

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF DIANE CLARE HARPER, solicitor (The Respondent)

Upon the application of Peter Harland Cadman
on behalf of the Solicitors Regulation Authority

Mr D J Leverton (in the chair)
Mr A H B Holmes
Mr S Marquez

Date of Hearing: 22nd March 2010

FINDINGS AND DECISION

Appearances

Timothy Dutton QC appeared on behalf of the Applicant, Peter Harland Cadman, solicitor and partner in the firm of Russell-Cooke of 8 Bedford Row, London WC1R 4BX.

The Respondent, who was present, was represented by Gregory Treverton-Jones QC instructed by Nigel West of RadcliffesLeBrasseur.

The application to the Tribunal, on behalf of the SRA, was made on 21st July 2006.

Allegations

The Allegations against the Respondent were that she had been guilty of conduct unbefitting a solicitor and that she had breached the Solicitors' Practice Rules (the Rules) in that she had:-

1. Acted and/or continued to act when there had been a conflict and/or significant risk of conflict of interests between the interests of her clients and her interests.
2. Failed to act in the best interests of clients in that she had (a) failed to provide any or adequate advice on the funding of claims generally and (b) failed to advise clients on the agreement with PR Associates (Advisory Services) Ltd (PRA).
3. Acted and/or continued to act when there had been a conflict and/or significant risk of

conflict of interests between the interests of her clients and of PRA.

4. Accepted introductions 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) contrary to Rule 3 of the Rules.
5. Contrary to Rule 9 of the Rules she had 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, a person (not being a solicitor) 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 solicits or receives contingency fees in respect of such claims.
6. Contrary to Rule 15 of the Rules she had failed to give the information required to be given to clients in accordance with the Solicitors' Costs Information and Client Care Code (the Client Care Code).
7. Being aware of Rules 3 and 9 and of the Code she had categorised payments as marketing fees which had been in effect payments of referral fees.
8. Allegation Withdrawn.
9. Contrary to Rule 22(1) of the Solicitors' Accounts Rules 1998, she had caused or permitted money to be withdrawn from client account when it had not been properly required for a payment to or on behalf of her client.

Factual Background

1. The Respondent, born in 1954, was admitted as a solicitor in 1981. Her name remains on the Roll.
2. The Respondent practised on her own account under the style of Kidd & Spoor Harper Solicitors (KSH) of Norfolk House, 90, Grey Street, Newcastle upon Tyne, Tyne & Wear NE1 6AG. She had practised with a salaried partner who had left in 2001 and an equity partner who had retired in 2002. Since that date she had been a sole principal assisted by four solicitors and some 40 non-admitted staff.
3. An inspection of the books of account of the Respondent's practice had commenced on 24th May 2004 resulting in a Report dated 23rd November 2004 and subsequent correspondence between the Respondent and the Law Society.
4. The Respondent's firm had become heavily involved in claims arising out of coal mining. These claims for Vibration White Finger (VWF) and Respiratory Diseases (RD) had been made under Claims Handling Agreements (CHAs); which were Court approved schemes that had provided the framework for the conduct of all claims.
5. As at April 2004 KSH had had 6631 open files for clients in respect of RD claims, 4193 in respect of VWF and 1,405 related to industrial deafness.

