

IN THE MATTER OF MICHAEL JOHN DARBY, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr. D. J. Leverton (in the chair)
Mr. N. Pearson
Mr. M. C. Baughan

Date of Hearing: 19th November 2007

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of The Law Society by Jennifer Johnson, solicitor, employed by The Law Society of Victoria Court, 8 Dormer Place, Leamington Spa, Warwickshire, CV32 5AE on 15th January 2007 that Michael John Darby, solicitor, of M J Darby & Co., 107 Kent Road, Halesowen, West Midlands B62 8PB might be required to answer the allegations contained in the statement which accompanied the application and that such Order might be made as the Tribunal should think right.

The allegations were that he had been guilty of conduct unbecoming a solicitor in each of the following particulars:-

- (i) He had failed to discharge fees owed to Mr Stockill, Mr Fay and Mr Hamilton of Counsel in breach of Principle 20.06 of The Guide to the Professional Conduct of Solicitors (eighth edition).
- (ii) By his acts and/or omissions, he had caused the name of his practice on 19th November 2004 to be placed on the list to which the Bar Council's Withdrawal of Credit Scheme 1988 applied, thereby compromising or impairing the good repute of the solicitor or of the solicitors' profession.
- (iii) He failed to comply with a resolution of a Law Society Adjudication Panel dated 13th September 2006.

The application was heard at The Court Room, Third Floor, Gate House, 1 Farringdon Street, London EC4M 7NS when Jonathan Richard Goodwin of Jonathan Goodwin Solicitor Advocate of 17E Telford Court, Dunkirk Lea, Chester Gates, Chester CH1 6LT appeared on behalf of the Applicant and the Respondent appeared in person.

The evidence before the Tribunal included a written statement of the Respondent who made oral submissions.

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

The Tribunal Orders that the Respondent, MICHAEL JOHN DARBY of M J Darby & Co, 107 Kent Road, Halesowen, West Midlands, B62 8PB, solicitor, do pay a fine of £5,000.00, such penalty to be forfeit to Her Majesty the Queen, and they further Order that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £6,000.00 inclusive.

AND

The Tribunal further Orders that unless the Respondent pays the outstanding fees to three Counsel totalling £10,457.50 or such other sum as is agreed with Counsel within 28 days of today he will be suspended from practice indefinitely from the 17th day of December 2007.

The facts are set out in paragraphs 1 – 33 hereunder:-

1. By letter of 17th May 2005 the Bar Council notified The Law Society that on 18th November 2004 the Bar Council had issued a Withdrawal of Credit Direction in respect of M J Darby & Co on grounds of non-payment of Counsel's fees. Fees owing to three Counsel totalled £10,457.50.
2. The fees of Mr Stockill related to work carried out between 9th November 1993 and 12th December 1994. His fees, including VAT, were £3,701.25. Mr Fay's fees were in respect of work carried out between 7 February 1994 and 14 April 1994. His fees, including VAT, were £2,350. The fees of Mr Hamilton related to work carried out in February 2002 and, including VAT, were £4,406.25.

Fees of Mr Stockill and Mr Fay

3. The fees of Mr Stockill and Mr Fay related to the same client matter. On 13th June 1995 the Vice Chairman of the Bar wrote to the Respondent, enclosing a Schedule of the fees due to Mr Fay and Mr Stockill and copies of their fee notes and reminder letters. The Respondent was asked to make payment of the fees and was warned of the risk of credit being withdrawn. A copy of the "Terms of Work on which Barristers Offer Their Services to Solicitors and the Withdrawal of Credit Scheme 1988" was also enclosed.
4. The Respondent explained the history of the matter as follows:-
 - i. The Respondent had been a sole principal running a general practice since 1983. He had employed solicitors and other legally qualified staff.

- ii. Up to about 1994 the Respondent regularly used the barristers in No. 5 Fountain Court Chambers, Birmingham, which were well renowned. The Respondent had an exceptionally good relationship with them, and there had been no difficulties with the payment of fees, save that there had been an adjustment negotiated with the clerk where a barrister had upset the clients.
- iii. Mr Stockill and Mr Fay had been engaged on behalf of a client, Mr O, in connection with a petition to wind up a company by his co-director. The matter was one of some complexity. At a hearing the Judge had criticised Mr O, who had followed Counsel's advice. That advice had been wrong.
- iv. The Orders made were devastating to Mr O. The Respondent handed up a letter from Mr O confirming his dissatisfaction with Counsel's advice and his conduct of the matter.
- v. The Respondent made a substantive oral complaint direct to Counsel's clerk, who acknowledged it and suggested that Mr Fay take over conduct of the case.
- vi. Upon next returning to Court it had become clear to the Respondent and Mr O that the new Counsel had a poor grasp of the matter and did not perform satisfactorily. The outcome of the case was disastrous for Mr O.
- vii. With the benefit of hindsight the Respondent recognised that it was unfortunate that he had relied upon the representations of the barristers' clerk that he would endeavour to resolve the complaints that had been made. He and the Respondent subsequently had a meeting and the Respondent believed that the clerk would seek to persuade the barristers not to pursue their fees. Mr O had instructed the Respondent not to pay Counsel's fees, but some time later Mr O, in order to bring the matter to a close, instructed the Respondent to offer £4000 in full and final settlement of the fees of Messrs Stockill and Fay. This was rejected.
- viii. The Respondent instructed Mr Hamilton to act on his behalf in his own matter. The Respondent gave direct express and clear instructions to Mr Hamilton requiring him to challenge the credibility of the opponent. Mr Hamilton did not carry out those instructions. The Respondent believed that that adversely affected the outcome of the hearing. Even if it did not he considered that there was a deliberate breach of a specific instruction, which amounted to a breach of contract.
- ix. Mr Hamilton's clerk had agreed a fee of £3000 for the hearing, which had had to be adjourned. The fee had been paid in advance of the hearing. The figure of £3750 had not been mentioned at any time until after the hearing finally took place.
- x. The further fee of £3750 was not justified and the Respondent disputed Mr Hamilton's further fees on the basis that (a) the agreed fee had already been paid in advance and in respect of the work carried out by Mr Hamilton (b) any further fee had to be justified before it could be regarded as "proper", and (c)

