthermore, it was confirmed that the First Respondent’s solicitor who was present at the hearing had spoken to the First Respondent during an earlier

adjournment and therefore he was aware that the hearing was proceeding today. The Tribunal granted leave to proceed in the First Respondent's absence.

55. Mr Dutton QC submitted that the First Respondent, as well as being a partner in Avalon Solicitors, who had received costs of £40.65 million for coal mining cases, was also a shareholder and director in Sureclaim Ltd. Broadly speaking, Sureclaim Ltd had received £25 million or more from referrals from miners work and the First Respondent had been using improper referral methods enabling him to achieve very significant profit for himself, which had been compounded by the fact that clients had not been informed of DTI payments of Avalon's costs or of the interest of the First Respondent's wife, his brother and his brother's wife in Sureclaim Ltd.
56. In relation to Miners and General Workers Compensation Recovery Unit Ltd, this was incorporated on 7th November 2001. Mr Nulty's then girlfriend (who later became his wife) and his brother's girlfriend (who later became his brother's wife) were both appointed directors and company secretary and shareholders of the company. In October 2005 Miners and General Workers Compensation Recovery Unit Ltd which gave the impression that the organisation was a Trade Union organisation when in fact it was a commercial body. It later changed its name to Compensation Recovery Unit Limited.
57. Mr Dutton QC drew the Tribunal's attention to the case of JN who had entered into an agreement with Sureclaim. The agreement before the Tribunal was a contingency fee agreement and, as the agreement was contingent on the success of the claim, it was inappropriate for a solicitor to be associated with it. Other similar examples from other client files were provided to the Tribunal. Mr Dutton QC submitted that any solicitor making payments to a company in which he had an interest was duty bound to disclose that interest to his clients. Furthermore, failure to do so was a serious breach of the Solicitor's obligation of independence.
58. The Tribunal's attention was drawn to a number of cases where the Second Respondent was recorded on the client files as the acting solicitor. He had supervisory responsibility for other fee earners who were not qualified solicitors and it was therefore submitted that the Second Respondent had been involved in the files and was aware of the payments being made to Sureclaim.
59. The Tribunal were provided with a number of examples of payments from Avalon Solicitors to Sureclaim, in some instances where the Second Respondent was the named solicitor. Concerning the relationship between Sureclaim and Miners and General, the First Respondent had denied he had any involvement in Miners and General or that that company had any link with Sureclaim. However, Mr Dutton QC submitted that the following supported the conclusion that Miners and General was at all material times an associated company of Sureclaim:-
  - (a) At all material times the companies had common directors;
  - (b) The companies traded from the same address from April 2003;
  - (c) The First Respondent's girlfriend (and then wife), and his brother's girlfriend (and then wife) were directors and shareholders of Miners and General

Payments had been by Avalon to Miners and General without any contract existing between Avalon and Miners and General. This indicated the First Respondent had an interest in Miners and General otherwise, it was submitted, he would have wanted the relationship between the companies to be properly documented. The Tribunal's attention was drawn to a number of documents which referred to Sureclaim and Miners and General interchangeably. Furthermore, the Advertising Standards Authority adjudication on 18th February 2004 had stated Miners and General was a subsidiary of Sureclaim. The Tribunal's attention was drawn to a number of cases where Miners and General had been used and payments had been made to them. There were also cases when the Second Respondent had been the relevant fee earner. The Respondents had denied cases pursued under CHA's were contentious. However, Mr Dutton QC submitted that pursuant to High Court Orders, scheme claims were deemed to be issued and therefore contentious.

60. The Respondents had submitted to the SRA caseworker that payments made to Miners and General were for services not referral fees. This was based on Miners and General visiting clients, and assisting them to complete forms. However, the Tribunal were referred to the case of Sharratt – v – London Central Bus [2] [TAG test cases] 15<sup>th</sup> May 2003 where it had been concluded that a pre-retainer payment could not be a disbursement. Furthermore, Mr Dutton QC submitted that the fee of £595 plus VAT paid to Miners and General was disproportionate to the work carried out and would not be recoverable in any event.
61. Both Miners and General and Sureclaim engaged in advertising which, if done by a solicitor, would breach the Solicitors Publicity Code. In particular Miners and General falsely claimed to act on behalf of Miners Unions thereby giving a false impression that they were an official organisation.
62. Mr Dutton QC invited the Tribunal to draw the conclusion that this was a labyrinthine network of companies that led to the First Respondent having an interest in all the companies. The companies were being paid referral fees and clients were not being told of these referral fees nor of the First Respondent's interests in the various companies. The labyrinthine structure had been intended to disguise the First Respondent's involvement and to ensure a steady stream of income to the First Respondent, whose interests conflicted with those of the clients of the firm.
63. In relation to the claim handling agreements ("CHAs") Mr Dutton QC submitted that whilst the DTI could not prohibit solicitors making their own arrangements with clients concerning costs, it was plainly the intention of the DTI that the amount payable by clients in costs was to be the amount recovered from the DTI as costs. Where there was a schedule of fixed fees, it was not intended that clients should have monies deducted from their damages or pay extra costs on top. The First Respondent had contended in correspondence that there was nothing wrong with using CFAs or contingency fee agreements but, Mr Dutton QC submitted that it would have been possible for those clients to instruct other solicitors who would not deduct any additional costs and clients should have been informed of this. The cases were relatively simple and this was born out by the fact that unqualified fee earners were processing the claims. This together with the referral system that was in place resulted in high profits being made by the First Respondent.

