

IN THE MATTER OF ALEXANDER FRANCIS SPEED
AND JOHN KENNETH FAIRCLOUGH, solicitors

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr D J Leverton (in the chair)
Miss J Devonish
Mr M C Baughan

Date of Hearing: 28th February 2008

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of The Law Society by Peter Harland Cadman solicitor and partner in the firm of Russell-Cooke of 8 Bedford Row, London WC1R 4BX on 23rd July 2007 that Alexander Francis Speed solicitor of Francis Alexander Solicitors and Estate Agents, 559 Barlow Moor Road, Manchester M21 8AN and John Kenneth Fairclough solicitor of Hobsons Solicitors, 47-49 High Street, Newton-le-Willows, Merseyside WA12 9SP might be required to answer the allegations contained in the statement which accompanied the application and that such order might be made as the Tribunal should think fit.

The allegations against the Respondents were that they had been guilty of conduct unbecoming a solicitor in each of the following particulars namely:-

- a) That they entered into an arrangement with a Union Official that was improper, unprofessional and/or corrupt.
- b) That they provided benefits and/or made payments to a Union Official (in cash or otherwise) that the Respondents knew or ought to have known were improper, unprofessional and/or corrupt.

The application was heard at The Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London EC4M 7NS on 28th February 2008 when Peter Harland Cadman solicitor appeared as the Applicant, the First Respondent was represented by Mr Treverton-Jones of Queen's Counsel and the Second Respondent was represented by Jonathan Goodwin Solicitor Advocate of 17e Telford Court, Dunkirk Lea, Chester Gates, Chester CH1 6LT.

The evidence before the Tribunal included the partial admissions of the Respondents in that they admitted that their conduct had been improper and unprofessional but denied that it had been corrupt. Mr Paul McCarthy, Mr John McDonnell, Mr Gordon Hair and Ms Jacqueline Baker gave oral evidence. Neither Respondent gave oral evidence to the Tribunal.

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

The Tribunal Orders that the Respondent, Alexander Francis Speed of 559 Barlow Moor Road, Manchester M21 8AN, solicitor, do pay a fine of £5,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Orders that he do pay 50% of 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 Officer of The Law Society.

The Tribunal Orders that the Respondent, John Kenneth Fairclough of 47-49 High Street, Newton-le-Willows, Merseyside WA12 9SP, solicitor, do pay a fine of £5,000.00, such penalty to be forfeit to Her Majesty the Queen, and it further Orders that he do pay 50% of 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 Officer of The Law Society.

The facts are set out in paragraphs 1 to 24 hereunder:-

1. Mr Speed (the First Respondent) born in 1967 was admitted as a solicitor in 1998. Mr Fairclough (the Second Respondent) born in 1947 was admitted as a solicitor in 1999. The names of both Respondents remained on the Roll of Solicitors.
2. At all material times the Respondents practised in partnership under the style of Fairclough Alexander. The First Respondent now practised on his own account under the style of Francis Alexander Solicitors and Estate Agents and the Second Respondent now practised under the style of Hobsons Solicitors.
3. The firm of Fairclough Alexander was formed in April 2003 with the two Respondents being partners. The Respondents had previously worked for the firm of W Solicitors and had undertaken work there on behalf of the GMB Trade Union.
4. The firm of Fairclough Alexander was appointed by the Union to receive referrals of cases for members including personal injury claims. At the time the firm was appointed the Regional Secretary of the Lancashire region of the Union was Mr Gary Jones. The firm paid an administration fee to the Union of £200 plus VAT per case.
5. Gary Jones was suspended by the Union for unrelated reasons on 15th July 2005 and was dismissed by the Union in December 2005. At the time of the suspension Mr Paul McCarthy, a full time officer of the Union in another region, was appointed

acting Regional Secretary for the Lancashire region. Mr McCarthy undertook a review of the work that had been undertaken by Mr Jones.

6. On 7th March 2006 at the request of the Second Respondent a meeting took place between the Second Respondent, Mr McCarthy, Mr John McDonnell of the Union and the Second Respondent's son.
7. At the meeting the Second Respondent said that cash payments were regularly paid to Gary Jones and hospitality provided. In a letter dated 5th June 2006 to The Law Society Mr McCarthy said that the Second Respondent had referred to payments being paid in cash to Mr Jones exceeding £50,000 and possibly up to £70,000 and hospitality costs of £28,000. These figures were disputed by the Second Respondent (paragraph 21 below).
8. On behalf of the Union Mr McCarthy reported the matter to the Solicitors Regulation Authority by his letter dated 5th June 2006. In that letter Mr McCarthy said he was unaware of any agreement between the Union and the firm relating to cash payments for receipt of personal injury cases and said that there was no record of such payments being made or received. He also sought advice in relation to the sums paid and received and the extent to which the Union could recoup what appeared to be substantial losses caused by payments being made to Mr Jones in cash in a personal capacity.
9. Enclosed with that letter were statements of Mr McCarthy dated 31st May 2006 and Mr McDonnell dated 7th June 2006 setting out their account of the meeting with the Second Respondent and stating that in a subsequent meeting with the First Respondent the First Respondent admitted nothing and asked for the allegations to be put in writing.
10. The SRA wrote to each Respondent and the relevant correspondence was before the Tribunal.
11. The First Respondent replied by letter dated 4th October 2006 enclosing a witness statement of the same date.
12. In his letter the First Respondent said that the complaint was made on a false premise i.e. that the firm paid cash for each case and that Gary Jones received cash payments exceeding £50,000 and possibly up to £70,000. The correct position was that Mr Jones received £1,000 per month for twenty months on a retainer basis which was unrelated to the number or quality of cases referred to the firm which were allocated by the legal administrator of the GMB and not Mr Jones. The fixed sum was on occasions reduced when hospitality had been provided to Mr Jones and he agreed that the costs of this could be set off against the monthly payments. The Union itself received about £100,000 in fees for its preparatory work and commission payments.
13. Corporate hospitality was provided to Mr Jones and other employees of the Union including the whole of the Regional Committee but there was nothing improper in that and the figures had been exaggerated.