6. Under the terms of the CHAs, KSH had received costs paid by the Department of Trade & Industry (DTI) through Aon IRISC. However, KSH had also deducted substantial sums from compensation payments made to clients in respect of agreements entered into by some of those clients with PR Associates (Advisory Services) Limited (PRA).
7. PRA was a claims assessor that attracted claims by marketing and advertising, identifying and locating people with a potential claim.
8. A large percentage of the Respondent's work relating to industrial disease claims had been referred to the firm by PRA. At the conclusion of claims, monies from the damages awarded to clients had been paid by the Respondent directly to PRA. Between July 1999 and September 2001, a total of £554,565.33 had been paid by the Respondent to PRA in respect of 791 different clients.
9. PRA had received other payments from KSH including:-
 - (a) On two occasions KSH had paid for advertising and marketing campaigns for PRA.
 - (b) KSH had made payments to PRS for "Room Rental" initially at the rate of £30 for "room rental" on every VWF and deafness claim. There had been a payment of an additional £60 if a claim had been successful and a refund of £30 if a claim had been unsuccessful. The arrangement had changed in 2001 to a payment of £90 at the conclusion of a successful claim, but no payment with regard to unsuccessful claims. The payments for "room rental" from KSH to PRA had totalled £30,556.35 for the year 2001/02; £14,133 for the year 2002/03 and £9,930 for the year 2003/04.
 - (c) KSH had also shared disbursement costs with PRA. The sum of approximately £7,000 in medical costs related to second claims made by a number of miners who had already received compensation. No other disbursements costs had been shared with PRA.
10. The Respondent had been aware that clients referred to her firm by PRA had all entered agreements to pay PRA a percentage of their damages. "The First Form of Agreement", the terms of which had sometimes been subject to amendment, had been replaced by "the Second Form of Agreement" following a determination by Leeds County Court on 19th July 2001 that agreements similar to "the First Form of Agreement" offended the law of Champerty and were therefore unenforceable. Subsequently, the Respondent had received 1,273 agreements in the Second Form signed by her clients. The Respondent had made deductions of sums from the damages recovered by clients and had paid those deductions to PRA.

Documentary Evidence before the Tribunal

11. The Tribunal reviewed the Rule 4(2) Statement together with the documentary exhibits as detailed in that Statement. The Tribunal also had the benefit of a Mitigation Bundle served on behalf of the Respondent and an Opening Note drafted by Timothy Dutton QC.

Preliminary Matters

12. Mr Dutton QC for the Applicant sought the Tribunal's permission for the withdrawal of allegation eight. He explained that the Respondent had made admissions in relation to the other allegations and the SRA did not believe it to be in the public interest to proceed with that particular allegation. The Tribunal consented to the application.

Submissions

Allegations 1, 2 & 3

13. The first three allegations related to conflicts of interest and failing to act in the best interests of clients. Mr Dutton QC for the Applicant had submitted that the Respondent's arrangements with PRA had created a coincidence in the business interests of the firm and those of PRA. It had been in both of their interests that PRA should continue to attract claims and refer them to KSH on the basis of both fees and deductions. Moreover, the coincident interests of PRA and KSH had conflicted with the interests of the Respondent's clients referred by PRA in that PRA had stood to gain financially in circumstances where the agreements under which payments had been made had been unenforceable, or at the very least, arguably unenforceable and/or had conferred little or no benefit on the client.
14. Mr Dutton QC submitted that the Respondent had acted in conflict with the interests of her clients in three specific ways by: failing to provide her clients with legal advice and/or not advising them to seek independent legal advice in respect of the agreements that they had concluded with PRA; failing to advise her clients not to enter into the Second Form Agreement with PRA and in passing on awards of damages to PRA rather than directly to her clients and thereby assisting PRA to make deductions from the awards made to its clients.
15. Mr Dutton QC submitted that the Respondent had failed to provide her clients with adequate independent legal advice as to the funding of claims generally and as to the agreements with PRA in particular. That contrary to her duty to her clients, the Respondent had failed to advise clients in the client's best interest in relation to the means by which the client's claim might be brought without payment to PRA in relation to the First Form of Agreement because such agreement had been against the client's interest and had been, at least, arguably unenforceable. In relation to the Second Form of Agreement he submitted that there had been no need for the client to enter into it and that such independent, objective advice should have been but had not been given.
16. Mr Dutton QC submitted that in failing to deal with conflicts of interest and in failing to act in the best interests of clients arising from the arrangements with PRA and the handling of referred claims, the Respondent had compromised or impaired or had been likely to compromise or impair her good repute and that of the solicitors' profession and the proper standard of work in relation to advice on the funding of claims.
17. Mr Dutton QC submitted that it had been the Respondent's duty, particularly

following the decision of the Leeds County Court, to provide advice to all clients who had suffered or might suffer deductions for the benefit of PRA. They should have been advised whether the agreements between the client and PRA had been legally binding or enforceable, whether the client should have authorised any deduction to be made at all and whether it had been in the client's interests, as opposed to PRA's interests, to enter into an agreement with PRA at all.

