

IN THE MATTER OF BARRY ROGER HOWARD, solicitors

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

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Mr. J. C. Chesterton (in the chair)  
Mr. R. Nicholas  
Mr. D. E. Marlow

Date of Hearing: 16th 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 (the "SRA") by Margaret Eleanor Bromley of Bevan Brittan LLP, Kings Orchard, 1 Queen Street, Bristol BS2 0HQ on 2<sup>nd</sup> June 2009 that Barry Roger Howard of Howard & Company, 43 Wimpole Street, London W1G 8AE (a solicitor) be required to answer the allegations contained in the statement that accompanied the application and that such Order be made as the Tribunal should think right.

The allegations made against the Respondent were that:

1. He was not frank in his responses to the SRA and/or attempted to mislead the SRA with regard to the relationship between Howard & Howard and Nomura International plc contrary to the Solicitors Practice Rules 1990 rule 1(a)(d) and/or Solicitors' Code of Conduct 2007 rule 20.03.
2. He failed to comply in full with a direction under section 44B of the Solicitors Act 1974 made on 18th May 2007.
3. He acted in breach of the Solicitors Separate Business Code 1994 and/or
4. He has done something in the course of practising as a solicitor which compromised or impaired or was likely to compromise or impair, (a) his independence or integrity

and/or (d) his good repute or that of the solicitors profession contrary to the Solicitors Practice Rules 1990.

The application was heard at the Courtroom, 3<sup>rd</sup> Floor, Gate House, 1 Farringdon Street, London EC4M 7SN when Margaret Eleanor Bromley appeared as the Applicant and the Respondent was represented by Robert Roscoe, solicitor of Victor Lissack, Roscoe & Coleman, 70 Marylebone Lane, London W1U 2PQ.

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

The evidence before the Tribunal included the admissions of the Respondent of allegations 2, 3 and 4. He denied allegation 1. The Respondent gave oral evidence and handed up at the hearing a copy of client ledgers at the Respondent's firm.

### **At the conclusion of the hearing the Tribunal made the following Order:-**

The Tribunal Ordered that the respondent, Barry Roger Howard of Howard & Company, 43 Wimpole Street, London, W1G 8AE, solicitor, do pay a fine of £4,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £12,000.00.

### **The facts, which were not in dispute, are set out in paragraphs 1-52 hereunder:-**

1. The Respondent, born in 1945, was admitted as a solicitor in 1982. His name remained on the Roll of Solicitors. At the material times the Respondent practised under the style of Howard & Howard Solicitors of 42 Wimpole Street, London W1G 8AE. The name of his firm subsequently changed to Howard & Company.
2. Mr Howard was a sole practitioner and his firm's letterhead made reference to Gillian Howard (Mrs Howard), the Respondent's wife, as a non-solicitor consultant.
3. The Respondent's field of work concerned areas of law relating to public houses, clubs, hotels and bars including aspects of land law and licensing. He also dealt with commercial property and specialised in lease extensions.
4. Mrs Howard was recognised as an employment lawyer, a field in which she had marked expertise and enjoyed an excellent reputation. She qualified as a barrister but had not been called to the Bar. She ran her own business which had high profile "blue chip" clients. Mrs Howards' CV was before the Tribunal. It demonstrated that she had been retained by the Law Society to write the Law Society's publication "Drafting Contracts of Employment".
5. Under arrangements current at the date of the hearing Mrs Howard was entitled to have direct access to Counsel. That had not been the case at the time of the events leading to the allegations against the Respondent.
6. The Respondent and Mrs Howard had been anxious to link her business and his firm partly to enable the Respondent to advise clients of his wife's services but primarily to enable Mrs Howard to instruct Counsel to advise or to conduct legal proceedings. At

the material time the Bar Council had not relaxed its rules which required Counsel to be instructed only by solicitors.

7. The Respondent and Mrs Howard had sought Counsel's advice to ensure compliance with the appropriate regulations and had been provided with a form of agreement. Mrs Howard as the principal and Mr Howard of Howard & Howard solicitors as the agent had entered into this agreement on 2nd January 2000. The agreement set out the parties' respective obligations and in particular the agreement defined "the business" as Mrs Howard's practice of employment law, personal injury and clinical negligence work and stated that the agreement related to Mr Howard's work as agent "engaging with solicitors (acting for the opposing party) acting for Mrs Howard on behalf of her clients in contentious and employment law matters, personal injury or clinical negligence matters in cases where the agent was specifically asked to do so. The agent should permit the principal to use the notepaper of Howard & Howard for the purposes of instructing Counsel for individual and corporate clients. "In practice (Mrs Howard) as consultant to the firm will give detailed instructions to Counsel and liaise with Counsel and nothing in this agreement will create any legal relationship or retainer between (Mrs Howard's) client and Howard & Howard." The agreement set out the principal's and the agent's obligations which included requirements that Mrs Howard ensured that she was fully insured under a professional indemnity policy and to ensure that all her clients provided information required under the money laundering regulations. She was also required to use best endeavours to ensure that the client paid Counsel's fees in advance and to keep the Respondent updated in each case leaving all correspondence open for him to read and to update him regularly as to progress on each matter. In turn the Respondent would provide facilities at his offices, would protect and promote the interests of Mrs Howard, would allow Mrs Howard to use the secretarial and office facilities and would consult and allow Mrs Howard to participate in any decision to recruit staff and to monitor and supervise their work.
8. The agreement also provided that Mrs Howard would allow Mr Howard a 25% reduction in the rent he paid to a settlement trust in the name of Mrs Howard and himself such trust being held on behalf of their two sons. It was further agreed that Mrs Howard would make ad hoc contributions towards typing, secretarial, IT and photocopying costs of the Respondent's firm.
9. The Respondent sent a "client care" letter to Mrs Howard dated 2<sup>nd</sup> January 2000 which stated
 

"...you will not bill me for your consultancy services as you in reality will be undertaking the majority of the work under my supervision and I will not bill you for the work undertaken by my practice for you.