14. In his statement the First Respondent set out his professional history and the background to the contact between the firm and the Union. Prior to commencing their new partnership the Respondents had been to see Mr Jones so that the First Respondent could introduce the Second Respondent to him and they could discuss the supply of Union cases to the new firm. Mr Jones made it clear at the meeting that he would have to "stick his neck out" if the new firm was to have any more favoured status and if he wished to move the Union to a panel of solicitors concept. Historically the Union had used only one firm of solicitors, W. The First Respondent wrote:-

"However Gary told us, if the firm paid him, as the Union's Regional Secretary, a retainer, he would be prepared to provide us with panel status, would introduce us to other Regions and would "champion" Fairclough Alexander generally."

The First Respondent wrote that the Respondents treated the payment of £1,000 per month as "a panel membership retainer combined with a form of marketing consultancy." The First Respondent wrote that their reservations in this matter had related to the cost not the propriety of the proposal. He further said:-

"We were not paying for cases (in the result we received few more than we had been receiving previously) but rather paying a retainer to someone to be a 'friend at court' just as an MP can be paid retainers by special interest groups, including Unions, to advance their interests. Employing the same analogy it was, in our view, a matter for Gary Jones to declare to the Union and not a matter requiring disclosure by us. We assumed that if he asked us to pay him it would have been proper, as between himself and the Union, for him to receive payment. Further, we did not enquire as to how Gary accounted for the fees, as between himself and the GMB. That was a matter for him."

The First Respondent wrote that he had made it clear to Mr Jones that it was up to him to declare the arrangement.

15. The First Respondent wrote that the description of the Union investigator's meeting with him was untrue and that Mr McCarthy had misrepresented the position.

"When we met in May 2006, I pointed out to him that the GMB had received about £100,000 in file preparation payments (that is the £200 fee per case). He was unaware of this and requested, at that meeting, the Legal Administrator's attendance. She attended and duly confirmed all payments and the fact they were in a separate "legal" bank account. She was hurriedly rushed out by Mr McCarthy and he confirmed to me that he would "look into it." Clearly, he has not. The misleading implication has been allowed to remain; that money due to the Union was paid to Gary Jones."

16. The First Respondent set out in his statement the background of the ending of the partnership between the two Respondents.
17. In a further letter dated 3rd November 2006 the First Respondent wrote to the representative of the SRA:-

"The payments were not made to the client, the GMB Union, but to an individual (who intimated to us that there was nothing wrong with the arrangement as between himself and his employers), who was not our client and who was not responsible for the direct distribution of claims to solicitors."

18. By letter dated 10th October 2006 the Second Respondent's then solicitors Messrs Halliwells wrote to The Law Society's representative. The letter stated that the only evidence of any potential professional misconduct was as a result of the Second Respondent's own "confession" to the GMB. The letter referred to the inaccurate representation of the Second Respondent's discussion with Mr McCarthy and Mr McDonnell contained in the letter of complaint and their statements.
19. The letter set out the Second Respondent's professional background and the background to his partnership with the First Respondent. The letter stated that from the commencement of the partnership in March 2003 for each case sent by the GMB to the firm a payment was made at a rate of £200 plus VAT by cheque to the Union for investigation work and VAT. Following the regulatory changes in March 2004 this was described as a referral fee. The arrangement was against the background of much uncertainty and ambiguity within the profession as to the treatment of referrals. The payments of the Union were organised through the accounts of the firm.
20. The Second Respondent did not accept several of the assertions made by Mr McCarthy and Mr McDonnell and the letter said that the Second Respondent's son would confirm that the details and figures in the complaint were not part of the discussion at that meeting.
21. The letter stated:-

"Mr Fairclough does not believe that he said at the meeting that Fairclough Alexander had paid Mr Jones £150 per case. He did not mention a figure of £38,000. He would positively assert that he has never paid such a sum and believes that an analysis of the money he received from the partnership Fairclough Alexander together with an analysis of what he can be seen to have spent that money on, will show that this was not the case. There was no cash cheque for £8000.

He did not say sums of £50,000 and £70,000 had been received by Mr Jones.

There is reference to money being paid from "a bank account" as if that was created for a special purpose. Such money as he gave to Mr Jones, we will deal with that later, either directly or through Mr Speed, came from Mr Fairclough's own personal bank account, the same account that he paid his bills through and made withdrawals for social/holiday expenses."...

"The firm spent somewhere in the region of £22,000 in total on entertaining, Mr Fairclough does not have any ready means of establishing how much of this sum was spent on entertaining Mr Jones specifically. ...