64. The Tribunal's attention was drawn to a number of client files where the Tribunal was taken through the costs information, retainers and CFA agreements on the files and it was submitted that a lay client would not have understood the intricacies of those documents sent to them. No proper costs information had been provided to clients, CFA agreements had not been explained to them and nor had they been informed of the DTI scheme. Furthermore, any success fee should have been calculated as a percentage of basic costs and not damages but this is not what had happened. Clients had been provided with incorrect and misleading information regarding changes in law in an attempt to enable the matter to be switched from a CFA to a contingency fee agreement.
65. Clients were being sent three letters, the first letter advised the clients that "this claim will not cost you a penny". The second letter was in the same form save that it said nothing about costs and the third letter enclosed a "mistakenly omitted" letter enclosing a CFA (which was in reality a contingency fee agreement). None of the three letters referred to the 15% deduction from damages or gave the clients any advice on the CFA, or the deduction or informed clients that Avalon would be paid on a fixed fee basis by the DTI. Whilst the letters before the Tribunal had been sent by unadmitted staff, the First Respondent must have known of this system and allowed it to happen. The First Respondent would not have left the sending of these letters to unadmitted staff and he must have been involved to some extent. Indeed, when he attended for his medical examination with Dr Sillince, he had described his detailed supervision of files to her so he must have been aware of this practice.
66. In September 2003, the three letter process was replaced by a two letter process where the first letter was the same but the second letter was amended so that the "CFAs" were sent out with the second letter rather than subsequently. In this second letter it was stated "If you are successful then we are paid a fixed fee by the Government for carrying out the work. In addition, we will take 10% of the damages recovered." The Tribunal were taken through a number of permutations of the letters sent to clients being dealt with under CHAs and it was submitted that due to the complex manner in which the information had been provided, clients could not make informed decisions on their options.
67. The Tribunal were reminded that during the time the "mistakenly omitted letter" was being sent out, the Second Respondent was the Complaints Partner but he took no steps to alter the procedure despite receiving complaints from clients about the deductions. It was accepted that the Second Respondent was in a less serious position than the First Respondent but nevertheless he allowed these procedures to continue.
68. The Tribunal's attention was drawn to a letter from Avalon Solicitors to the DTI dated 3<sup>rd</sup> March 2004 in which it was stated

"we can confirm that our British Coal Scheme Department was instigated in August 2003 and confirm that no monies whatsoever are to be deducted from the client and as a practice we rely solely upon receiving the fees set by the DTI.

Further due to some recent negative press we have confirmed to each and every client that they are to receive 100% of their damages."

Mr Dutton QC submitted this letter was misleading and incorrect as the firm's British Coal Scheme work had been ongoing since 2001. It was untrue that the firm relied only on DTI fees and it was untrue that every client received 100% of their damages as deductions had been made. Whilst there was no name on the letter dated 3<sup>rd</sup> March 2004, it was submitted that when this letter was raised with the First Respondent by the FIO he did not confirm or deny that the letter was his. It was further submitted that as he was the senior partner of Avalon Solicitors, to whom the letters of 18<sup>th</sup> December 2003 and 23<sup>rd</sup> February 2004 were addressed, the First Respondent must have written the letter of 3<sup>rd</sup> March 2004 and in doing so had been dishonest. The Applicant referred the Tribunal to the case of Twinsectra Ltd v Yardley and Others [2002] UKHL 12 in relation to the objective and subjective test of dishonesty. In the alternative, if the Tribunal was not satisfied that the First Respondent had acted dishonestly, the Applicant submitted that his conduct in writing the letter was seriously improper and referred the Tribunal to the case of Bryant Bench – v – The Law Society [2009] 1WLR 263.

69. Mr Dutton QC submitted that the First Respondent had breached the Solicitors Publicity Code by holding out Mr Brandolani firstly as managing partner and then as a consultant on Avalon's headed notepaper when he was an unadmitted member of staff.