The billing of your client remains your responsibility as Nomura or whichever your client happens to be."
10. Prior to the agreement in September and October 1999 Mrs Howard had delivered invoices to Nomura on Howard & Howard letterhead, the first was for a year's "retained services" and the second was for Counsel's fees on account. Both were settled by payment to Howard & Howard.

11. The Respondent confirmed receipt of these monies into client account and confirmed that none of such monies received had been paid to office account. Counsel's fees had been settled.
12. Mrs Howard had been engaged by Nomura International plc ("Nomura") some 12 years prior to her being asked to act on Nomura's behalf in connection with a claim by Ms M, following her being made redundant by that company. Mrs Howard had sent Nomura a "client care" letter dated 22<sup>nd</sup> February 2002.
13. In the particular case of Ms M, all communications between Mrs H and Ms M or her representatives, the Employment Tribunal and Counsel were conducted through Howard & Howard. Communications between Mrs Howard and staff at Nomura were routinely made by email usually from Mrs Howard's personal email address.
14. On 7th January 2002 Mrs Howard wrote to Mr F at Nomura saying that Howard & Howard were acting as her agent to instruct Counsel. Under the heading "Instructing Counsel" the following was stated:

"As agreed my husband's firm of solicitors, Howard & Howard, 43 Wimpole Street, London W1M 7AF will instruct Counsel. I am a consultant in this firm, specialising in employment matters, I am not myself a solicitor. I will in practice give instructions to Counsel, prepare all the paperwork, attend any conferences, etc. Nothing in this arrangement creates any legal or contractual or de facto relationship between Nomura and Howard & Howard and for this reason upon agreeing my terms in this client care letter, you agree to retain me and not Howard & Howard in the [Ms M] matter at all times and agree that I may secure as my agent Howard & Howard so that I may transact this litigation for you. I will be billing you for all my work on the [Ms M] matter."
15. Mrs Howard dealt with the Ms M matter on behalf of Nomura through Howard & Howard Solicitors. Invoices in respect of Counsel's fees were always raised by Howard & Howard Solicitors.
16. Howard & Howard's ledger card in respect of Nomura recorded a receipt from Nomura of £46,060 on 3rd September 2002 and payment of fees to Mrs Howard on 13th September 2002, 24th September 2002 (two payments), 15th November 2002 (two payments), 26th November 2002 and 2nd December 2002. The total paid to Mrs Howard was £45,079.25.
17. On 12th September 2002 Mrs Howard wrote to Nomura on Howard & Howard letterhead enclosing an invoice covering her fees of £10,000 + VAT and Counsel's fees.
18. Mrs Howard dealt with the Mrs M matter on behalf of Nomura through Howard & Howard solicitors. Invoices in respect of Counsel's fees were always raised by Howard & Howard Solicitors.
19. On 1<sup>st</sup> January 2003 Mrs Howard's retainer with Nomura was renewed for one year.

20. On 31<sup>st</sup> January 2003 an invoice was raised on Howard & Howard letterhead in respect of Counsel's expenses - taxis and fares.
21. On 27<sup>th</sup> May 2003 Nomura wrote to Mrs Howard at Howard & Howard Solicitors confirming termination of their existing arrangements with her. The letter referred to concerns about her response "as our instructed solicitor". On the same date a second letter was sent from Nomura to Mrs Howard at Howard & Howard Solicitors formally confirming termination of her current retainer agreement and the specific retainer in connection with Ms M's matter.
22. Nomura was sent an invoice dated 3<sup>rd</sup> June 2003 printed on the headed paper of Gillian Howard Employment Lawyer. It stated
- "Howard & Howard present their compliments and wishes to state that their fees for professional services are as follows:"
- The invoice covered agreed expenses for Counsel.
23. On 9<sup>th</sup> June 2003 Howard & Howard wrote to the Employment Tribunal stating
- "our firm is no longer on the record in this case."
24. In about May 2006 Mrs Howard brought proceedings against Nomura and one of its staff on the basis that she had a contract with Nomura to provide services personally. She specifically pleaded that she was not engaged as a consultant with any firm of solicitors. Nomura defended that action on the basis that certain of the work was done under successive contracts with Mrs Howard under which she was obliged to personally execute the work. Certain of the work, including the instruction of counsel, was undertaken under a contract between Nomura and Howard & Howard. The litigation had been settled.

#### Correspondence with the SRA

25. On 2<sup>nd</sup> February 2007 the SRA wrote to Mr Howard raising issues of supervision and on 9<sup>th</sup> February 2007 the SRA raised issues with him about keeping client information confidential and the supervision of Mrs Howard.
26. Mr Howard replied by letter dated 9<sup>th</sup> February 2007 in which he said
- "You are not correct when you assert that Howard & Howard was retained by Nomura in respect of the proceedings brought by [Ms M].
- My firm has never been instructed by Nomura, has never met any of its officials other than [Mr F] in a purely social setting and has never conducted any business nor given any advice to Nomura of any sort ...
- Nomura agreed with my wife that she should engage our firm as her agent merely to use our notepaper during the course of the litigation."