any further fees should be subject to review as a result of the complaint made against Mr Hamilton.

5. The Respondent did not make payment. The matter was referred to the Solicitors' Complaints Bureau on 20th June 1995.
6. On 4th July 1995 the Respondent wrote to the Bar Council stating that he hoped to be able to resolve the problem directly with the clerk to Messrs Fay and Stockill; fees charged had not been agreed.
7. The SCB corresponded with the Respondent and it emerged that the Respondent disputed the fees payable to Counsel as neither he nor his client had been satisfied with Counsel's performance. The Respondent had not been placed in funds by the client who had instructed him to try to obtain a satisfactory reply to the criticism of Counsel, in the hope that the fees would be reduced. The Respondent accepted that there had been no written complaint about the barristers' performance.
8. Counsel's clerk had a meeting with the Respondent which did not resolve matters, the clerk wrote to the Bar Council on 18th January 1996 asking it to intervene and adjudicate.
9. Further correspondence did not progress matters. The Bar Council suggested to the Office For The Supervision of Solicitors ("the OSS") that the matter be submitted to a Joint Tribunal. On 18th September 1997 the Bar Council wrote to the Respondent asking him to agree to submit the dispute to a Joint Tribunal and agree to be bound by its decision. The Respondent was informed that if his written agreement was not forthcoming, his challenge to the fees would not be accepted as an adequate explanation for non payment of those fees under the Withdrawal of Credit Scheme.
10. On 22nd December 1997 the Bar Council wrote to the Respondent to say that, as he had declined to be bound by the decision of the Joint Tribunal, unless Mr Fay's and Stockill's fees were paid within 21 days, the matter would be referred back to the OSS. In the absence of payment the matter was so referred on 19th February 1998.
11. The OSS wrote to the Respondent on 16th October 1998. The Respondent's substantive reply to the OSS was by letter dated 12 November 1998. He made complaints about the service provided by Mr Stockill and Mr Fay and said that he had tendered a sum which he believed exceeded the sums that were properly due.
12. In his letter of 15 January 1999 to the OSS the Respondent stated:-

"I can find no trace of the suggested reference to a Joint Tribunal
If you can however satisfy me that the Professional Conduct Committee have carried out the first part of the investigation under Rule 20.07 then I accept that the matter can reasonably be referred to the Joint Tribunal".
13. By letter of 18th May 1999 the Bar Council notified the Respondent that if he wished to proceed with a Joint Tribunal consideration he would have to let them have a signed agreement to be bound within 21 days, Counsel had signed their agreement to be bound in 1997.

14. By letter of 10th June 1999 the Respondent replied that he did not consider it appropriate to proceed to a Joint Tribunal unless and until the dispute resolution procedure had been completed.
15. Further correspondence between the Respondent and the Bar Council took place between 15th June 1999 and 31st August 2000. The Respondent refused to make his own complaint in writing to the Professional Conduct Committee of the Bar Council. The Fees Collection Manager of the Bar Council on 17th October 2000 initiated the complaint on the Respondent's behalf by forwarding the Respondent's letters to the Professional Conduct Department.
16. That complaint was dismissed by the Bar's Complaints Commissioner on 7th June 2001 after the Respondent failed over a period of four months to respond to Counsel's comments on his complaints.
17. Once again the Respondent was asked to refer his complaint to the Joint Tribunal.
18. By letter of 18th July 2001 to the OSS the Respondent stated that he had no wish not to be bound by a Joint Tribunal but he believed that the preliminary steps to be taken by the Bar Council Complaints Department should be resolved first.
19. The Bar Council wrote to the OSS on 20th August 2001 to say that the Respondent had not referred the dismissal of his complaint to the Legal Services Ombudsman. By letter of 19th September 2001 the OSS confirmed to the Respondent that the complaint had been dismissed by the Bar Council on 7th June 2001 and they enclosed a further Joint Tribunal agreement for signature.
20. By letter of 11 October 2001 the OSS informed the Bar Council that it appeared that the Respondent had no intention of agreeing to the Joint Tribunal procedure and the best way forward would be the implementation of the Withdrawal of Credit Scheme.
21. By letter of 12 October 2001 the Bar Council gave the Respondent a final opportunity to submit the issue or dispute to the Joint Tribunal and warned that if such agreement was not forthcoming then his challenge would not be accepted as an adequate explanation for non payment of the fees under the Withdrawal of Credit Scheme. The Respondent replied by letter of 29th October 2001 saying that he would be happy to be bound by the Joint Tribunal's decision if he had an assurance that the complaints concerning Counsel would be considered by the Tribunal.
22. The Respondent had at no time submitted a signed agreement to be bound by the decision of the Joint Tribunal nor had he issued a statement of case to be considered by the Joint Tribunal. On 8th January 2004 the Bar Council gave written notice to the Respondent that a direction to withdraw credit would be made unless the outstanding fees were paid.

