SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11091-2012

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

BRIAN LEWIS BARSO (Solicitor) First Respondent

KEVIN UNDERWOOD Second Respondent

MATTHEW PHILLIPS (Clerks) Third Respondent

Before:

Mr K. W. Duncan (in the chair)
Mrs E. Stanley
Mr S. Marquez

Date of Hearing: 25 to 28 November 2013

Appearances

Mr David Pittaway QC, counsel, of Hailsham Chambers, 4 Paper Buildings, Temple, London EC4Y 7EX instructed by Daniel Purcell, solicitor, of Capsticks LLP, 1 St George's Road, Wimbledon, London, SW19 4DR for the Applicant.

The First Respondent, Mr Brian Barso, appeared and represented himself.

The Second and Third Respondents, Mr Kevin Underwood and Mr Matthew Phillips, appeared and were represented by Mr William Hansen, counsel, of 3 Paper Buildings, Temple, London EC4Y 7EU instructed by Mr Afzhar of Zak Solicitors, 20 College Road, Handsworth, Birmingham B20 2HX.

JUDGMENT

Allegations

1. The allegations against the First Respondent, Brian Lewis Barso, on behalf of the SRA contained in a Rule 5 Statement dated 12 November 2012 were that he:

1.1 Failed to account to clients for commissions, contrary to Rules 1(a), 1(c) and 10(1) Solicitors Practice Rules 1994 ("SPR") and, from 1 July 2007, contrary to Rules 1.02, 10.4 and 2.06 Solicitors Code of Conduct 2007 ("SCC");

1.2 Failed to make referrals to a third party in good faith, contrary to Section 4(1) Solicitors Introduction and Referral Code 1990 ("SIR Code"), and thereby Rule 3 SPR and, from 1 July 2007, contrary to Rule 9.03(1) SCC;

1.3 Used his position as a solicitor to take unfair advantage of clients, contrary to Rule 1(c) SPR and, from 1 July 2007, contrary to Rules 1.04 and 10.01 SCC.

2. It was further alleged that in respect of allegations 1.1, 1.2 and 1.3 the Respondent acted dishonestly.

3. The allegation against the Second Respondent, Kevin Underwood, on behalf of the SRA was that he had, in the opinion of the Law Society, occasioned or been a party to an act or default in relation to a legal practice which involved conduct on his part of such a nature that, in the opinion of the Law Society, it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in Section 43(1)(A) of the Solicitors Act 1974 (as amended by the Legal Services Act 2007) in that he:

3.1 By virtue of his position within a legal practice made secret profits by retaining commissions in respect of client matters received directly from a third party, contrary to Rules 1.02 and 1.04 SCC.

4. The allegation against the Third Respondent, Matthew Phillips, on behalf of the SRA was that he had, in the opinion of the Law Society, occasioned or been a party to an act or default in relation to a legal practice which involved conduct on his part of such a nature that, in the opinion of the Law Society, it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in Section 43(1)(A) of the Solicitors Act 1974 (as amended by the Legal Services Act 2007) in that he:

4.1 By virtue of his position within a legal practice made secret profits by retaining commissions in respect of client matters received directly from a third party, contrary to Rules 1.02 and 1.04 SCC.

Documents

5. The Tribunal reviewed all of the documents submitted by the parties, which included:

Applicant:-

- Application dated 12 November 2012
- Rule 5 Statement, with exhibit "JJG1" (comprising 3 bundles), dated 12 November 2012
- Hearing bundle (5 bundles), including witness statements of Diarmuid McKeown, John Carter and Geraint Harris
- Applicant's opening note dated 20 November 2013
- Schedule of costs dated 17 November 2013

First Respondent:-

- Response to Rule 5 Statement, undated, received 15 May 2013
- First Respondent's witness statement dated 10 October 2013
- First Respondent's hearing bundle
- Skeleton argument (undated), received 26 November 2013
- Draft statement of agreed facts, prepared by First Respondent
- Witness statements of David Brennan, Patrick White and Frank Harrold
- Statement of Katie Silker 23 November 2013
- Email from Mr Harrold with attachment, 23 November 2013
- Emails First Respondent to Tribunal dated 25 October and 8 November 2013
- Bundle of three character references
- Statement of financial means

Second Respondent:-

- Response to Rule 5 Statement, 16 May 2013
- Second Respondent's witness statement (undated)
- Statement of Agreed Facts (undated)
- Statement of Agreed Facts and Outcome, 25 November 2013

Third Respondent:-

- Response to Rule 5 Statement, 16 May 2013
- Third Respondent's witness statement (undated)
- Statement of Agreed Facts (undated)
- Statement of Agreed Facts and Outcome, 25 November 2013

Preliminary Matter (1) – Progress of hearing

6. At the commencement of the hearing on 25 November 2013 the Applicant was represented by Mr David Pittaway QC, the First Respondent represented himself and was accompanied by Mr Patrick White whose role was to assist and take notes and the Second and Third Respondents were present and were represented by Mr William Hansen.

7. The Tribunal was aware that the First Respondent was awaiting news of a personal nature during the course of the morning and gave permission for the First Respondent to have his mobile phone on "silent" during the hearing, there being no objections by the other parties. The Tribunal further agreed that witnesses could be present in court before giving evidence. This issue had to be considered as Mr White was to be a witness for the First Respondent and his presence to give practical assistance was wanted by the First Respondent. It was submitted by Mr Pittaway QC that the parties should be in the same position and the Tribunal agreed that this would be appropriate.

8. The Tribunal considered the Statement of Agreed Facts and Outcomes in relation to both the Second and Third Respondents – see further below – then excused Mr Hansen and the Second and Third Respondents from further attendance until towards the end of the hearing, when the issue of costs would be considered. Mr Hansen confirmed that he would keep himself available.

9. During 25 November, the Applicant's case was opened and evidence was given by: Ms Sarah Taylor, a forensic investigation officer ("FIO") of the Applicant; Mr Diarmuid McKeown; Mr John Carter and Mr Geraint Harris. The Applicant's case was concluded.

10. On Tuesday 26 November, the First Respondent presented his skeleton argument and gave evidence. Thereafter, the Tribunal was informed that Mr Frank Harrold, who was expected to give evidence for the First Respondent was unable to attend, but arrangements could be made for him to attend at 10am on 27 November. The Tribunal then heard evidence from Mr Patrick White and Mr David Brennan. There being no other evidence available during the day, the Tribunal rose at approximately 3.30pm.

11. At the commencement of the hearing on 27 November, the First Respondent informed the Tribunal that Mr Harrold was en route to the Tribunal and was due to arrive in London at 10.30am. Whilst waiting from Mr Harrold's arrival, the Tribunal heard from the Applicant and First Respondent in relation to a document within the bundles and the First Respondent gave sworn evidence on that matter. Mr Harrold arrived and began giving evidence at about 11.15am. After lunch, the First Respondent made closing submissions and thereafter the Tribunal began its deliberations.

12. The Tribunal began sitting at approximately 9.30am on 28 November, at which point it announced its findings, heard mitigation and considered issues of costs and sanction. The Tribunal was able to announce the orders made at approximately 10.40am, although there had been a technical problem in drawing up the orders in relation to the Second and Third Respondents by that time; it was arranged that the orders would be forwarded to the relevant parties.

Preliminary Matter (2) – "Agreed Outcomes"

13. The Tribunal was notified before the start of the hearing that the Applicant and Second and Third Respondents had each agreed a "Statement of Agreed Facts and Outcomes" and the Tribunal was provided with copies of these documents.

14. Mr Pittaway QC submitted that the roles of the Second and Third Respondents in the matters underlying the allegations were lesser than the role of the First Respondent. The First Respondent was a solicitor, whilst the Second and Third Respondents were unadmitted clerks. The Second and Third Respondents had admitted the allegations made against them.

15. The details of the facts and admissions made are set out further below. However, in short, the Second Respondent admitted that he had received approximately £16,000 from FH Consulting and/or Utopian Services and/or BCR and/or Mr FH which sums were now admitted to be commissions which ought to have been disclosed to clients; no such disclosure was made. The Second Respondent accepted that the Applicant should exercise control over his future activities within the legal profession, in the public interest. The Third Respondent admitted, in brief, that he had received approximately £3,000 from SCR and/or Mr FH in respect of referrals of approximately 75 cases. The Third Respondent now accepted that these payments were commission payments which should have been disclosed to clients, and no such disclosure had been made. The Third Respondent accepted that the Applicant should exercise control over his future activities in the legal profession, in the public interest. The factual background to this matter, set out from paragraph 18 below, is drawn from the Statements of Agreed Facts and Outcomes, insofar as it relates to the Second and Third Respondents.

16. The Tribunal was informed that, in principle, it had been agreed that the Second and Third Respondents would each pay 10% of the total costs of the case.

17. The Tribunal agreed to dispose of the case against the Second and Third Respondents on the basis of the Statements of Agreed Facts and Outcomes, further details of which are set out below. The admissions made met the justice of the case. Further, the Tribunal's only discretion where the facts of a case against an unadmitted person were admitted or proved was whether or not to make a s43 Order. Such Orders were regulatory and not punitive in nature. In this instance, the misconduct which had been admitted was of sufficient gravity to warrant the making of an Order to control the way in which the Second and/or Third Respondents were able to work within the legal profession. It would be for the Applicant to consider the circumstances in which the Second and/or Third Respondents could work within a solicitors' firm or other regulated body. The question of costs would be determined at the end of the proceedings. At this stage, the total costs had not been assessed and the First Respondent did not agree that he should pay 80% of the total costs, whatever those costs might be.

Factual Background

18. The First Respondent was born in 1970 and was admitted to the Roll of Solicitors in 2000. He did not hold a current practising certificate at the date of the hearing. At all material times the First Respondent was a partner and then, on incorporation, a director and shareholder in McKeowns Solicitors Limited of 8 Parkway, Porters Wood, St Albans, AL3 6PA ("the Firm"). The First Respondent left the Firm on 6 April 2009 and resigned from his directorship of the Firm on 24 April 2009.

19. The Second Respondent was at all material times an unadmitted member of staff working for the Firm. The Third Respondent was at all material times an unadmitted member of staff working for the Firm.

20. On 30 March 2010 the Forensic Investigation Unit of the Applicant commenced an inspection of the Firm, which resulted in the production of a Forensic Investigation Report dated 28 June 2011 ("the Report"). The Report produced to the Tribunal had been redacted to remove material which was not relevant to the allegations in these proceedings and which may have been potentially prejudicial.

The Firm and personal injury work

21. The Firm was established in 1992 by Mr Diarmuid McKeown ("Mr McKeown"), a solicitor admitted to practise in Northern Ireland and in England and Wales. The Firm specialised in personal injury work. Over time, the Firm expanded. As at March 2010 the Firm employed 25 solicitors and 113 unadmitted staff and had offices in St Albans, Northern Ireland, Milton Keynes and Bishops Stortford.

22. The First Respondent joined the Firm as a personal injury claims handler in 1994. He qualified as a solicitor in 2000 and became a partner in the Firm in 2001, owning 45% of the partnership. The Firm was incorporated on 29 October 2004. The First Respondent and Mr McKeown were the only two directors and shareholders. There was some dispute concerning the management roles and responsibilities of the directors.

23. The Second Respondent commenced employment with the Firm on 1 November 2003 as a personal injury claims handler. He was appointed a Team Leader in 2005 and an Account Manager in 2007. As an Account Manager he received an annual salary of £60,000 and was responsible for the Firm's relationships with a number of Claims Management Companies ("CMCs") and other work providers who referred personal injury claims to the Firm, in return for which a fee was paid. He was suspended from his employment on 13 March 2009 and dismissed on 8 May 2009 for gross misconduct, a decision which was upheld following an internal disciplinary hearing. A subsequent claim brought before the Employment Tribunal was unsuccessful.

24. The Third Respondent commenced employment with the Firm on 21 October 2002 as a personal injury claims handler. He was subsequently appointed a Team Leader in June 2006 and then an Account Manager. As an Account Manager he was responsible for the Firm's relationships with a number of CMCs and other work providers who referred personal injury claims to the Firm, in return for which a fee

was paid. Prior to his dismissal he was working as a Business Development Manager with the Firm. The Third Respondent was suspended from his employment on 13 March 2009 and dismissed on 8 May 2009 for gross misconduct, a decision which was upheld following an internal disciplinary hearing. A subsequent claim brought before the Employment Tribunal was unsuccessful.

25. Much of the Firm's personal injury work was undertaken using Conditional Fee Agreements ("CFAs"), often on the basis of a "no win, no fee" arrangement. In order to protect clients in respect of any exposure to an adverse costs order at the conclusion of an unsuccessful case, "after the event" insurance ("ATE insurance") was taken out on behalf of the client with an insurer ("the Insurer"). The premium for the ATE insurance was an inter partes recoverable cost and so at the end of a successful case could be included as a disbursement claimed from the losing party. The majority of ATE insurance was arranged through brokers. The Firm had delegated authority to write ATE insurance for work from specific referrers who insisted on using specific insurers.