My wife never works from my office, she occasionally sees one of her clients in our spare office if it is geographically more convenient for her client.”

I do not and have never employed my wife. I placed her name on my notepaper for the benefit of my clients ... who sometimes have tricky employment problems. On occasion they have asked me if my wife could give them employment advice. This has only occurred probably two or three times. On those occasions I have referred clients of mine to my wife and she has dealt with them through her own practice.”

I have never had to monitor my wife’s advice or work as she has never conducted any work through my firm ... I have never discussed my wife’s cases as she is bound by her duty of confidentiality.”

Neither I nor my firm was ever retained by Nomura. My wife never discussed her cases or matters relating to Nomura or any other client with me.

I was not in any position to supervise my wife concerning the Ms M case as we were not instructed.”

27. The SRA wrote again on 27<sup>th</sup> April 2007 asking about any retainer between Howard & Howard and Nomura, suggesting that the Respondent had not been full and frank in his response, and the use of his firm’s letterhead had been misleading to third parties and the Court as it indicated that his firm had been retained by Nomura.

28. In his written reply of 30<sup>th</sup> April 2007 the Respondent stated

“I have not ever been retained by or instructed by Nomura International PLC (NIP) or any of NIP’s associated or subsidiary companies.

My wife (GH) had a longstanding retainer with Nomura that neither my firm nor I have ever participated in. I have never had any telephone call, email or letter save for the letter sent by Nomura to my wife which was clearly sent as a safety measure as it is the only letter ever to have been sent by my wife at my firm. I have never seen it before today ... this letter does not refer to or relate to any dis-instruction of my firm. It asked GH to transfer the [Ms M] files to OC which she did.

The letter sent to the Employment Tribunal has GH’s reference on it and complies with the agreement that Nomura had with GH for her using my firm as her agent, to be placed on the record for the purpose of her acting for Nomura ....

I do not believe that anyone whether it be Nomura, the Court or the Employment Tribunal was misled by the use of the notepaper of Howard & Howard. Nomura had had a full and frank explanation of the reason for GH using Howard & Howard to instruct Counsel in litigation matters.”

29. Mr Howard further commented in his letter,

“It must be incumbent upon Nomura to produce and provide documentary evidence of the alleged retainer with Howard & Howard. There is none because no contractual relationship ever existed...

In practice all correspondence came via DX with GH’s name on the envelope. This was opened by me in the office and brought home by me at the end of each day.

Counsel and Nomura had telecons with Gillian in her office without any reference to me or my office. Had Howard & Howard been instructed it would have been a breach of the Bar Council’s Rules ... to have Counsel speaking directly with the client without the instructing solicitor present.

As I understand it Nomura only wanted Howard & Howard on the notepaper as a matter of form, i.e. to have a firm of solicitors nominally on the record.

... Nomura were not misled by allowing GH to use the Howard & Howard letterhead for the sole purpose of instructing Counsel. She had done this in the past with Nomura in numerous other Employment Tribunal cases and Nomura had never and has never alleged that it believed that it had engaged Howard & Howard.

... I do not have the expertise or knowledge to supervise her work as she is an acknowledged expert in her field.

I have never employed my wife and did place her name on my notepaper for the benefit of clients of mine who needed employment advice.

... I am not an employment lawyer, I have no expertise in employment law and would not wish Howard & Howard to undertake any such work. The main purpose of having GH on my notepaper is to alert clients that I am able to recommend someone with this expertise.”

30. On 18 May 2007 Mr Howard wrote again repeating that his firm had never acted for Nomura.
31. The SRA wrote again on 1<sup>st</sup> June 2007 raising further queries about the relationship with Nomura and how money paid by Nomura to Howard & Howard had been dealt with.
32. The Respondent replied on 13th June 2007 stating:

“The Court of Appeal were told quite wrongly that Howard & Howard were retained by Nomura in the M case which we were not.

I absolutely deny that in practice there was any relationship between Howard & Howard and Nomura ... how could Nomura form any kind of relationship with a firm of solicitors when there was no contact, no meeting, no correspondence and no communication! ... I treated the funds from Nomura

purely for the purposes of paying Counsel and did this as an agent of Gillian Howard a consultant instructed by the firm.”

33. On 19<sup>th</sup> December 2007 Mr Howard appealed against an SRA decision that the name of his firm breached the Solicitors Publicity Code. He stated,

“My wife did not act as a consultant for this firm as this firm was not instructed by Nomura as was evidenced by the documents provided by us between her and David Farrant and David Mee of Nomura. In relation to that matter, my wife was not paid any fees as consultant of this firm as this firm was never instructed on behalf of Nomura.

Any statements about my wife not being paid fees as consultant were written only in the context of Nomura’s/Ms M’s complaint and I am sorry if my explanation about this matter has been read out of context as if my wife had never acted as a consultant for this firm.

My wife does act as a consultant to this firm’s clients and had done for many years. Over the years she has advised numerous of this firm’s clients on all aspect of employment law and has drafted contracts and other documents as well as advising them on Employment Tribunal claims.

