No. 10505-2010

SOLICITORS DISCIPLINARY TRIBUNAL

SOLICITORS ACT 1974

IN THE MATTER OF TREVOR HARWOOD KIRKMAN, solicitor (First Respondent)

and

CAROLYN LESLEY HULL, solicitor (Second Respondent)

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

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Mrs K Todner (in the chair)
Mr R Hegarty
Mr M R Hallam

Date of Hearing: 27th September 2010

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# FINDINGS & DECISION

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**Appearances**

The Applicant, Katrina Wingfield, solicitor of Penningtons Solicitors, LLP, Abacus House, 33 Gutter Lane, London, EC2V 8AR appeared on behalf of the Solicitors Regulation Authority ("SRA").

Both Respondents were present and were represented by Gary Christianson, solicitor, of The Stables, Radford Lane, Lower Penn, Staffordshire, WV3 8JT.

The application to the Tribunal on behalf of the SRA was made on 19th April 2010.

**Allegations**

The allegations against both Respondents were :

1. That contrary to Rule 1 of the Solicitors Practice Rules 1990 ("the Rules") they did things in the course of practising as a solicitor (or permitted other persons to do such

things on their behalf) which have compromised or impaired or were likely to compromise or impair:

(a) their independence or integrity;

(b) a person's freedom to instruct a solicitor of his or her choice;

(c) their duty to act in the best interests of clients;

(d) their good repute and the good repute of the solicitors' profession.

2. That contrary to Rule 3 of the Rules they accepted instructions and referrals of business from other persons in breach of and otherwise than in compliance with the Solicitors' Introduction and Referral Code 1990 ("the Code");

3. That contrary to Rule 9 of the Rules, they had in respect of claims arising as a result of death or personal injury: entered into arrangements for the introduction of clients with, or acted in association with, a person (not being a solicitor) whose business or some part of whose business is to make, support or prosecute (whether by action or otherwise and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury and who in the course of such business solicits or receives contingency fees in respect of such claims;

4. That contrary to Rule 1(a), (c) and (d) and/or 15 of the Rules and/or the Solicitors' Costs Information and Client Care Code they failed to give, and failed to ensure others gave, adequate and/or accurate information to clients in relation to costs;

5. That they transferred funds from client to office account contrary to Rules 19(2) and 22 of the Solicitors' Accounts Rules (SAR).

Preliminary matter

6. The Applicant informed the Tribunal that in the light of medical evidence produced on behalf of the Second Respondent, the allegation of dishonesty in respect of the fifth allegation was withdrawn. This was the only allegation of dishonesty against either Respondent. Subject to the withdrawal of that allegation of dishonesty, both Respondents made admissions in respect of the allegations against them.

**Factual background**

7. The First Respondent, born 1951, was admitted to the Roll of Solicitors in 1976.

8. The Second Respondent, born 1959, was admitted to the Roll of Solicitors in 1984.

9. At all relevant times the First and Second Respondents practised in partnership together under the style of Latham & Co Solicitors, 15 High Street, Melton Mowbray, Leicestershire, LE13 OTX. At the date of the hearing both held current practising certificates.

10. An inspection of the books of account and other documents of Latham & Co Solicitors was commenced by the SRA on 29th August 2008. The Investigation Officer's Report is dated 23rd April 2009.

11. At the time the inspection began the firm of Latham & Co was a general practice with a staff of 35 including six assistant solicitors and a consultant, Miss OD, who supervised the industrial injury department. The Second Respondent was at all material times the finance partner of Latham & Co.

12. The allegations fell into two categories, those concerning the breaches of the SAR and those concerning the firm's handling of miners' compensation claims.

SAR

13. In carrying out the inspection, the Investigation Officer had identified a shortfall on client account of £12,475. 61 together with a further sum of £344.31 where the shortfall had been replaced prior to the inspection. The shortfall had now been replaced in its entirety.

14. The client account shortfall had arisen as a result of some 50 transfers, 2 in January 2006, and 48 in the period March to May 2008. The amounts transferred incorrectly from client to office account varied in amount between £5.30 and £5,535.94. In each case where a transfer had been made in breach of the SAR a bill had been raised in a sum equivalent to the amount held on client account on a number of dormant files. The bills raised were not addressed to clients and there was no evidence that they had been sent to those clients. In each case the sum billed was equivalent to the amount held on the dormant client account.