26. The vast majority of the Firm's personal injury work was referred by third party sources such as CMCs. In exchange for bona fide personal injury cases that generated an instruction the Firm paid referral fees to a number of CMCs.

The Rules

27. The SIR Code regulated referral arrangements from 1990 until 1 July 2007; thereafter such arrangements were primarily governed by Rule 9 of the SCC. These Rules concerning referral arrangements applied whenever a solicitor received referrals of business from, or made referrals to, a third party. The SIR Code and Rule 9 contained detailed provisions concerning referrals of business, the financial arrangements with introducers and the disclosure which needed to be given to clients. Rule 9 SCC was supported by a "warning card" issued by the Applicant, which was sent to all firms. For practical reasons the Rules set a de minimis sum of £20. It was the Applicant's case that it was not permitted under the Rules (SCC or SPR) for a solicitor to retain commissions (at or above the de minimis level) without having first made full disclosure to the client of the amount and terms of the commission and having received their informed consent to the arrangement.

28. Where a client was referred to the Firm by a CMC, in circumstances in which a referral fee would be payable, the Firm (in compliance with its obligations) disclosed this to the client. Typically, the explanation was along the following lines:

> "We are required by the Solicitors' Introduction and Referral Code to inform you of financial arrangements concerning the referral of your claim to this firm. As a member of the panel of Solicitors, the introducer has undertaken preliminary work to assist us in dealing with your claim, including the initial assessment of liability, the gathering of information regarding the claim and the provision of a telephone service to their clients (you) along with possible arrangements for vehicle repair and car hire. In exchange, McKeowns Solicitors pay a fee of between £400 and £600 for this referral. This payment is a financial arrangement between ourselves and the introducer and does not

affect your claim. The sum is paid by us and not you and is not deducted from your damages."

29. Where the terms of an agreement with a CMC required the Firm to use a particular broker when placing ATE insurance or a particular medical agency for writing of an expert report, the Firm disclosed this to their client. Typically, this was along the following lines:

> "After the Event Insurance
>
> … We use the insurance policy recommended by the company who referred your case to us. We are able to utilise other policies but feel that the policy recommended provides excellent cover for you and good value.
>
> We do have an indirect interest in recommending the policy as our work provider requests that we do so, although we ultimately will not recommend the policy to you if we do not feel it is in your best interest or a better policy is available to you. We are satisfied that in this instance that the policy is suitable for your needs."

First Respondent's relationship with Mr FH

30. In late 2005 the First Respondent was introduced to Mr FH through a mutual acquaintance. The First Respondent and Mr FH became friends; Mr FH is godfather to one of the First Respondent's children.

31. Mr FH was a director and 49% shareholder in an insurance brokerage called BCR Legal Assist Limited ("BCR"), which specialised in ATE insurance. At the relevant time, ATE insurance placed through BCR was mainly underwritten by Elite Insurance Company Limited ("Elite"). Mr FH also had interests in companies or entities known as FH Consulting, Utopian Services and a number of CMCs, in particular WMO Services.

32. It was not disputed that from about 2006 payments were made to or for the benefit of the First Respondent by BCR via various other businesses controlled by Mr FH and that ATE insurance was purchased for a substantial number of the Firm's clients through BCR.

Medical Reports

33. Dr A was regularly instructed by the Firm for the purposes of producing expert medical reports for clients in personal injury cases. Dr A's fee for producing a report could vary but his standard charge for such a report was £420. When a client's case was concluded successfully, the Firm included the costs of a medical report, such as any report prepared by Dr A, in its claim for costs and disbursements from the other party; when the Firm received its costs it would pay Dr A.

34. At the end of each month a spreadsheet would be provided by the Firm (in particular the Second Respondent) to Mr FH setting out all the matters in which the Firm had

instructed Dr A and the matters in which the Firm had recovered Dr A's fee and paid it over to him. Dr A would then be invoiced by either FH Consulting or Utopian, both of which companies were owned and controlled by Mr FH and Dr A would pay a defined proportion of his fee to one or other of them. In no case did Dr A receive all of the monies invoiced by the Firm and claimed from the other party. Instead, Dr A paid parts of the fee to the First and/or Second Respondent and BCR. In a typical matter, of the fee of £420: Dr A would keep between £150 and £250 per report; the remainder (£170-£270) was paid to either FH Consulting or Utopian and would be split between Mr FH and the First and Second Respondents (with the precise split varying). In a typical case of a payment of £170 to Utopian/FH Consulting Mr FH would retain £5-10 as an administration fee; the Second Respondent would receive £30 to £50 and the First Respondent would receive the rest.

Facts agreed by the Second Respondent

35. The following facts and matters were agreed by the Second Respondent, in the terms noted:

35.1 In the course of conducting claims brought by clients of the Firm it was common in personal injury cases for a medical expert to be instructed to provide a causation and prognosis report. The Firm frequently instructed Dr A, an independent medical expert, who was instructed to examine the claimants and provide a report to the Firm to support the personal injury claim brought by the client. The Second Respondent knew Dr A prior to joining the firm, having instructed him at his previous firm, Scott Rees & Co.

35.2 During the course of his employment, and from around March 2007 until February 2009, the Second Respondent would provide Dr A with a monthly spreadsheet of all matters where the Firm had instructed Dr A and all matters where the Firm had recovered Dr A's fee and paid it over to him. Dr A was invoiced each month by either FH Consulting or Utopian Services (a work provider who supplied the Firm with work) in respect of all matters on which he had been instructed by the Firm for the previous month. Dr A would send payments either to Utopian or to FH Consulting. Dr A would retain a proportion of the overall sum recovered in respect of his medical report fee received from the defendant insurer.

35.3 The Second Respondent received monies from FH Consulting and/or Utopian Services and/or BCR (a company) and/or Mr FH (an individual) which were calculated by reference to the number of instructions issued to Dr A. The payments received varied between £30 (for all instructions amounting to a report fee of less than £350) and £50 (for all instructions which exceeded that threshold) per entry.

35.4 The total amount of payments made by Mr FH in relation to Dr A was around £600,000, of which the Second Respondent accepts that he personally received around £16,000 by way of direct transfer into his personal bank account.

35.5 The Second Respondent was aware that the monies received were commissions which ought to have been disclosed to the claimants as clients of the Firm. The Second Respondent did not inform clients in respect of whom medical reports were obtained

that such payments had been received. None of the clients gave their consent, whether informed or otherwise, to the retention of such payments by the Second Respondent.

Facts agreed by the Third Respondent

36. The following facts and matters were agreed by the Third Respondent, in the terms noted:

36.1 In the course of his work with the Firm, the Third Respondent was approached by Mr Brian Barso, the First Respondent and Mr FH, director of BCR Legal Services Ltd, to broker an introduction between the firm and Accident Assistance ("AA"), a large CMC, such that AA would become a work provider of personal injury claims to the Firm. The Third Respondent approached AA to secure their agreement that BCR would provide ATE insurance on cases referred to the firm by AA.

36.2 Having successfully secured referral of work from AA to the Firm, an introduction brought about by the Third Respondent during the course of his employment, clients referred to the Firm by AA were able to obtain ATE insurance from BCR rather than another broker, Red Lamp, to whom such clients had previously been referred.

36.3 The Third Respondent received a payment in respect of, and calculated by reference to, the number of AA cases placed with the Firm for which BCR provided ATE insurance, where the premium was recovered from the defendant insurer.

36.4 The Third Respondent received £40 per case in respect of referrals received from AA and placed with BCR for ATE insurance over the period November 2008 – March 2009.

36.5 Payments were received by the Third Respondent from BCR and/or Mr FH directly into his personal bank account in or around the sum of £3,000 for referral of approximately 75 cases from AA to BCR.

36.6 The payments ceased when BCR entered into a formal arrangement and became the tied ATE insurance broker to AA (known as a "tied agent"). This had the effect of cutting the Third Respondent out of the arrangement directly, consequently the commission payments to him ceased.

36.7 The Third Respondent accepted that the payments, described by him as a "finders' fee", were in reality commission payments which should have been declared to claimants as clients of the firm.

36.8 The Third Respondent did not take steps to ensure that clients were informed, nor caused them to be informed, as to receipt of the commissions by the Third Respondent. Consequently, no client was able to give their consent, whether informed or otherwise, to the retention of the payments by the Third Respondent.

General

37. The First Respondent denied all of the allegations made against him. In particular, the circumstances in which payments were made to or for the benefit of the First Respondent were in dispute; the Applicant's case was that the payments were commissions but this was denied by the First Respondent. The factual background, evidence and arguments in relation to these matters will be set out below under the Findings of Fact and Law.

Witnesses

38. Ms Sarah Taylor, a Forensic Investigation Officer ("FIO") of the SRA gave evidence for the Applicant. She confirmed the contents of the FI Report dated 28 June 2011 and was cross-examined by the First Respondent.

39. Mr Diarmuid McKeown, the principal of McKeowns Solicitors, gave evidence for the Applicant. He confirmed the contents of his witness statement dated 2 March 2010 and its appendices and expanded on this in his evidence in chief. Mr McKeown was cross-examined by the First Respondent.

40. Mr John Carter, a solicitor formerly employed by the Firm, gave evidence for the Applicant. He confirmed the contents of his witness statement dated 23 August 2013, was cross-examined by the First Respondent and re-examined by Mr Pittaway.

41. Mr Geraint Harris, a solicitor formerly employed by the Firm, gave evidence for the Applicant. He confirmed the contents of his witness statement dated 23 August 2013 and was cross-examined by the First Respondent.

42. The First Respondent gave evidence on his own behalf and confirmed the contents of his witness statement dated 10 October 2013 and the skeleton argument produced to the Tribunal on 26 November 2013. The First Respondent was cross-examined by Mr Pittaway. The First Respondent was recalled on the morning of 27 November to deal with the contents of a particular document within the hearing bundle.

43. Mr Patrick White, a former employee of the Firm, gave evidence for the First Respondent. He confirmed the contents of his witness statement dated 8 October 2013, with an exhibited statement dated 30 July 2010 prepared in an Employment Tribunal matter. Mr White expanded on the contents of his statement in evidence in chief and was then cross-examined by Mr Pittaway.

44. Mr David Brennan, a former employee of the Firm, gave evidence for the First Respondent. He confirmed the contents of his witness statement dated 2 October 2013, on which he expanded in evidence in chief and was cross-examined by Mr Pittaway.

45. Mr Frank Harrold, a former director of BCR and owner/operator of other businesses including FH Consulting, Utopian Services Limited and WMO Services Ltd gave evidence for the First Respondent. He confirmed the contents of his witness statement dated 8 October 2013, on which he expanded in evidence in chief, and was then cross-examined by Mr Pittaway.

Findings of Fact and Law

46. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondents' rights to a fair trial and to respect for their private and family lives under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

47. The Tribunal noted the admissions made by the Second and Third Respondents, as set out in the Statements of Agreed Facts and Proposed Outcome. The Tribunal was satisfied on the evidence presented and on the admissions made that the facts admitted by the Second and Third Respondents had been proved as against them. The facts agreed and admitted by the Second and Third Respondents were not taken into account in considering the allegations against the First Respondent.

48. The Tribunal made a number of findings of fact and law which were then considered in the light of the specific allegations made against the First Respondent.

Findings in relation to the rules governing referral arrangements and commissions

49. The First Respondent denied all of the allegations, and in particular he denied that certain payments he had received were commissions and/or that he had failed to make referrals to parties in good faith. It was important for the Tribunal to be satisfied as to the requirements of the relevant Rules and/or Code of Conduct at the material times. Paragraphs 50 to 52 set out the requirements which the Tribunal was satisfied applied at the relevant times.

50. The Solicitors Practice Rules 1990 ("SPR") were in force at all material times prior to 1 July 2007. The provisions relied on by the Applicant were:

50.1 Rules 1(a) and (c), which read:

> "A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair any of the following:
>
> (a) the solicitor's independence or integrity;
>
> (b) the solicitor's duty to act in the best interests of the client"

50.2 Rule 3, which read:

> "Solicitors may accept introductions and referrals of business from other persons and may make introductions and refer business to other persons, provided there is no breach of these rules and provided there is compliance with a Solicitors' Introduction and Referral Code promulgated from time to time by the Council of the Law Society with the concurrence of the Master of the Rolls"

50.3 Rule 10, which read:

> "(1) Solicitors shall account to their clients for any commission received of more than £20 unless, having disclosed to the client in writing the amount or basis of calculation of the commission or (if the precise amount or basis cannot be ascertained) an approximation thereof, they have the client's agreement to retain it.
>
> (2) Where the commission actually received is materially in excess of the amount or basis or approximation disclosed to the client the solicitor shall account to the client for the excess.
>
> (3) This rule does not apply where a member of the public deposits money with a solicitor who is acting as agent for a building society or other financial institution and the solicitor has not advised that person as a client as to the disposition of the money."