No fees were sought or paid to this firm or to my wife as a consultant of this firm on that matter.” (ie. the Nomura matter).

34. The Respondent replied to further SRA letters dated 11<sup>th</sup> February and 4<sup>th</sup> March 2008, and 7<sup>th</sup> March 2008. In response to a request to provide evidence of the arrangements in place for supervision and management of the practice he said,

“all correspondence and supporting documentation both in and out were seen by me. I would normally discuss all matters with my wife on a daily basis. We would jointly consider the drafts of letters or documentation to be sent out as well as received. This would also have applied to any faxes ... In the usual course of events, if my wife was not present matters would be dealt with by fax or telephone.”

35. On 13<sup>th</sup> May 2008 the SRA wrote again. In his response of 23<sup>rd</sup> May 2008 the Respondent said,

“It was the position that Mrs Howard was my client and that I acted as her agent when she wished to instruct Counsel on behalf of her client ... The retainer agreements were between Nomura and Mrs Howard and not with Howard & Howard. There was never any retainer between Nomura and Howard & Howard.

The only reason that Mrs Howard’s retainer arrangement was placed on my letterhead in 2002 was because Nomura’s accounts department told Mrs Howard that they would not set up a separate account for her so that they would only pay her fees into one account (ie. the Howard & Howard account). She therefore agreed to place her retainer on Howard & Howard for this

purpose. As Mrs Howard was a client of my firm, I do not believe that this was inappropriate.

You will see that the only fees ever requested on Howard & Howard's notepaper were those for Counsel and on one occasion Mrs Howard requested her fees for her retainer on Howard & Howard notepaper because Nomura accounts department had requested her to do so...

Mrs Howard was a client of my firm in respect of her retainer with Nomura and as such she asked that fees be paid direct to Howard & Howard so that any fees due to Counsel and to me could be taken from these monies.

... Blackstone Chambers would only allow Mrs Howard to instruct Counsel through Howard & Howard and Nomura knew and approved of this procedure ...”

Nomura's Legal Department is headed by [C] ... He never wrote to me, the principal of the firm, never asked to meet me, never talked to me by telephone ...”

Having described Mrs Howard as “a consultant only with my firm” the Respondent went on to say,

“Nomura was always aware that Howard & Howard acted for Mrs Howard as her agent and that Mrs Howard in these cases was the direct client of this firm.”

He went on,

“We were never given the opportunity to explain to the Court of Appeal, High Court, Employment Tribunal, etc. what the relationship was.”

He went onto explain

“No instructions had ever been given by Nomura to Howard & Howard. Mrs Howard had made it clear to Mr F (Mr C's predecessor) how the relationship between the three of us would work.”

36. With regard to the question of supervision Mr Howard stated “we discussed her case on a daily basis and I saw all letters that were drafted and that went out on the [Ms M] case ... every letter was either drafted or vetted by Paul Goulding QC or his junior and the Legal Department and HR Department of Nomura. As such, I ensured through this procedure that every letter was vetted by at least two if not more senior and experienced legal practitioners. ... Mrs Howard informed me at the start of the [Ms M] litigation that this would be the practice. I therefore asked to see each and every letter or email that went out on Howard & Howard notepaper.”

37. In response to the concern expressed that he had not been frank in responses to the SRA, Mr Howard reiterated that his firm had not acted for Nomura, that Mrs Howard had never been paid by him and with regard to payment of fees,

“Nomura paid fees direct to Howard & Howard in order for us to pay Counsel whom we had instructed and Mrs Howard asked that her fees be paid by Nomura to Howard & Howard so that I could use these monies with her approval to update the premises, pay the service charge of the building, etc.”

38. With regard to supervision the Respondent stated

“I therefore contend that in delegating any and all correspondence and documents on these matters to a qualified solicitor at Nomura [MC] or KP and to leading and junior Counsel at Blackstone Chambers, this was correct and diligent supervision on my part. I am not an employment lawyer and could not and would not have accepted the instructions from Mrs Howard unless another qualified solicitor and/or expert Counsel had been engaged in the matter.”

39. Mr Howard replied on 18<sup>th</sup> June 2008 to a letter from SRA of 6<sup>th</sup> June stating,

“Reference to my wife being a client of the firm has been very limited and I enclose a printout of the file relating to S Limited.”

40. The SRA wrote again on 23<sup>rd</sup> June pointing out that he had not given a substantive reply to their letter of 6 June 2008. The Respondent replied on 30<sup>th</sup> June 2008 dealing in part with the SRA’s queries.

41. On 1 August 2008 the SRA sent Mr Howard a copy of the caseworker’s report. In his reply of 18<sup>th</sup> August 2008 he said,

“I have for many years accepted Mrs Howard as my client. She has worn two hats, one as my client and one as a consultant (not employee) of my firm undertaking the work for her client.

In Nomura’s case for one year in 2002/2003 Nomura instructed both my firm on a retainer and Mrs Howard in her personal capacity on a retainer. The retainer with Howard & Howard was solely in respect of the [Ms M] case so that Counsel could be instructed by Howard & Howard and fees paid to our firm on account of Counsel’s fees.

When Mrs Howard acts as consultant my firm is acting as her agent for clients of hers. I believe that she is entitled to use our notepaper as a consultant of our firm and as the client fees are paid into Howard & Howard’s office account as Mrs Howard is our client.