Fees of Mr Hamilton

23. On 4 December 2002 the Chairman of the Fees Collection Committee for the Bar Council wrote to the Respondent in respect of Mr Hamilton's unpaid fees asking for

payment within 14 days and warning him of the risk that credit might be withdrawn. That letter enclosed reminders sent by Mr Hamilton's clerk and a copy of the Terms of Work on which barristers offer their Services to Solicitors and the Withdrawal Of Credit Scheme 1988 (which had been amended on 17 November 2001). The principal changes from the previous version of this document were to paragraph 13, namely that the payment of fees were to be within one month and the introduction of interest to be charged on unpaid fees.

24. By letter of 6 December 2002 the Respondent complained about the performance of Mr Hamilton whilst representing the Respondent personally at a hearing.
25. By letter of 6th January 2003 the Bar Council invited the Respondent to agree that the dispute be referred to the Joint Tribunal, even though the challenge to Mr Hamilton's fees had not occurred within the requisite three month period. The Law Society became involved in seeking the Respondent's agreement to the referral to the Joint Tribunal and sent an agreement for his signature to the Respondent on 8th January 2003. A reminder was sent on 24th January 2003.
26. By letter of 28th February 2003 The Law Society informed the Bar Council that the Respondent had stated that he could not agree to a Joint Tribunal as he was awaiting various documents. The Bar Council's reply of 4th March 2003 was that the agreement could still be signed and the Respondent could be given more time to produce his statement in response. This was relayed to the Respondent. Reminders were sent on 4th June 2003, 30th July 2003 and 6th October 2003. By letter of 26th November 2003 The Law Society informed the Respondent that if he did not submit the agreement to be bound by 4 December 2003 The Law Society would close its file and the Bar Council would proceed with the Withdrawal of Credit Scheme.
27. The Law Society notified the Bar Council on 12th December 2003 that it appeared that the Respondent had no intention of agreeing to the Joint Tribunal procedure. By letter of 15th December 2003 the Bar Council informed the Respondent that unless he agreed to refer the issue to a Joint Tribunal within 14 days the matter would be referred to the Fees Collection Committee with a view to making a direction to withdraw credit.
28. By letter of 16th August 2004 the chairman of the Fees Collection Committee informed The Law Society that it now considered it appropriate to issue a Withdrawal of Credit Direction on the grounds of the outstanding fees owing to all three Counsel.
29. On 23rd November 2005 The Law Society commenced an investigation into the Bar Council's complaint of 17 May 2005. The Respondent was given the opportunity to take part and make his position clear.
30. The matter was referred to a Law Society Adjudicator who, on 19th June 2006, found:-

"Mr Darby is well aware that when dissatisfaction is expressed concerning the performance of Counsel, or in connection with fee notes raised by Counsel's clerk in circumstances where there is ground for concern or complaint, the matter should be referred to a Joint Tribunal operated by the Bar Council and

The Law Society so that issues such as this may be resolved. Mr Darby has taken no steps whatsoever, so far as I can see, to make such a referral and although it is said that he has made complaints to Counsel's clerk, the matter remains extant, and I am conscious that the first letter from the Chairman of the Bar Council seeking payment in respect of the fees of Mr Fay and Mr Stockill was dated in mid June 11 years ago".

31. The Adjudicator expected the Respondent to pay the outstanding fees due to Mr Fay of Counsel in the sum of £2,350, to Mr Stockill of Counsel in the sum of £3,701.25 and Mr Hamilton of Counsel in the sum of £4,406.25. He further stated that if the Respondent did so within 28 days he would be severely reprimanded but if he did not then his conduct was to be referred to this Tribunal.
32. The Respondent appealed the decision of the Adjudicator. His appeal was dismissed by an Adjudication Panel on 13th September 2006 which resolved that it expected the Respondent to pay outstanding Counsel's fees within 28 days of notification of its decision. If he did so the Respondent would be severely reprimanded; if he failed to do so then his conduct would be referred to this Tribunal.
33. At the date of the hearing Counsel's fees remained outstanding and the Respondent's firm had been placed on the list to which the Bar Council's Withdrawal of Credit Scheme 1998 applied on 18th November 2004.