15. The Investigation Officer had reviewed two client files in particular. On the file of GB a draft letter dated 1st November 2005 concerning a partnership dispute was seen. At that point a sum of £5,000 had been retained on client account. It was not clear if the draft letter had been sent. A bill was raised in the sum of £5,535.94 on 23rd May 2008 and the sum held on client account was transferred to office account. The bill was not sent to the client. This matter had been dealt with by a predecessor firm of Latham & Co. The Respondents had subsequently replaced the client account sum and issued a credit note.

16. In respect of the estate of Mr LLB deceased, the estate accounts had been approved in March 1997. A sum of £344.31 had been retained on client account, apparently to deal with any residual expenses of the estate, for a period of more than eleven years. On 29th May 2008 a bill was raised and the sum of £344.31 was transferred from client to office account in respect of the bill, thereby giving a zero balance on the account. On 18th July 2008 a credit note was raised and the sum of £404.11 transferred to client account, the additional sum of £59.30 representing interest on the sums held. There was no evidence that either the bill or the credit note had been sent to the executors of the estate. There was, however, a letter to the executors dated 17th July 2008 enclosing a cheque for £404.61 (sic) with an explanation that this was the balance due to the estate.

17. At a meeting with the Investigation Officer on 17th September 2008 the Second Respondent admitted this was a breach of the SAR. At the same meeting in respect of

the GB matter the Second Respondent explained that she understood that work had been done on the file and that the bill was for the work done, but the Second Respondent subsequently agreed that this was not the case.

18. The Second Respondent had produced a schedule showing the 50 matters in which bills had been raised in respect of dormant sums on client account and transfers made to office account. The bills had been marked with the client name and "c/o Latham & Co" and not sent to the client. In the matter of the estate of Mrs LLB, the Second Respondent had agreed with the Investigation Officer that the bill had not been sent to the client and was therefore a breach of the SAR.

19. The First Respondent admitted that he was jointly and severally liable with the Second Respondent in respect of breaches of the SAR but had not been personally aware of the matters giving rise to the breaches and had not been involved in effecting the transfers.

20. The Second Respondent had explained to the Investigation Officer that at the time of the bulk of the transfers (March to May 2008) she had not been at her best. A medical report by Mr Fussey, Consultant Psychologist, dated 6th September 2010 was referred to in this regard. From this report (from which more details are given below when dealing with mitigation) it could be seen that the breaches happened in a set of unique circumstances. The Second Respondent had made wrong decisions about dealing with old client account balances and this was admitted. The potential problem with old client account balances, some of which had accrued since 1996, had not been pointed out by the firm's accountant and prior to this investigation the accountant's reports had been good and not qualified.

Miners' compensation claims

21. At the time of the investigation in 2008 Latham & Co had been instructed in 1,850 chronic obstructive pulmonary disease ("COPD") claims and 2,104 vibration white finger ("VWF") claims, of which almost 300 in each category were still open at the time of the investigation. All of these claims were introduced to the firm by the Union of Democratic Mineworkers South Derbyshire section ("the Union"). The firm and its predecessor practices had for many years conducted industrial injury work, principally on behalf of mineworkers in relation to both to industrial accidents and the COPD and VWF claims. The latter types of claim were from about 1998 governed by compensation schemes, both of which "closed" in 2004 i.e. all claims under these schemes had to be registered by that time. Under the schemes the legal costs involved in pursuing claims would be met by the Department of Trade and Industry ("DTI").

22. The Respondents' firm had acted for the Union for many years, and a predecessor firm had been involved from the inception of the Union. There was, accordingly, a long relationship with the Union and a significant history of acting for mineworkers in connection with industrial accident and industrial disease claims. The Union referred substantial number of its members and former members to the Respondents' firm for legal advice in connection with both COPD and VWF claims. The Union had entered into agreements with its members and former members in respect of the VWF claims. Under the terms of those agreements those who were not full and current members of the Union agreed to pay to the Union on the successful conclusion of their claim the amount of 6% of the total damages recovered. It was understood that there was a

"cap" on the amount to be paid to the Union of £600. This arrangement did not apply in the case of those who were full members of the Union and paying Union subscriptions.