Howard & Howard was retained directly in 2002/3 for the [Ms M] case for administrative ease ... in order that they could pay fees on account of Counsel directly to Howard & Howard rather than paying the fees to Mrs Howard who in turn, as our client, would have transferred those fees to our firm.

Howard & Howard never rendered fee notes or charged Nomura any fees for the work undertaken by us through our consultant Gillian Howard. The fee notes were solely for the work undertaken by Counsel on behalf of our client Gillian Howard who in turn was acting for Nomura.

The accounts department of Nomura suggested that if Howard & Howard accepted a retainer and billed Nomura direct this would be a more efficient way of getting Nomura's fees to Counsel.

I apologise for anything written earlier that was misleading. I had forgotten that for one year Nomura asked for Howard & Howard to be the retained firm as well as Gillian Howard. For the remaining years when there was a retainer from Nomura it was with Mrs Howard in her personal capacity and not with Howard & Howard.

All the parties mentioned were right to believe that Howard & Howard was acting for Nomura on the [Ms M] matter.

Howard & Howard entered into a separate retainer agreement with Nomura as requested by Nomura. Nomura was aware at all times that this firm held its documents relating to the [Ms M] case. Indeed [Mr C] of Nomura wrote to Howard & Howard terminating this firm's retainer on the [Ms M] case on 27<sup>th</sup> May 2003...

That was a reference to Howard & Howard which had also accepted the instructions to act for Nomura on the [Ms M] case as well as Mrs Howard, independent consultant, who was also instructed under the terms of a separate retainer agreement.

I have not disclosed improperly any confidential documents or documents covered by legal professional privilege. As Howard & Howard was instructed by Nomura in 2002/3 for the purposes of the [Ms M] case this firm properly had possession of these documents.

I see every letter in draft before it is sent and I discuss with Mrs Howard every development in a case in which Howard & Howard is acting ... I vet and supervise every piece of correspondence that comes to this practice and goes from this practice. I open every letter in the morning, date stamp it and then deal with it accordingly. Telephone calls made on the [Ms M] case either came to this office or went through to Mrs Howard but Mrs Howard would respond by either a draft response which would be sent through as a draft to me for approval. Since virtually every response was drafted by leading Counsel I would rarely make any changes. The draft would also be approved by [Mr C] Nomura's internal solicitor before any response was sent back to [Ms M's] solicitors.

Howard & Howard clearly was acting for Nomura on the Ms M matter but so was Mrs Howard by way of a separate retainer. I would like to withdraw my error in saying that Howard & Howard did not act for Nomura. The

arrangement that I had was that Mrs Howard was my client and that my firm acted as her agent for her when she acted for her client. In that respect I genuinely believed that Mrs Howard was always my client and not the client for whom Mrs Howard was acting. I am perfectly prepared to accept that Nomura instructed both Howard & Howard and Mrs Howard to act in the [Ms M] matter. I supervised Mrs Howard more closely than any normal trainee. Every letter for Howard & Howard is sent to Howard & Howard's office and is opened by me every morning and every call is taken and vetted by me before I refer the call to Mrs Howard. Similarly every draft letter going out of the practice drafted by Mrs Howard is vetted by me either during the day or during the evening being sent from this office the next day."

42. The Respondent told the Tribunal that he and his wife had had to cope between the end of 2006 and 2008 with the terminal illness of her mother and the death of her father only nine weeks after her mother died. The Respondent's own father had died after suffering three heart attacks.
43. The Respondent had maintained a Nomura Ms M file which had been sent into storage. Mrs Howard had kept a duplicate file which had been kept at their home. The upheaval at home owing to the illness of three of their parents coupled with the emotional strain suffered from by the Respondent and his family contributed to his incorrect recollection of the various issues in what was then a comparatively old matter. He had never been contacted directly about the Ms M case and his involvement had been limited. The Respondent maintained that he never discussed his clients with Mrs Howard nor did she discuss her clients with him, save in general and discreet terms.
44. The Respondent had come to accept that his firm had, through Mrs Howard, instructed Leading and Junior Counsel and that such Counsel had drafted letters and pleadings that had been sent through Howard & Company. He had not personally conducted such litigation nor had he been involved in the proceedings. He made the point that he read all letters sent out on the firm's letterhead and all communications that the firm received. He had been aware that all documentation had been considered by Counsel and had been copied to the client.
45. The Respondent accepted and regretted that his letters to the SRA dated 9<sup>th</sup> February, 18<sup>th</sup> May, 1<sup>st</sup> and 13<sup>th</sup> June and 19<sup>th</sup> December 2007 all contained inaccuracies in respect of the retainer of his firm based on the original false premise that the Nomura matters were entirely within the remit of Mrs Howard and did not involve either the Respondent or his firm save in the most general way. The Respondent had come to accept that he did not originally set out the correct position. With regard to the two pieces of conducted for litigation for Nomura he had come to accept that Nomura was Howard & Company's client and Mrs Howard was the consultant with whom Nomura and the claimants and Counsel liaised.
46. The Respondent confirmed that he and Mrs Howard had an arrangement whereby the rent for Howard & Company's offices could be set off against any fees that might become due to Mrs Howard were she to have carried out any consultancy work for the firm. The Respondent had disclosed this agreement with his wife but he accepted and apologised should his responses to the SRA have been misleading. He had

formulated no intention to mislead. He said that Mrs Howard had occasionally acted as a consultant to Howard & Howard's clients but only on a small number of occasions.