51. The Applicant further alleged breaches of Section 4(1) of the Solicitors Introduction and Referral Code 1990 ("SIR Code"), which read:

> "(1) If a solicitor recommends that a client use a particular firm, agency or business, the solicitor must do so in good faith, judging what is in the client's best interest. A solicitor should not enter into any agreement or association which would restrict the solicitor's freedom to recommend any particular firm, agency or business.

52. The Solicitors Code of Conduct 2007 ("SCC") applied at all material times from 1 July 2007. The Applicant alleged breaches of the following Rules:

52.1 Rule 1.02 – You must act with integrity

52.2 Rule 1.04 – You must act in the best interests of each client

52.3 Rule 2.06, which read:

> "If you are a principal in a firm… you must ensure that your firm pays to your client commission received over £20 unless the client, having been told the amount or, if the precise amount is not known, an approximate amount or how the amount is to be calculated, has agreed that your firm may keep it."

The Tribunal noted that the Guidance to the SCC, in the section dealing with Rule 2.06, read:

> "A commission:
>
> a) is a financial benefit you receive by reason of and in the course of the relationship of solicitor and client; and
>
> b) arises in the context that you have put a third party and the client in touch with one another".

Rule 9.03(1) SCC read:

> "If you recommend that a client use a particular firm, agency or business, you must do so in good faith, judging what is in the client's best interests."

53. The Tribunal noted that the purpose of the rules was to ensure a solicitor's independence and ability to act and advise in the best interests of his/her clients, without being compromised by any conflicting financial interest. The Tribunal was satisfied that the Firm was permitted to pay for referrals of work and introductions, provided it adhered to the relevant rules. The Tribunal also noted that Principle 15.04 of the Guide to the Professional Conduct of Solicitors, which accompanied the SPR, provided that a solicitor must disclose with complete frankness whenever he or a member of his staff might obtain any personal interest or benefit in a transaction in which the Firm was acting for a client. The guidance to Rule 2.06 of the SCC made it very clear that "commission" included a payment made to a solicitor for introducing a client to a third party; there was no reason to think that definition was any different prior to the introduction of the SCC.

54. The Tribunal considered whether or not the First Respondent was aware of the various rules, regulations and requirements concerning the payment of referral fees and receipt of commissions. At paragraph 7 of his witness statement, after stating that he had never had any training in relation to compliance, and that he was not the Firm's compliance manager, the First Respondent stated,

> "…I was aware of the referral fee rules to a degree, I do not deny that although I never saw a warning card."

Mr Pittaway asked the First Respondent in cross-examination if he was aware of the rules concerning commissions. The First Respondent told the Tribunal that he was "not exactly" familiar with the rules, but he understood that disclosure of commissions was required. In response to a further question, the First Respondent told the Tribunal that he knew the rules were something along the lines that the amount of commission had to be disclosed. The Tribunal was therefore satisfied to the required standard that, on his own evidence, the First Respondent knew the main principles which applied although it accepted that he may not have known the details of each and every rule or requirement.

The role of the First Respondent in the Firm

55. The evidence of Mr McKeown and the First Respondent was consistent insofar as it dealt with the First Respondent's work history and his importance to the Firm and its growth. The Tribunal therefore found as undisputed facts that:

55.1 The First Respondent had worked for an insurance company for about 2 years after leaving university and then (in 1994) began to work for the Firm as a personal injury caseworker. At that time, the only principal in the Firm was Mr McKeown.

55.2 The First Respondent undertook the necessary courses, including the Legal Practice Course, on a part-time basis whilst working for the Firm and was admitted as a solicitor in 2000. The First Respondent became the second principal in the Firm in

2001 and owned 45% of the partnership. The Firm was incorporated in 2004 and the First Respondent held 45% of the equity, with Mr McKeown owning the remainder. At the time the First Respondent became a partner the Firm had an office in Northern Ireland which employed about seven staff and an office in St Albans, which employed about sixteen staff.

55.3 The First Respondent had a role in business development, which role involved meeting representatives of CMCs, insurers and insurance brokers and the like with a view to attracting work to the Firm and then maintaining a relationship with the various contacts and work providers. The Firm grew rapidly, and it was generally accepted that this was largely due to the First Respondent's work in developing the business. By 2006/7, the Firm was employing approximately 140 staff, mostly in personal injury, in four offices. The Firm continued to grow until about 2008.

55.4 From about 2006/7 Mr McKeown spent less time at either the English or Northern Ireland offices and instead spent some time in France.

55.5 From about mid-2007 the First Respondent also spent less time at the Firm's offices, which coincided with the discovery of a serious illness and treatment of his younger daughter, P, (which condition and treatment was ongoing). In order to respect the right of that child to privacy, no specific details are given of the illness or treatment but there was no dispute that the circumstances were greatly concerning to the First Respondent.

55.6 In or about autumn 2008 the Firm's management structure was reviewed, with the formation of a "board" albeit there was no change in the ownership of the Firm and Mr McKeown and the First Respondent remained the only directors.

56. There was no doubt that the First Respondent had played a substantial role in the expansion of the Firm by developing relationships with organisations and individuals who could refer work to the Firm. It was of concern to the Tribunal that a solicitor who played such a key role in developing business relationships would have limited knowledge of the rules about payment of commissions and referral fees, which appeared to be the First Respondent's evidence as noted in paragraph 54 above. This concern was exacerbated by the fact that the First Respondent, in his own evidence, had told the Tribunal that the money involved in the personal injury field was in "huge figures" and there was money to be made in the industry; he further commented that there was nothing wrong with that.

57. There was a dispute on the evidence about how much time the First Respondent spent working at the Firm's offices and/or on behalf of the Firm (given that much of his work, on his own evidence, would involve meeting contacts). There was also a dispute about whether the First Respondent had been responsible for compliance matters and whether he was the de facto "managing director" of the Firm.

58. The essence of Mr McKeown's evidence was that his role was that of "Chair" of the Firm, with involvement in the major and strategic decisions whereas the First Respondent was responsible for much of the day-to-day management, with a practice manager dealing with administration. The First Respondent's evidence was that he

was certainly not responsible for compliance. Mr Carter was undoubtedly the compliance officer from summer/autumn 2008 but he told the Tribunal that the First Respondent had had this role until 2008 although there had been no named compliance officer. Mr Harris had told the Tribunal that the First Respondent had been responsible for staff supervision, management systems and discipline. Mr White's evidence was that the First Respondent was not responsible for compliance (in the period prior to Mr Carter taking on this role) and Mr Brennan's evidence was that he would have asked other senior solicitors about compliance, not the First Respondent.

59. What was very clear to the Tribunal was that, at least until late 2008, there was considerable scope for confusion about roles within the Firm and who was accountable for which areas. The Tribunal was satisfied that Mr McKeown and others had assumed that the First Respondent dealt with this area, whilst the First Respondent did not see it as explicitly within his remit. This lack of clarity was a matter of concern for the Tribunal.

60. The Tribunal noted that the First Respondent had placed considerable emphasis in his evidence on his assertion that he was not specifically responsible for compliance within the Firm. In particular, there had been evidence given by several witnesses – in particular Mr McKeown, Mr Harris and the First Respondent – about the steps the First Respondent had taken in relation to the Firm's client care letters, in the sections dealing with commissions and financial interests. The form of CFA in use in or about December 2005 read, at the relevant section:

> "We do have an indirect interest in recommending the policy as our work provider requests that we do so, although we ultimately will not recommend the policy to you if we do not feel it is in your best interest or a better policy is available to you. We are satisfied that in this instance the policy is suitable for your needs."

The example CFA shown to the Tribunal with this wording related to an instruction given to the Firm on 9 December 2005, where the policy was issued (via BCR) on 15 December 2005.

The version of the Firm's CFA in use in or about December 2008, at the relevant section, read:

> "The companies with which we deal provide cover for claims of this nature and are prepared to allow the premium to be deferred until the outcome of the case is known… We do not have any financial interest in any insurance arrangement we may recommend to you.
>
> …We do have a direct financial interest in recommending the policy as our work provider requests that we do so, although we ultimately will not recommend the policy to you if we do not feel it is in your best interest or a better policy is available to you. We are satisfied that in this instance that the policy is suitable for your needs."

The First Respondent referred in particular to an email he sent to Mr CS, Mr Harris and the Second Respondent on 27 December 2005, at a comparatively early stage in the relationship between the Firm/First Respondent and Mr Harrold/BCR. The email read,

> "Hi all.
>
> This is the info needed re the BCR CFA insurance policy that we need to follow.
> We cannot claim from it but get a decent kick back.
>
> We need to add something to the client care letter re financial interest and anything more we see fit re indirect interest to protect ourselves…"

There was no evidence that the client care letter or standard form CFA had been amended in the light of this email. The First Respondent suggested that the fact no changes had been made showed that he was not in charge of compliance as otherwise some action would have been taken as a result of his email. It was not disputed that the First Respondent himself could not change a precedent on the computer system but others, including Mr Harris and in particular Mr CS could do so.

61. As noted above, the Tribunal could not be sure that the First Respondent had had a particular responsibility for compliance within the Firm. However, he was a solicitor and a principal in the Firm and so had responsibility for his personal conduct and, as a principal, for the overall management of the Firm. The Tribunal did not find that any of the allegations made against the First Respondent turned on whether or not he had particular responsibility for compliance, or any other area within the Firm. The only allegation to which this might be relevant was allegation 1.3. The First Respondent did not at any point give evidence or even suggest that he would have behaved differently in relation to receipt of monies from BCR/Mr Harrold and/or Dr A if the client care letter had been changed; the proposed changes to the client care letter mentioned by the First Respondent in the email of 27 December 2005 could only be relevant to whether or not he had taken unfair advantage of clients (e.g. by failing to inform them of the payments he received). The First Respondent had not suggested at any point that the client care letters should be changed to inform clients that he, personally, was receiving money from BCR/Mr Harrold and/or Dr A, let alone the amount he received or how it was to be calculated. Under the relevant rules, it would not be sufficient simply to state there was an interest without also specifying the amount of any commission received or how it was calculated; of course, the First Respondent maintained that the money he received was not in the nature of a commission. In any event, in his closing submissions the First Respondent had accepted that the Firm's disclosure had been inadequate and he should have checked that proper disclosure had been made.

62. As noted above at paragraph 55.5, the First Respondent had spent less time in the office from mid-2007; on his own account, which was not disputed to any significant degree by the Applicant's witnesses, he had only been in the office on about 7 days in a period of over a year from mid-2007. (Mr Harris initially gave evidence that the First Respondent was in the office most days, but later accepted the First Respondent's account). However, there was good evidence that he had remained in regular contact with the Firm's offices, e.g. by email or telephone calls. In the same

period, the First Respondent's evidence was that he was undertaking work for BCR/Mr Harrold in developing their business contacts and that the payments he received from that source were because of this work for those businesses. There was some lack of clarity in the evidence about how much time the First Respondent spent on working for the Firm, in which he was a principal, and for the external businesses run by Mr Harrold so the Tribunal could make no specific finding in that regard. The Tribunal noted that at paragraph 22 of his witness statement, the First Respondent stated:

> "I know that the amounts were large, at the time there was a lot of money to be made with these introductions, quite incredible really, which is why I worked so hard on that area for BCR"

and went on to state that the work he did for BCR was not dependent on his being a solicitor and that it did not interfere with his job at the Firm. Nevertheless, it was of some concern that the First Respondent had been able to devote even part of his energies to an external business when, on his evidence, he was significantly distracted and concerned about his daughter's medical condition.

63. The Tribunal noted that Mr McKeown maintained that at an early stage in the partnership with the First Respondent it had been agreed that neither of them would enter any business arrangements outside of the partnership. Mr McKeown gave as an example an estate agency business which the Firm had tried to set up, which had been unsuccessful, but in relation to which he and the First Respondent had agreed on the steps to be taken. The First Respondent did not explicitly deny there was such an agreement, but in his statement he referred to a statement given to the police on 22 September 2010 in which he stated that,

> "In my role as a director of (the Firm)… I made (Mr McKeown), as my fellow director…aware that I had business arrangements with (Mr Harrold) and BCR… I also strongly denied that (Mr McKeown) was unaware that I provided consultancy services outside (the Firm)…"

The First Respondent had given no information about when or in what form he had supposedly made Mr McKeown aware of his business arrangements with Mr Harrold/BCR. The Tribunal was satisfied on the evidence presented that there was a general agreement between Mr McKeown and the First Respondent that they would not engage in external business arrangements.

The First Respondent's relationship with Mr Harrold/BCR

64. It was not disputed that the First Respondent met Mr Harrold of BCR in or about late 2005 and from shortly thereafter the Firm began to place ATE insurance through BCR. The email referred to at paragraph 60 above illustrates this. Over the following years, the Firm placed much of its ATE insurance through BCR, save where work had been introduced by a "source" which required insurance to be placed with its preferred insurer/broker. The FI Report recorded that the Firm had recovered premiums on policies brokered by BCR in 10,533 claims where the policy was in force up to 27 February 2009 and that as that date a further 6,789 BCR policies were outstanding. The Tribunal found that, with typical ATE premiums of £350 or £450

per case, BCR's income from work supplied to them by the Firm in the period of just over three years to February 2009 had generated payments to BCR of between £3.6 and £4.7 million, with the potential for a further £2.3 to £3 million if the outstanding premiums were recovered. The relationship between the First Respondent and Mr Harrold/BCR had produced a significant income stream for BCR. The issue of the profits available will be considered further below.

