

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF DAREN JOHN ISMAY, solicitor (The Respondent)

Upon the application of Katrina Elizabeth Wingfield  
on behalf of the Solicitors Regulation Authority

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Mr R B Bamford (in the chair)  
Mr A H B Holmes  
Mrs S Gordon

Date of Hearing: 7th July 2010

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**FINDINGS & DECISION**

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**Appearances**

Ms Katrina Wingfield of Penningtons Solicitors LLP, Abacus House, 33 Gutter Lane, London, EC2V 8AR for the Applicant.

Mr Donald McCue of Counsel for the Respondent.

The application was dated 21<sup>st</sup> December 2009.

**Allegations**

1. The Respondent acted in breach of Rule 7 (1A) of Solicitors Practice Rules 1990 (“SPR”) in that he entered into and maintained an improper fee-sharing agreement with the Legal Advice Bureau (“LAB”) whereby LAB provided services to the clients of his firm rather than his firm providing those services.
2. Contrary to Rule 1(a) SPR, the Respondent accepted a vast majority of referrals from one source thereby potentially compromising or impairing his independence or integrity.
3. The Respondent acted in breach of Rule 3 SPR and Section 2A (3) and (4) of the Solicitors’ Introduction and Referral Code 1990.

4. Contrary to Rule 1(d) SPR the Respondent acted in a manner which compromised or was likely to compromise the good repute of the solicitors' profession by accepting referrals acquired by "cold calling".

The Respondent admitted allegations 3 and 4.

### **Factual Background**

1. The Respondent, born in 1968, was admitted to the Roll on 1<sup>st</sup> December 1993. The Respondent held a current practising certificate.
2. The Respondent was formerly a sole principal at, and was currently a partner at Delta Legal Solicitors ("the firm") of 1 Riverview, The Embankment, Vale Road, Heaton, Mersey, Stockport, SK4 3GM. The firm became a partnership on 12<sup>th</sup> January 2009. The Respondent was the sole principal at Delta Legal Solicitors at all material times.
3. An inspection of the books of accounts and other documents of the practice of Delta Legal Solicitors ("the firm") took place and a report was produced dated 28<sup>th</sup> July 2008. The Investigation Officer ("IO") found that the firm's books of accounts were compliant in all material respects but there were concerns arising out of the firm's relationship with an organisation known as The Legal Advice Bureau ("LAB").
4. The firm was set up in January 2004 and became a panel solicitor with a claims funding company called "I". "I" entered into voluntary liquidation on 22<sup>nd</sup> June 2004.

### Allegation 1

5. Whilst a panel solicitor with "I", the firm was referred cases from LAB through "I". On 1<sup>st</sup> June 2004, the firm entered into a fee sharing agreement direct with LAB. LAB referred cases to the firm (and provided certain other services) and LAB received 33% of the global gross fees. Between January 2004 and June 2007 the firm accepted 17,577 cases from LAB.
6. Prior to entering into the fee sharing agreement, LAB provided the firm with a loan of £300,000. The Respondent told the IO that the "loan was not supposed to be required, but with the demise of "I" the firm could not afford to pay upfront fees."
7. On 17<sup>th</sup> April 2008, the Respondent informed the IO that he reviewed the referral arrangement with LAB by way of:-
  - Running the business
  - Reviewing cases
  - Dealing with the firm's finances

The above was instead of a written six monthly review. In May 2005, the firm had been subject to a Practice Standards Unit monitoring visit. The report following that visit confirmed that no written review was required.

8. The Respondent explained to the IO that when he entered into the agreement with LAB, he needed cases. He could not afford to pay upfront referral fees so he

preferred a fee sharing agreement which, he said, was a change being considered by the Law Society. The fee sharing arrangement listed a number of services provided by LAB and the Respondent explained that some of the services listed in the fee sharing agreement overlapped with the separate LAB loan. The Respondent confirmed that LAB provided 99% of the firm's referrals. Section 2(11) of the Solicitors' Introduction and Referral Code 1990 states that "where more than 20% of the firm's income during the period under review arises from a single source of introduction of business, the firm should consider whether steps should be taken to reduce that proportion." The Respondent indicated that he was aware of the suggested ratio in the Code but that, "if he did not do this, from a cash flow point of view the firm would have struggled".