What Mr Fairclough can say, and did say to Mr McCarthy and Mr McDonnell, was that in or about September 2003 he was approached by Mr Speed and was

told that in addition to the current payments that were to be made to the Union, Mr Jones required cash payments to be made to him, both by Mr Speed and Mr Fairclough, in order for him to continue directing work to Fairclough Alexander. At the time the new practice had made substantial borrowings. Mr Fairclough had extended his mortgage the firm had extended its overdraft and the prospect of losing the work seemed to offer to Mr Fairclough the prospect of financial ruin.

He felt he had no alternative but to agree to Mr Speed's suggestion. Payments were made, which Mr Fairclough believes were for the benefit of Mr Jones, from September 2003. His recollection is that the first payment was £400. This was a sum suggested by Mr Speed, he does not believe it was as a result of any formal calculation related to cases.

His recollection then was that payments would be made approximately monthly. The position would be that either money would be given to Mr Speed in the belief that it was to be transmitted to Mr Jones or Mr Jones would call Mr Fairclough Alexander [sic] and would arrange to meet him away from the office to be paid money. Mr Fairclough would draw that money from his own bank account. He did not take the money from the office account. The monthly figure would be between £400 and £500. The figure would be suggested either by Mr Speed or Mr Jones."

The payments continued until November 2004.

22. On 23rd April 2007 Mr Gordon Hair of the Solicitors Regulation Authority interviewed the First Respondent. In his witness statement dated 4th February 2008 Mr Hair set out his account of the interview in which he stated that the First Respondent worked at W Solicitors between 1986 and 1989 and that firm did work for the GMB. The First Respondent set up Fairclough Alexander which existed between April 2003 and February 2005. He set up a scheme with the GMB sometime between February and April 2004. The Regional Secretary, Gary Jones, approved the setup and sent clients to Fairclough Alexander. Mr Jones then requested "kick backs" (see paragraph 33 below) for his referrals and the firm of Fairclough Alexander paid these in cash from personal accounts. No monies went through the books of Fairclough Alexander.
23. On 4th July 2007 Mr Hair spoke to the Second Respondent and set out in his witness statement his report of that interview in which he said the Second Respondent confirmed that the First Respondent had told him to pay Mr Jones to keep a steady flow of referrals. The Second Respondent paid Mr Jones cash of £400 or £500 a month out of his drawings. The Second Respondent made payment to Mr Jones between September 2003 and November 2004 in a total of between £5,000 and £6,000. GMB referrals to Fairclough Alexander stopped in November 2004. Referrals were still being made to the First Respondent up to February 2005 without the knowledge of the Second Respondent. Mr Jones was probably under investigation by the GMB and was fired at the end of 2005. The Second Respondent decided to "spill the beans" to GMB. The Second Respondent met the GMB in March 2006.

24. The matter was considered by the SRA and in January 2007 the caseworker recommended that a severe reprimand be imposed upon the Respondents. On 8th March 2007 an adjudicator referred the Respondents to the Tribunal in relation to Rule 1 of the Solicitors Practice Rules, not in relation to the Introduction and Referral Code 1990.

The Submissions of the Applicant

25. Given the partial admission of the Respondents the issue to be decided by the Tribunal in relation to the allegations was limited to a decision as to whether the Respondents had been corrupt/dishonest. The Tribunal was referred to the Divisional Court case of Bryant & Bench [2007] EWHC 3043 (Admin) which approved the case of Twinsectra Ltd v Yardley and Others; [2002] UKHL 12.
26. There was no allegation against the Respondents in respect of the payments per case to the Union or in respect of the Introduction and Referral Code. It was accepted that the SRA at the stage of the caseworker's report had wrongly looked at the matter as one relating to referral fees. The only relevance of the payments per case to the Union was that both Respondents knew of these payments to the Union for Union work when paying cash and giving hospitality to Mr Jones.
27. It was difficult for the Applicant to quantify the payments to Mr Jones. The Union was unable to assist. The Tribunal had before it the recollections of the Union officials of their conversation with the Second Respondent which had taken place at the request of the Second Respondent.
28. The Union official said that the Second Respondent said that money had been given to Mr Jones on a per case basis, that he was like a drug addict, that the Respondents were handing over cash and that the Second Respondent drew money from his bank account of some £38,000 and that some £28,000 was spent on hospitality.
29. The letter from Messrs Halliwells dated 10th October 2006 accepted that the payments by the Second Respondent had been from his personal bank account not from the firm and that payments had been made away from the office (paragraph 21 above). These matters might assist the Tribunal in coming to their decision.
30. In a further letter to The Law Society's representative dated 14th November 2006 Messrs Halliwells had stated that payments of between £400 and £500 per month were made to Mr Jones by the Second Respondent and this was confirmed in the interview with Mr Hair when the Second Respondent said these were cash payments per month out of his drawings.
31. For the avoidance of doubt the Applicant was presenting these payments as part of the total of the £1,000 per month which the First Respondent said had been paid to Mr Jones.
32. The Tribunal was asked to note that the First Respondent had said in his letter of 4th October 2006 that the Respondents' reservations had been about quantum not propriety.