65. In addition to the First Respondent's agreement with Mr Harrold/BCR concerning the placing of ATE insurance through BCR, the Tribunal also found (and it was not disputed) that the First Respondent and Mr Harrold had been in business together (with a Mr S) as "WMO". The First Respondent explained in his witness statement, at paragraph 24, that WMO, "took data from HelpHire and some other companies, passed it to Chameleon telesales who called the clients and if they had been injured passed it to their panel solicitor." The First Respondent went on to explain that the Firm did not take this work, in order to avoid any conflict of interest. The First Respondent was keen to stress that WMO had been properly compliant, with a licence from the Ministry of Justice and an appropriate data protection license. The First Respondent estimated that WMO had "generated about £500,000 to £1 million".

66. In the light of the BCR and WMO relationships, there was no doubt that the First Respondent and Mr Harrold were in a business relationship which had considerable financial benefits for both of them. In addition, they were friends; the Tribunal noted, for example, that Mr Harrold was a god parent to one of the First Respondent's children.

67. The First Respondent contended (and it was not disputed) that his relationship with Mr Harrold was well known within the Firm and that, for example, WMO sponsored the Firm's football team. Mr White told the Tribunal that Mr Harrold would organise "drinks for the boys" and social events. Mr White also told the Tribunal that he could not recall any work coming into the Firm via WMO, which accorded with the First Respondent's evidence on this point. What was disputed was whether Mr McKeown and others knew of the financial relationship between the First Respondent and Mr Harrold and/or the extent of that financial relationship.

68. Mr McKeown told the Tribunal that whilst he had no reason to be concerned about the First Respondent's conduct until about December 2008 he had felt that Mr Harrold was drawing the First Respondent away from Mr McKeown as a business partner. He also told the Tribunal that prior to a telephone conversation between himself and the First Respondent on 7 March 2009 he did not know that the First Respondent received payments (by the mechanism described below or otherwise) from BCR/Mr Harrold. Mr McKeown confirmed under cross examination that he knew that the First Respondent was introducing his contacts to Mr Harrold but that he had been unaware of any payments being made until the telephone call in March 2009. The First Respondent put to Mr McKeown that Mr Harrold had been putting money into the Firm but Mr McKeown did not accept he had known about this.

69. The First Respondent's case on this issue was that the Firm had agreed that Mr Harrold/BCR could retain "untied commissions" (explained further below) and in exchange he would use his contacts to help expand the Firm, in particular by introducing Industrial Disease ("ID") work, through some of his other businesses.

There was no dispute that the Firm's ID work had increased substantially in volume in the period after 2006, such that by late 2008/early 2009 the Firm dealt with one of the largest caseloads of ID claims in the country. Mr McKeown asserted that in fact many of the claims introduced, for which the Firm was paying a referral fee, were not good quality claims; in short, the Firm was receiving a large quantity but not high quality referrals. The First Respondent asserted that because of the agreement under which Mr Harrold/BCR could retain the "untied commissions" the referral fees and terms of introduction were more advantageous to the Firm than was standard in the personal injury claims industry. (The Tribunal noted with some concern that much of the discussion concerning personal injury claims was in the context of this being an "industry", which generated substantial incomes for many of those involved in it. In the context of this hearing at least there was little acknowledgement of the personal difficulties experienced by genuine claimants injured by the negligence/breach of duty of others; those clients appeared to be largely incidental to the operation of the various businesses involved.)

70. In his skeleton argument, produced to the Tribunal after conclusion of the Applicant's evidence, the First Respondent asserted that after cross examination:

> "(Mr McKeown) admits to a meeting with the First Respondent and Geraint Harris in which it was approved that (Mr Harrold) could retain (these) untied commissions."

The Tribunal considered Mr McKeown's witness statement, his evidence in chief and evidence given under cross-examination. The Tribunal did not find any reference to such a meeting in Mr McKeown's witness statement, or evidence in chief. Under cross-examination, Mr McKeown had admitted that he had agreed that Mr Harrold could retain commissions which were generated by work from Endsleigh Insurance but he denied that he was aware of any further arrangements for Mr Harrold to receive commissions. The Tribunal could not find a note that the First Respondent had put to Mr McKeown that any particular meeting or discussion had occurred, let alone an admission in oral evidence that Mr McKeown had agreed that Mr Harrold could take commissions which might otherwise have been due to the Firm, save in respect of Endsleigh as noted above. Indeed, the Tribunal could not find a reference to any such meeting in the First Respondent's witness statement and it was unclear when the alleged meeting (or discussion) was supposed to have taken place. It was, however, stated at paragraph 13 of his statement that, "It was agreed that (Mr Harrold) could retain any commissions that (the Firm) allowed him to." Mr Harris, under cross-examination, had told the Tribunal he did not recall any meeting at which there had been a discussion about Mr Harrold taking commissions and putting these towards growing the Firm's business; it had been asserted by the First Respondent that Mr Harris and Mr McKeown had been present when the agreement was made.

71. By reference to the First Respondent's skeleton argument, it appeared that the First Respondent asserted that the agreement had been reached prior to the arrangement whereby the First Respondent would introduce his contacts to Mr Harrold/BCR. In his statement, the First Respondent suggested that arrangement had been made (initially with some input from the First Respondent's then wife, NB) "during 2005" (paragraph 15) and in the skeleton argument it was said that this arrangement had been "within a few months" of the agreement on commissions. If there had been a

meeting (or discussion), as asserted by the First Respondent, it must have occurred within a matter of months of Mr Harris joining the Firm, which was in August 2005; whilst Mr Harris was a senior solicitor within the Firm he was not part of the "board" of the Firm until 2008.

72. For reasons elaborated upon below, the Tribunal preferred the account of Mr McKeown and Mr Harris, to the effect that there was no agreement by the Firm whereby Mr Harrold could retain commissions which could otherwise have been paid to the Firm. The Tribunal was satisfied, however, that such an arrangement was made between the First Respondent and Mr Harrold/BCR and that as a principal of the Firm he would have ostensible authority to enter into such an arrangement. The Tribunal was satisfied that whilst Mr McKeown knew of the working relationship between the First Respondent and Mr Harrold he did not know that the First Respondent received a financial benefit from that relationship until the telephone conversation on 7 March 2009.

The Firm's policy on commissions

73. Mr McKeown, Mr Harris and Mr Carter all gave evidence to the effect that the Firm had a policy of not taking commissions. For example, in his witness statement Mr Harris stated, at paragraph 12,

> "It had always been the firm's policy that commission from third parties was not to be taken for undertaking work on behalf of the firm's clients."

He had maintained that position in evidence. The First Respondent had put to Mr Harris the email quoted at paragraph 60 above, in particular the quote, "We cannot claim from it but get a decent kick back". Mr Harris told the Tribunal he understood the "kick back" in question to be further referrals of work, not a direct financial benefit or commission although such an interest should also be disclosed to clients as additional referrals would be a financial benefit to the Firm.

74. Mr Carter stated in his witness statement, at paragraph 26,

> "It had been a long established principle within the firm that McKeowns did not take commissions arising out of claims received from clients."

Mr Carter told the Tribunal that there had been discussions about this policy in late 2008/early 2009. The Tribunal noted that any such discussions post-dated the First Respondent's business arrangement with Mr Harrold/BCR. Mr McKeown had been unmoveable whilst giving evidence and under cross examination on the general principle of not accepting commissions within the Firm. However, he had had to concede that there had been some arrangements with some insurers (in particular Endsleigh, as noted at paragraph 70) and that referral fees had been paid to some work sources in breach of the regulations before such payments had been permitted. Mr McKeown was questioned, for example, about an arrangement with Wiseway whereby the Firm had received £125 each time there was recovery under a Wiseway insurance policy. His explanation was that the Firm had loaned that company approximately £1.1 million and that this was one of the methods of repayment of the

loan and that the Applicant had reviewed the arrangement and taken no action against the Firm.

75. In contrast to the evidence given by the Applicant's witnesses, the First Respondent and his witnesses gave evidence that the Firm received commissions. For example, in his witness statement at paragraph 11 Mr White stated,

> "It was well known that the firm retained a small commission from ULR Norwich and Wisecall ATEs."

In a witness statement, not confirmed in evidence and therefore of little evidential weight, Katie Silker described her experience in the personal injury claims industry and asserted that,

> "I have worked with probably 15 law firms in my career and it is very obvious that every single one of them had a system of collecting commissions in some way, be it directly or in the main personally."

Whilst this was an untested assertion, it accorded with the First Respondent's evidence which was to the effect that commissions were widely paid and received within the personal injury claims sector.

76. From an unknown date, but probably about 2004, the Firm sent a number of instructions to Dr A to prepare medical reports on clients who were bringing personal injury claims. As recorded in the FI Report – and not challenged – in about 500 cases a fee of £250 had been recovered from the defendants' insurers in respect of Dr A's fees but, on receipt, only £150 was paid to Dr A with the remaining £100 being diverted to the office bank account. Mr McKeown had maintained that he had been unaware of this and, indeed, unaware of Dr A until late 2008. In January 2007 the First Respondent had taken steps to stop that practice. The Tribunal noted an email from the First Respondent to Mr CS and Mr Harris on 29 January 2007 which was copied to over 40 recipients (not including Mr McKeown) on 30 January 2007 and which read, so far as relevant:

> "1. (Dr A's) fee must be billed as presented and whatever is paid by (T?) must be paid to Dr A. It is no longer £150 but the bill in full; anything less than this is not allowed and will need to be repaid to (Dr A) from your bonus. This should not be necessary as we just need to pay his bill as normal like we do any other consultant. This is as of now…"

77. What the Firm's dealings with Dr A – in the period to late January 2007 – clearly showed was that the Firm's relationships with third parties were not properly regulated and operated in accordance with the relevant rules and principles. If McKeown did not know about the improper manner in which Dr A was being paid – such that the Firm was retaining £100 of the amount recovered from the defendant as a disbursement for a medical report – it showed that the management of the Firm by him and/or the First Respondent had been ineffective or inadequate. There was no clarity in the evidence about who had started the practice of making deductions from Dr A's bills. Whether or not the First Respondent had been aware of it or had permitted it, prior to the email of January 2007 the Firm had been claiming

disbursements from another party which were not paid in full to the medical expert who had provided the service in respect of which the disbursement was claimed. There were no allegations based upon the way Dr A was paid prior to February 2007 but these facts illustrated that the Firm was not wholly compliant and that there appeared to be a culture in which the "official" policy was not in practice followed.

78. The Tribunal noted the various accusations which the First Respondent had raised concerning Mr McKeown and the Firm in relation to the taking of commissions and improper payments of referral fees. The Tribunal was not required to make any findings in relation to such matters, although the facts raised could have an impact on the credibility of the witnesses. Even if the Tribunal had concluded that Mr McKeown and/or others in the Firm had acted improperly, such matters would not be relevant to the particular allegations and matters raised against the First Respondent unless the evidence of the Applicant's witnesses was tainted. Improper conduct by Mr McKeown/the Firm would not excuse any improper conduct by the First Respondent although it might be relevant to mitigation and to explain how the First Respondent's conduct had arisen.

79. Having weighed all of the evidence on the question of whether or not commissions were taken by the Firm, the Tribunal concluded that in principle commissions were not taken. However, this principle was in practice breached, not least in relation to Dr A prior to late January 2007.

"Hold harmless" insurance arrangements

80. In the course of the hearing there was considerable evidence about the prevalence or otherwise of so called "hold harmless" agreements in the personal injury sector. There was no substantial dispute about the meaning of this term and so the Tribunal was able to adopt the explanation given by the Applicant in the Rule 5 Statement.

81. A "full risk" ATE insurance policy was one in which the insurer bore the full risk of an insured event occurring and bore the full cost of that insured event subject, of course, to any limitations on the policy. Such arrangements were described by the Applicant as "typical" insurance arrangements and the Tribunal accepted that this would certainly be what most people would consider an insurance arrangement to be. Where there was a "hold harmless" agreement, however, behind the standard "full risk" ATE insurance policy there would be a further agreement between the insurer and the solicitor who was instructed on behalf of the client. Under such an agreement the solicitor would agree to indemnify (or "hold harmless") the insurer in respect of all or part of the claims arising from the ATE insurance. So, if there was a claim on the policy (e.g. in the event of an unsuccessful personal injury claim in which the claimant became liable for the defendant's legal costs) the insurer would be liable to pay out but was indemnified from having to do so by the solicitor. This had the effect of greatly reducing the insurer's overall risk, as the insurer would only pay out in the event not only of a claim on the policy but if the solicitor was unable to pay e.g. if the business had failed.