18. Mr Dutton QC submitted that the Respondent's conduct had been improper and unconscionable in that she had improperly preferred her interests and the interests of PRA to those of her clients in that it had been in the Respondent's financial interest to continue to receive referrals from PRA and therefore not to provide any advice to clients that might lead to the non-payment of PRA's charges, whereas it had been in the clients' interest to receive independent advice as to their obligations, if any, to PRA. Moreover, that it had been in PRA's interest that clients signed the Second Form of Agreement whereas it had not been in the clients' interest to do so and the Respondent had preferred PRA's interest above that of the client. Finally that it had been in PRA's interest to receive information and payments from the Respondent but it had not been in the clients' interest that they should have done so given the dubious nature of the First Form of Agreement. He submitted that the Respondent had preferred PRA's interest by not advising as to the clients' ability to instruct that information be withheld and no payment made and further that she had taken steps to assist PRA to obtain payment.

Allegation 4

19. Mr Dutton QC submitted that the Respondent had accepted introductions and referrals of business from PRA in breach of the requirements of the Solicitors' Introduction and Referral Code in that she had failed to retain her professional independence and her ability to advise her clients fearlessly and objectively and had permitted the financial requirements of PRA and her desire to see those requirements met, to undermine her independence. Moreover, that she had accepted referrals pursuant to arrangements that would have been likely to compromise or to impair the principles set out in Practice Rule 1 and repeated expressly at Section 1 paragraph 2 of the Code. He submitted that further the Respondent had rewarded PRA by the payment of commission or otherwise and had allowed herself to become so reliant on PRA as a source of referrals that the interests of PRA had affected the advice given by KSH to clients.
20. Mr Dutton QC stressed that KSH had not, but ought to have, provided advice upon the basis upon which claimants could have advanced their claims other than by contracting with PRA, the contents, costs, benefits and the enforceability of the PRA agreements and about the relationship between KSH and PRA.
21. In addition, Mr Dutton QC submitted that the Respondent had failed to maintain sufficient consciousness of the need to advise impartially and independently clients referred by PRA and to ensure that the wish to avoid offending PRA had not coloured the advice given to such clients.
22. Moreover, he submitted that the Respondent had failed adequately or at all to conduct reviews at six-monthly intervals to check that the provisions of the Code had been

complied with, that referred clients had received impartial advice that had not been tainted by the relationship between KSH and PRA and to check the income arising from the introduction of business by PRA.

Allegation 5

23. Mr Dutton QC submitted that the arrangement between the Respondent and PRA had been an arrangement with a claims assessor in respect of claims arising as a result of death or personal injury or alternatively that the Respondent had acted in association with PRA. He noted that PRA's business had been, in whole or in part, at all material times to make, support or prosecute, whether by action or otherwise, claims arising as a result of death or personal injury. Moreover, that in the course of such business PRA had solicited and/or had received contingency fees in respect of such claims.

Allegation 6

24. Mr Dutton QC submitted that the Respondent had persistently failed clearly to explain to clients the payments required of them under the PRA agreement and the issues raised by those agreements relevant to the making of clients' compensation claims. He referred to the 13 transactions exhibited as examples of the Respondent's approach and took the Tribunal through a number of the cases.

Allegation 7

25. Mr Dutton QC submitted that the payments made by the Respondent to PRA had been made in breach of Rule 3 and had been known or ought to have been known by the Respondent to be such so that she could not have properly characterised them as bona fide payments for "rent" nor for anything other than what they had been namely rewards to PRA for referrals.

Allegation 9

26. Mr Dutton QC submitted that the deductions of sums from the damages recovered by clients made by the Respondent and paid to PRA until approximately mid 2001 had been monies improperly withdrawn from client account in that they had not been payments properly required to be made to or not behalf of clients.

The Tribunal's Findings as to Fact and Law

27. The Tribunal found all the allegations to have been substantiated on the facts, indeed the Respondent had accepted the facts and admitted all of the allegations. However, the Respondent had not accepted that her conduct set out in paragraph 14.6 of the Rule 4 Statement had been unconscionable and, in the sense of unscrupulous or unprincipled, the Tribunal had not found it to be such. The Tribunal also accepted that although the payments made by the Respondent referred to in paragraph 19.1 of the Rule 4 Statement had, as a matter of fact and law, been referral fees and in breach of Rule 3 of the Solicitors' Practice Rules, the Respondent had not realised that when she had made the rental payments.