33. The Applicant clarified that the reference to "kick backs" in Mr Hair's statement (paragraph 22 above) was Mr Hair's word and Mr Hair did not seek to attribute the use of that word to the First Respondent.
34. Payments made to Mr Jones whether small or large were improper and no solicitor should have made them and no honest solicitor would have made them. Both Respondents were aware that the payments were being made as was shown by their admissions. The First Respondent said the payments were in cash. The Second Respondent said the payments were in cash from his drawings and were made away from the office. The view of the SRA was that the Respondents' conduct amounted to dishonesty within the test set out in the case of Bultitude -v- The Law Society [2004] EWCA Civ 1853. Their conduct was dishonest in terms of both the objective and subjective tests.
35. Both Respondents had worked at the firm of W before and had dealt with GMB cases before. Both knew how the cases worked and were responsible for the payments which had been properly made to the Union through the firm's books and which had been properly declared and were paid by cheque. The Second Respondent had accepted that the payments to Mr Jones were not made through the firm's books and no records were kept. The First Respondent had also accepted that payments were in cash and not through the firm's books. All these factors were indicative of dishonesty.
36. If the Tribunal did not find dishonesty substantiated then the Applicant presented the matters as serious misconduct. If the Respondents did not subjectively believe that their conduct had been dishonest then they were a danger to the profession.

Oral Evidence of Mr Paul McCarthy

37. Mr McCarthy confirmed the truth of his statements dated 31st May 2006 and 15th January 2008.
38. Mr McCarthy had been the GMB Regional Secretary for another region and was then asked to stand in as temporary Regional Secretary in Lancashire. Mr Jones had been suspended from the Union and subsequently fired for reasons unconnected with the matters before the Tribunal, relating to Employment Tribunal matters.
39. Within the Rules of the Union (Rule 27) the Regional Secretary allocated work to solicitors.
40. Mr McCarthy had made his first statement, which he had prepared with the Union's solicitors, because the matter was so serious that it needed to be recorded. Mr McCarthy had taken this decision after discussion with Mr McDonnell.
41. Mr McCarthy was unsure why his letter of 5th June 2006 referred to the statement being unsigned when his signature predated the letter.
42. Mr McCarthy said that he had met the First Respondent on two occasions the first in September or October 2005 for reasons unrelated to the matters before the Tribunal and then in May 2006 in respect of the allegations. Mr McCarthy was referred to the

First Respondent's statement in which he said that he had told Mr McCarthy in May 2006 about the file preparation payments received by the Union (paragraph 15 above). Mr McCarthy accepted that that might well now be his recollection.

43. Mr McCarthy said that the contents of his letter dated 5th June 2006 were true but accepted that his assertion in that letter he was unaware of any agreement between the Union and the firm relating to cash payments for receipt of personal injury cases and that there was no record of payments made or received (paragraph 8 above) was not correct. He said that he had believed what he had written at the time he signed the letter. It was based on his knowledge at the time. The thrust of his letter had been that Mr Jones had received money.
44. There was nothing wrong with the money the Union received in respect of referrals. Such payments were reported to the Regional Council in committee. Mr McCarthy accepted that some individual Union members would not be told by the Union of the payments by solicitors either at the time these matters arose or now. The payments paid for legal services if the Union took cases in respect of other matters such as in relation to the Government or another Union. The Union did not have sufficient income from membership fees for this purpose. The referral fees did not represent profit for the Union. They were held in reserve on an account and used, for example, for campaigns on legal services.
45. It was usual for solicitors to pay a referral fee to the Union for cases but it was not a hard and fast rule.
46. Mr McCarthy said he had received hospitality from other solicitors for example attending football matches. The purpose of such hospitality was friendship but it was business related, solicitors developing the relationship with a view to the referral of work. There was nothing wrong with such hospitality.
47. The Second Respondent had volunteered to come to see Mr McCarthy and Mr McDonnell. The notes had been prepared by Mr McDonnell, not in the presence of Mr McCarthy.
48. Mr McCarthy's recollection had been that the Second Respondent had raised the figure of £50,000 to £70,000 but he accepted that he could be wrong. He had not made any calculation.
49. Mr McCarthy accepted that the Union had not suffered any loss in respect of referral fees. The Union had recovered what it expected to recover so far as was known.

Oral Evidence of Mr McDonnell

50. Mr McDonnell had retired as a full time Union official but remained actively involved as a lay member and was a member of the Regional Committee.
51. Mr McDonnell confirmed the truth of his statements of 7th June 2006 and 15th January 2008.