The Submissions of The Law Society

34. The allegations against the Respondent stemmed from unpaid Counsel's fees totalling £10,457.50. Three Counsel were involved. Mr Stockill's work was carried out more than 12 years ago, Mr Fay's work 13 years ago and Mr Hamilton's work 5 years ago. The Tribunal had the history of these matters before it. The Respondent had been given every opportunity to have his asserted dissatisfaction with Counsel's performance considered by a Joint Tribunal but he had not availed himself of it.
35. It was accepted that the Respondent was dissatisfied with the service provided by the three Counsel but the disciplinary proceedings arose out of the Respondent's failure to resolve the matter of the outstanding fees either by payment, compromise or referral to a Joint Tribunal.
36. The Respondent as a solicitor had a personal liability for the payment of Counsel's proper fees and if the Respondent believed that the fees requested were not proper then he should have brought the issue to a head by using the Joint Tribunal procedure. Leaving the matter in abeyance with the result that the name of his practice was placed on the list to which the Withdrawal of Credit Scheme 1988 applied, compromised or impaired the good repute of him as a solicitor and that of the solicitors' profession.
37. The Guide to the Professional Conduct of Solicitors 1999 (8th Edition) Principle 20.06 provided:-

"Except in Legal Aid cases, solicitors are personally liable as a matter of professional conduct for the payment of Counsel's proper fees, whether or not they have been placed in funds by the client".

Notes 2 and 4 set out that payment must be made or a challenge made within 3 months of the delivery of the fee note and reference is made to Principle 20.07 containing details of the procedure for resolving disputes.

38. The Terms of Work on which Barristers offer their services to Solicitors under the Withdrawal of Credit Scheme 1988 (this was relevant to Messrs Stockill and Fay) at paragraph 14(2) provides:-

"No challenge to a Barrister's fees will be accepted either by the Barrister or in the case of a complaint by the Barrister to The Bar Council of failure to pay those fees by The Bar Council unless:-

- (a) The challenge was made in accordance with paragraph 14(1) hereof; and
- (b) The Solicitor has within 14 days of being requested to do so either by the Barrister or by The Bar Council agreed in writing (i) to submit the issue or dispute giving rise to the challenge to the decision of a [Joint] Tribunal (ii) to abide by and forthwith give effect to the decision of the [Joint] Tribunal."

39. In the slightly updated Terms of Work which applied in the case of Mr Hamilton under paragraph 14(2) the same conditions had to be satisfied before a challenge to a Barrister's fees would be accepted.
40. It was the Respondent's position that in order for fees to be "proper" they must either be (a) agreed or (b) justified as properly due following a fair and reasonable determination of all the facts. As for (a) the Respondent had not cited any authority or produced any written agreement entered into with any of the Barristers concerned introducing that term into their relationship. As for (b) the Respondent had had many opportunities to submit his dispute to the Joint Tribunal, having been granted many extensions of time in which to do so, and had always failed to do so, so that he had now become barred from challenging the Barristers' fees, [paragraph 14(2) of the Terms of Work].
41. As to the Respondent's position, it was significant that no reference of the dispute was ever made to the Bar's Professional Conduct Committee. The Respondent himself refused to make such a written complaint and failed to cooperate when The Bar Council tried to present his complaint on his behalf. It was the Respondent's case that his complaint was not considered on its merits but was dismissed because of his failure to comment upon Counsel's observations. He said that it was not fair and reasonable for a Barrister to determine the dispute in this way. The fact was that by his own conduct the Respondent put it outside the power of the Complaints Commissioner to consider his version of events and refer the matter to the Professional Conduct Committee. He made no application to the Legal Services

Ombudsman to register any dissatisfaction with the way the matter had been dealt with.

42. If the Respondent had submitted to a Joint Tribunal, that would have consisted of a solicitor and a barrister. The Respondent made a conscious decision not to use the Joint Tribunal procedure and had said that his concerns "about a Joint Tribunal were such that in accordance with the Rules I chose not to proceed on that basis".
43. No sanction had been imposed on the Respondent of a disciplinary nature in relation to the non payment of Counsel's fees. His conduct had been referred to the Tribunal which would make its own determination as to whether or not there had been misconduct. It was well established that the Solicitors Disciplinary Tribunal was compliant with Article 6(1) of the European Convention on Human Rights (*Pine v Law Society* (2001) EWCA Civ 1574).
44. It was the Respondent's case that The Law Society's Adjudicator was wrong to say that the matter should have been referred to a Joint Tribunal. In the submissions of the Applicant the Adjudicator was correct in what he said as the Joint Tribunal was the only procedure available (outside of any possible Court proceedings) to determine a complaint about Counsel's fees; further, the Bar Council's Terms of Work made such a referral mandatory otherwise no challenge would be accepted. The Adjudicator rightly pointed out that the dispute remained extant and the matter had been unresolved for 11 years – a very unsatisfactory state of affairs.
45. The Respondent complained that Mr Hamilton had been in breach of a contractual agreement because he was expressly instructed how to cross examine a witness and he failed to do so. No civil claim had been brought. It was submitted that none would be possible as Counsel's fees were payable by way of honorarium and not pursuant to contract.