82. The Tribunal heard evidence that such arrangements were commonplace and, indeed, that the Firm had such arrangements with insurers such as ULR Norwich. The

Tribunal was referred, for example to an email from Mr S of ULR (who was later also part of WMO with the First Respondent and Mr Harrold) dated 26 January 2002 which confirmed the outcome of a meeting about a referral arrangement between the Firm and ULR and stated, so far as relevant,

> "Finally, at no stage will you look to make a claim under the legal expenses policy or the after (the) event policy supplied."

Mr McKeown confirmed in his evidence that he accepted that the Firm may not have claimed on these insurance policies "because (the Firm) was getting a lot of fees from that source" i.e. referrals. There appeared, on the basis of the evidence, to be a culture whereby if claims were made against an ATE policy the work referrer could withdraw or reduce the volume of work supplied and Mr McKeown told the Tribunal that he accepted that the Firm would sometimes absorb the costs but that this did not mean there was a "hold harmless" agreement.

83. The Tribunal did not need to find whether or not the Firm had entered into any "hold harmless" agreements with insurers prior to the arrangement with BCR which was relied on by the Applicant in making the allegations. However, the Tribunal noted that the First Respondent relied on the prior existence of such agreements, which he said were known to Mr McKeown, as part of his explanation of the circumstances in which he had signed a Deed of Indemnity with Elite Insurance Company Limited ("Elite"). The First Respondent told the Tribunal that he believed Mr McKeown had entered a similar agreement with ULR, although the arrangement could have been more in the nature of a "gentleman's agreement"; the First Respondent had therefore believed he could enter such an agreement with BCR's underwriters.

84. The Tribunal found – and there was no dispute on this point – that Elite underwrote many of the ATE policies placed by BCR. In a Deed of Indemnity which appeared to have been made between the Firm and Elite it appeared that the Firm undertook to:

> "indemnify Elite and any of its directors, officers, employees and/or shareholders against any and all claims, losses, proceedings, demands and expenses which may be made by or against Elite or its directors, officers, employees and/or shareholders arising from or in connection with, whether directly or indirectly, the cases referred to Elite by (the Firm) and for which cases Elite has, at the request of (the Firm) issued policies of insurance to the Firm's clients."

This document was dated 12 September 2006 and was signed by the First Respondent but not by Mr McKeown, whose evidence was that he was unaware of this agreement. The Tribunal noted that Elite had subsequently acknowledged that the agreement was not binding on the Firm. The First Respondent told the Tribunal, and the Tribunal accepted, that in fact BCR (if not Elite) had paid out in the small number of cases in which claims had been made under ATE insurance policies.

85. Notwithstanding the apparent "hold harmless" agreement from September 2006 the terms of the ATE insurance appeared to be the same as in a "full risk" policy; it was not possible to discern from the documentation whether the policies were "full risk"

or "hold harmless" and the defendants' solicitors were not informed that the policy was made under a "hold harmless" arrangement.

86. This was significant, in the Tribunal's view, as the paying party would be unaware of the distribution of the insurance premium which was claimed. The Tribunal noted that a typical distribution was described by Mr Harrold in the course of an interview with the police on 5 March 2009. According to Mr Harrold, of a typical gross premium of £420 on a "full risk" policy: £20 would be paid as insurance premium tax; £200 would go to the "source", where the "source" was the party who referred the matter to BCR (as BCR and Mr Harrold were prepared to pay commissions to the "source" in return for a steady stream of cases requiring ATE insurance to be placed with BCR); £160 would go to BCR, part of which was held in escrow on behalf of Elite to pay for any claims made under "full risk" policies; £36-60 of the premium would go to Elite. Also according to the information Mr Harrold gave to the police, where there was a "hold harmless" agreement, and assuming the same gross premium of £420, the distribution would be as follows: £20 in insurance premium tax; £300 to the "source"; £90 to Elite (although Elite stated it received £30); £20 retained by BCR.

87. The Tribunal noted with concern that on both types of policy as described by Mr Harrold, a small proportion of the premium was used actually to provide a pot of money from which claims could or would be paid and a large percentage (50-75%) of the premium paid was in fact distributed as commissions to whoever had introduced the work. There was a risk, therefore, that premiums in the personal injury sector had been inflated above the level required to provide insurance (as generally understood); the Tribunal did not need to make a finding on this point. It was not surprising that there was some distaste in some quarters about the personal injury sector; indeed, the First Respondent himself described it in evidence as a "nasty industry". Of course, there were many decent and honourable solicitors who acted completely ethically and properly but evidence such as that heard in the course of this hearing did not help the reputation of those engaged in personal injury work.

88. The Tribunal found that whether or not a policy placed through BCR with Elite was a "full risk" or "hold harmless" policy, the "source" would be paid a significant sum typically of between £200 and £300. In giving this evidence, clearly Mr Harrold had no concerns about whether or not payment of commissions was ethical. As he was not a solicitor he was not bound by the professional rules governing the conduct of solicitors.

89. The Tribunal noted that in Mr Harrold's police interview he did not identify the First Respondent as a "source" in relation to insurance commissions (although he did identify the First Respondent's role in relation to Dr A) and the First Respondent denied that he had been paid commissions for introducing ATE insurance work to BCR. The Tribunal's findings on this point are set out below. However, the Tribunal found that where an insurance policy was issued on the basis that it was under a "hold harmless" agreement the amount available for distribution (and actually distributed) to the "source" was larger than under a "full risk" arrangement.

Payments made to or for the benefit of the First Respondent

90. There was little dispute about the amounts of the payments made to or for the benefit of the First Respondent although there was significant dispute about the nature of those payments and, in particular, whether they were commissions. There were two broad categories of payments considered by the Tribunal – those from BCR/Mr Harrold and his companies calculated by reference to insurance policies placed through BCR and those in relation to Dr A. The First Respondent maintained that the payments received were for work done by him and/or NB in introducing work to BCR and were not commissions.

91. There was no doubt that the Firm placed ATE insurance through BCR. According to Mr Harrold's statement to the police, the "source" of that work would be paid a commission.

92. The evidence of the First Respondent and Mr Harrold – and this could not be gainsaid by the Applicant's witnesses – was that in 2005 or 2006 (the dates were not entirely clear) there had been a discussion involving NB, who was then the First Respondent's wife, about business opportunities. The proposed venture, as described, would involve NB introducing the First Respondent's contacts to Mr Harrold to enable BCR to increase its business, in return for which a consultancy fee would be paid. However, it was clear from the evidence of the First Respondent and Mr Harrold that NB actually undertook little, if any, work on behalf of BCR. Rather, it was the First Respondent's evidence that he had undertaken work for BCR which, he said, was not in conflict with his work for the Firm. By way of example, the First Respondent referred to introducing a Miss SW of AC (a CMC) to Mr Harrold and securing an agreement whereby AC asked all of the panel solicitors they used to place policies through BCR. This, and similar arrangements, assisted the growth of BCR according to the First Respondent's evidence and that of Mr Harrold.

93. The Tribunal was referred to a number of invoices in the name of "NDB Consulting Services" on headed paper which contained the home address of the First Respondent and NB. These invoices began to be issued from 26 July 2007; prior to that date a schedule of payments showed that NDB Consultancy had been paid a total of over £664,000 between 12 May 2006 and 23 July 2007. Those payments had been made by a number of bodies linked to Mr Harrold: BCR, FH Consulting and WMO (in which the First Respondent had an interest). From late July 2007 invoices were issued in the name of NDB Consultancy to FH Consulting, WMO, ASL and BCR. A schedule of payments, which was not disputed by the First Respondent, showed that in the period from 12 May 2006 until 2 February 2009 payments totalling £2,413,658.40 (including VAT) were made to NDB Consulting by bodies controlled by Mr Harrold. There could be no doubt that significant sums had been received by or for the First Respondent both before and after the introduction of the SCC, although the bulk of the payments were made after 1 July 2007.

94. The Tribunal found, and it was not disputed, that each month the First Respondent would prepare a document called a "bordereau" which set out a schedule of the insurance premiums received by the Firm in respect of BCR policies i.e. where claims made by clients of the Firm had been concluded successfully and costs (including insurance premiums) recovered. The schedule for March 2008 (dated 7 April 2008)

was before the Tribunal and listed matters in which premiums of, typically £400 had been received by the Firm. The Tribunal also saw a covering letter dated 7 April 2008, with which the bordereau had been enclosed, from BCR (at its address in Finchley, London) to Mr Harrold of Utopian Services Limited at Mr Harrold's residential address in Wales. This letter read:

> "Dear Sirs
>
> March Commission
>
> | | |
> |---|---|
> | McKeowns | £100,891.42 |
> | Action settled claims | £2,730.00 |
> | McKeowns ULR settled cases | £1,160.00 |
> | Crusader settled cases | £715.00 |
> | Less refunds: see attached list | (£1,140.00) |
> | ULR advance | £945.00 |
> | ULR settled cases | £2,775.00 |
> | Less ULR refunds: see attached list | (£630.00) |
> | McKeowns overpayment | £240.00 |
> | Less paid to NDB | (£20,000.00) |
> | Total due | £87,666.42 |
>
> Yours sincerely…"

95. The Tribunal noted that the sums for March 2008 were in line with the level of payments for most months and, indeed, were lower than in many months.

96. The Tribunal was referred to a number of invoices from NDB Consulting Services addressed to various businesses operated by Mr Harrold for July 2007 as follows: to FH Consulting Ltd on 26 July for £75,000 plus VAT, described as "provision of ad hoc consultancy services, fee as agreed"; to AS Limited on 31 July for £20,000 plus VAT (of which £20,000 was noted as "paid on account"); also to AS Ltd (with different invoice number)n for £20,000 plus VAT of which, again, £20,000 was noted as "paid on account"; a third invoice to AS Ltd was in the same terms; to FH Consulting Ltd on 31 July for £7,000 plus VAT, again for "provision of ad hoc consultancy services, fee as agreed" of which £7,000 was noted as paid on account; to WMO Service Limited on 31 July for £20,000 plus VAT of which £20,000 was noted as paid on account; to AS Limited on 31 July for £20,000 plus VAT (again, £20,000 was noted as paid on account); to WMO Services Limited on 31 July for £47,000 plus VAT, of which £47,000 was noted as paid on account; to FH Consulting Ltd on 31 July for £20,000 plus VAT (of which £20,000 was noted as paid on account on 31 May); to WMO Services Ltd on 31 July for £6,500 plus VAT (of which £6,500 was noted to have been paid on account); to AS Ltd on 31 July for £20,000 plus VAT (expressed to be for May) for £20,000 plus VAT of which £20,000 had been paid on account; to FH Consulting Ltd on 31 July for £25,210 plus VAT, of which £25,210 was noted as being paid on account on 20 June: to FH Consulting Ltd on 31 July for £23,750 plus VAT of which, again, the basic amount was noted as being paid on account in June: to WMO Services Ltd on 31 July for £50,000 plus VAT of which the £50,000 was noted as being paid on account in June; to FH Consulting on 31 July for £30,000 plus VAT, with the principal sum being noted as paid on account on 4 July;

to FH Consulting Ltd on 31 July for £20,000 plus VAT of which the principal sum was noted as paid on account on 6 July; to AS Ltd on 31 July, expressed to be for May, for £30,000 plus VAT where the principal sum was noted as paid on account; and to WMO Services Ltd on 31 July for £50,000 plus VAT. In the light of these invoices and the schedule of payments made to NB there was no doubt at all that the sums passing from Mr Harrold's businesses to NB were huge. The First Respondent told the Tribunal that the various invoices were generated by an accountant who was also in business with Mr Harrold and Mr Harrold told the Tribunal that the method of payment through the various companies, rather than BCR, was "to keep the VAT clean, by making payments from a VAT registered company." The Tribunal did not need to make any findings in relation to Mr Harrold's motivation but simply found that all concerned accepted that the mechanism described – whereby monies were paid to BCR then paid via other companies to NB – had indeed been used.

97. The Tribunal noted an email in the name of NB, which the First Respondent confirmed in his Response to the Rule 5 Statement had been written by him (and which he exhibited to the Response), dated 20 December 2008 sent to Mr Harrold. That email read:

> "… It was a good year for me again, I am sure you would agree our agreement has been very fruitful for both of us.
>
> To confirm where we are, I have agreed to waive the original agreement to share profit (50/50) on the cases introduced by me and the associated intros from that introduction i.e. Accident Claims, Chameleon, Crusader, ULR, PIH, Broker Direct, Central Claims, Triple A and maintained your relationship with Midland Claims etc etc, you advise it has exceeded 1,500 policies a month, averaging RTA policies at about net £430 now and ID £1,575, profit on these ranging from £350 (where you pay no commission) and £200 for RTA and £1,300 to £500 on ID cases and of course any stepped premiums or higher one offs agreed – you mentioned taking an average of that at £325 bearing in mind the majority are RTA – based on 1,500 a month that's nearly £500,000 a month, or £250,000 each.
>
> I understand it is a bit too rich for everyone involved and I never expected it to snowball that much, I expect some of the contracts you would have picked up sooner or later yourself sooner or later, knowing (the First Respondent) would have given them to you instead of me.
>
> Anyway, I am happy enough for 2009 continuing with £20,000 plus VAT from BCR and understand you continue to prefer to pay me from another of your companies for whatever reason you see fit at £45,000 plus VAT, totalling £65,000 plus VAT a month or £780,000 a year, better than £3 million for you! Any problems with this, please let me know, (the First Respondent) is eager to ensure that any agreements we have continue to be completely unrelated to him, which of course they are, he did say, if he asked you for commissions on his work, it would be a lot more, but understand the provision of ID work to him works well enough…"

The Tribunal noted that this email was sent after it had become widely known that Dr A was being investigated by the police.