47. The Respondent accepted the breaches alleged against him in allegations 2, 3 and 4.
48. The Respondent did not accept that there had been any confusion in the mind of Nomura as to whether or not they were dealing with a firm of solicitors. Nomura had been fully aware of the correct position. The Respondent appreciated that it was not the client who necessarily had to comply with the regulations but wished to make it clear that the head of legal at Nomura (Mr C) and his colleague (Mr F) were both fully aware of the position. They both appreciated that Mrs Howard was the consultant dealing with the Ms M matter and that Mrs Howard was not a solicitor. When terminating the retainers Mr C had written both to the Respondent and to Mrs Howard.

49. On 8<sup>th</sup> May 2007 the SRA wrote to Mr Howard requesting

“copies of all ledger sheets for Nomura International Plc and a copy of any agency agreement with Mrs Howard from 1<sup>st</sup> January 2005 within 7 days of the date of this letter.”

The Respondent replied on 14<sup>th</sup> May 2007 saying

“to assist could you please let me know your request for ledger sheets”.

50. On 18<sup>th</sup> May 2007 a direction was made under section 44B of the Solicitors Act 1974 requiring the Respondent to produce within 7 days

“all ledger sheets relating to Nomura International Plc and any agency agreement with Mrs Howard from 1<sup>st</sup> January 2005”.

51. On 23<sup>rd</sup> May 2007 the Respondent enclosed “a copy of the ledger sheet” that did not record the payment of Nomura invoices delivered on his firm's letterhead. The Respondent said that a copy of the agency agreement had already been provided with his letter of 14<sup>th</sup> May 2007. Following a telephone call to him on 30<sup>th</sup> May 2008 Mr Howard wrote that day enclosing a copy of the agency agreement dated 12<sup>th</sup> January 2004.

52. In a letter of 13<sup>th</sup> May 2008 the SRA pointed out to the Respondent that the ledger sheet which he had provided covered a period between 3<sup>rd</sup> September 2002 and 4<sup>th</sup> June 2003, when invoices had been delivered by Howard & Howard to Nomura in 1999. None of the payments referred to had been recorded on the ledger sheet produced by the Respondent.

53. At the hearing the Respondent produced a copy of the ledger sheet dealing with these payments and confirmed that the payments in and payments out had all been conducted through the firm's client account and no transfers of any sort had been made from client account to the firm's office account.

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

54. The Respondent had asserted in his earlier correspondence with the SRA that Howard & Howard were not retained by Nomura in respect of Ms M's claim; that Mrs Howard never worked from his firm's office; that on rare occasions clients of Howard & Howard asked if Mrs Howard could give them employment advice and that on those occasions the clients had always been dealt with by Mrs Howard through her own practice; that he had never had to monitor his wife's advice or work and that she had never conducted any work through his firm; that he has never discussed his wife's cases with her; that he was not in any position to supervise Mrs Howard concerning the Ms CM case as Howard & Howard were not instructed; that Mrs Howard used the Howard & Howard letterhead for the sole purpose of instructing Counsel; that Nomura paid Mrs Howard's fees for the Ms M work and were not billed by Howard & Howard and Howard & Howard did not seek to recover any fees from Nomura; that he did not have the expertise or knowledge to supervise Mrs Howard's work; that Mrs Howard had not undertaken any work formally for any Howard & Howard client. If the client needed to instruct Mrs Howard they instructed her directly and not through Howard & Howard; the letter of 27 May 2003 from Nomura terminating the retainer contained clear evidence that Howard & Howard had no retainer since it referred only to Mrs Howard's services and was addressed "Dear Gill". The Respondent said that he had not seen it before 30 April 2007 and that no Nomura files were kept on the Howard & Howard premises. The Respondent had been categorical and emphatic in his responses to the SRA.
55. In subsequent correspondence commencing on 19 December 2007 Mr Howard made assertions which were inconsistent with what he had previously stated including:
- (i) any statements about Mrs Howard not being paid fees as a consultant were written only in the context of the Nomura/Ms M complaint; Mrs Howard did act as a consultant to Howard & Howard's clients and had advised numerous of the firm's clients on all aspects of employment law; that all correspondence and supporting documents in and out of the firm were seen by him; that he would discuss all matters with Mrs Howard on a daily basis and they would jointly consider the drafts of letters or documents to be sent out as well as received; that he discussed Mrs Howard's case on a daily basis and he saw all letters that were drafted and that went out on the Ms M case; that he asked to see each and every letter or email that went out on Howard & Howard notepaper; that he had delegated any and all correspondence, documents on these matters to a qualified solicitor at Nomura and a leading and junior Counsel at Blackstone Chambers; that in Nomura's case for one year in 2002/3 Nomura instructed both Howard & Howard on a retainer and Mrs Howard in her personal capacity on a retainer solely in respect of Ms M's case; that he vetted and supervised every piece of correspondence that came to and went out of his practice; that he supervised Mrs Howard more closely than any normal trainee; that every letter for Howard & Howard was sent to the firm's office and opened by the Respondent every morning and every call was taken and vetted by him before he referred the call to Mrs Howard; that in respect of the letter of 27 May 2003, this did relate to the termination of Howard & Howard's retainer; and that Howard & Howard did have a file and documents relating to Nomura at their offices.