23. The Respondents had been aware that their mineworker clients had such contracts with the Union. The Respondents had stated that they had made no deduction by way of success fees or other sums from the amounts recovered on behalf of their clients and had only recovered in costs the sums paid by the DTI. However, the Respondents had, with their clients' consent, received compensation cheques where claims were successful. The compensation was paid into client account and a cheque was then forwarded to the Union for the amount of compensation due. It was accepted that the Union had then made a deduction, where relevant, before forwarding the compensation to the firm's client. It was not known in how many cases any deduction had been made, nor was the total amount of the deductions known. The Respondents' firm had received complaints from some former clients in respect of the deductions made by the Union and in those cases the firm had repaid the deducted sums. It was accepted by the Respondents that the deductions made by the Union were in effect a contingency fee. The Respondents had stated that the solicitor or paralegal dealing with the case would explain to the client about the possible deduction by the Union. However, there had been no advice given in writing concerning this nor any advice given concerning the enforceability or otherwise of the agreement with the Union, nor was there advice given in writing confirming that the client was free to instruct any solicitor of his choice.

24. The Investigating Officer had reviewed six client files and on the basis of those had identified a number of concerns:

(a) There was a concern about the client care information and costs information given to the clients. There was no documentary evidence to show that the VWF or COPD schemes (as appropriate) had been explained to the client, no confirmation of who the fee earner on the file would be and no confirmation that the client was free to instruct any solicitors of their choice. The First Respondent had produced a 2006 client care information sheet but it was noted that the COPD and VWF schemes closed in 2003/4, so this sheet post-dated instructions in these cases. The information sheet confirmed that the client would not receive a bill and that the firm would make no deductions from the costs to be received from the DTI. Again, there was no general advice given on the COPD/VWF schemes, general costs information or the agreements that clients had entered into with the Union. It had been admitted by the Respondents that in most cases information was not given to the clients in writing, although the Respondents submitted that information had been given orally. Concern had also been expressed by the Investigation Officer about the potential confusion about who was the client. The Respondents had admitted that they regarded both the Union and the mineworker as the client, although it was stated that the individual client came first. This gave rise to a potential conflict of interest.

(b) The agreement between the mineworker clients and the Union in the VWF claims whereby 6% of the compensation received was to be deducted by the Union caused concern. This deduction was stated to be "to offset the costs of pursuing claims". The Union had been involved with the individuals pursuing

the claims in, for example, advising on benefits and in providing background information to the Respondents' firm. The Respondents' firm had not confirmed in writing to their clients that a deduction would be made, on the basis that the agreement had already been signed between the client and the Union. As compensation cheques had been sent to the firm and the relevant amounts then forwarded to the Union, it was not possible for the Respondents to know on how many cases a deduction had been made and the amount of the deduction. The First Respondent had told the Investigation Officer that the Union provided practical help and support to the clients and also to the firm in pursuing the claim. The firm had not sought reimbursement from the Union of the sums it had repaid to clients in respect of the deductions made by the Union. The Respondents had produced a schedule which showed the costs billed in respect of VWF and the COPD claims in the period from 1999 to 2008 that over £5,000,000 had been received in costs from the DTI. A schedule had also been produced showing the percentage of the firm's income derived from these cases in the same period. At its highest this was 45.75% of the firm's income in the period 2002/3. In addition to the deductions made by the Union, the Union raised quarterly invoices to the Respondents’ firm described as being for "typing and administration, together with postage and packing". The total paid to the Union in respect of such invoices in the period 1999 to 2009 was put at £728,815.36. There was no breakdown of the typing and administration charges e.g. for use of office space, the time spent by a Union employee in carrying out typing in respect of the claims etc. The Respondents had admitted that as not all of these sums paid to the Union could be accounted for by way of rent of office space, typing charges or other such potentially justifiable costs, part of the sums paid to the Union could be seen as referral fees.

(c) A further item of concern was that the mineworker clients had been routinely informed by the firm that they should not phone the firm but should contact the Union to raise any enquiries. It had been suggested that this was to "weed out" routine questions from the clients and that those questions which could not be answered by the Union would be referred to the solicitors.

25. The amounts recovered for the mineworker clients under both the VWF and COPD schemes were, on average, higher than those recovered by most other firms dealing with similar claims. An individual service had in practice been provided to the clients in that most, if not all, had been seen by a solicitor or fee earner with the Respondents' firm. The firm had received referrals for cases it may not otherwise have received but it did have a history of handling compensation claims on behalf of mineworkers.

**Findings as to fact and law**

26. No allegations of dishonesty being pursued by the Applicant, it was not necessary for the Tribunal to consider or determine any issues concerning dishonesty in respect of the Respondents.