#### The Oral evidence of Martina Hogg

70. Mrs Hogg took the oath and confirmed that her statement before the Tribunal dated 11<sup>th</sup> March 2009 was true and correct. She confirmed she had prepared the Forensic Investigation Report dated 9<sup>th</sup> June 2005, which was before the Tribunal and that, having seen the written submissions of the Respondents', she did not have any cause to alter her report in any way.
71. Mrs Hogg confirmed she had reviewed 50 files altogether and had made hand written notes contemporaneously at any meetings held with the Respondents. Where those meetings were quite "talkey" she made more detailed notes afterwards. She confirmed her notes were accurate.
72. Mrs Hogg confirmed that she had questioned the First Respondent about the letter dated 18<sup>th</sup> December 2003 from Nigel Griffiths MP to the "senior partner responsible for coal health claims" at Avalon Solicitors. She had been told that the Respondents had not received this letter although they did recall receiving a letter from an MP in early 2004. Following the meeting with Mrs Hogg, the First Respondent had provided her with a copy of Nigel Griffith MP's further letter of 23<sup>rd</sup> February 2004, together with the firm's reply dated 3<sup>rd</sup> March 2004. The report accurately recorded what had been said by the First Respondent in relation to this letter.

#### The further submissions of the Applicant

73. Mr Dutton QC referred the Tribunal to various witness statements upon which he intended to rely and which had been served under Civil Evidence Act Notices on both Respondents. The First Respondent's solicitor had managed to take instructions from him and had confirmed the Civil Evidence Act Notices were accepted. The Second Respondent did not challenge the statements, therefore it was not necessary to call those witnesses to give formal evidence.

## The Tribunal's findings

74. The Tribunal had considered carefully the oral submissions of the Applicant and all the documentary evidence provided.

The Tribunal found allegations 1 – 5 to have been substantiated against the Second Respondent, indeed they had not been contested. In relation to the First Respondent, the Tribunal found all the allegations to have been substantiated. The Tribunal gave the following reasons for its decision:-

### Allegation 1

75. The Tribunal found that the charging of “success fees” was contrary to Rule 1 of the Solicitors Practice Rules 1990 as it was clear under the Claims Handling Agreements (“CHA’s”) the firm was paid its costs in successful cases by the DTI. Indeed, the CHAs specifically envisaged that the only fees paid to claimant’s solicitors would be those paid by the DTI, and, in unsuccessful cases, the DTI paid medical disbursements in any event. Given that the majority of cases being dealt with by Avalon Solicitors were successful, the Tribunal found there was no justification for the firm to require clients to pay a success fee pursuant to a CFA to balance out the risk of unsuccessful cases. Furthermore, the Tribunal found that the purported “CFA” was in fact a contingency fee agreement and was therefore misleading on the face of it. The Tribunal were particularly concerned that the firm had given no advice whatsoever on the CFA it required clients to sign and clients were not informed that they were entitled to instruct a solicitor of their own choice or that other firms would act for them without charging a success fee.
76. The Tribunal were also concerned about the “mistakenly omitted” letter sending the client a CFA after the client had already signed a retainer with the firm which again, did not give any advice on the CFA but simply required clients to sign the new CFA, in some cases stating that a 15% deduction was required as a result of a change in the law and Avalon’s change of name. During the time that this practice was taking place the Second Respondent was the Complaints’ Partner and despite clients frequently telephoning the firm making complaints about the deductions, the system was not altered.
77. The First Respondent informed the FIO at the final interview that the “mistakenly omitted” letter had been sent by an unadmitted fee earner as an error. The Tribunal noted that three separate fee earners had sent such letters out and it appeared to be the firm’s standard practice from July 2001 until at least January 2003. The First Respondent also advised the FIO that he had made these deductions because it was the “done thing”. Whilst the First Respondent was the only equity partner at the date that these letters and documents started to be sent out, the Second Respondent was a partner at the time when CHA clients were first required to sign documents and from July 2002 he became an equity partner until he resigned in October 2004. The Second Respondent was responsible for dealing with complaints about success fees and arranging repayment, and accordingly the Tribunal found that he must have known deductions were being made from the damages of CHA client. Furthermore, the Tribunal rejected the First Respondent’s submissions to the FIO that the “mistakenly omitted” letter had been sent as an error by unadmitted fee earners as the

Tribunal found this explanation unrealistic and did not accept that three unqualified members of staff could on their own operate such a system which was the firm's standard practice over a lengthy period of time. When the First Respondent attended for his medical examination with Dr Sillince she confirmed in her medical report dated 25<sup>th</sup> June 2008 that he had told her he was in the habit of rising at 4am and was in the office at 4.30am, he managed every aspect of his employees work and that he was constantly generating letters and advising staff on how to proceed with cases. The Tribunal did not therefore accept that the letters and documents had been sent out without the First Respondent's knowledge.