9. The Respondent confirmed that there was no formalised agreement for the payment of money under the fee sharing agreement, rather, this was down to the Respondent's ongoing negotiations with the directors of LAB. The Respondent also confirmed that the firm generally paid fees monthly to LAB, although it could be more frequently than that. The Respondent used the term "ad hoc" to describe the arrangement.
10. From January 2005 to June 2007 £1,926,569 was paid to LAB in the first six months of 2007 and that the next largest sum was £100,000, paid to another referrer, CD. A total of £12,630 was paid to the other introducers. Sums in excess of £5m had been paid to LAB in the years 2005 and 2006.
11. Payments were made to LAB in various categories. The Respondent explained that "Statement Fees" were payments which covered the completion of LAB Questionnaires and short witness statements to enable the case to progress. He confirmed that these questionnaires were necessary in addition to the IRISC Questionnaire.
12. The category headed "Fee Share" represented a third of the firm's gross fees under the fee sharing agreement with LAB. When asked about the difference between the "IRISC Vetting Fee" and the "Statement Fee", the Respondent said that once the IRISC Questionnaire was completed, LAB staff would check against the template provided by the firm. This was because the firm did not have enough staff to do this. If the firm had had sufficient staff, according to the Respondent, the firm's staff would have carried out the work, as opposed to LAB staff.
13. In relation to "IRISC documenting fees", the IO noted that the Respondent had told him previously that he thought that this "concerned taking IRISC questionnaires to obtain the client's signature".
14. The Respondent said that he thought that these fees also included the travelling costs and investigator salaries for completing the IRISC questionnaires.
15. The Respondent confirmed that payments for "IRISC data input fees" concerned inputting details onto the LAB case management system. The Respondent stated that "IRISC data management fees" were in respect of transferring all the information input from the LAB case management system onto the firm's IT system. He said that payments for "marketing fees" related to LAB, "sending out agents to sign documents

on behalf of the firm, checking the firm were doing their job and making sure the client was happy”.

16. The IO asked the Respondent what the firm was doing on these claims, while LAB was incurring the charges. The Respondent said that the firm was, “facilitating getting all the information and deciding whether the claim could run under the firm’s claims handling scheme... A lot of administrative tasks needed to take place as questionnaires were returned under the existing processors... There was a lot of upfront effort for what was a limited amount of money for clients as the scheme developed”. The Respondent confirmed that LAB dealt with the administrative side of the claims but the firm was running the cases. He stated that the initial administrative tasks required by the cases would have been “overwhelming” for the firm to have done. He said that after 2005, the payments to LAB stopped, as the firm was running the cases.

#### Allegation 2

17. LAB provided 99% of the firm’s cases. The Respondent explained the rationale in taking referrals from one source. He mentioned, amongst other things, “survival”, not having to make upfront payments, the volume of cases, the quality of LAB cases, and the fact that the LAB did not impose time constraints on the firm, i.e. freedom on handling instructions once received. The Respondent also confirmed that he wished to grow the business and was entering into referral arrangements with new claims management companies in 2007.

#### Allegation 3

18. The May 2005 PSU monitoring visit identified for the Respondent that clients should be informed of the relationship between LAB and the firm. During his investigation, the IO reviewed 15 files, nine of which predated the PSU monitoring visit.
19. Of the nine files which predated the PSU visit, seven made no mention that the case was referred from LAB. Of the six files post-dating the PSU visit, two made no mention that the case was referred from LAB. The IO also reviewed Rule 15 letters from a random selection of LAB referrals in January 2007 and noted that reference was made to both the fee sharing agreement and the referral arrangements with LAB.
20. The Respondent said that once the need for clients to be informed of the relationship between LAB and firm was raised following the PSU monitoring visit in May 2005, the firm’s standard letter was changed to make reference to the fee sharing agreement with LAB.