27. Both Respondents had admitted the breaches of the Rules and SAR as alleged. The Tribunal found in respect of each allegation that it had been proved.

28. The unwritten arrangement which the Respondents' firm had with the Union allowed the Respondents' firm to be seen as too close to the Union. In letters to clients the firm had referred to their duties to the Union. Clients were not informed in writing of their freedom to instruct a solicitor of his or her choice. The first allegation had therefore been proved.

29. In respect of the allegation 2 the Tribunal was satisfied so that it was sure that the Respondents had accepted instructions and referrals of business from the Union in such a way that there was a breach of the Solicitors' Introduction and Referral Code 1990. In particular, the Respondents' firm had paid to the Union substantial sums which could not be justified by reference to the provision of specific services. The Tribunal accepted that the Union had provided the use of office space, some typing support and the like but no proper invoices had been raised explaining the amount of the charges. The problems with referral fees, particularly relating to miners' compensation claims, had been well publicised within the legal profession, from about 2003 onwards, but the Respondents had not been aware that their arrangement with the Union constituted an agreement under which they were in effect paying referral fees.

30. With regard to allegation 3, the Respondents' firm had had an arrangement with the Union for the introduction of clients in a situation where the Union had entered an agreement with the client for a deduction to be made from compensation which could only be considered to be contingency fee.

31. With respect to allegation 4, the Respondents failed to give full information concerning legal costs, in particular with regard to the operation of the VWF and COPD compensation schemes. The Tribunal accepted that the Respondents' firm had dealt properly with the miners' compensation claims and had made no direct deductions from compensation for their own costs. The sums recovered from their clients were at the "top end" of the range of sums recovered for clients in similar cases. The deductions made by the Union could possibly be viewed as a form of Union subscription, as the sums were paid only by mineworkers who were not full members of the Union and hence not otherwise paying Union subscriptions.

32. However, the Respondents had been unable to justify the sums paid to the Union in a ten year period, which amounted to over £700,000, by reference to specific services provided. The mineworkers' compensation cases formed a substantial part of the income of the firm throughout the period from 1999, and in particular from about 2002. Accordingly, the Respondents should have been alert to any issues concerning costs and supervision in respect of the miners' compensation claims.

33. With respect to allegation 5 (transfer of funds), the Respondents had transferred, or caused to be transferred, from client to office account monies in respect of bills which were drawn but which were not sent to clients.

**Mitigation**

34. It was submitted that the Respondents' firm had been instructed by the Union over a long period of time. It provided a good quality service to mineworkers. There had been no intention to seek or be paid referral fees. The local branch of the Union had been keen for the firm to act for its members. The firm was of modest size and could

have been "swamped" by the volume of cases. It was the Respondents' intention that the firm should use Union facilities and typing support in order to assist with the handling of the claims. The Union was also able to provide expertise, in particular with regard to the history of the use of machinery etc at the various mines involved. Had the agreement with the Union been clearer, such that it had invoiced specifically for rent of office space and typing services, in a quantifiable way, there would have been no question of a referral fee being paid. However, it was accepted that as the Union services could not be quantified, a referral fee had been paid albeit that this had been done inadvertently. The Respondents had not recognised that they were paying a referral fee.

35. The Respondents accepted that the structure they had adopted with the Union created the impression that the integrity of the advice given could be impaired. However, this was a firm which had carried out the claims in a "traditional" way on behalf of individual clients although it was accepted that those involved had not been “strong” on the regulatory side of the mineworkers' compensation claims. Those handling the claims had focused on the needs of the clients, including meeting with them at the colliery, for example, before or after a shift or at other times convenient to the client. The firm had relied on the Union to act properly with regard to its members. So far as was known this in fact had been the case and it was not thought that this Union had made substantial deductions as some other Unions were reported to have done.

36. There had been a failure to appreciate that the full Rule 15 requirements as to costs information should have been provided to clients in the mineworkers' compensation cases. As the firm had intended only ever to accept the DTI fees and make no deductions from damages, it had not been appreciated that full information should nevertheless be given.