52. Mr McDonnell had made notes after the meeting with the Second Respondent in March 2006. He had prepared them on his own. He did not accept that his recollection might be inaccurate.
53. The reference in the notes to "Dick Turpin wore a mask" had been written because Mr McDonnell was in an emotional state. He was indicating that at least Dick Turpin wore a mask and tried to conceal his identity. In the Union matter Mr McDonnell was dealing with three people he had known for years. The reference to "feel sick" in his notes was a reference to Mr McDonnell feeling sick. People he had known for a long time were involved in cash payments. This was very different from hospitality.
54. Mr McDonnell had enjoyed hospitality from the firm including attending the Reebok Stadium and attending a Christmas event in Blackpool but this had been in the context of the whole Regional Council attending and was not improper. Mr McDonnell would have seen hospitality as wrong if it was done on an individual basis. W Solicitors had also put on functions for the whole Council.
55. Mr McDonnell confirmed that the Second Respondent had instigated the meeting in March 2006. Mr McDonnell said that the Second Respondent had mentioned £38,000 and possibly the same amount being paid by the First Respondent hence Mr McDonnell's reference to a total of £70,000. The only lower amount Mr McDonnell recalled was reference to £8,000 the Second Respondent had made from his personal account to Mr Jones.
56. Mr McDonnell had discussed with Mr McCarthy Mr McCarthy's letter of 5th June 2006 but had not seen it before it was sent. He was referred to the reference to the wish to recoup apparent substantial losses (paragraph 8 above) and accepted that if the administration fees had been paid to the Union in any event then the Union had sustained no loss. He said he had noted the figures as he recollected them and had not been seeking to put a higher figure for the Union's benefit in recoupment.
57. Mr McDonnell confirmed that Mr Jones as Regional Secretary had authority under Rule 27 of the Union's Rules. He had informed the Regional Council that he was bringing in a firm who would receive five cases per week for competition. Mr Jones had complete authority to appoint solicitors on any terms and conditions he saw fit.
58. The Regional Council had not known of the referral fees. The first time Mr McDonnell had known of that was when Mr McCarthy came in as acting Regional Secretary.
59. Mr McDonnell had worked under five Regional Secretaries and each one was a law unto themselves under Rule 27.

The Oral Evidence of Mr Hair

60. Mr Hair confirmed the truth of his statement dated 4th February 2008 subject to clarifying that the reference to the word "kick backs" was his view of the nature of the conversation and his own word and had not been used by the First Respondent. The correct word would be payments.

61. Mr Hair confirmed that the First Respondent had been helpful and cooperative.
62. Mr Hair confirmed that the Second Respondent had said in discussions that he had paid a total of £5,000 to £6,000 to Mr Jones although Mr Hare had no evidence to support that or otherwise.
63. Mr Hair confirmed that the Second Respondent cooperated and gave appropriate assistance.
64. Mr Hair had not had discussions with the Union. He had thought at the time that Mr Jones was under investigation for receipt of the monies but that had been based on his conversation with the Second Respondent and he had no evidence to support it.

Oral Evidence of Ms Jacqueline Baker

65. Ms Baker gave oral evidence in support of the Second Respondent as to his good character.
66. Ms Baker, who had been a solicitor for 20 years and held judicial posts, had known the Second Respondent for 25 years as a friend. She spoke of his hard work to qualify as a solicitor at a late stage in life. He had a very high regard for the solicitors' profession and continued to work hard. Ms Baker had never had the slightest reason to doubt the Second Respondent's honesty.

Submissions on behalf of the First Respondent

67. The First Respondent accepted that the payments for Mr Jones were improper as they were made to an individual, not to the Union, and were effectively referral fees which were not allowed before March 2004 and after that time had to be disclosed to the client but had not been.
68. The First Respondent now fully appreciated that that was the case but at the time he considered the payments to be legitimate. He now unreservedly accepted that that view was wrong and apologised. This was the only stain on an otherwise unblemished career.
69. The Tribunal was given details of the First Respondent's educational and employment history. He had qualified as a solicitor in 1998.
70. The Applicant had put the case on the basis that the payments to Mr Jones were dishonest and the hospitality given to him was dishonest.
71. The Tribunal would have to be sure that the relationships between the First Respondent and Mr Jones and the Second Respondent and Mr Jones were corrupt i.e. that they were acting dishonestly.
72. Referral fees had been banned by The Law Society until March 2004 and solicitors had tried to find legitimate ways round the ban as payment of commission for the introduction of work were "the way of the world" and were not wrong in other

settings. The former Chief Executive of The Law Society had said that referral fees were honoured more in the breach than in the observance.

73. Until 2004 The Law Society and The Tribunal had said that provided genuine services were carried out by introducers before the introductions to solicitors then solicitors could pay marketing or administration fees. The Tribunal case of David Alexander Tubby (8463/2001) had been decided under that regime and had given administration fees the all clear.
74. The state of affairs had altered as the result of a decision of Costs Master Hurst and The Law Society had issued further guidance and ultimately relaxed the ban. There were also concerns that the ban had been anti-competitive and possibly unlawful. This was the background against which the Tribunal had to consider whether or not the Respondents had behaved dishonestly.
75. The Divisional Court had emphatically restored the test in *Twinsectra* in the case of *Bryant & Bench*. The Court had also said in the case of *Donkin v The Law Society* [2007] EWHC 414 (Admin) that the Tribunal had to take into account character evidence when considering dishonesty.
76. When considering objective and subjective dishonesty the Tribunal was assisted by:-
 - a. The First Respondent's statement dated 4th October 2006 in which he had given a coherent account and had made the admissions essentially from the start. The only cross examination on behalf of the First Respondent in respect of Mr McCarthy was a discrepancy in relation to the May 2006 meeting and Mr McCarthy had fairly conceded that the First Respondent's recollection could well be right.