56. Mr Howard had also asserted that Howard & Howard's notepaper was used only for the purposes of instructing Counsel. This was not true. All correspondence on the Ms M matter with her solicitors and with the Employment Tribunal was conducted on Howard & Howard notepaper.
57. With regard to the question of the retainer, the Respondent had found himself in a cleft stick. He had on different occasions asserted the opposite.
58. With regard to the Respondent's failure to produce documents on 8 May 2007 the SRA wrote to Mr Howard requesting documents within 7 days to which he replied on 14<sup>th</sup> May 2007,

"To assist, could you please let me know your request for ledger sheets."

59. On 18<sup>th</sup> May 2007 a Direction was made under Section 44B of the Solicitors Act 1974 requiring Mr Howard to produce within 7 days

"All ledger sheets relating to Nomura International Plc and any Agency Agreement with Mrs Howard from 1 January 2005."

On 23<sup>rd</sup> May 2007 he enclosed "a copy of the ledger sheet" which did not record the payment of Nomura invoices delivered on his firm's letterhead.

60. Section 2 of the Solicitors Separate Business Code 1994 provided that "separate business" means any business, other than a solicitor's practice or a multi-national partnership, which provides any service or services which may properly be provided by a solicitor's practice and references to a solicitor who has a separate business are references to a solicitor who (alone, or by or with others) controls, actively participates in or operates its separate business.
61. Section 3 provides "subject to the exceptions in Sections 4 and 5, a solicitor must not have a separate business which provides any of the following services:
- (a) the conduct of any matter which could proceed before any Court, Tribunal or Enquiry, whether or not proceedings are commenced;
  - (b) advocacy before any Court, Tribunal or Enquiry;
  - (c) Instructing Counsel;
  - (d) giving legal advice.
62. Mr Howard actively participated in the separate business of Gillian S Howard Employment Lawyer. The Agency Agreement entered into between Mrs Howard and Mr Howard specifically allowed for Mrs Howard to use the notepaper of Howard & Howard for the purposes of instructing Counsel for individual and corporate clients of Mrs Howard. The Agency Agreement sought to exclude any legal relationship or retainer between Mrs Howards' clients and Howard & Howard.

63. Mrs Howard's firm shared the premises of Howard & Howard at 43 Wimpole Street, London. The two business shared the same reception and used the same DX number. Mrs Howard had the use of an office in those premises. Under the agency agreement the Respondent allowed Mrs Howard to use the facilities for the purposes of running her practice. Mrs Howard made ad hoc contributions towards the typing and secretarial costs and the maintenance contract for IT support and photocopying.
64. The Respondent provided services to Mrs Howard's business which included allowing Mrs Howard to conduct proceedings through Howard & Howard; instructing Counsel; and receiving payments from Nomura which included Counsels' fees and Mrs Howard's fees and paying those into client account.
65. The Respondent's involvement in providing services for Gillian S Howard clearly amounted to active participation within the meaning of Section 2(a) of the Solicitors Separate Business Code 1994. Gillian S Howard was providing services that fell within Section 3(a), (b) and (c) of the Code and accordingly the Respondent was in breach.
66. It was clear that there was confusion in the mind of Nomura as to whether they were dealing with a firm of solicitors. Nomura believed that their retainer was with Howard & Howard.
67. The Applicant rejected the submission that the Tribunal should take into account on only the Respondent's firm's performance when assessing his means.

### **The Submissions of the Respondent**

68. The Tribunal was reminded that in order to find allegation 1 substantiated against the Respondent it must apply the criminal standard of proof. The Tribunal would have to find that the Respondent had not been frank and that he had attempted to mislead his own regulatory body.
69. The Tribunal was invited to look at the evidence to ascertain whether the Respondent would have had any motive to act in that way. The Respondent was not endeavouring to conceal any inadequate professional service or some breach of the worst kind.
70. The Respondent's wife was highly regarded as an unadmitted expert. He had thought that it was appropriate to put her name on his firm's paper. That might have been a bad idea. The Respondent had been criticised for naming his firm Howard & Howard in such circumstances. His explanation had been that his wife's name had been Howard before they married and they were known to all as Howard & Howard.
71. Mrs Howard had enjoyed a professional relationship with Nomura for a period of some 12 years. There had been no need for Nomura to instruct Howard & Howard until the case of Ms M. The Respondent had explained how the situation had arisen with regard to the need for a firm of solicitors to instruct Counsel.
72. The fact that the Respondent had been in breach of the Solicitors Separate Business Code had been difficult to recognise especially in the circumstances where the two parties concerned were married. The Respondent had thought that his clients would

benefit from his wife's expertise in a particular area of law. There had been no suggestion that any client had suffered and the arrangement between the Respondent and Mrs Howard was not really the type of arrangement that the code was designed to prevent.

