

IN THE MATTER OF DAVID ROBERT ALLAN and STEPHEN MARK PORTEUS,  
solicitors

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

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Mr A G. Gibson (in the chair)  
Mr A Gaynor-Smith  
Mr D Gilbertson

Date of Hearing: 9th February 2010

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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 (SRA) by Katrina Elizabeth Wingfield , solicitor advocate and member in the firm of Penningtons LLP, Abacus House, 33 Gutter Lane, London EC2V 8AR on 27<sup>th</sup> August 2008 that David Robert Allan and Stephen Mark Porteus of Marrons Solicitors of 58 Jesmond Road West, Newcastle upon Tyne NE2 4PQ 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 fit.

The parties had signed a Regulatory Settlement Agreement (RSA) which had been placed before the Tribunal for its approval. The Respondents agreed in the RSA to submit to the following findings being made by the Tribunal:

1. David Robert Allan and Stephen Mark Porteus, being the majority share equity partners and having shared responsibility for the supervision of miners compensation claims cases, failed to comply with Rule 1 of the Solicitors Practice Rules 1990 (SPR) in that they acted in a manner which was likely to impair their independence or integrity and their duty to act in the best interests of their clients in that they:

- (i) failed to ensure clients were aware that they were free to instruct solicitors of their own choice;
  - (ii) failed to inform clients bringing claims under the CHAs, that the DTI would meet costs in successful cases;
  - (iii) failed to advise clients as to the terms of the IDC funding agreement;
  - (iv) either deducted the settlement fee from compensation or delayed forwarding the compensation until the settlement fee was received from the client for onward transmission to IDC; and
  - (v) acted where there was a potential conflict.
2. David Robert Allan and Stephen Mark Porteus acted in breach of Rule 3 of the SPR and the “Code” by rewarding an introducer, namely IDC, by paying them substantial sums described as an “annual membership fee” together with additional payments.
  3. David Robert Allan and Stephen Mark Porteus acted in breach of Rule 9 of the SPR in that they entered into an agreement with IDC, a claims assessor, part of whose business was to make, support or prosecute personal injury claims and who solicited or received contingency fees in respect of that business.

The application was heard at the Court Room, 3<sup>rd</sup> Floor, Gate House, 1 Farringdon Street, London EC4M 7NS on 9th February 2010 when Katrina Elizabeth Wingfield solicitor advocate appeared as the Applicant and the Respondents were represented by Mr Gregory Treverton-Jones of Queen’s Counsel.

The Tribunal considered all the documents before it including the following documents submitted during the hearing:

- (i) A list of firms who had conducted the most claims under the Claims Handling Agreements handed in on behalf of the Respondents.
- (ii) An analysis of previous miners’ cases handed in by the Applicant.

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

The Tribunal Orders that the Respondent David Robert Allan of Marrons Solicitors, 58 Jesmond Road West, Newcastle upon Tyne, NE2 4PQ, solicitor, do pay a fine of £2,500.00, such penalty to be forfeit to Her Majesty the Queen, and it further Orders that he be jointly and severally liable with the Second Respondent for the costs of and incidental to this application and enquiry fixed in the sum of £25,833.25.

The Tribunal Orders that the Respondent Stephen Mark Porteus of Marrons Solicitors, 58 Jesmond Road West, Newcastle upon Tyne, NE2 4PQ, solicitor, do pay a fine of £2,500.00, such penalty to be forfeit to Her Majesty the Queen, and it further Orders that he be jointly and severally liable with the First Respondent for the costs of and incidental to this application and enquiry fixed in the sum of £25,833.25.