The Submissions of the Respondent

46. The Respondent had already had a disciplinary sanction imposed upon him as he had been informed that had he paid the disputed fees he would have received a severe reprimand, the inference then being that nothing further would have occurred. That clearly in itself was a determination of a disciplinary nature.
47. The Rule of Conduct dealing with payment of Counsel's fees was at paragraph 20.06 in the Guide for the Professional Conduct of Solicitors which stated that Solicitors were liable for "Counsel's proper fees".
48. In the case of each of the three barristers a serious complaint had been made by the Respondent about the service provided by the barrister and his competence. Further in the case of Mr Hamilton, there had been a duplication of fees and a deliberate breach of a direct instruction.
49. In the case of Messrs Fay and Hamilton it was trite of The Law Society to suggest that there was any doubt as to the nature and content of the complaint. It was clear that at no time was that matter resolved.

50. It was not right to say that no attempt had been made to compromise the fees with regard to Messrs Fay and Hamilton. The Law Society's investigation, which was said to have involved discussions with the Bar Council on behalf of the barristers concerned, failed to recognise the fact that a significant payment had been offered to resolve the dispute, albeit without prejudice to any liability for any fees due to be paid. The barristers themselves did not carry out any further attempt at compromise.
51. With regard to Messrs Fay and Hamilton there remained a dispute as to whether or not the fees were properly due. The Law Society's position could not be that a barrister is entitled to his fees irrespective of his competence, ability and performance. While a dispute as to whether or not the fees were properly due remained outstanding, there could be no obligation on the Respondent to pay those fees.
52. In the case of Hamilton a fee was agreed and paid and no further fee had been agreed. The work was then carried out by the barrister and the second area of dispute arose in that the barrister had been specifically directed to carry out a course of action during the course of the proceedings which he deliberately failed to do, despite being again requested to do so by the Respondent during the course of those proceedings.
53. It was the Respondent's case that there had been a direct breach of the terms upon which the barrister was engaged and that entitled the Respondent to argue that any fees charged would not be "proper fees" within the provisions of Rule 20.06.
54. It followed that if there was a dispute as to whether or not the fees were properly payable, no liability for them nor disciplinary sanction could fairly attach to the Respondent in respect of any alleged breach of Rule 20.06.
55. Apparently the only procedure for dealing with disputed fees was that provided by Rule 20.07 which provided that if the dispute, which the Respondent averred had clearly been identified in the case of each of the barristers, could be resolved, it may be referred to a Joint Tribunal. That was not a mandatory requirement and as such there could be no breach of any obligation on the part of the Respondent for having failed to refer the disputes to a Joint Tribunal.
56. As referral to a Joint Tribunal was not mandatory it was hard to see why any party who might have had the opportunity to use the Joint Tribunal should be questioned or criticised for choosing not to use it. There were good reasons in this particular case as the Joint Tribunal did not comply with the requirements of Article 6 of the European Convention on Human Rights.
57. The Law Society had suggested that the Bar Code of Conduct in dealing with a Joint Tribunal was binding upon a solicitor where there was a dispute. That could not be correct as if it were so, reference to a Joint Tribunal where a solicitor disputed barristers' fees, or otherwise complained about a barrister, would be obligatory. Under Rule 20.07 it was not.
58. The dispute between the Respondent and the barristers remained unresolved. The complaint investigated in the first instance by the Adjudicator of The Law Society followed receipt of the letter from the Bar Council, dated 14th February 2006, which stated, "the problem lies in the refusal of [the Respondent] to agree to have their

challenges to Counsel's fees tested by the Joint Tribunal mechanism". This demonstrated the mistaken belief that there was an obligation to refer a dispute to the Joint Tribunal when Rule 20.07 was clear upon that matter.

59. It could not be right that withdrawal of credit was justifiable when a dispute about fees remained unresolved.
60. The determination of The Law Society's Adjudicator of 19th June 2006 at paragraph 5 stated that where there remains a dispute as to the payment of fees, "the matter should be referred to a Joint Tribunal..." That determination was incorrect in stating that there was an obligation to refer when Rule 20.07 did not impose that obligation.
61. The Adjudicator acknowledged that the matter had not been resolved but nevertheless directed that the Respondent settle the fees and said that failure to settle the fees would result in a referral to the Disciplinary Tribunal. That was a disciplinary sanction.

The Tribunal sets out below

the relevant authorities relating to the payment of Counsel's fees

Principle 20.06: Solicitors liability for Counsel's fees

62. "Except in legal aid cases solicitors are personally liable as a matter of professional conduct for the payment of Counsel's proper fees whether or not they have been placed in funds by the client."

Paragraph 2 of Principle 20.06

63. "In non legal aid cases and unless there is a special agreement a solicitor must pay or challenge Counsel's fees within three months of the delivery of the fee note at the conclusion of the case whether or not the solicitor has been put in funds by the client or the costs have been taxed or assessed."