78. The Tribunal were satisfied that sending the "mistakenly omitted letter" was a systematic and deliberate method of misleading clients. The Second Respondent continued to allow these letters to be sent even after he became the Complaints Partner and was aware of complaints about them.
79. The Tribunal were extremely concerned that client care letters failed to adequately explain fees would be paid in all successful cases by the DTI and that even in unsuccessful cases the DTI would pay medical expenses. The Tribunal found that the letters misleadingly informed clients "the conduct of this claim will not cost you a penny" whereas under the subsequent "mistakenly omitted" letter the firm required the client to sign a CFA with a 35% basic costs success fee. The Tribunal found that it was false to advise clients that due to changes in the law and the firm's change of name the original CFA signed was "no longer valid" when in fact there had been no change in the law and therefore the letter was untrue and misleading.
80. The Tribunal were extremely concerned that Avalon Solicitors had agreed to act for clients referred to the firm by Sureclaim, and Miners and General, despite a conflict of interest or a significant risk of a conflict of interest between the First Respondent's personal interest (by way of his own and/or family members directorship and/or shareholding) in Sureclaim and/or Miners and General and the interests of clients being represented by Avalon Solicitors. The First Respondent's conflict was even more stark where clients had agreed to pay a contingency fee of 20% of damages to Sureclaim. The Tribunal's attention had been drawn to the various companies involved and the relationships of both the First Respondent and members of his family to each of those companies. The Tribunal were satisfied that all the companies were linked and that the First Respondent had a clear conflict of interest between his personal involvement in those companies and his duty to act in clients best interests. Furthermore, the Tribunal did not accept that the Second Respondent could not have known of the involvement of the First Respondent or members of his family in the various companies given the sheer scale of the operation. The Tribunal were satisfied that the labyrinthine network of the various companies was a system which ensured a steady stream of income to the First Respondent, his brother and their respective wives.

### Allegation 2

81. The Applicant submitted that Rule 3 of the Solicitors Practice Rules 1990 had been breached as Avalon Solicitors had paid referral fees to Miners and General and Sureclaim prior to 8<sup>th</sup> March 2004 when the payment of such referral fees was absolutely prohibited. Furthermore, the Applicant submitted Avalon Solicitors had paid referral fees to Miners and General and Sureclaim after 8<sup>th</sup> March 2004 without

complying with the requirements of the amended Solicitors Introduction and Referral Code 1990. The Second Respondent when discussing the payments with the FIO accepted these were referral fees. However the First Respondent contended they were payments for services rendered by Miners and General, and Sureclaim, namely obtaining work histories and explaining the CFA/disbursement loan to clients. The Tribunal rejected the First Respondent's contention and found that the payments were referral fees for the following reasons:-

- (a) The same "fee" was paid in every case;
- (b) A pre-retainer investigation could not be a disbursement and the alleged services had been provided prior to the date of the retainer. The Tribunal had taken into account the case of Sharratt – v – London Central Bus [2] [TAG test cases] 15<sup>th</sup> May 2003 in which Master Hurst had looked at the issue and concluded a payment incurred pre-retainer could not be a disbursement.
- (c) There was no written contract between Avalon Solicitors and Sureclaim or Miners and General which, if genuine services were being provided, would have been properly documented;
- (d) The payments made in CHA cases were documented in some invoices and/or accounts vouchers as referral fees.

82. The Tribunal found that even after the payment of referral fees was lawful (post 8<sup>th</sup> March 2004) Avalon Solicitors failed to comply with the amended Solicitors Introduction and Referral Code due to the following reasons:-

- (a) Clients were not informed that referral fees were paid, nor of the First Respondent's interest in the referral companies.
- (b) Miners and General advertised by way of cold calling which was not permitted by the code;
- (c) Both Miners and General and Sureclaim engaged in advertising which, if done by a solicitor, would have breached the Solicitor's Publicity Code. The Tribunal were mindful of the witness statements provided in which clients had been informed that Miners and General were acting on behalf of miner's unions or were linked to the National Union of Mine Workers and gave a false impression to potential clients that they were an official organisation.

### Allegation 3

83. The Tribunal were satisfied that Sureclaim had received contingency fees from Avalon Solicitors clients and that Avalon Solicitors had deducted the contingency fees from client damages to pass them on to Sureclaim which was a clear breach of Rule 9 of the Solicitors Practice Rules 1990. This was of further concern to the Tribunal particularly due to the First Respondent's personal interest in Sureclaim resulting in a clear conflict of interest between the interests of Sureclaim and the interests of Avalon Solicitors' clients.

Allegation 4

84. The Applicant had alleged Avalon Solicitors entered into agreements in CHA cases which, although described as “Conditional Fee Agreements” were in fact contingency fee agreements as they provided for deductions from client’s damages. The First Respondent denied that the cases pursued under the CHAs were contentious and that accordingly such deductions from client’s damages could be made.
85. The Tribunal had considered carefully the High Court Orders dated 1<sup>st</sup> October 1998 and 25<sup>th</sup> August 1994. The Tribunal were satisfied that the High Court Order deemed all claimants to be “plaintiffs” and whose claims were deemed to be issued by the High Court and accordingly concluded that cases pursued under the CHAs were contentious cases. The Tribunal found that the Respondents had entered into arrangements to received contingency fees which were not permitted under statute or by common law.