**The agreed facts**

1. The First Respondent was admitted as a solicitor in 1981. The Second Respondent was admitted as a solicitor in 1976. The names of both Respondents remained on the Roll of Solicitors.
2. At all material times the Respondents practised in partnership with each other and others under the style of Marrons Solicitors from offices at 58 Jesmond Road West, Newcastle upon Tyne, NE2 4PQ.
3. On 20<sup>th</sup> February 2007 The Law Society commenced an inspection of the firm. A report dated 20<sup>th</sup> September 2007 noted the matters set out below.
4. The Firm conducted claims on behalf of miners or their dependants under the Claims Handling Agreements (CHAs) set up by the Department of Trade and Industry (DTI) under the supervision of the High Court.
5. The Firm registered a total of 3767 claims (a total of 692 were rejected or withdrawn). Approximately two thirds of those claims were referred to it by Industrial Diseases Compensation Ltd/Freeclaim ID (IDC).
6. The Firm initially paid fees to IDC on a case by case basis but from 1<sup>st</sup> April 2000 they paid an “annual panel membership fee” of £60,000 payable at a rate of £5,000 per month. From 1 March 2002 the “annual panel membership fee” was increased to £100,000 payable at a rate of £8,300 per month.
7. IDC would invite potential claimants to “clinics” to which representatives of the firm were also invited. Generally, after the claimants had seen the representative of the firm they would sign an “IDC Funding Agreement”, under which the client was bound to pay an initial “administration fee” of £35. A further fee was payable on the successful outcome of the claim (“the settlement fee”). The amount of the settlement fee was dependent in part upon the damages received and in part as to when the agreement was signed.
8. The Firm accepted approximately 2000 CHA cases from IDC. As at the time of inspection 1545 of those cases had been successful or were ongoing and a total of £384,990.50 had either been paid to IDC from clients’ funds under IDC funding agreements or was expected to become due to be paid to IDC on the agreements in force at the time, absent any change in the arrangement (the larger part of this figure however related to fees due to IDC under agreements entered into before the CHAs came into force).
9. In respect of all successful CHA claims undertaken by the firm they recovered for clients damages totalling £17,953,085.52.
10. £272,892.54 of the total fees deducted and paid to IDC had been repaid by the firm to clients, to date.

11. Proceedings were commenced in the Solicitors Disciplinary Tribunal in August 2008 following a decision of the Adjudication Panel to refer made on 20<sup>th</sup> February 2008. There were subsequent negotiations leading to the RSA.

### **Undertaking contained in the Regulatory Settlement Agreement**

12. The Respondents confirmed that they had agreed a form of letter with the Legal Complaints Service which had been sent to their former clients and they undertook to deal with any responses received from clients in accordance with the requirements of the Legal Complaints Service including appropriate payments.

### **The Submissions of the Applicant**

13. The Applicant referred the Tribunal to the RSA signed by both parties. There was considerable mitigation on the face of the document to which the Applicant did not object although the Tribunal was asked to note that not all the mitigation was accepted. In particular paragraphs 25, 26, 27, 28, 33 and the latter part of 35 below were not agreed.
14. The issue relating to Practice Rule 9 (allegation 3) had now been settled in the case of Beresford and Smith v The SRA and The Law Society [2009] EWHC 3155 (Admin).
15. The “IDC Funding Agreement” was a cause of considerable concern to the SRA. Prior to February 2000 the “IDC Funding Agreement” provided a sliding scale settlement fee but thereafter it was replaced by a fixed fee of £65 plus VAT. The Firm made conciliation payments to 55 clients whose settlement fees had been on the sliding scale basis post introduction of the CHAs. Both versions of the agreement made it clear that IDC would be choosing the solicitors. IDC instructed the firm as was shown by the firm’s letter to a claimant Mr F dated 18<sup>th</sup> September 2000. Under the agreement the individual claimant agreed to instruct the retained solicitor. One of the sets of circumstances in which the registration fee would be forfeited was where a claimant transferred his claim to a solicitor not approved by IDC. Both versions of the agreement provided for the settlement fee to be deducted from the compensation received by the solicitors and then paid to IDC. If a cheque was payable to a client, correspondence before the Tribunal suggested that the firm would not release the cheque to the client until a cheque in the sum of IDC’s fees had been received from the client. If the cheque was payable to the firm then the firm deducted IDC’s fee and paid it to IDC and forwarded the balance to the client.
16. During the investigation the First Respondent confirmed to the Forensic Investigation Officer (FIO) that clients were not informed by the firm of the changes to funding introduced as a result of the CHAs coming into force. The Tribunal was referred to the case of Mr A which was exemplified by the FIO in the Report. Mr A signed a sliding scale agreement with IDC on 25th November 1999. A letter from the firm to Mr A dated 22<sup>nd</sup> November 1999 made no mention of the commitment by the Government to meet costs in successful cases. The client was therefore not fully informed of the true position regarding costs but the agreement indicated that IDC would pay all of the costs of the claim including legal fees. In return the client agreed to make the payment to IDC. Consequently the firm made a conciliation payment to

Mr A in the sum of £1,686.12 being the difference between the settlement fee under the sliding scale and the fixed fee arrangements.