Paragraph 4 of Principle 20.06

64. "If a solicitor wishes to challenge Counsel's fees this must be done promptly upon receipt of the fee note. It would usually be appropriate for a solicitor to ensure that the client has an opportunity to consider whether the fees should be challenged. For details of the procedure for resolving disputes see Principle 20.07."

Principle 20.07: Counsel's fees: challenge and dispute resolution

65. "If a solicitor wishes to challenge Counsel's fees this must be done promptly upon receipt of the fee note. If the dispute cannot be resolved, it may be referred to a Joint Tribunal consisting of a member of the Council and a Queen's Counsel nominated respectively by the President of The Law Society and the Chairman of the Bar.
 - (1) It would usually be appropriate for the solicitor to ensure that the client has an opportunity to consider whether the fees should be challenged.

- (2) Solicitors wishing to invoke the procedure should inform Counsel within three months of the delivery of the fee note and apply to the Office for the Supervision of Solicitors (OSS) (see p.xv for contact details).
- (3) Where a dispute as to fees is referred to it, the Joint Tribunal's task is to look to all the circumstances in dispute. Where matters touching Counsel's competence amounting to professional misconduct are in issue, such matters are first considered by the Professional Conduct Committee of the General Council of the Bar (see p.xv for contact details).
- (4) The Joint Tribunal is an informal body, fixing its own procedure which may or may not involve a hearing of the parties. Both parties are asked to agree the documentation to be submitted to the Joint Tribunal and, where possible, the Tribunal will reach a decision on that documentation. The parties to an adjudication bear their own expenses, unless these are otherwise awarded. The parties are required to undertake to abide by the decision of the Tribunal. Failure on the part of a solicitor to comply with the award of a Tribunal is regarded by the OSS as unbecoming conduct and can lead to disciplinary proceedings."

The provisions of the terms of work on which barristers offer their services to solicitors and the Withdrawal of Credit Scheme 1988 which contained the recital "(4)"

"Except in legal aid cases a solicitor is personally liable as a matter of professional conduct for the payment of a barrister's proper fees whether or not he has been placed in funds by his lay client"

Clause 14

- (1) Any challenge by a solicitor to a barrister's fee (whether giving rise to an issue of competence or a dispute on quantum or otherwise) must be made by the solicitor in writing within three months after the first fee note relating to that fee has been sent to him or within one month after such letter relating to that fee as is referred to in paragraph 15(a) hereof has been sent to him whichever is the later.
- (2) No challenge to a barrister's fees will be accepted either by the barrister or in the case of a complaint by the barrister to the Bar Council of failure to pay those fees by the Bar Council unless:-
 - (a) the challenge was made in accordance with paragraph 14(1) hereof; and
 - (b) the solicitor has within 14 days of being requested to do so either by the barrister or by the Bar Council agreed in writing (i) to submit the issue or dispute giving rise to the challenge to the decision of a

Tribunal (ii) to abide by and forthwith give effect to the decision of the Tribunal."

The Findings of the Tribunal

66. The Tribunal found that the Respondent had failed to discharge fees owing to Mr Stockill, Mr Fay and Mr Hamilton of Counsel. The Respondent himself accepted that he had not paid the fees.
67. The Respondent's firm had been placed on the list to which the Bar Council's Withdrawal of Credit Scheme 1988 applied on 19th November 2004.
68. The Respondent had not complied with the resolution of a Law Society Adjudication panel of 13th September 2006 which expected him to pay outstanding Counsel's fees within 28 days of notification of its decision. At the date of the hearing all of the Counsel's fees the subject of the allegations remained unpaid.
69. The Tribunal therefore found all of the allegations to have been substantiated. The Tribunal rejected the Respondent's arguments. The relevant procedures were clearly laid down. The Respondent had sought to avoid the payment of Counsel's fees without availing himself of a reference to a joint Tribunal. Whilst such referral was not mandatory, unless the Respondent sought to involve himself in the process, his only alternative was to pay the fees.

Previous Findings

70. At a hearing on 27th February 2002 the Tribunal found the following allegations to have been substantiated against the Respondent. The allegations were that the Respondent had been guilty of conduct unbecoming a solicitor in each of the following respects, namely:-
 - a) He compromised or impaired, or was likely so to do, his independence or integrity;
 - b) He compromised or impaired his good repute and that of the solicitors' profession;
 - c) He compromised or impaired his duty to act in the best interests of his client;
 - d) He failed to comply with provision of Rule 15 of the Solicitors Practice Rules, and failed to provide information on costs to his client in accordance with Written Professional Standards (a), (c), (d) and (f) such breaches being material and serious;
 - e) He failed to keep confidential the affairs of his client, Mr L;
 - f) (not substantiated)

On that occasion the Tribunal said:-

"With regard to allegations (a) and (b) the intemperate letters written by the Respondent criticising Mr L or written to relatives of Mr L most certainly compromised and impaired the Respondent's independence and integrity and compromised and impaired his good repute and that of the solicitors' profession.

With regard to allegation (c) the Respondent had not acted in the best interest of his client when he did not attend the taxation hearing and/or did not give careful advice to Mr L with regard to that hearing.