98. There was no dispute that, in fact, the money from BCR/other companies was received by or for the benefit of the First Respondent. Whilst the Applicant and First Respondent were in dispute about why the payments had been made and whether or not they constituted payment of commissions there was no dispute that the money related to the First Respondent and not to work done by NB. Indeed, the First Respondent told the Tribunal under cross examination that everyone (in particular Mr Harrold) knew that NB did not undertake work for BCR; he went on to tell the Tribunal that there was nothing wrong with having a business where the named person did not do the consultancy work as one could have set up a limited company and employed someone to do the work. The First Respondent did not accept the Applicant's proposition that the arrangement was, in effect, a sham and that he was deceiving people about the position and insisted that there was nothing wrong with the arrangement and lots of men would have similar businesses in the name of their wife for tax reasons. In the light of the First Respondent's evidence, it was clear that he accepted that he had been in receipt of the payments albeit via a) BCR, Utopian and other businesses controlled by Mr Harrold and b) his then wife. He also accepted when giving evidence that a number of emails sent in NB's name had been written by him

99. In relation to the monies received in respect of Dr A, the Tribunal found that until late January/early February 2007, the Firm had retained part of the monies which had been billed to the insurers. The Tribunal accepted that that practice had ended following the First Respondent's email of 29 January 2007, referred to at paragraph 75 above. Thereafter, the Firm sent Dr A the full amount he had billed. There was no dispute that Dr A had then been invoiced by Mr Harrold's businesses; Mr Harrold produced a schedule showing that FH Consulting Ltd and Utopian Services Ltd had received a total of £87,703.87 from Dr A in the period from 13 March 2007 to 1 October 2008 and the Tribunal found that this sum – if not more – had therefore passed between them. Again, the Tribunal did not have to make a finding on this point but it appeared from the evidence that Dr A had been prepared to hand over part of his fee to Mr Harrold/his companies as otherwise he may not receive instructions to prepare medical reports.

100. There was some lack of clarity about the amount which the First Respondent had then received from Mr Harrold's companies. In the Response to the Rule 5 Statement prepared by the First Respondent's then solicitors, paragraph 73 of the of the Rule 5 Statement had been "noted and agreed" and paragraph 74 had been noted to contain an accurate transcript of the First Respondent's interview by the police. At paragraph 73 of the Rule 5 Statement it was alleged that the bulk of the monies sent to Utopian/Mr Harrold were then provided to the First Respondent; in the example of a payment by Dr A of £170, Mr Harrold would retain £5-10, the Second Respondent would receive £30-50 and the First Respondent would receive the rest. Whilst the Tribunal could not be sure of the amounts involved, in the light of the admissions by the Second and Third Respondents, and on the assumption that Mr Harrold/his companies retained part of Dr A's payments for administration fees or similar, the amount sent to or for the First Respondent could not have been more than about £63,000. Indeed, in cross examination the First Respondent had told the Tribunal that

the amount he received was "probably about £60,000" and went on to say that the "majority" of that money was money to which Mr Harrold was entitled. Whatever, the precise amount – and the Tribunal could not be sure of that figure – the First Respondent had admitted receiving payments funded from monies paid to Mr Harrold/his companies by Dr A and that amount was tens of thousands of pounds.

Police Investigation

101. There was no dispute that both the First Respondent and Mr Harrold had been arrested by the police in March 2009 in connection with various suspicions or allegations concerning their dealings with insurance companies and others. The police investigation appeared to have arisen as a result of investigations into Dr A and at least one other firm of solicitors; the latter had started in late 2008. Transcripts of the police interviews of the First Respondent, NB and Mr Harrold had been referred to in evidence. The Tribunal accepted that the prosecution had been completely unsuccessful and that the First Respondent (and Mr Harrold) were innocent of any criminal offences of which they had been suspected in or about March 2009. The Tribunal further noted and accepted that until the prosecution was abandoned in or about November 2011 (with a hearing to conclude matters in January 2012), as the prosecution offered no evidence, the First Respondent had been under the strain of those proceedings. Of course, the conduct issues considered by the Tribunal were not the same as the alleged criminal offences although the two sets of proceedings arose from substantially the same underlying facts.

Witnesses

102. There were few questions of fact which were actively disputed. The First Respondent had accepted that he had received significant payments from Mr Harrold/his companies and the mechanism of payment had also been accepted. There was little dispute about the First Respondent's influential role in the growth of the Firm and his business relationship with Mr Harrold. The main areas of factual dispute related to the nature of the payments, whether the First Respondent had had a role in compliance at the Firm, whether the Firm had "hold harmless" arrangements with insurers, whether the Firm in fact took commissions and/or paid referral fees when such payments were not permitted and the extent of knowledge of and/or agreement by the Firm/Mr McKeown to the First Respondent's arrangement with Mr Harrold. The nature of the payments was the only one of these matters which was directly relevant to the allegations. The Tribunal had to consider the credibility of the various witnesses from whom it had heard to assist in determining those points which were disputed.

103. The Tribunal had had the considerable benefit of hearing and seeing a number of witnesses and over the course of the hearing was able to gauge the consistency of their evidence with other evidence and documents as well as to form a view about the way in which they had given evidence.

104. The Tribunal found that Mr McKeown had been passionate when giving evidence, but at least some of the evidence he gave was self-serving. He appeared basically honest, but was motivated to present his Firm's situation in the best possible light and did so with an amount of bluster. For example, he had had to admit that the Firm had taken some commissions from Endsleigh, when referred to the relevant documents. He had

been immoveable in his evidence that he did not know anything about the First Respondent taking payments from Mr Harrold/his companies until a telephone conversation on 7 March 2009. The Tribunal found that Mr McKeown was aware in general terms of the relationship between the First Respondent and Mr Harrold but was unaware that money was changing hands and in particular that such large amounts of money were being paid to the First Respondent. It seemed highly unlikely to the Tribunal that Mr McKeown would have sanctioned such an arrangement when no-one but the First Respondent had any direct financial benefit. The Tribunal noted the First Respondent's contention that the arrangement whereby Mr Harrold could retain commissions otherwise due to the Firm meant that Mr Harrold contributed to the growth of the Firm's Industrial Disease department, which was of financial benefit to the Firm and hence to Mr McKeown. However, Mr McKeown's evidence was that that work had not been as profitable as hoped because the Firm had been persuaded to take on a large volume of poor quality claims. The Tribunal found that whilst Mr McKeown had been aware that the First Respondent was contributing significantly to the growth of the business by virtue of the relationship with Mr Harrold, Mr McKeown did not know – and did not ask about – the details until March 2009.

105. Mr Harris and Mr Carter had been consistent in their evidence that the Firm had a policy of not taking commissions. The Tribunal found their evidence to be credible. The Tribunal noted that Mr Harris had been corrected by the First Respondent on the issue of how frequently the First Respondent had attended the Firm's offices after mid-2007 but did not find that this damaged his credibility as he had explained that the First Respondent had been in contact with the Firm by email. Mr Harris' evidence was only relevant to the issues of whether or not the Firm took commissions and whether there had been a meeting at which it had been agreed that Mr Harrold could take commissions which would otherwise have been payable to the Firm; his evidence on the latter was that he could not recall such a meeting. The Tribunal also found Mr Carter's evidence to be credible, in particular on the point that the Firm's policy was not to take commissions.

106. The Tribunal noted that Mr White, a witness for the First Respondent, admitted in cross examination that he felt he had been "stabbed in the back" by Mr McKeown. The Tribunal nonetheless found him a credible witness, whose evidence was not tainted. The Tribunal could understand his expressed view that it appeared to him that Mr McKeown and others had chosen to blame anything and everything wrong within the Firm on the First Respondent; this was something which came across in Mr McKeown's own evidence. Mr White's evidence to the Tribunal indicated that amongst the fee-earners in the Firm there was an understanding that there were commercial arrangements with various work sources about which insurers, doctors etc to use in a case and that it was well-known in the Firm that the First Respondent and Mr Harrold worked together. It was also his evidence that although he did not know the detail of the various commercial agreements in place he was aware that the Firm would not claim on ATE policies as if one did "the source would pull the work."

107. Mr Brennan also told the Tribunal that it was common knowledge that one did not normally claim on ATE insurance policies because of various commercial agreements in place.

108. In considering the evidence of all of those involved in the Firm at the relevant time, it became apparent that whilst formal "hold harmless" agreements may not have been in place with insurers, there was a widespread understanding that it was not in the Firm's interest to make a claim on an ATE insurance policy in the event of an adverse costs order against a client; rather, it appeared to be the usual practice for such claims to be "absorbed" by the Firm in order to maintain a good relationship with the work sources, who in turn – it appeared from the evidence – received commissions from the insurers to whom work was referred.

109. Mr Harrold was generally consistent in his evidence, save that it became apparent that he gave different accounts in his police interview and in evidence to the Tribunal. The police interview had taken place in March 2009, much closer to the events in question than the present hearing. In connection with a discussion about Dr A "paying" the solicitors who instruct him, Mr Harrold was asked, "Why are you involved?" and replied,

> "Because (the First Respondent) is not really supposed to collect commission himself so he obviously has an arrangement with his wife who acts as a consultant to collect that money."

When asked why the First Respondent was not allowed to collect commission from Dr A, Mr Harrold had responded:

> "Because he should be sharing that with his business partner and he doesn't."

It was correct that a little later in the police interview Mr Harrold had resiled a little from that position and in his evidence to the Tribunal Mr Harrold had maintained that the money paid to the First Respondent (via NB) was not commission. Nevertheless, there was a clear indication from Mr Harrold at time close to the relevant events that he had thought that a) the payments represented commission and b) Mr McKeown was unaware of the payments. This contrasted with the evidence in his witness statement (at paragraph 16) that he now knew, "for certain" that the arrangement "was approved by Mr McKeown." In response to a question from the Tribunal, Mr Harrold stated that his knowledge arose from a number of conversations "in the pub" with senior people in the Firm; in the witness statement, it appeared that this knowledge was based simply on Mr McKeown mentioning to the police that he (Mr McKeown) was responsible for all of the day to day operations of the Firm.

110. The Tribunal did not believe Mr Harrold on one peripheral matter, which point was not crucial to determining the case but which helped the Tribunal confirm its view of the credibility of the First Respondent and Mr Harrold. On 28 March 2007 Mr Harrold had emailed the First Respondent, with the subject heading "dca" which read,

> "BB
>
> Does the signature for your sister look dodgy on here?"

to which the First Respondent replied on the same day, saying,

> "It looks really dark compared with everything else?
>
> Why not just sign it yourself, it doesn't matter, she won't say it wasn't her so not really a problem.
>
> BB"

111. The Tribunal accepted the evidence of Mr Harrold and the First Respondent that these emails were probably linked to WMO and its registration with the Department for Constitutional Affairs; the First Respondent's sister was a named director of WMO. Whereas the First Respondent told the Tribunal he had just been suggesting that Mr Harrold should "go over" his sister's signature on the document it was then put to him that he had been asking Mr Harrold to forge the sister's signature. The First Respondent conceded, "I guess that's right" and that this was not a good way to deal with matters. In contrast, Mr Harrold told the Tribunal in relation to the same emails that it had just been "a bit of banter" and a "jokey thing." Under cross-examination Mr Harrold told the Tribunal that it was an informal email exchange and that it was "jokey" because the First Respondent knew that he, Mr Harrold, would not sign the document. Mr Harrold told the Tribunal he had not signed the document. There was nothing to suggest that Mr Harrold's conduct was in fact inappropriate, but he and the First Respondent were not consistent in their explanation of what appeared, on its face, to be a suggestion by the First Respondent that Mr Harrold should forge a signature.

112. It was very clear that Mr Harrold did not regard the taking of commissions as in any way disreputable but, rather, as a normal part of the personal injury industry. Of course, Mr Harrold was not bound by the professional obligations which apply to solicitors. Overall, the Tribunal concluded that Mr Harrold had shown no particular commitment to telling the truth – either to the police or to this Tribunal - and so his evidence was unsatisfactory although not incredible. Whilst not in itself indicative of the truthfulness or otherwise of his evidence, the Tribunal found that Mr Harrold had become hostile when the questioning by the Applicant's counsel had been tough, but he had nevertheless stood his ground.