The First Respondent had no other dispute with the evidence of Mr McCarthy or Mr McDonnell. Most of their evidence was in relation to their meeting with the Second Respondent. The First Respondent did not seek to draw a veil over his admitted serious misconduct.
 - b. The caseworker's recommendation. The caseworker saw this matter as simply a referral fee case and recommended a severe reprimand. This was relevant to whether or not the Tribunal could be satisfied so as to be sure that the conduct could be objectively described as dishonest or whether the mental state could be subjectively described as dishonest.
 - c. Testimonials on behalf of the First Respondent which were powerful and which the Tribunal was asked to read carefully. The Tribunal was asked to note that the First Respondent was described as caring and compassionate and that the testimonials spoke of his honesty. These were matters which the Tribunal was entitled to take into account.
77. Essentially the Respondents were paying this money to Mr Jones to have "a friend at court" i.e. Mr Jones could provide introductions to others in the Union and could provide them with cases. As the First Respondent had said in his statement however the payments were not made on a case basis but on the basis of £1,000 per month for

20 months. Mr Jones had not been guaranteeing a particular number of cases for that sum. The per case payments were made to the Union as an administration fee.

78. The Respondents now saw that the payments to Mr Jones in order to have a friendly voice in the Union were improper but they had not seen that at the time. The payments stopped in November 2004 and by then there was a serious partnership dispute between the Respondents which ended in litigation.
79. The Tribunal was referred to the chronology prepared on behalf of the First Respondent which showed that the Respondents went their separate ways and the First Respondent severed any connection with these matters.
80. Mr Jones had been suspended and dismissed for entirely unconnected reasons.
81. No client had suffered at all.
82. It was accepted that the payments should have gone through the firm's books and did not but that did not transform what was not a dishonest course of action into dishonesty.
83. Hospitality was always a grey area for any professional person. Solicitors and barristers were entitled to show ordinary hospitality. Invitations to football or rugby matches were unexceptional. There was no written guidance on this matter which was left to the judgment of the professions.
84. There was very little hard evidence in relation to hospitality. The First Respondent had said that the firm spent £25,000 on hospitality over 20 months the lion's share of which was spent on the Union. This included a function at the Reebok Stadium for some 30-40 people and another function in Blackpool.
85. Mr McDonnell had attended these functions and had said that there was nothing remotely improper in the hospitality he had received. In the light of that evidence and the lack of evidence to show that hospitality provided by the firm was excessive the Tribunal was asked to put the matter of hospitality to one side.
86. In considering both the issue of dishonesty and penalty the Tribunal would give full credit to the First Respondent for his early admissions and for his acceptance through Counsel of what he had done. The First Respondent apologised for his conduct which he accepted looking back was improper and unprofessional but at the time he had not realised that. The Tribunal was asked to acquit the First Respondent of the charge of dishonesty.
87. After the Tribunal's Findings in relation to liability it was submitted in mitigation that the references in support of the First Respondent showed that he had been an entirely decent and straightforward solicitor to everyone he had met and the Tribunal was asked to take the references into account in considering penalty. The Tribunal was asked to be as lenient as possible in the light of the admissions made and the fact that dishonesty had not been proved.

Submissions on Behalf of the Second Respondent

88. The Tribunal was given details of the Second Respondent's employment history. He had come to the law late in life being admitted as a solicitor in 1999 and had since worked very hard to establish his practice. He was very proud of being a solicitor. The Second Respondent had every desire to continue to practise subject to the Tribunal's decision.
89. The Second Respondent offered his apologies. He accepted and had since October 2006 (when Messrs Halliwells wrote their letter on his behalf), if not before, that the payments made were improper and unacceptable. The Second Respondent had maintained a consistent view however that at the time he did not believe that what he was doing was dishonest. Even absent dishonesty the Tribunal would find the admitted matter serious and would impose a penalty. The Second Respondent had been filled with dread about the hearing before the Tribunal and had suffered enormous pressure with the matter hanging over his head. In one sense it would be a relief that the matter would be behind him at the close of the day.
90. The letter of October 2006 from Messrs Halliwells was a response to the case as put to the Respondents at that time by the SRA namely as a breach of the Introduction and Referral Code.
91. These events occurred in 2003/2004. The Code changed in March 2004 and thereafter solicitors could make payments subject to the requirements of The Code. There was confusion in the profession. Further personal injury work was subject to enormous changes. The caseworker had recommended an internal sanction and the Tribunal might view the caseworker's note as persuasive. It was relevant as to whether or not the Second Respondent was dishonest.
92. Both Respondents had admitted monthly payments to secure the referral of cases but the internal sanction was not indicative of an objective view of dishonesty.
93. The Tribunal would also have regard to the fact that the Second Respondent held a genuine belief that he was not acting dishonestly at the time which went to the very core of the subjective test. His voluntary disclosure to the Union was not indicative of a man who believed that he had acted dishonestly.
94. In determining the issue of dishonesty the Tribunal would have to be satisfied so as to be sure that the Applicant had discharged the burden upon him to satisfy the Tribunal, effectively to the criminal standard, that the Respondents had acted dishonestly. The phrase in the second allegation "ought to have known" was insufficient. The Applicant had to establish that the Respondents knew at the time what they were doing. The Tribunal might have a view of the payments but it was respectfully submitted that that would be to import an objective element into the consideration of the subjective test. The Tribunal had to be sure that these Respondents knew at the time that what they were doing was wrong. In determining that it was important to bear in mind that the payments spanned a period between 2003 and 2004 which was both somewhat historical and at a time when there was confusion and a change in The Code.