Mitigation

28. Mr Treverton-Jones QC outlined the Respondent's professional history and the background of her firm's involvement with PRA. He stressed that PRA had been one of the best of the many introducers in the field of mining claims, adding real value by, inter alia, providing pastoral care and home visits. PRA had been established in 1997, before the CHAs, to help retired miners with DSS appeals. PRA had understood the mining industry, had a data-base of witnesses and had been able to obtain relevant evidence so that when making claims miners had been placed in their appropriate category thus maximising their awards. At the time the Respondent had not thought that her firm's practices had been out of line.
29. Mr Treverton-Jones QC stressed that of the 10,824 cases undertaken by the Respondent's firm, referrals from PRA had represented some 38%, not, he submitted, an overly, dependent situation. He explained that on the basis of the published figures for average awards, the Respondent's firm had achieved extremely good results for its clients.
30. Mr Treverton-Jones QC explained that in the Summer of 2001, after the case in the Leeds County Court, the Respondent had decided to stop making the deductions and PRA had sought advice from Counsel. He submitted that both parties had been seeking to behave properly. The Respondent had not been deliberately breaking rules or seeking to close her eyes to the situation, indeed she had written to all her clients. Her firm had co-operated fully with The Legal Complaints Service and had paid all awards of compensation.
31. As to the rental payments, Mr Treverton-Jones QC explained that many of the Respondent's clients had lived some distance from her offices and it had made sense to see those clients at the offices of PRA, hence the monthly payments for her staff to use PRA's offices. The Respondent had accepted the breach but had stressed that it had been unintentional. As to the breach of Rule 9, which again the Respondent had accepted, he explained that the Respondent had not realised that the Rule had been engaged because she had thought, like many others, that the proceedings by way of the CHAs had been non-contentious.
32. Mr Treverton-Jones QC also gave the Tribunal details of the Respondent's personal circumstances and her recent illness.

Application for Costs

33. Mr Dutton QC explained to the Tribunal that the Respondent had agreed to an order for costs, fixed at £70,000, to be paid within 12 months. He noted that the allegations had been fully contested until some two weeks before the date of the substantive hearing.

Sanction and Reasons

34. The Tribunal had listened carefully to the statements made on behalf of the Applicant and the Respondent and had noted a number of relevant documents to which it had been referred to by both parties. It had also noted that it had been rightly conceded by Mr Dutton QC that the matter was far less serious than the previously decided cases

of Beresfords and Raleys. The Tribunal stressed that every case turned on its own particular facts.

35. The Tribunal noted that all of the eight allegations had arisen out of a course of dealings by the Respondent with PRA and her clients. It was clear to the Tribunal that as in previously decided cases, the Respondent had acted in situations of conflicts of interest in which she had failed to advise her clients properly as to their rights. Moreover, she had been far too close to PRA to provide her clients with proper, independent advice.
36. However, the Tribunal considered that the Respondent had given her clients what appeared to be an excellent service in prosecuting their claims and in obtaining for them proper levels of damages. She had not taken a penny for herself other than the costs to which she had been entitled under the CHAs. When the Respondent had learnt of the Leeds County Court Judgment, she had written to her current clients and had warned them that the Agreements they had signed might not be enforceable. Later, she had arranged for re-payments to her clients following claims made to The Legal Complaints Service.
37. It was clear to the Tribunal that at all times the Respondent had believed that she had not done any wrong. The Tribunal accepted that there was evidence of wide-spread misapprehension in the Profession at the material time which had continued until matters had been clarified.
38. Quite apart from the amount of time that the allegations had been hanging over the Respondent, the Tribunal had also noted that she had suffered from severe ill-health, difficult personal circumstances and a financial down-turn in her practice. The Tribunal had noted the information about the Respondent's finances and the agreed costs in the sum of £70,000. Taking into account all relevant matters, the Tribunal considered that the correct penalty was a total fine of £5,000 and it so Ordered.

Decision as to Costs

39. As agreed between the parties, costs were to be fixed at £70,000, to be paid within 12 months and the Tribunal so Ordered.
40. The Tribunal Ordered that the Respondent, Diane Clare Harper of Norfolk House, 90 Grey Street, Newcastle Upon Tyne, Tyne & Wear, NE1 6AG, solicitor, do pay a fine of £5,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £70,000.00, such costs to be paid within 12 months.

Dated this 14th day of July 2010

On behalf of the Tribunal

D J Leverton
Chairman