#### Allegation 4

21. The May 2005 PSU monitoring visit report stated that in two files reviewed, there were indications of “cold calling”. The Respondent informed the IO that LAB signed an undertaking (some time between May and September 2005), to comply with the professional rules and the Solicitors Introduction and Referral Code. When asked by the IO what else was done to ensure that LAB was not cold calling, the Respondent said that he regularly met the director of LAB to discuss issues.

22. In October 2007 the IO sent a questionnaire to 28 clients, asking how their claim was initiated and whether they were informed of the firm's fee sharing agreement with LAB. Seven clients stated that they were contacted by LAB either by "cold calling" or an unsolicited visit. Four clients stated that they were not informed by LAB of a fee sharing agreement with Delta Legal. The Respondent confirmed to the IO that LAB were "probably not" complying with their undertaking, although he thought a sample of eight was not representative of the 6,000 claims dealt with by the firm over the period in question.
23. The Tribunal reviewed all the documents submitted by the Applicant which included:-
- Rule 5 Statement together with all enclosures.
  - Schedule of Costs.
24. The Tribunal reviewed all the documents submitted by the Respondent which included:-
- Statement of Daren John Ismay dated 30<sup>th</sup> June 2010 together with all attached documents.

#### **Witnesses**

25. The following witnesses gave oral evidence:-

Darren John Ismay

#### **Findings as to Fact and Law**

26. The Tribunal had listened carefully to the parties and had considered all the evidence and documents provided in detail. The Tribunal found allegations 3 and 4 were proved, indeed these were admitted by the Respondent.
27. In relation to allegations 1 and 2, the Tribunal had heard evidence from the Respondent. In his evidence the Respondent stated LAB had been providing services to his firm and that he had outsourced work to them. In relation to allegation 1 it had been submitted the services carried out by LAB were not provided to clients but were services provided to the Respondent's firm. The Respondent had been in a position where he required capital and also needed services to be provided to his firm in order to enable him to deal with the large volume of IRISC cases. The Respondent's firm was unable to deal with all these cases and accordingly engaged LAB to assist with the administrative side of the work. LAB had been obtaining and processing information on behalf of the Respondent's firm.
28. The Tribunal accepted this argument in relation to allegation 1 and was satisfied that a large amount of work needed to be dealt with quickly as the deadline for IRISC work was March 2005. The Tribunal had not been provided with evidence to show that services had been provided to clients and indeed, the statements provided from the various clients did not indicate that they thought LAB were acting for them. Furthermore, the Tribunal noted that when the Respondent had been interviewed by the IO on 17<sup>th</sup> April 2008, he had maintained that LAB were dealing with the

administrative side of the cases but that the firm was actually running the cases. The Tribunal was not satisfied on the evidence placed before the Tribunal that allegation 1 was made out and accordingly found this allegation not proved.

29. Dealing with allegation 2, the Respondent had submitted he had not done anything which was likely to compromise/impair his integrity or independence. The Respondent had admitted in evidence that 99% of his work came from LAB and that as a result of this LAB received one third of the fees generated by the Respondent. It was submitted by the Respondent that this had been a commercial risk and he admitted that he had had business concerns as he did not like having all his eggs in one basket. However, LAB took no interest in how the cases were run and did not exercise any control over the manner in which the cases were dealt with. They did not audit any files. The Respondent had submitted that Rule 1 (a) of the Solicitors Practice Rules made reference to a situation which was “likely” to compromise a solicitor’s integrity/independence. The Applicant accepted this was the correct test. The Respondent submitted that whilst accepting 99% of referrals from one source had the potential to compromise or impair his independence/integrity, in this case it was not likely to compromise/impair his independence or integrity.
30. The Tribunal accepted the correct test was whether accepting 99% of referrals from one source was “likely” to compromise/impair the Respondent’s independence or integrity. From an objective point of view, the Tribunal, having applied the higher test of whether the situation was likely to compromise/impair the Respondent’s independence or integrity, found the allegation proved. Whilst the Tribunal had sympathy for the Respondent as he did indeed look at the matter with potential business concerns in mind, the Tribunal was satisfied that looking at matters objectively, the Respondent would have to ensure the payments made to LAB were sufficiently high enough to ensure referrals continued to be received. This was likely to affect the manner in which cases were dealt with. The Tribunal found allegation 2 was proved.