95. In relation to hospitality the Tribunal was asked to note the submissions made on behalf of the First Respondent and the fact that two witnesses had said that the hospitality was not improper.
96. The Tribunal was asked to consider whether the Respondents were wrong to think that there was no distinction between taking 30 or 40 people to the Reebok Stadium and making the payments they had made. The Tribunal would view the payments in cash as unsavoury but that was different from concluding so as to be sure that the Respondents had acted dishonestly at the relevant time. The test was that of *Twinsectra* as confirmed in the cases of *Donkin*, *Bultitude* and *Bryant & Bench*. The case of *Barlow Clowes International Ltd v Eurotrust International Limited* [2005] UKPC 37 was not the test for these purposes.
97. The Tribunal was referred to the judgement of Mr Justice Richards in *Bryant & Bench* where he advanced an explanation as to why the combined test in *Twinsectra* was the appropriate test:-

"In any event there are strong reasons for adopting such a test in the disciplinary context and for declining to follow in that context the approach in *Barlow Clowes*. As we have observed earlier, the test corresponds closely to that laid down in the criminal context by *R v Ghosh*; and in our view it is more appropriate that the test for dishonesty in the context of solicitors' disciplinary proceedings should be aligned with the criminal test than with the test for determining civil liability for assisting in a breach of a trust. It is true, as Mr Williams submitted, that disciplinary proceedings are not themselves criminal in character and that they may involve issues of dishonesty that could not give rise to any criminal liability (e.g. lying to a client as to whether a step had been taken on his behalf). But the Tribunal's finding of dishonesty against a solicitor is likely to have extremely serious consequences for him both professionally (it will normally lead to an order striking him off) and personally. It is just as appropriate to require a finding that the defendant had a subjectively dishonest state of mind in this context as the court in *R v Ghosh* considered it to be in the criminal context. Indeed, the majority of their lordships in *Twinsectra* appeared at that time to consider that the gravity of a finding of dishonesty should lead to the same approach even in the context of civil liability as an accessory to a breach of trust. The fact that their Lordships in *Barlow Clowes* have now taken a different view of the matter in that context does not provide a good reason for moving to the *Barlow Clowes* approach in the disciplinary context."

98. Making payments in the way the Respondents had might initially give real rise to concern on the part of the Tribunal but the Tribunal was asked to take into account the admissions and to have regard to all the surrounding circumstances at the time including the arena in which the firm was operating, the existing arrangements as to payment of administration fees between solicitors and the Union and the uncertainty in the profession as to what constituted a referral payment or not or what constituted acceptable hospitality or not.
99. Payment away from the office was a serious point but the payments had been to the same man for the same purpose whether through the office account or out of the

Second Respondent's drawings. The money was his not clients' and there had been no loss to the Union.

100. It would be inappropriate to infer dishonesty. The Tribunal had to be sure. The Tribunal was asked to give the Respondents the benefit of the doubt. The Applicant had not produced any evidence to show that the Respondents knew at the time that they were behaving dishonestly. The Tribunal was asked to give the Second Respondent credit for his disclosure to the Union without which the matter might not be before the Tribunal.
101. The Tribunal was referred to the bank statements in the Second Respondent's bundle. The Second Respondent had been concerned as to the use of large figures by the Union officials and the Second Respondent's position had been set out to Mr Hair and in the correspondence from Messrs Halliwells referring to a much lower figure. The bank statements exhibited together with others which could be provided did not demonstrate the very large sums advanced by the Union officials as going out. Whether paid from office account or the Second Respondent's personal account however the issue was the principal not the amount. Whether the sum was £5,000 or £50,000 the Tribunal would need to determine the outstanding issue of dishonesty. The Respondent had made personal payments but these were for the purpose of championing the firm.
102. The Second Respondent accepted that his action had been inappropriate but the Tribunal was urged not to find him dishonest.
103. The character evidence was important and the Tribunal was referred to the written testimonials and the evidence of Ms Baker. These showed that the Second Respondent was not a man with a propensity to act dishonestly. The character reference was relevant in such a case as this. The character evidence spoke highly of the Second Respondent and his honesty.
104. The Tribunal had to be satisfied so as to be sure in respect of both the tests set out in Twinsectra and for the reasons advanced above the Applicant had failed to establish dishonesty.

The Findings of the Tribunal

105. The Tribunal had paid great attention to the documentation and the oral evidence and had been assisted by the submissions made by or on behalf of the three parties.
106. This case related to payments made in cash by the Respondents to Gary Jones an official of the GMB Union responsible for arranging the referral of cases to solicitors on the Union panel.
107. An arrangement had previously been made by the Respondents to pay the GMB Union an administration fee of £200 plus VAT for each case sent to them. No criticism had been made of this payment which seemed to have been standard practice as far as the Union was concerned.