Allegation 5

86. For the reasons already given in this judgment, the Tribunal were satisfied that the Respondents had failed to give adequate information to clients in accordance with Solicitors Costs Information and Client Care Code. In particular, the Respondents had failed to:-
- (i) Inform clients that the firm was paid costs in successful cases by the DTI and that even in unsuccessful cases, the DTI paid medical disbursements in any event.
  - (ii) The firm failed to give clients any advice about the “CFA”.
  - (iii) Clients were not informed that other solicitors firms would act for them without charging any success fee, or that they were entitled to instruct a solicitor of their own choice.
  - (iv) Clients were told in letters “the conduct of this claim will not cost you a penny” which was clearly not correct.
  - (v) Clients were told that the original CFA signed was “no longer valid” due to recent changes in the law and the firm’s change of name which again was a false and misleading statement.

Allegation 6

87. This allegation was only pursued against the First Respondent. The Tribunal had before it a number of letters which referred to Mr Brandolani as “managing partner” and other correspondence referring to him as a consultant. Mr Brandolani did not hold a practising certificate and therefore the Tribunal found he should have not have been described or held out as a partner or solicitor.

Allegation 7

88. This allegation had been pursued against the First Respondent only and related to a letter dated 3<sup>rd</sup> March 2004 sent to the DTI stating “no monies whatsoever are to be deducted from the client and as a practice we rely solely upon the fees set by the DTI”. This letter had been sent in response to a letter dated 23<sup>rd</sup> February 2004 from Nigel Griffiths MP a government minister to the senior partner responsible for coal health claims at Avalon Solicitors. During interview with the FIO, the First Respondent recalled receiving this letter but could not remember whether the letter in response had been drafted by him. The First Respondent had submitted the Second Respondent dealt with letters from MPs but he could not say that this particular letter had been drafted by either himself or the Second Respondent as it did not have their references on. The Second Respondent did not recall receiving a letter from the Minister.

The Tribunal noted from the file note prepared by Mrs Hogg dated 27<sup>th</sup> October 2004 that the First Respondent had agreed to provide her with a copy of the letter from Nigel Griffiths MP and “his reply”. Mrs Hogg had confirmed on oath that this was an accurate description of the conversation and that the First Respondent had indeed provided her with a copy of the letter dated 23<sup>rd</sup> February 2004 and the response from Avalon Solicitors dated 3<sup>rd</sup> March 2004. In the circumstances, the Tribunal were satisfied that the First Respondent was the author of the letter dated 3<sup>rd</sup> March 2004 particularly as the letter from Nigel Griffiths MP dated 23<sup>rd</sup> February 2004 was addressed to “the senior partner” who was indeed the First Respondent.

89. In relation to whether that letter was intended to mislead, and whether the First Respondent had been dishonest in stating “no monies whatsoever are to be deducted from the client and as a practice we rely solely upon receiving the fee set by the DTI”, the Tribunal had already found Avalon Solicitors had deducted “success fees” from clients damages when it was not entitled to do so and this was in addition to the fees paid by the DTI to the firm for claims being dealt with under the CHAs. It was quite clear to the Tribunal that extremely large fees had been deducted overall from client’s damages and indeed, the total sums deducted in respect of success fees between 1<sup>st</sup> July 2001 and 31<sup>st</sup> January 2004 were £221,241.30, and between 1<sup>st</sup> February and 30<sup>th</sup> June 2004 were £43,258.12. It was inconceivable that the First Respondent could not have known of these deductions when he wrote the letter dated 3<sup>rd</sup> March 2004 to the DTI and the Tribunal were therefore satisfied that the test laid down in the case of Twinsectra Ltd v Yardley and Others [2002] UKHL 12 was satisfied. It was clear to the Tribunal that any ordinary, honest and reasonable member of the public would regard the First Respondent’s conduct as dishonest in stating no monies were deducted from clients, and, as the First Respondent knew that the firm had been carrying out CHA cases since 2001 and success fees had been deducted between 2001 to June 2004, the First Respondent must have known that by those same standards his conduct was dishonest. This was further reinforced by the fact that Avalon Solicitors had written to clients on or about 27<sup>th</sup> January 2004 stating no further deductions would be made and that clients would now receive 100% of their compensation, despite the fact that the firm continued to make deductions.