### **Mitigation**

31. Counsel for the Respondent confirmed that whilst from an objective point of view a reasonable person may consider the situation was likely to compromise the Respondent’s integrity/independence, in this case it did not happen. As a result of these proceedings the Respondent had been through a great deal of stress and had incurred high costs. The Tribunal was asked to be lenient on penalty in all the circumstances.
32. Allegations 3 and 4 had been admitted but the context of those admissions had been explained to the Tribunal. The Respondent had not informed clients of the fee sharing agreement as he did not want them to think they had paid monies to LAB when this had not been the case. In any event, once the PSU Report had pointed out his error he changed the procedure to ensure the correct information was given. The Applicant’s case was based on two files dealt with after the PSU visit where clients had not been informed. In relation to the first matter, the Respondent had not yet received the PSU Report.

33. Regarding allegation 4, a number of clients who believed they had been cold called were in fact not cold called at all. This was a mistake made by the clients who had in fact received a telephone call from Delta Solicitors after the referral had been made. However the Respondent accepted some clients claimed to have been cold called and accepted this allegation on the basis that he did not realise cold calling was taking place and there had been no evidence provided that he was aware of it. When the issue was raised, he dealt with it immediately at meetings with LAB.

### **Costs Application**

34. The Applicant provided the Tribunal with a schedule of costs and confirmed these had been agreed with the Respondent in the sum of £20,000.

### **Previous Disciplinary Sanctions Before the Tribunal**

35. None.

### **Sanction and Reasons**

36. The Tribunal had listened carefully to the submissions of both parties and had considered all the documents in detail.
37. The Tribunal found the Respondent to be credible, open and honest, when giving evidence. The Tribunal was mindful that no member of the public had suffered and indeed, it appeared that the reputation of the profession had not been damaged. These were regulatory breaches which were in place to protect clients and to ensure solicitors acted properly in the client's best interests. The Tribunal had found three allegations were proved and in this particular case felt that the appropriate sanction was to fine the Respondent in relation to each allegation.
38. Dealing firstly with allegation 2, the Tribunal accepted that although this allegation had been proved in that it was likely the Respondent's independence/integrity was compromised or impaired by the Respondent accepting a vast majority of referrals from one source, the Tribunal did accept that the Respondent had not compromised his independence or integrity and that the allegation was proved on the basis that he was likely to have done so. The Tribunal ordered the Respondent be fined £2,500 in relation to this allegation.
39. In relation to allegation 3, this had been admitted by the Respondent who accepted clients should have been informed of the relationship between LAB and the firm. There was a lack of frankness with clients when it was incumbent on the Respondent to reveal that he was receiving referrals on a fee sharing basis and indeed it was extremely important that clients were provided with full information and had an understanding that the solicitor had paid fees to a referrer so that the client could make an informed choice. The Tribunal ordered the Respondent be fined £4,000 for this allegation.
40. Concerning allegation 4, whilst the Tribunal accepted the Respondent corrected the position once it was drawn to his attention, he still had to accept liability for the manner in which that work was obtained by his referrer and if there were breaches of

the regulations, the Respondent had to accept responsibility for these. A number of clients had been approached by the Authority and informed the Authority that they were cold called. There was a lack of evidence before the Tribunal that the Respondent had been scrupulous in monitoring how those referrals were obtained and it had been incumbent upon him to ensure the referrer was acting in accordance with the rules and regulations and in accordance with any contract entered into or undertaking given. The Tribunal ordered the Respondent be fined £5,000 for this allegation.

41. Accordingly, the Tribunal ordered the Respondent be fined a total of £11,500 for the breaches.

#### **Decision as to Costs**

42. The Tribunal ordered the Respondent to pay costs in the sum of £20,000 as agreed between the parties.

#### **Order**

43. The Tribunal Ordered that the Respondent, DAREN JOHN ISMAY of 1 Riverview, The Embankment, Vale Road, Heaton Mersey, Stockport, SK4 3GN, solicitor, do pay a fine of £11,500.00, 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 £20,000.00.

Dated this 9<sup>th</sup> day of November 2010  
On behalf of the Tribunal

R B Bamford  
Chairman