The Tribunal was also concerned that the Respondent appeared to have provided Mr L with terms of business making it plain that monies on account of costs would not be required and subsequently sought to refuse to attend hearings because he had not received a specific requested payment on account.

The Tribunal considered that the Respondent's failure to attend the Industrial Tribunal on Mr L's behalf was regrettable. It was not, however, clear that the terms of business in respect of the Industrial Tribunal matter had been the same as the terms of business relating to the case involving Mrs C. Mr L had not made the payment on account requested.

There was, of course, a conflict in the evidence. Mrs L recalled that she had attended the Respondent's office to collect the papers and had been treated rather badly on that occasion. The Tribunal do not consider Mrs L's evidence in that regard to be of any particular significance. If a solicitor has not been put in funds by his client, then he has to examine very carefully how he behaves if there is an imminent hearing. The Tribunal has not found that the complaint made in respect of the Industrial Tribunal case supports allegation (c).

The Tribunal found allegation (d) to have been substantiated. It is very clear from the documents before the Tribunal that the Respondent did not achieve a punctilious compliance with Rule 15. His approach to the requirements of Rule 15 and in particular the requirement to give a client information about the calculation of costs was not closely and properly followed. The Tribunal accepts that the Respondent's letter to Mr L dated 9th February 1996 and the terms of business enclosed therewith (and on the evidence the Tribunal is not satisfied that that letter was not sent) go some way to ameliorate the mischief addressed by Rule 15. The Tribunal notes that the Respondent did not apply the "nil" payment on account set out in the schedule to the terms of business.

The Tribunal does not accept the Respondent's submission that he was not required to comply with Rule 15 at the time when he was "looking into" the way in which Mr L's former solicitor's had conducted the action against Mrs C, nor that the position then was different from the position when he was instructed by Mr L to have conduct of the substantive matter. There could be no doubt that when the Respondent was instructed in the matter from the outset he was required to comply with Rule 15.

The Tribunal does, however, accept that the Respondent was not, as appears to have been alleged by Mr & Mrs L, responsible for seeking unreasonably to maintain an action at great cost to his client. Mr L's contention that he had been required to pay enormous costs relating to a £460.00 claim was disingenuous. Mrs C had, of course, counter-claimed and Mr L was defending the counter-claim made by Mrs C.

The Tribunal have not considered it necessary to make any ruling as to whether or not Mr & Mrs L were business partners. The Tribunal is in no doubt that the content and tone of the letters written to the Manager of M bank, Mrs G, Mr L's mother, and Mrs L were appropriate and none of those letters was couched terms which should ever emanate from a solicitor's office.

There could be no doubt that the writing of such letters compromised or impaired the good reputation not only of the writer but also of the solicitor's profession.

With regard to allegation (e) even if a client's affairs are within the knowledge of another or indeed in the public domain, it is nevertheless not proper for a solicitor to discuss those affairs with, or bring them to the attention of, a third party.

The Tribunal accepts that the situation would have been different in the case of the letter written to the Manager of M Bank if, as stated by the Respondent, Mr L had authorised the writing of such letter.

The Tribunal considers that if Mr L might previously have authorised the writing of the letter to the bank, it was unlikely that any such previous authority remained in being at the time the letter was written and moreover Mr L would not have been likely in any event to have authorised the terms in which it was written. To that extent the Tribunal found allegation (e) to have been substantiated in respect of the letter to Midland Bank.

The Respondent's failure to maintain the confidentiality of Mr L clearly also extended to the letters to Mrs G, Mr L's mother and Mrs L.

The Tribunal deprecates the Respondent's letters in which he referred to his bill being in a specific figure when the reality was that no bill had been drawn.

With regard to allegation (f) the Tribunal accept the Respondent's submission that the proposal that Mr L transfer a property to the Respondent in settlement of the outstanding costs was no more than that – a proposal. The Tribunal note that there could be no actual conflict of interest, nor even a potential conflict of interest when the proposal had not approached any degree of formality. The Tribunal note the Respondent's assurance that he would have ensured that Mr L took independent advice if and when that proposal had crystallised. The Tribunal found allegation (f) not to have been substantiated.

The Tribunal did not find that the Respondent had been guilty of dishonesty. There had been no misappropriation of clients' funds. The Respondent was responsible for ten staff and had successfully obtained a franchise from the Legal Services Commission in two areas of work. That spoke highly of the way in which his office was organised.

The Respondent told the Tribunal that he had received a visit from the Law Society's Investigation Accountant and his books of account had been given a clean bill of health.

The Tribunal finds it extraordinary that given these factors this Respondent should have behaved as he did in connection with the affairs of Mr L.

The Tribunal concludes that the friendship formed between Mr L and the Respondent, and the subsequent souring of that friendship, clouded the Respondent's judgement. On the face of it, it appeared to the Tribunal that Mr L was very happy with the Respondent's legal services, advice and assistance provided he did not have to meet the costs. It was clear that Mr L did not always answer letters or deal with matters with which the Respondent or his firm required Mr L to deal.