## Mitigation of the Second Respondent

90. On behalf of the Second Respondent, Ms Butler-Cole accepted responsibility for regulatory compliance but reminded the Tribunal that a large amount of material before the Tribunal pertained to the First Respondent's knowledge, such as details of the various companies involved, of which the Second Respondent had no knowledge. The Second Respondent asked the Tribunal to take into account the guidelines that had been issued at the time to solicitors undertaking this type of work, which were not consistent or clear together with his own personal involvement and circumstances surrounding these cases.
91. The First Respondent had greater responsibility for the breaches and that was clear from the evidence before the Tribunal. The Second Respondent was a junior partner, who had started off as a salaried partner and subsequently become an equity partner. He had been involved mainly in common law matters where contingency fees were allowed and the problems around the "mistakenly omitted" letter did not arise. By August 2003 the Second Respondent had become more involved in the CHAs but by this time the firm's practices had been well established. The Second Respondent was not involved in the day to day running of non common law cases and indeed, the Tribunal were referred again to the First Respondent's statement to Dr Sillince, which she had mentioned in her medical report dated 25<sup>th</sup> June 2008, stating that the First Respondent had told her "most of the day to day case management was done by high quality staff, who were not in fact, legally qualified."
92. The Applicant had submitted the Second Respondent was the complaints' partner and this derived from a comment made to Mrs Hogg during the interview when the Second Respondent had been asked who dealt with complaints to which he replied he did and gave six examples of such complaints. However, the witness statement before the Tribunal from Ms Kulic dated 9<sup>th</sup> April 2007 referred to the First Respondent as the complaints' partner and indeed, all the client care letters before the Tribunal also referred to the First Respondent as the person to whom complaints should be directed. Accordingly, it was submitted that the Second Respondent was not the correct complaints' partner. He had not been motivated by any financial gain personally, he did not benefit financially and certainly not on the same scale as the First Respondent. Ms Butler-Cole accepted that whilst the Second Respondent could be accused of failure to challenge the systems that were already in place when he became a partner, the Second Respondent could not be accused of any more than this.
93. There had also been difficulties with the guidelines that had been issued regarding miners compensation claims in 2004. The Law Society's position in 2004 was that the deduction of additional charges relating to miners claims was acceptable. The only concern was the scale of charges and whether clients were properly informed. The Tribunal's attention was drawn to a number of documents to illustrate the confusion existing at the time. A letter from Irwin Mitchell to Yvette Cooper MP dated 15<sup>th</sup> November 1999 confirmed conditional fees were a legitimate method of funding miners claims. The letter also referred specifically to claims assessors who were, at that time the subject of enquiry. The Tribunal were then referred to a letter from Irwin Mitchell to Mr Kevin Barron MP which explained the DTI did not make any payment for unsuccessful cases. The Tribunal's attention was drawn to a report prepared in response to a complaint by Kevin Barron MP which concluded there was no evidence of professional misconduct in relation to the deductions made from

client's damages. However, Ms Butler-Cole did point out to the Tribunal that this report was based on the false premise that letters had been written to clients, which premise turned out to be incorrect.

94. These documents proved the Law Society did have knowledge of the complaints that were raised and the fact that contingency fees were being charged but did nothing about the situation which was relevant to the decisions made by solicitors firms. The allegation made against the Second Respondent was that monies should not have been deducted from client's damages but that was not the approach of the Law Society. Even if the Second Respondent had provided the appropriate information to clients, given the Law Society's stance at the time, it was still acceptable for deductions to have been taken from clients damages.
95. The Tribunal's attention was drawn to a number of other letters that had passed between various MPs, the Law Society and solicitors firms regarding the matter and indeed, the Law Society's own Accident Line Service endorsed a referral system by charging £2,500 plus VAT per annum for referrals. In November 2001 the Citizens Advice Bureau had written to the Law Society requesting guidelines or regulations relating to the practice of charging success fees in addition to fees paid by the DTI. The Law Society's response was to write to Irwin Mitchell solicitors asking them if there was any guidance available for solicitors. Clearly the Law Society was on notice that there were issues regarding the matter. Irwin Mitchell responded to the Law society by a letter dated 24<sup>th</sup> April 2002 confirming it was a matter for individual claimants and their legal advisors as to whether or not they entered into Conditional Fee Agreements. By November 2003 it appeared to be the view that solicitors wishing to make deductions from damages should inform clients that many solicitors did not do so. The Law Society's own view in December 2003 was that the question of whether contingency fees were technically prohibited for these claims was likely to be a complex one. However where agreements provided for excessive amounts to be deducted from damages, there was a potential issue of professional misconduct. Furthermore, the terminology used was not particularly helpful as the description was "deduction from damages", rather than conditional fee agreements or contingency fee agreements. Finally, the Tribunal's attention was drawn to a transcript from a Radio 4 programme that took place in June 2004 which was the first indication from the Law Society that there had been a change of policy which was to ask solicitors to pay money back to clients.
96. There had been no clear guidance from the Law Society prohibiting contingency fee agreements and the Second Respondent had simply made an error in determining whether the proceedings were contentious or non contentious.
97. The Tribunal were also asked to bear in mind that the contingency fee agreements were already in place prior to the Second Respondent becoming a partner and that those cases where the fees had not been explained to clients and there had been letters missing from files did not relate to the team that the Second Respondent was responsible for. The Second Respondent's fault had been in not challenging the systems and the way that the practices were being implemented. The Tribunal were also reminded that until the TAG litigation had taken place, it was not clear what was the dividing line between a referral fee and an investigation fee.