37. With regard to the breaches of SAR, the medical report of Mr Fussey detailed the unique circumstances and the emotional state in which the Second Respondent had been at the time most of the breaches occurred. She had been a finance partner in the firm for about 12 years before these incidents with no previous problems. There had been an attempt to address old client account balances and it had been accepted by the Respondents that this had not been carried out correctly. Had the Second Respondent been in good health at the time there was an attempt by the firm’s Loughborough office to "tidy up" these accounts, the Second Respondent would have raised questions and it would have been unlikely that those breaches would have occurred.

38. On becoming aware that there had been a breach the Respondents had transferred back the relevant sums. In some cases it had been correct to render a bill, but there was a failure to send out the invoices to the clients and this was therefore a breach. With respect to one matter, the issue had been very complicated and subsequent to the investigation Senior Costs Counsel had now advised that the monies belonged to the firm, but those sums had in any event now been sent to the correct party.

39. The Second Respondent had undergone an accounts refresher course. The Respondents had made great efforts to track down where the money held on client account should be sent, and some amounts had been sent to the Solicitors’ Benevolent Association as permitted in some circumstances.

40. In addition to the medical report of Mr Fussey, references for the Second Respondent included letters from Dr Lavelle, the Reverend Brodie and Sally Barnett of Counsel. The Second Respondent was the Deputy Coroner for Rutland and North Leicestershire and the First Respondent was the Coroner. In addition, the First Respondent was the Registrar for the Diocese of Leicester and had references from both the Bishop of Leicester and the Chancellor of the Diocese. He was a former President of the local Law Society and a lay Rector in the Church of England.

41. It was submitted that both Respondents were well respected and capable. They had not undertaken a wilful flouting of the Rules for their own benefit. Both were mortified to be before the Tribunal. The Second Respondent was grateful that the allegation of dishonesty had been withdrawn.

**Costs application**

42. The Applicant requested an Order that the Respondent should pay costs in accordance with the costs schedule served on 24th September 2010 in the total sum of £16,913.48. The Applicant sought a summary assessment of costs.

43. The Respondents did not contest in principle the making of an Order for costs. The costs schedule had arrived at the same time as the letter informing the Respondents that the allegation of dishonesty was withdrawn and it had not been possible to take full instructions of costs in those circumstances. The Respondents accordingly asked for the costs to be assessed, but would endeavour to consider them as soon as possible.

**Previous disciplinary proceedings before the Tribunal**

44. None.

**Sanction and reasons**

45. The Tribunal had listened carefully to the submissions of the Applicant and Respondent. It was clear to the Tribunal that the liability and responsibility of the Respondents duties as partners had been lacking. This was particularly so in relation to the issues concerning the mineworkers' compensation claims which had constituted a large proportion of the firm's income. The professional performance of both Respondents fell well short of what is and should be expected. The Tribunal took a dim view of the way in which the transfers from client to office account were effected but noted that they were rectified, both before and after the SRA investigation. The Tribunal took note of the psychiatrist's report into the Second Respondent's health at the time of the transfers. However, there was clearly a lack of proper supervision and oversight of the practice.

46. Note was taken of the psychiatric report on the Second Respondent and in particular this might provide a reasonable explanation of how the breaches, which had been admitted, had occurred. The Respondents had failed to recognise the difficulties into which they were falling with regard to the payments to the Union, when they should have done so.

47. Given the seriousness of the allegations it was appropriate and proportionate to Order the Respondents to each pay a fine. In respect of the First Respondent this would be the sum of £5,000 and in respect of the Second Respondent £10,000.

**Decision as to costs**

48. The Tribunal Ordered that the Respondents should pay the costs of and incidental of the application to be subject to detailed assessment unless agreed.

**Orders**

49. The Tribunal Ordered that the Respondent, Trevor Harwood Kirkman of Latham & Co., 15 High Street, Melton Mowbray, Leicestershire, LE13 0TX, solicitor, do pay a fine of £5,000.00, 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 to be subject to a detailed assessment unless agreed between the parties to include the costs of the Investigation Accountant of the Law Society, such costs to be joint and several between the Respondents.

50. The Tribunal Ordered that the Respondent, Carolyn Lesley Hull of Latham & Co., 15 High Street, Melton Mowbray, Leicestershire, LE13 0TX, solicitor, do pay a fine of £10,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that she do pay the costs of and incidental to this application and enquiry to be subject to a detailed assessment unless agreed between the parties to include the costs of the Investigation Accountant of the Law Society, such costs to be joint and several between the Respondents.

Dated this 8th day of November 2010
On behalf of the Tribunal

Mrs K Todner
Chairman