108. There came a time when Gary Jones required further payments to be made to him to ensure that the Respondents' panel status was maintained and to champion their firm. The Respondents had regarded the arrangement as a "panel membership retainer combined with a form of marketing consultancy". Their only reservation at the time was as to the costs of the proposal not its propriety.
109. In the event a figure of £1,000 per month was agreed and was paid personally in cash by the Respondents not through the practice accounts. This arrangement continued for some 20 months until finally at a meeting in March 2006 the Second Respondent told other Union officials of the arrangement with Gary Jones. That report led ultimately to these proceedings.
110. The Respondents had made partial admissions. The outstanding issue was that of corruption/dishonesty.
111. The Tribunal had rightly been referred to the Divisional Court decision of Bryant & Bench -v- The Law Society of 21st December 2007 which approved the Twinsectra test for dishonesty and differentiated the decision in Barlow Clowes. Reference had also been made to the case of Bultitude.
112. The Tribunal had to be sure that the dual test in Twinsectra was properly applied in this case and the Tribunal had carefully considered the circumstances surrounding the matter. The Tribunal had come to the conclusion that the two limbs of the Twinsectra test had not been made out. In reaching that conclusion the Tribunal had taken note of the previous background to referral fees for solicitors and taken into account the situation in which the Respondents found themselves at the time. The Tribunal was not satisfied that by the ordinary standards of reasonable and honest people that the Respondents would have been considered dishonest. Further the Tribunal was not convinced that the Respondents were aware at the time that by these standards their conduct was dishonest.
113. In reaching its decision the Tribunal had taken careful account of the excellent character references handed in by both Respondents and had noted what had been said by individual referees about their character and honesty.
114. Suspicion, and there was a great deal of it in this case, was not enough. Dishonesty could not be proved by inference and speculation. While cash payments which were not put through the office accounts were a matter of concern there were possible explanations for this and no evidence of the reason for the payments being made in this way had been put forward. The fact that it appeared that the recipient had not declared the payments to his employing Union was between him and his employer. It was fair to say that the firm might have been in serious difficulty without cases received from the Union which made the Respondents more vulnerable to an approach by a Union official asking for money in addition to that being paid directly to the Union. In the circumstances prevailing at the time however it was possible that the Respondents had viewed the payments as an additional commission. There was in the Rule 4 statement and supporting evidence insufficient proof to make out the allegations of corruption. In relation to the payments to Mr Jones the allegations were substantiated only on the admitted basis.

115. The Tribunal had considered the issue of hospitality but was satisfied that the hospitality provided was not improper, unprofessional or corrupt. It was clear that the whole of the Union Regional Council had been to at least two events provided by the firm. The amount of money spent by the firm on hospitality was not out of line with that of other firms and the Tribunal was not satisfied that the allegations in relation to hospitality were substantiated.
116. In considering penalty the Tribunal had taken account of the submissions in mitigation and had noted that both Respondents were late entrants to the profession. The Tribunal had again taken into account the character references in support of the Respondents. These were nevertheless serious offences of making improper and unprofessional payments. The proceedings had been properly brought by the Applicant notwithstanding the fact that the allegations of corruption had not been substantiated. The appropriate penalty was a fine and the Tribunal would order each Respondent to pay a fine of £5,000.

Submissions as to costs

117. The Applicant sought his costs in accordance with the schedule served. Although corruption had not been proved the matter had been properly brought as a corruption matter as there had been suspicions. Neither Respondent had put in a statement in response to the proceedings as opposed to when the case was referred so there had been no new material for the Applicant to review in relation to corruption.
118. It was submitted on behalf of the First Respondent that while it was accepted that the First Respondent had to pay some of the Applicant's costs the Tribunal was invited to say that the Respondents should pay only half of the Applicant's costs as the Applicant had failed to establish dishonesty in both limbs of the Twinsectra test. The Tribunal was further invited to say that each Respondent should pay 50% of such sum as the Tribunal found appropriate. It was right that the matter go to detailed assessment. Notice of the Applicant's costs had only been received today. The amount of time claimed by the Applicant for preparation, analysis and attendance at meetings in respect of the rather thin material before the Tribunal required a certain amount of investigation before it could be found to be justified.
119. On behalf of the Second Respondent the Tribunal was invited to order that each Respondent pay 50% of such proportion of the Applicant's costs as the Tribunal order, to be assessed. The costs schedule had been received only today. The allegation of corruption had been rejected on both the objective and the subjective approach in Twinsectra. On 30th October 2007 Mr Goodwin on behalf of the Second Respondent had written to the Applicant to make admissions but without dishonesty and invited the Applicant to consider his position. No criticism was made of the Applicant but given that the contentious allegation had been defeated and given that the Respondents would have to pay costs to those representing them the Tribunal was asked to order that the Respondents pay a total of 50% of the costs sought. It was not suggested that The Law Society should pay any of the Respondents' costs in defeating the allegation of corruption.

120. Having considered the submissions on costs the Tribunal did not accept the submission that the costs payable by the Respondents should be reduced by 50% to reflect the unsubstantiated part of the allegations. As stated above the allegations had been properly brought. The Tribunal would order the Respondents to pay 50% each of the costs sought by the Applicant those costs to be subject to detailed assessment.
121. The Tribunal Ordered that the Respondent, Alexander Francis Speed of 559 Barlow Moor Road, Manchester M21 8AN, solicitor, do pay a fine of £5,000, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay 50% of 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 Officer of The Law Society.
122. The Tribunal Ordered that the Respondent, John Kenneth Fairclough of 47-49 High Street, Newton-le-Willows, Merseyside WA12 9SP, solicitor, do pay a fine of £5,000, such penalty to be forfeit to Her Majesty the Queen, and it further Ordered that he do pay 50% of 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 Officer of The Law Society.

Dated this 25th day of April 2008
On behalf of the Tribunal

D J Leverton
Chairman