73. The Respondent had had to accept that he had not provided all of the documents in accordance with the Section 44B notice. If he had been entirely frank and had provided all of the documents requested it was likely that the SRA as a reasonable body would have accepted that he had made a mistake and would have dealt with him by way of an internal sanction. This was not the sort of case where the Respondent might fear a draconian penalty.
74. It was the Respondent's submission that the evidence demonstrated no motive for acting as he did and the evidence adduced by the Applicant did not satisfy the beyond reasonable doubt standard. The Tribunal was invited to accept that the Respondent had been guilty of an error of recollection and how the lengthy matter had developed. It was a sorry chapter in his career.
75. The Applicant had pointed out that the Respondent's earlier incorrect responses had been emphatic. The Respondent was an emphatic writer and speaker. He had indicated that he had a clear and emphatic recollection but that this was a reflection of his personality.
76. The Respondent had accepted during the course of correspondence that he had got things wrong. He had sought to put them right during the course of later correspondence before the allegations before the Tribunal had been made. The Tribunal could rely on the fact that he had admitted his errors and put them right in correspondence with the SRA: he had not sought to give an explanation only when appearing before the Tribunal. He had not made any deliberate attempt to mislead the SRA.
77. The Respondent's means should be taken into account both in connection with a financial penalty and with an order for costs. The Tribunal was reminded of the cases of *D'Souza* and *Merrick* and the Respondent's means should be taken into account. The Respondent's firm had made a modest loss in the financial year before last and in his previous financial year a loss of £15,000. The type of work which he undertook had been seriously adversely affected by the financial recession. It was submitted that any assets or other means of the Respondent was not relevant to the Tribunal's consideration as the proceedings related to his professional practice as a solicitor.
78. The Tribunal heard from the Respondent again in the witness box as to his means.

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

79. The facts placed before the Tribunal were not in dispute. The Respondent had admitted allegations 2, 3 and 4 and the Tribunal found those allegations to have been substantiated.
80. With regard to allegation 1 the Tribunal found that the required standard of proof had not been satisfied to establish that the Respondent had not been frank in his responses

to the SRA and/or had attempted to mislead the SRA. The Tribunal accepted that the Respondent had been very stupid when seeking formally to describe and give effect to the relationship that he and his firm had with his wife and her business. The Tribunal could not avoid reaching the conclusion that he had wanted the best of all worlds and he had allowed his judgment to be clouded by the fact that he had a close personal relationship with Mrs Howard.

81. The Tribunal accepted that the Respondent and Mrs Howard together had suffered the illness of three of their parents and bereavement within a relevant short period of time. The Respondent had not thought things through with a proper degree of objectivity and had not sought advice when it would have been prudent to do so. Such advice as had been obtained with regard to the agency agreement did not appear to have encompassed advice about the Solicitors Separate Business Code.
82. The Tribunal accepts that the Respondent and Mrs Howard did not enter into the arrangements which they did for any nefarious purpose but such arrangements were inappropriate and could and did lead to clients believing that they had all of the safeguards that a regulated firm of solicitors provides when that might well not have been the case. It was, of course, noteworthy that the agency agreement required Mrs Howard to carry professional indemnity insurance but there was also the fact that fees not being paid to the firm would not be declared to the firm's own professional indemnity insurer which in these particular circumstances might have had a serious effect upon the Respondent's own indemnity insurance position.
83. The Tribunal accepted the Respondent's evidence that he had not deliberately misled the SRA. The Tribunal accepted that he had been mistaken having seen and heard him give evidence. The Tribunal also took into account the fact that he sought to put matters right of his own volition during the course of correspondence to go to his credit.
84. When considering the sanction to be imposed, the Tribunal accepted that the allegations found to have been substantiated were not in the particular circumstances of this case at the most serious end of the scale but it could not ignore the fact that the failure on the part of a solicitor to comply fully with his profession's regulatory requirements, which are in place in order to protect the public, is serious and a financial penalty was appropriate in order to ensure that the good reputation of the solicitors profession be maintained. The Tribunal considered it both appropriate and proportionate to order that the Respondent pay a fine of £4,000.

#### **The Tribunal's Decision as to Costs**

85. The Applicant sought the costs of and incidental to the application and enquiry and handed up a schedule of such costs. She explained that a number of issues had been investigated which were not the subject matter of the application before the Tribunal. She had overestimated the time spent on advocacy and the investigation of matters not before the Tribunal in the main had been undertaken by the more junior members of her firm.

86. It was right that allegation 1 be brought against the Respondent and following the ruling in *Baxendale-Walker* the Law Society should not have costs awarded against it where it had not succeeded in an allegation.
87. The Tribunal gave careful considerations to the submissions made in respect of costs. The Tribunal concluded that it was both appropriate and proportionate that the Respondent pay the Applicant's costs. It noted that the Applicant had failed in respect of allegation 1 but the Tribunal concluded that the allegation was properly brought and it was right that it be aired before the Tribunal. In such circumstances the Respondent should pay the costs of the Applicant in relation to allegation 1. The Tribunal did not accept that the Respondent should bear the costs of the Applicant in relation to the investigation of other matters not brought before the Tribunal. The Tribunal gave due consideration to the schedule of costs provided by the Applicant and taking these matters and the fact that the Applicant herself had accepted that there had been some overestimation, the Tribunal fixed the costs in the sum of £12,000 inclusive of VAT and ordered the Respondent to pay the costs in that figure.
88. The Tribunal did not accept the submission of the Respondent that in considering means and ability to pay under D'Souza or Merrick they could only consider the means arising from his Professional Practice. It was the Tribunal's decision that D'Souza and Merrick were directed to the question of ability to pay from whatever source. In this case the Respondent had the ability to pay the costs order the Tribunal was preparing to make.
89. The Tribunal fixed the costs to be paid by the Respondent to the Applicant in the sum of £12,000.

Dated this 21<sup>st</sup> day of May 2010.

On behalf of the Tribunal

J. C. Chesterton  
Chairman