17. In relation to allegation 1 the Applicant submitted that the Respondents had compromised their independence and integrity and failed to act in the best interests of their clients by:
  - (i) Failing to ensure that clients were aware that they were free to instruct solicitors of their own choice. The firm wrote to the client indicating that the firm had been instructed by IDC to act on their behalf. The Applicant had drawn the Tribunal's attention to the format of the letter.
  - (ii) Failing to inform clients who were bringing RD and/or VWF claims under the CHA that the firm's fees would be met by the DTI in successful cases.
  - (iii) Failing to advise clients as to the terms of the IDC funding agreements (both sliding scale and fixed fee), in particular as to whether it was in the clients' best interests to sign the said agreements, either on a commercial basis or on the basis that there was provision thereunder for confidential information to be supplied to IDC.
  - (iv) In cases where the compensation cheques were payable direct to the clients, failing to forward the same to the client until after payment was received from the client for IDC in accordance with the funding agreement.
  - (v) In cases where compensation cheques were payable to Marrons, deducting the settlement fee from the compensation and forwarding it to IDC.
  - (vi) Acting for clients in claims where there was a potential conflict between the interests of the client and themselves, in that they remained silent about the "funding agreement" preferring to maintain the flow of referrals from IDC.
18. In relation to allegation 2 it was submitted that the Respondents had acted in breach of Rule 3 and the Code by rewarding an introducer, namely IDC, by paying them substantial sums described as an "annual membership fee" together with other additional payments. The majority of cases had been prior to the lifting of the absolute bar on referral fees.
19. The clients were vulnerable individuals due to illness, age and potentially, level of understanding of the legal documents they were faced with. The sums involved were substantial. It was accepted however that the firm had taken steps to ensure repayment. The repayment scheme was set out in the RSA and the firm had agreed a form of letter with the Legal Complaints Service. It was also accepted that the firm had already repaid sums where the agreement had been on a sliding scale but post-dated the CHAs.
20. The Applicant clarified that IDC was a company which sent out cases to a number of firms and was not in any sense a "creature" of the firm.

21. While the Tribunal had recently heard a case involving a much smaller number of miners' cases the Applicant said that the top 13 firms had dealt with many more cases than the Respondents' firm. In some of those other cases success fees had also been claimed and paid which was not the situation in the present case.
22. The Respondents had agreed the costs of the Solicitors Regulation Authority in the sum of £25,833.25.

### **Mitigation set out in the RSA**

23. Allegation 1: the Respondents considered at the time that it was not part of the firm's retainer to advise clients about the terms and enforceability of the IDC Agreement. Clients freely entered into the agreement, and there were other choices available to them which had been extensively advertised. IDC was only one of many companies offering services to former miners and their families. The Respondents also believed that the IDC Agreement was of benefit to the client and provided clients with access to justice that they otherwise might not have obtained. The firm assessed the product which IDC offered in the context of other similar arrangements on the market and found it to be competitive. They considered that IDC provided a valuable service at a reasonable price.
24. The firm had been receiving recommendations from IDC and acting for clients on the basis of the IDC Agreement for a period of years before the CHAs came into force, at a time when there was little in the way of a viable alternative for clients seeking to make claims. Of the fees paid or potentially payable to IDC referred to in the RSA (£384,990.50) £241,957.65, or approximately 63%, related to agreements entered into between clients and IDC before the CHAs came into being, in respect of which, it was submitted, no complaint could be made.
25. The Respondents did not believe that clients were under any restraint as to the solicitors they could choose to instruct and they believed that instructions received by the firm were the subject of recommendation and not stipulation. There were many firms to whom IDC recommended clients.
26. Clients were properly informed that they had no liability for the firm's costs whether or not the claims were successful (save in exceptional circumstances which, in the event, never arose).
27. Allegation 2: the Respondents did not believe that the prohibition in the Code as to payments to introducers by way of reward for the referral of cases had any application to their arrangements with IDC as they considered that the payments made to IDC were entirely proper, and for legitimate services rendered by IDC, which was consistent with the manner in which the Code was widely interpreted at the time and the limited guidance available from The Law Society.
28. Allegation 3: the Respondents believed at the time that Rule 9 did not apply, and that in consequence they were not in breach, because they considered the subject matter of the IDC Agreement to be non-contentious.