There was no doubt that the costs owed to the Respondent by Mr L represented a significant proportion of the income of his firm over the period to which those costs related. The Tribunal considered that Mr L was a business man of some sophistication who had instructed solicitors on a number of occasions before he instructed the Respondent. There could however be no certainty that Mr L's sophistication, expertise and knowledge would equip him to be entirely au fait with solicitors' costs and the effect on costs in litigation where his opponent was legally aided. It was dangerous for a solicitor to rely upon such an argument as an explanation for his failure to comply with Rule 15. There was no evidence before the Tribunal which satisfied it that Mr L was so knowledgeable that he need not be given proper explanations and details of potential costs.

The Tribunal considers the Respondent's failures to be serious and conclude that it would be right to impose a fine upon the Respondent of £3,000.00 in respect of each of the five allegations found to have been substantiated. The total fine was therefore £15,000.00".

The Tribunal's written findings were filed with The Law Society on 14th June 2002.

The Respondent's mitigation

71. The Respondent accepted that he had been at fault in not following some of the procedures that had been laid down. He had been extremely disappointed at the way in which Counsel behaved.
72. The Respondent was a sole practitioner running a small practice and the availability of funds to him was limited.

73. The Respondent was 54 years of age and he indicated that he had had enough of being a member of the solicitors' profession. The disappointment which he had suffered would lead him to leave the profession. He found it unacceptable that Counsel could behave in any way that they wished.
74. The Respondent had to care for a young son and he had no source of income other than that earned by his practising as a solicitor.
75. The Tribunal was reminded that no dishonesty had been alleged against the Respondent.

The Tribunal's decision and its reasons

76. The Respondent sought to justify his denial of the allegations by seeking to explain in great detail the background to the cases in which Counsel's fees had been generated. The Tribunal rejected his arguments that he had already been subject to a disciplinary sanction imposed upon him by The Law Society. Despite the Respondent's remarkable lack of cooperation and his success in ensuring that matters remained outstanding, in part for some eleven years, the Respondent had been granted extensions of time and every opportunity to have his complaints properly aired through the appropriate channels. He had rejected these opportunities and, indeed, when the Adjudication Committee offered the Respondent a last opportunity to meet his personal obligations to pay Counsel's fees he did not do so. Had he done so an "internal" disciplinary sanction would have been imposed.
77. The Respondent's arguments that Counsel's fees were not proper, that he had made oral complaint, that he had attempted to make compromise or his suggestion that a solicitor should not be compelled to pay a barrister's fees regardless of that barrister's competence, ability to perform or whether he had been in breach of clear instructions, were considered to be without force. It was clear from the terms of work and the relevant principles of conduct that it was available to a solicitor to challenge Counsel's fees in writing within three months of receipt of the fee note. The Respondent did not do so.
78. Notwithstanding his personal liability for the fees, they had not been paid at all.
79. With regard to the Respondent's position that reference to a Joint Tribunal was not mandatory, the Tribunal accepted that that was the case but it was a dispute resolution mechanism available to a solicitor. His choice was either to engage in that form of dispute resolution or pay the fees. The Respondent was not right in his suggestion that reference to the Conduct Committee of the Bar was a pre-requisite to a reference to a Joint Tribunal. It was clear that where competence was in issue reference to the Conduct Committee was most likely to be after agreement had been reached as to reference to a Joint Tribunal. Clearly the Joint Tribunal would not be in a proper position to make a decision until there had been a ruling on competence.
80. The result of the Respondent's behaviour had been an enormously long drawn out matter. He had caused a great deal of trouble to Counsel and their clerks, the Bar Council and, indeed, his own professional body. A huge amount of work involving a

great deal of time and at great financial cost to both branches of the profession had been undertaken.

81. The Tribunal noted that the Respondent had been treated very gently and had been given numerous extensions of time and opportunities to put matters right. He had rejected all of these and had also not availed himself of an opportunity to invite the Legal Services Ombudsman to consider the decision of the Bar's Complaints Commissioner.
82. The Tribunal also noted that the Respondent had appeared before it on an earlier occasion when a number of allegations had been substantiated against him including a failure to comply with a practice rule. A substantial fine was imposed upon the Respondent on the last occasion.
83. Despite his disciplinary history the Respondent appeared not to have sought advice in connection with the present disciplinary proceedings and had continued to pursue a hopeless defence.
84. The Tribunal was concerned that a solicitor who conducted himself in such a manner might well not be an appropriate person to be entrusted with the affairs of members of the public or indeed to do so as a sole practitioner. As before, the Tribunal considered it fair to give the Respondent a last opportunity to put matters right. It therefore ordered that unless the Respondent paid Counsel within 28 days of the Tribunal hearing he would be suspended from practice indefinitely. His failures were to be marked in any event by the imposition of a fine of £5000.
85. As to costs the Tribunal was pleased to note that agreement had been reached in connection with the Applicant's costs and the Tribunal ordered the costs to be fixed in the agreed sum of £6000.00.

Dated this 15th day of January 2008
On behalf of the Tribunal

D. J. Leverton
Chairman