98. The Second Respondent's personal involvement was on a different scale to the First Respondent. No personal conflict of interest had been alleged against the Second Respondent and whilst he knew the First Respondent's wife/girlfriend was involved in Sureclaim, he had not known the scale or nature of the involvement and when it had changed. Given the complexity of the different companies involved, it was not surprising that the Second Respondent had limited knowledge of matters. He had been under the impression that payments being made were for proper investigation, obtaining of statements and photographs and related to genuine services rendered.
99. The Tribunal were reminded that Avalon Solicitors had now repaid all deductions made by way of success fees to clients and the Second Respondent had been involved in the decision to confirm there would be no more deductions in success fees from clients. This was relevant to the degree to which the Second Respondent was morally at fault. The Tribunal were referred to other similar cases and the sanctions that had been made in those cases before the Solicitors Disciplinary Tribunal. The Tribunal were asked to take into account the Second Respondent's witness statements which showed the effect that these proceedings had had upon him, further exacerbated by the delay in concluding proceedings. He had lost his job twice, he had taken a substantial pay cut and had suffered financially already from an investigation which had started four and a half years ago.

#### The Applicant's response to the Second Respondent's mitigation

100. It was accepted that the Second Respondent was less culpable, less liable and a junior partner, but these were still matters of serious misconduct. The Tribunal were referred to the recent decision of the Court of Appeal in the case of Financial Services Authority – v – Fox Hayes [2009] EWCA CIV 76 in which the Court of Appeal had commented on the position of a regulated person who had not received advice from their regulator. In this case neither Respondent had sought advice from the regulator and the Tribunal was asked to bear this in mind.
101. In Financial Services Authority – v – Fox Hayes Lord Justice Longmore had stated "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 the regulator to advise whether conduct of a particular kind does or does not constitute compliance with or contravention of a rule. The most that can, in my view, be said is that, if advice or guidance is given and it subsequently transpires that it was wrong, that may have an effect on the penalty for any transgression."
102. Regarding the contingency fees charged, Mr Dutton QC reminded the Tribunal that there had been a lack of risk assessment and a lack of information to clients which was particularly relevant in low risk cases. Avalon Solicitors had not been on the Steering Group relating to Miners claims and it was not clear whether either Respondent had sought advice from the Steering Group regarding the charging of contingency fees or the use of conditional fee agreements. The Tribunal's attention was drawn to a letter dated 19<sup>th</sup> July 2000 from Irwin Mitchell to the members of the Steering Group in which it stated clearly "many solicitors will be entering into conditional fee agreements under the new regulations. Please ensure that notice is given in accordance with the regulations to IRISC." The principle in this case was

the severity of the breaches in the absence of the Second Respondent either seeking or receiving guidance from the Law Society.

### Costs

103. Mr Dutton QC stated that the Applicant's costs were estimated at £180,000 which excluded an interim hearing where no costs were awarded. The Tribunal were asked not to assess those costs particularly as the First Respondent was not in the jurisdiction and the costs were large. An Order that costs be assessed if not agreed was requested. This had been a complex case where a vast amount of work was required, numerous witnesses had been interviewed and the Tribunal were provided with a schedule of the costs that had been incurred.
104. It was accepted by the Applicant that the Second Respondent was clearly in a different financial position to the First Respondent. The First Respondent was a very wealthy tax exile and if he had faced up to the disciplinary proceedings months ago, a huge amount of costs could have been saved. Mr Dutton QC requested an Order that the First Respondent pay £100,000 towards the Applicant's costs within 28 days as it was very unlikely that the costs would be reduced below this level even on detailed assessment. The Second Respondent's contribution to costs should be apportioned commensurate with his responsibility and mitigation. There was no objection to the costs payable by the Second Respondent to be capped at a level to be set by the Tribunal.

### The Second Respondent's submissions on costs

105. Concerning the question of costs, Ms Butler-Cole asked the Tribunal to bear in mind the following matters in relation to any Order for costs concerning the Second Respondent:-
- (a) The Tribunal had already made a finding of unreasonable delay in July 2008 and this breach of Article 6 must have some consequences if it were to have any real meaning. It was appropriate for the sanction relating to delay to be reflected in the costs order on principle. Furthermore, in practical terms, it was likely that costs had increased due to the breach of Article 6.
  - (b) Most of the costs had been incurred against the First Respondent in relation to proving the case against him and in ascertaining his links with the various referral companies. The Tribunal were reminded that the First Respondent had been involved in these types of cases for much longer, both before and after the Second Respondent became a partner.
  - (c) The Tribunal were reminded that in a previous case heard by the Tribunal, the matter of Anthony Warren Wagner, Michael Benjamin Lopian and Karen Bradley [9668/2007] an Order had been made by the Tribunal that the junior partner should be liable for only 10% of the overall costs. Ms Butler-Cole submitted that, in relation to the Second Respondent, this figure was still too high and in the case now before the Tribunal, there had been a finding of a breach of Article 6. Furthermore the Second Respondent's financial position was that he was unable to pay costs, no dishonesty had been found against him and one allegation had been withdrawn against him. The Tribunal were asked

to limit the Second Respondent's contribution in the circumstances to a fixed amount.