113. The First Respondent's evidence was generally consistent. He presented as believing in the truth of what he said. He maintained throughout that the money he received was not by way of commission payments. However, the Tribunal found that the First Respondent was self-serving in his evidence and that there were at least some aspects of his behaviour which could not be trusted. The Tribunal noted, for example, an email from the First Respondent to the Second Respondent (and others) dated 6 March 2007 in response to an email from the Second Respondent which had referred to Dr A conducting telephone interviews with personal injury clients (rather than examining them) which included the following:

> "A medical expert or ourselves should not mislead the court, a grey area, as long as Dr doesn't say examined client then we are not doing anything wrong as far as I can see it – no rule against expert speaking to a client."

This appeared to show a cavalier attitude to potentially misleading third parties, and did not put the First Respondent in a good light.

114. Of much more significance – not least because the First Respondent was specifically cross-examined on this area and so the Tribunal could assess his evidence fully – were the emails which appeared to be sent by NB but which were actually written or dictated by the First Respondent. The First Respondent told the Tribunal that he did not see anything wrong in writing emails in NB's name.

115. The first such email was one included in the First Respondent's hearing bundle, dated 30 April 2006 in which it appeared that NB agreed to Mr Harrold's proposal to pay her £3,000 per month, that she would act as a self-employed consultant and that she would "do all I can to persuade any firms to move in your direction for their ATE products." The First Respondent submitted that this email supported his contention that there was a consultancy agreement.

116. The Tribunal further noted an email which appeared to be from NB but which the First Respondent confirmed he had written dated 19 June 2007 to Mr Harrold. The reference to "B" in the email is to Mr Harrold's business partner, a Mr BW. The email read:

> "How's things? I understand from B that as per our agreement, there is scope to increase my monthly retainer to £30k as some of the contracts introduced are sending a lot of work.
>
> I know we originally said I would be entitled to 60% of premiums but understand that things may have grown quicker than you first imagined.
> Maybe if we simply increase my retainer to £30k and if things continue as we hope, up to £40k in the next few months?..."

The Tribunal further noted the email quoted at paragraph 97 above dated 20 December 2008.

117. The Tribunal did not have to make specific findings in relation to these emails. It noted that the First Respondent contended that no-one was misled, as Mr Harrold knew that it was really the First Respondent with whom he was dealing. However, it was a fiction to write or dictate emails apparently from NB which were not her emails; this cast considerable doubt on the extent to which the Tribunal could trust the First Respondent in his evidence.

118. Again, whilst not determinative of any particular issues, the Tribunal was concerned by a series of emails on or about 16 June 2008 concerning some payments to be made by Mr Harrold in respect of work which had apparently been carried out by the First Respondent's father (who had died on 13 May 2008). It further noted an email of 1 November 2007 from the First Respondent to Mr Harrold concerning payments made in respect of Dr A which, following emails identifying that there was to be £3420 for the First Respondent and £1290 to the Second Respondent, which read:

> "… but accounted for in the usual Barso way. Keep the Barso method up, always works if you throw enough money at it."

It was put to the First Respondent that "the Barso way" meant "covertly" but he denied it, suggesting that he hoped it meant "quickly and accurately".

119. The First Respondent was unable to explain to the Tribunal's complete satisfaction the tone or content of these emails which, at best, could not put the First Respondent – a solicitor - in a good light. He did not present in his correspondence as someone who was reliable and committed to behaving with complete propriety.

120. In assessing the evidence presented, the Tribunal was conscious that the events in question had occurred in the period 2006 to 2009, i.e. some 4-7 years prior to this hearing. The Tribunal also took into account that the First Respondent had left the Firm in March 2009, since when he had not had access to emails or documents which would have been in the Firm's possession. However, the Tribunal noted that many of the emails concerning the business relationship between the First Respondent and Mr Harrold were from private email addresses, not the Firm's email system. Notwithstanding this, the Tribunal noted that the First Respondent had not presented any documentary evidence of the work he said he had done for BCR/Mr Harrold from 2006 e.g. in setting up meetings, making introductions and securing agreements between various "sources" and BCR.

The Allegations

121. Having considered a number of background facts and issues and made the necessary findings, the Tribunal went on to consider the specific allegations and the evidence and legal matters relevant to each.

122. Allegation 1.1 Failed to account to clients for commissions, contrary to Rules 1(a), 1(c) and 10(1) Solicitors Practice Rules 1994 ("SPR") and, from 1 July 2007, contrary to Rules 1.02, 10.4 and 2.06 Solicitors Code of Conduct 2007 ("SCC")

122.1 This allegation was denied by the First Respondent.

122.2 There was no doubt that the First Respondent – and the Firm – and failed to inform clients that the First Respondent was in receipt of monies from Mr Harrold/his companies. The Tribunal had heard evidence about the First Respondent suggesting changes to the Firm's client care letter to note that the Firm had some interests in using particular insurers, but even if those changes had been made there was nothing at all to suggest that there would have been disclosure that the First Respondent was receiving payments personally. There was also no doubt that the First Respondent – and the Firm – had not accounted to clients for the payments received by the First Respondent in that it had neither paid those sums to clients nor received their informed consent to retain the commission. In all cases, the amounts were above the de minimis amount of £20. So, if the payments were commissions, the allegation would be clearly proved and the main issue the Tribunal had to determine, therefore, was whether the payments were indeed commissions.

122.3 The Applicant's case was that the Firm would place ATE insurance with BCR in most, if not all, cases where there was no other arrangement in place with a "source" of work e.g. a CMC. On successful conclusion of a case, the Firm would recover costs and disbursements including for the costs of ATE insurance. The Firm would then pay an amount representing the ATE premium to BCR. BCR would then distribute the premium between itself, Elite (the underwriter) and the First Respondent, via NB. The Applicant also submitted that, without the authority of the

Firm, the First Respondent had signed a Deed of Indemnity in September 2006 which appeared to create a "hold harmless" arrangement by which the Firm agreed to indemnify Elite against all claims arising out of the ATE insurance. At the relevant time, Elite considered that it had a relationship with the firm and not just with the First Respondent although Elite subsequently accepted that the Deed of Indemnity was not effective. In relation to the "hold harmless" agreement, the Tribunal found as facts – on the basis of the evidence presented – that the Deed would have been ineffective but that at the time it gave comfort to Elite. The Tribunal found that generally there was an expectation – described at one point as a "gentleman's agreement" – that the Firm would not claim on insurance policies in the event of unsuccessful cases. However, it was asserted by the First Respondent and Mr Harrold – and there was no evidence to challenge this – that in fact BCR paid out on about two occasions. The Tribunal noted that the Firm had had few unsuccessful claims on which costs were to be paid to the defendant so it appeared that making claims on insurance policies would be have rare in any event.

122.4 The Applicant submitted that there was significant financial benefit to the First Respondent in the Firm (and others) referring insurance requests to BCR and that financial incentive was greater where there was, or appeared to be, a "hold harmless" agreement as a smaller amount of the premium was passed to the underwriters and a greater amount was available for distribution to the First Respondent and others. The Applicant's case was that premiums recovered from another party on behalf of clients of the Firm would be set out on a detailed schedule, known as a bordereau, and sent to BCR each month. At the end of the month, the premiums would be distributed by BCR with reference to the bordereau – see, for example, paragraphs 94 to 96 above. The Applicant's case was that the majority of each premium was passed to the First Respondent as a "source" and that such payments were commissions.

122.5 The First Respondent's case was that whilst he accepted that he had received payments, by the mechanism described above, the payments were not commissions but were payments of consultancy fees for work done on behalf of BCR, in particular introducing new sources of work. The First Respondent told the Tribunal that initially his agreement with Mr Harrold was that he would receive 50% of the profits generated by the work introduced by him to BCR. Subsequently, it was agreed that the First Respondent would accept payments from Mr Harrold's businesses, via NB, calculated by reference to commissions but that those payments were not commissions. The First Respondent maintained that the Firm had agreed that Mr Harrold could retain any commissions that the Firm allowed him to; the First Respondent explained in his witness statement at paragraph 13,

> "…The choice was that an ATE or medical company kept the extra profit or we could allow somebody else to benefit, we decided that if we allowed (Mr Harrold) to benefit, then he could work on growing our business at no cost to us, he had a lot of contacts and we wanted to grow our Industrial Disease department, he could to that for us. The clients did not lose out as the alternative would have been to leave the profit with the ATE company."

In short, it was suggested that the Firm could have received commissions from, for example, medical agencies (in return for providing those agencies with instructions) but instead allowed Mr Harrold/BCR to receive/retain those commissions. The

payments to the First Respondent were made from that "pot" of commissions which, it was maintained, belonged absolutely to Mr Harrold/his companies and which he was free to deal with as he saw fit. As the commissions were not the property of the Firm, they did not have to be disclosed to clients by the Firm. In the First Respondent's Response to the Rule 5 Statement, prepared by his former solicitors, it was stated at paragraph 52.1:

> "The First Respondent accepts that after the original agreement was changed the method for calculating the payments for his services was by reference to commissions which the Firm would otherwise have been entitled to had they accepted those monies by way of commissions."

122.6 The First Respondent acknowledged in evidence that there was in any event a distinction between commissions which were "tied" to Mr Harrold – because the work which was introduced to the Firm came from one of the sources which required insurance to be placed with BCR - and those which were "untied". In evidence, the First Respondent told the Tribunal that Mr Harrold referred work to the Firm on the basis that he would earn commissions and that there were "virtually none" of the commissions which were untied. Under cross examination, the First Respondent told the Tribunal that there was "very little" of the commission pot paid to Mr Harrold to which the Firm would be entitled, but that it had been agreed in any event that Mr Harrold could receive those commissions. On several other occasions in evidence the First Respondent told the Tribunal that "virtually all" of the commissions were Mr Harrold's money. The First Respondent maintained that Mr Harrold/his businesses were entitled to be paid commissions as they were a source of work for the firm and that on cases unconnected to Mr Harrold (e.g. cases from Endsleigh Insurance) the Firm allowed Mr Harrold to keep the commissions in any event. The First Respondent told the Tribunal that the cases in which Dr A was instructed to produce a report were linked to introductions by Mr Harrold, who kept both the ATE and medical report commissions. The First Respondent's case was that Mr Harrold provided work to the Firm – particularly in Industrial Disease cases – on favourable terms because he was able to keep commissions. The First Respondent's position was that he had done nothing wrong. He acknowledged and asserted that allowing the payments he received to be calculated by reference to BCR premiums had been a mistake and that he should instead have insisted on as share of BCR's profits from the works he had introduced.

122.7 Mr Harrold's evidence substantially supported that of the First Respondent. In particular, he told the Tribunal, in evidence in chief, that when he began his relationship with the First Respondent/the Firm most of the Firm's work was tied to a big provider or providers, who dictated who the Firm should use for ATE insurance and medical reports. The percentage of "untied" work was very small. Mr Harrold told the Tribunal that where the work was "untied", it was agreed that Mr Harrold would keep the commissions and in return would try to find other work, such as the Industrial Disease work, for the Firm. He told the Tribunal that there was only a small amount of "untied" work; the Firm would have been entitled to "a couple of thousand pounds" per month. Mr Harrold told the Tribunal that the First Respondent had been very successful in introducing new work to BCR, for example, work sourced by Action Claims (a CMC). Mr Harrold later told the Tribunal that of the £2.4 million paid to the First Respondent (via NB) "maybe up to £100,000" was "untied"

commissions. The Tribunal took this to mean that an amount of the "pot" from which the First Respondent/NB received payments was made up of monies to which the Firm might have been entitled, if it had taken commissions although part of the "pot" may have been created by work which was not connected to the Firm. In his closing submissions, the First Respondent submitted that the clear majority of payments from BCR to Mr Harrold and his other companies represented money due to Mr Harrold, but he acknowledged that some were "untied". The First Respondent also submitted that it was clear that Mr Carter and Mr Harris were aware of the agreement that Mr Harrold could retain "untied" commissions in exchange for referrals of Industrial Disease work, but this was not established by their evidence.

122.8 At least some of the contemporaneous documents supported the Applicant's case that the money the First Respondent received were, in part if not in full, commissions. The letter of 7 April 2008, referred to at paragraph 94 above, clearly referred to "March commission", with a significant part of the total being linked to the Firm. It was from these sums that the First Respondent/NB were paid by Mr Harrold/his businesses. There was no written agreement concerning the consultancy agreement which the First Respondent asserted existed; he told the Tribunal that nothing was formalised as he was a friend of Mr Harrold and that because of the stresses in his life at the relevant times he did not take steps to put a written agreement in place.

122.9 The First Respondent relied on the existence of a consultancy arrangement as justification for the payments he received. The Tribunal could not disregard the fact that the First Respondent was unable to produce any contemporaneous documents supporting his assertions about the work done e.g. emails setting up meetings or confirming arrangements between BCR and others which had led to the profitable relationship referred to. A number of the documents relied on by the First Respondent to support his contention that the payments were in relation to his consultancy work were not reliable documents, in that they purported to be written by NB whereas they had been written by the First Respondent, for example, the email of 20 December 2008 at paragraph 97 above.