29. Generally: the Respondents acted in good faith but now recognised that they made errors of judgement.
30. There had been a high level of co-operation both with the SRA and the LCS. In particular the Respondents had cooperated fully with the LCS in its scheme of reparation to relevant clients, having agreed to participate in the scheme when it was first proposed in September 2008. Immediately on concerns being expressed they ceased to make payments to IDC of the fees contractually due, unless expressly instructed to do so by clients. Consequently the anticipated and extrapolated total figure potentially payable to IDC was never reached.
31. The Respondents had been waiting for the opportunity to enter into this agreement for nearly two years, having offered in principle to do so in November 2007.
32. Whilst it was now recognised that there was a potential for conflict (as opposed to an actual conflict of interest, where another person's interests were actually preferred to those of the client, which did not occur), there had never been any suggestion that the firm had done anything but pursue the maximum level of compensation payable to clients. There was no suggestion that any individual clients' cases were settled at an under-value or that any steps taken by the firm were in any way prejudicial to the clients' best interests. The Respondents, at all times, provided proper and full advice to clients in relation to their claims.
33. There appeared to be no tenable argument that the IDC agreement was unenforceable so that the firm could not, in any event, have advised clients to withhold payment as to do so would have amounted to an inducement to breach of contract.
34. The firm did not receive any payments out of clients' compensation. Such deductions as were made were all paid to IDC with the full knowledge, and with the express authority, of the clients. The firm did not receive any success fees and all costs received were in accordance with the CHAs. The firm accordingly received no fees in relation to unsuccessful claims.
35. It had never at any stage been suggested, or even hinted at, that the Respondents acted dishonestly. This was a case of solicitors who at all times in good faith believed that they were wholly compliant with the rules of their profession, in a situation without historical parallel and where The Law Society had acknowledged that insufficient guidance was provided to the profession.
36. The investigation leading to these proceedings began in February 2007 and notwithstanding their full cooperation at every step of the investigation, the Respondents had had the threat of disciplinary sanctions hanging over their heads for over two and a half years.

### **Oral submissions in mitigation**

37. This was the seventeenth disciplinary case relating to miners to come before the Tribunal. At the top end of that scale were cases of dishonest exploitation. Next in gravity were cases involving success fees, then deductions from damages paid to trade

unions. The fourth level involved deductions from damages paid to introducers. IDC appeared in a number of such cases.

38. Miners and mining communities were very closely knit and there tended to be distrust of outsiders and of lawyers. Organisations grew up in those communities, often run by ex-trade union officials who knew the industry. IDC was set up by an ex-GMB man, Mr T, who was a respected and well known union official and ran a genuinely independent organisation which wanted to be paid for the work it did for miners and for the referrals it made. Mr T knew various partners in various firms including a former, now deceased, partner of the Respondents.
39. Referral fees were forbidden at the time and therefore solicitors had to enter into contractual arrangements which they thought were compliant with the Rules either by panel membership or by payment for work done by the introducer. Before the CHA came into effect IDC was taking the risk of loss. The risk was much less after the CHA and IDC reduced its charge to claimants and a panel membership fee was brought in. The First Respondent had changed to the panel membership fee system believing it to be compliant with the Rules and the Tribunal was asked to note that this was the system used by Accident Line which had been endorsed at the time by The Law Society. The alternative, payment for work done by the introducer, was a principle which was essentially affirmed by the Tribunal in the case of Tubby in which it was held it was not unlawful to pay an introducer for work done.
40. The system had been in a mess. In a radio programme in 2003 a former Chief Executive of The Law Society had described the ban on referral fees as “unenforceable”. The Tribunal had been sympathetic to the difficulty in some cases before it and financial penalties had been imposed. By way of example the Tribunal was referred to the case of Auld, Gorman, Hamilton and McCourt v The Law Society [10009-2008] in which the Tribunal said:

- “(1) Miners had been provided with accurate information regarding costs.
- (2) Gorman Hamilton had fully co-operated with the Legal Complaints Service and the SRA.
- (3) Whilst there had been a breach of the Rules, clients did not suffer as a result of these, and indeed, were fully refunded any amounts deducted and received interest on those amounts to ensure there was no loss.
- (4) Clients’ interests were not compromised and their claims were pursued to ensure maximum recovery.
- (5) Clients were fully aware of deductions being made ...

The Tribunal were mindful that Gorman Hamilton had dealt conscientiously and in clients’ best interests with regard to their claims and gave the Respondents credit for their honesty to clients. Taking into account all the circumstances of this case, the Tribunal considered the appropriate sanction was a financial penalty.”

Virtually all of the above applied to the present case.