### **The Tribunal's decision**

106. Dealing firstly with the Second Respondent, the Tribunal accepted he was a junior partner and that he had a significantly lower financial interest in the firm which was generally accepted by the Applicant. The Second Respondent was given credit for the admissions he had made, albeit late in the day. The Tribunal had found that the Second Respondent was aware of the payment of referral fees to companies with which the First Respondent was associated. The Second Respondent knew that the First Respondent's wife/girlfriend also had an interest in Sureclaim and should have realised that this was a breach of the Rules.
107. The Tribunal had found that inadequate information had been given to clients at the outset of the matter and whilst the Tribunal did not find the Second Respondent responsible for the three letter system, they were concerned about his involvement either personally or through the fee earners that he was supervising in the misdescription of contingency fee agreements as conditional fee agreements. The Tribunal were of the view that as an experienced solicitor and litigator, the Second Respondent must have been aware of this practice and must have known it was wrong. Furthermore the Second Respondent had been the Complaints Partner for over two years and during this time, despite receiving frequent complaints from clients, the Second Respondent did not take any action. He should have acted but did not do so until the Solicitors Regulation Authority investigation commenced. His conduct had brought the profession into disrepute and clients had suffered.
108. The Tribunal had given very serious consideration to suspending the Second Respondent in view of the seriousness of the breaches, however, taking all the circumstances into account, the Tribunal decided that the appropriate sanction was to fine the Second Respondent £15,000.
109. In relation to the First Respondent, the Tribunal considered his conduct had been a disgrace to the profession. He designed what had been described as a "3 letter system" which confused clients by calling contingency fee agreements conditional fee agreements, he had failed to provide proper information to clients and had used these techniques as a mechanism to deduct fees from client's damages when it was not appropriate to do so.
110. The First Respondent was personally involved and associated with a network of companies which was designed to confuse with regard to the payment of referral fees, which were of financial benefit to him and members of his family. He embarked on a programme of calculated deception and took advantage of vulnerable clients thereby bringing the profession into disrepute. Whilst the Tribunal noted that the sums deducted from client damages had been paid back, the Tribunal's concern was that damage had already been done to the reputation of the profession by the First Respondent's initial behaviour.
111. In relation to the letter dated 3<sup>rd</sup> March 2004 in response to the enquiry by the DTI, this was clearly intended to deceive and in that respect the Tribunal had found the First Respondent to be dishonest. The Tribunal had no hesitation in concluding that

the public needed to be protected from the First Respondent and that he should not be allowed to continue practising as a solicitor. In the circumstances, the Tribunal Ordered that the First Respondent be struck off the roll of solicitors.

112. Concerning the question of costs, the Tribunal had taken into account the criticisms of another division of the Tribunal with regard to delay made on 1<sup>st</sup> July 2008 and felt that in the circumstances, a deduction of 33% from the Applicant's costs was appropriate. The Tribunal Ordered the costs be subject to detailed assessment and after deduction of one third, the First Respondent pay 90% of the costs and the Second Respondent pay 10% of the costs. The Second Respondent's contribution to costs was to be capped at £10,000 and both Respondents were to be severally liable. The Tribunal also ordered that the First Respondent should pay an interim payment of £60,000 towards his proportion of costs such amount to be paid within 28 days.
113. The Tribunal Ordered that the respondent, Andrew Joseph Nulty of Avalon House, 47 Museum Street, Warrington, Cheshire, WA1 1LD, solicitor, be Struck off the Roll of Solicitors.
114. The Tribunal Ordered that the respondent, Malcolm John Trotter of 34 Ringshaw Drive, West Riverside, Gomersal, West Yorks, BD19 4NZ (formerly of:- c/o 16-17 Ralli Courts, West Riverside, Manchester, M3 5FT), solicitor, do pay a fine of £15,000, such penalty to be forfeit to Her Majesty the Queen.
  - i. The Tribunal further Ordered that the Respondents do pay the costs of and incidental to this application and enquiry such costs to be subject to detailed assessment. After detailed assessment there be a deduction of one third to the costs. Andrew Joseph Nulty do pay 90% and Malcolm John Trotter do pay 10% of the balance of costs. Any contribution to costs by Malcolm John Trotter be capped at £10,000. Both Respondents to be severally liable for costs. Further, Andrew Joseph Nulty do make an interim payment towards his proportion of costs of £60,000, such amount to be paid within 28 days.

Dated this 15<sup>th</sup> day of January 2010

On behalf of the Tribunal

Mr E Richards  
Chairman