41. The Respondents had obtained 1,545 claims from IDC but their other miners' cases were not in any way tainted and there had been no deductions. The Applicant had referred to the analysis of previous miners' cases which she had submitted to the Tribunal and the Tribunal was asked to contrast the high numbers of cases dealt with by some of those firms which put the 3,000 cases of the Respondents' firm into perspective.
42. Only 55 cases were signed up on the sliding scale after the CHAs came into existence. All of these claimants were refunded by conciliation payments before the forensic investigation in 2007. This was a perfect illustration of a firm which realised that what had gone on was not in the clients' interests and voluntarily without having to be told and without any intervention from the SRA or the LCS refunded the money.
43. The Respondents accepted that they had got things wrong but this had not been deliberate and the Tribunal might have some sympathy for them. They had not been trying to make large amounts of money out of miners' cases, they had done the work in a proper professional way but gone wrong as had many other firms.
44. In relation to referral fees the Respondents had not believed that they were in breach of Practice Rule 9 and the Tribunal was referred to the case of AB v British Coal Corporation and Others [2006] EWHC 1154 (QB) in which Mr Justice Mitting said obiter that work under the CHAs was non-contentious. A number of solicitors represented by Mr Treverton-Jones had similarly believed that work under the CHAs was not contentious. The Tribunal and the Divisional Court had held that this was not the case. The Respondents had not however shut their eyes or deliberately broken the rules.
45. The situation had been compounded by a lack of guidance from the The Law Society and indeed an early investigation into two cases had found no professional misconduct. As a result of a media storm however The Law Society had changed its policy and carried out investigations. The Tribunal was referred to the comment of the then President and the Chief Executive of The Law Society in the Gazette on 21<sup>st</sup> April 2005 cited in a letter from Andrew Hopper QC to the SRA on behalf of the Respondents
 

“There are lessons to be learned from the way this complex scheme has evolved. For example, clarity and consistency of advice for solicitors on how to administer the scheme has been lacking.”
46. It was submitted, although not in a spirit of criticism of The Law Society, that solicitors had been left to get on with it as best they could and many decent and honest solicitors had got it wrong.
47. The Respondents had always believed that what they were doing was compliant, they had fully cooperated at every stage including making admissions in early course and they had lived with this matter for some 3 years since the original investigation. The actual proceedings had been hanging over their heads for 2 years. No complaint was

made about this as the SRA had had to deal with a large number of such proceedings but for 2 years the Respondents had known that this day was approaching.

48. It was sad to see decent and honourable men such as the Respondents before the Tribunal. The Tribunal was referred to the references in support of the Respondents and in particular to the reference of Mr W which talked persuasively about the firm and its ethos. The Tribunal was asked to deal as leniently as it could consistent with the exercise of its public duties. This was a case near the bottom of the scale and it was submitted that it should fall below the case of Gorman Hamilton in the scale of penalty imposed.

### **The Findings of the Tribunal**

49. The Tribunal approved the RSA and commended the parties for it.
50. The Respondents had admitted the allegations on the basis set out in the RSA and the Tribunal found the allegations to have been substantiated on that basis.
51. The Tribunal noted the repayment of sums by the Respondents prior to the investigation when they realised that sums had been taken improperly and considered that this showed integrity on the part of the Respondents. The Tribunal also noted the excellent references in support of the Respondents. The Tribunal accepted the submission on behalf of the Respondents that while they had got matters wrong this had not been done deliberately or with any intention to exploit clients. The Tribunal was satisfied that the appropriate penalty was a financial penalty together with payment of the Applicant's agreed costs.

The Tribunal Ordered that the Respondent David Robert Allan of Marrons Solicitors, 58 Jesmond Road West, Newcastle upon Tyne, NE2 4PQ , solicitor, do pay a fine of £2,500.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he be jointly and severally liable with the Second Respondent for the costs of and incidental to this application and enquiry fixed in the sum of £25,833.25.

The Tribunal Ordered that the Respondent Stephen Mark Porteus of Marrons Solicitors, 58 Jesmond Road West, Newcastle upon Tyne, NE2 4PQ , solicitor, do pay a fine of £2,500.00, such penalty to be forfeit to Her Majesty the Queen, and it further Orders that he be jointly and severally liable with the First Respondent for the costs of and incidental to this application and enquiry fixed in the sum of £25,833.25.

Dated this 15<sup>th</sup> day of May 2010  
On behalf of the Tribunal

A G Gibson  
Chairman