122.10 That said, there was no doubt that there was a good business relationship between the First Respondent and Mr Harrold which at one point was described by Mr Harrold as a "back-scratching exercise". The Tribunal could not rule out the possibility that the First Respondent had indeed provided value for Mr Harrold/his businesses by introducing work; indeed, the Tribunal considered that some of the monies received could be described as a consultancy fee. However, even if some of the payments were made for consultancy work that in itself did not address the key question, which was whether the First Respondent had received commissions for which he had failed to account to clients.

122.11 The Tribunal concluded, on the basis of all of the evidence heard and read, that much of the money which the First Respondent received was generated from commissions which could have been paid to the Firm, if the Firm had been prepared to accept commissions. Instead, payments were made to the First Respondent by the back door. He received more than the Firm might have done, as he benefited from money generated from instructions given to other firms of solicitors as well as from instructions to his own Firm; the sums arising from work undertaken by other firms could not be described as a commission for which the First Respondent had to account

to clients or his Firm. The Tribunal had regard to the definition of commission which was contained in the Guidance to the SCC, in the section dealing with Rule 2.06, which made clear that a commission was a financial benefit a solicitor received by reason of and in the course of the relationship of solicitor and client and arose in the context that the solicitor had put a third party and the client in touch with each other. Clearly, the First Respondent received a significant financial benefit by reason of instructions given to the Firm of which he was a principal and that benefit arose in the context that the First Respondent had (through his employees) put BCR and the client in touch with each other.

122.12 In relation to the payments made in respect of Dr A there could be no doubt that the payments of £87,000 or thereabouts were connected with work done by or on behalf of clients of the Firm. Dr A paid money to Mr Harrold/his businesses in respect of instructions he received for clients of the Firm. Whilst Mr Harrold had sought to correct what he had said to the police during an interview in March 2009, the Tribunal found that the First Respondent was paid a large percentage of Dr A's fees, on matters in which the Firm instructed him, typically £110 on a fee of £420. Whilst the payments followed a circuitous route, there could be no doubt that Dr A paid a commission to Mr Harrold/his businesses which in turn passed on a substantial part of that commission to the First Respondent. Those payments arose by reason and in the course of the relationship of solicitor and client and in the context that the solicitor had put the third party (Dr A) and the client in touch; a client instructed the Firm in a personal injury claim and the Firm chose to instruct Dr A on behalf of that client. In relation to the payments from Dr A, the allegation was clearly proved beyond reasonable doubt.

122.13 In relation to the BCR insurance premiums, the Tribunal found that to the extent the payments arose in relation to the Firm's clients, they too were commissions for which the First Respondent had failed to account to those clients. The First Respondent had referred the Tribunal to an email sent in the early days of his business relationship with Mr Harrold which referred to the BCR policy and that, "We cannot claim from it but get a decent kick back." The term "kick back" was not defined; the First Respondent suggested that it meant referrals of work to the Firm. In any event, the email showed a clear understanding by the First Respondent that the Firm had a benefit from the relationship with Mr Harrold/BCR which in itself should have caused the First Respondent to consider carefully whether there was any risk of breaching his professional obligations.

122.14 The Tribunal had some concerns that the First Respondent was to some extent a "fall guy"; he, Mr White and Mr Harrold in particular had confirmed that payments in exchange for work generation were part of the personal injury "industry". It might well have been the case that other firms, and/or other individuals in the Firm had received commissions without accounting to clients. However, the Tribunal could only deal with the particular case presented; wrongdoing by others could not excuse the First Respondent's conduct, although the culture about which the Tribunal heard might help explain why the First Respondent did not consider what he had done was in any way in breach of the Rules.

122.15 The Tribunal considered each of the Rules which the First Respondent was alleged to have breached and found in each case that he was in breach of those Rules. The

majority of the commissions received and not accounted for to clients arose after 1 July 2007, according to the schedule of payments seen by the Tribunal but there had clearly been substantial receipts before that date, when the older rules applied. The First Respondent had at all material times been a principal in the Firm; he had received commissions and had failed to account to clients. The First Respondent had attempted to persuade the Tribunal that the work he did for Mr Harrold/BCR was not linked to his position as a solicitor but he clearly could not distance himself from his professional obligations.

122.16 The Tribunal was satisfied to the highest standard that the allegation had been proved. Although it could not be certain of the amount of commissions – as opposed to payments which were not linked to clients of the Firm – there was no doubt that the amounts were substantial. Commissions, as defined in the relevant rules, had clearly been received by a principal in a Firm and the principal and Firm did not account to the clients, or even inform them of the commissions.

123. Allegation 1.2 Failed to make referrals to a third party in good faith, contrary to Section 4(1) Solicitors Introduction and Referral Code 1990 ("SIR Code"), and thereby Rule 3 SPR and, from 1 July 2007, contrary to Rule 9.03(1) SCC

123.1 This allegation was denied by the First Respondent.

123.2 The Tribunal had heard a considerable amount of evidence during the hearing to the effect that all, or most, solicitors dealing with personal injury matters had agreements by which they were "tied" to particular ATE insurers and/or medical agencies. The Tribunal was not required to rule on the extent to which other firms or individuals might have been in breach of the various rules on referrals in good faith, simply on whether the First Respondent was in breach.

123.3 The Tribunal found that the Firm, through the First Respondent's influence, had entered arrangements with BCR/Elite and Dr A.

123.4 The Tribunal accepted that the Firm was not required in all cases to place ATE insurance with BCR, but it was so required where work had been introduced by or through Mr Harrold or one of his businesses/commercial arrangements. The terms of the ATE insurance offered did not appear to be materially different in form from many other such insurance policies available at the relevant time and the Firm's clients had the benefit – again, not unusual in the personal injury field – of having payment of the premium deferred until the end of the case, and then it was payable only if the claim was successful. The amount of the premiums – which varied depending on the nature of the case - appeared to be broadly in line with those for policies supplied by other insurers. The First Respondent told the Tribunal that the policies were appropriate for his Firm's clients and the Tribunal had no evidence from the Applicant to gainsay that. However, the Tribunal had found that the First Respondent had a substantial personal financial benefit arising from his relationship with Mr Harrold. The Tribunal had found that that benefit – and its extent – had not been disclosed to Mr McKeown. Whilst there was no evidence that the policies were unsuitable for the Firm's clients, the referral of work to BCR was done when the First Respondent stood to make substantial personal gain from those referrals and so was not done in good faith. This finding was supported by the purported "hold harmless"

agreement or Deed of Indemnity signed by the First Respondent in September 2006 which had the effect of decreasing the payments made to the underwriter and increasing the amount available to pay to the First Respondent.

123.5 The placing of insurance with BCR/Elite on the First Respondent's direction was not done in good faith. In particular, his association with BCR restricted his freedom and that of his Firm to recommend insurance arrangements. The Tribunal accepted that the First Respondent/the Firm were not bound completely, but the association restricted the necessary professional freedom.

123.6 In relation to Dr A, the Tribunal found that by late January 2007 (see paragraph 76 above) the First Respondent was aware that Dr A had been, in effect, paying the Firm commission for instructing him by permitting the deduction of part of his fee by the Firm. By 6 March 2007 (see paragraph 113 above) the First Respondent was aware that Dr A had been preparing medical reports based on telephone interviews with clients, rather than a medical examination. Both of these issues should have caused the First Respondent to query whether Dr A was a medical practitioner whose integrity could be relied on and in turn led to consideration of whether continuing to use Dr A was in the best interests of clients. The Firm continued to instruct Dr A. Whilst the Firm no longer retained monies recovered as part of Dr A's fee, the First Respondent received such money. It was in the First Respondent's financial interest for the Firm to instruct Dr A, as such instructions generated payments to the First Respondent. The Tribunal found to the highest standard that referrals or instructions given to Dr A by the Firm after the end of January 2007 were not given in good faith. The First Respondent's role in the Firm was such that he was largely responsible for relationships with work providers and which doctors/medical agencies and insurers should be used. Whilst he was not involved in fee-earning work, the First Respondent had a leading role in determining to whom instructions should be sent.

123.7 The Tribunal was satisfied to the required standard that referrals to Dr A were not made in good faith but, rather, in the expectation of financial gain by the First Respondent.

123.8 The Tribunal found the allegation proved to the required standard.

124. Allegation 1.3 Used his position as a solicitor to take unfair advantage of clients, contrary to Rule 1(c) SPR and, from 1 July 2007, contrary to Rules 1.04 and 10.01 SCC.

124.1 This allegation was denied by the First Respondent.

124.2 In the light of all of the findings noted above, it was beyond doubt that the First Respondent had taken unfair advantage of clients. He had received monies which should have been disclosed to and remitted to clients – unless, being aware of the amount/how it was calculated those clients gave their informed consent to the First Respondent retaining those sums. He used instructions given to his Firm by clients in order to receive substantial payments of commission. The First Respondent had been enriched by up to £2.4 million (including VAT) by his business relationship with Mr Harrold and a substantial part of that income was linked to instructions given to the Firm. To the extent that income generated was unrelated to clients of the Firm it

could not be said he had taken unfair advantage of clients; the figures were not certain, but clearly the payments received were linked closely to the number of successful cases in which the Firm had placed ATE insurance through BCR. The letter quoted at paragraph 94 above, clearly referred to "commissions", the bulk of which were linked to the Firm; other documents confirmed that this was the usual position.

124.3 The Tribunal found the allegation proved to the required standard.

125. Allegation 2 It was further alleged that in respect of allegations 1.1, 1.2 and 1.3 the Respondent acted dishonestly.

125.1 The Respondent denied that he had acted dishonestly with regard to any or all of the allegations.

125.2 In determining this allegation, the Tribunal had regard to the test for dishonesty set out in Twinsectra v Yardley and others [2002] UKHL 12 ("Twinsectra"). The Tribunal had to consider whether the First Respondent's conduct (in the relation to the matters alleged) had been dishonest by the standards of reasonable and honest people and if the First Respondent knew that his behaviour was dishonest by those same standards.

125.3 The Tribunal was concerned that the First Respondent had written a number of emails which purported to be from NB; indeed, as part of his defence he had admitted he had done so since he maintained that he (rather than NB) had undertaken work for BCR/Mr Harrold. This weakened the trust the Tribunal could place in his evidence. The Tribunal was also troubled by the email in which, on its face, it appeared that the First Respondent had suggested that Mr Harrold should forge a signature; it noted that the First Respondent and Mr Harrold gave different explanations for the contents of the email, as set out at paragraphs 110 to 111 above. The Tribunal was similarly concerned by a series of emails in June 2008 (referred to at paragraph 118 above) concerning payments for work done by the First Respondent's father.

125.4 The emails which purported to be from NB to Mr Harrold were the main documents relied on by the First Respondent in support of his contention that the payments he received were genuine consultancy fees and not commissions. However, as noted, those were not honest documents as they appeared to be from NB but were written by the First Respondent.

125.5 The Tribunal also noted that there were inconsistencies between what the First Respondent told the police in interview in March 2009, close to the events in question, and his current explanations for his receipt of money from Mr Harrold/his businesses.

125.6 The Tribunal noted the following exchanges and remarks in the course of the police interview of 12 March 2009:

> "Officer: So are you receiving – you personally – (First Respondent), receiving any commission payments from medical agencies?

> First Respondent: Well, via (Mr Harrold) and on to (NB's) consultancy business, yes…
>
> It blossomed into me working out the commissions coming in and justifying or working out from the profit (Mr Harrold) was making through the ATEs he was opening and the medical commissions coming in what would be a fair fee to pay to (NB). I mean, I am accepting that there was a proportion of the commissions coming in were going out to (NB)… I thought that whilst it was maybe a sly point it would actually physically not be me taking the commissions and therefore would be acceptable – a twist of the law really… You know, I tried to justify it originally with the consultancy business – that started on its own really. Erm, justify it. It was stupid. It started small and got out of hand. And it was greedy."

These comments had been put to the First Respondent in cross-examination. He had maintained that Mr Harrold had been entitled to most, if not all, of the commissions and that the way payments to NB/the First Respondent had been calculated had been by reference to commissions rather than a percentage of profit. The First Respondent had maintained that most of the monies paid to Mr Harrold/BCR had been monies due to Mr Harrold, which were not due to the Firm, with only a small number of "untied" cases.

125.7 The Tribunal noted that the First Respondent had explained in his closing submissions that during the police interview, he had had a bad feeling, perhaps a concern in case he had committed a criminal offence, and so had tried to distance himself from the arrangement with Mr Harrold. The First Respondent had acknowledged during his closing submission that he should have explained the position to Mr McKeown and it was his biggest regret that he had not done so. Nevertheless, the Tribunal noted that there would have been no need to distance himself from the arrangement if it had indeed been a bona fide arrangement. The Tribunal recognised there was some danger in relying completely on a transcript of a police interview in which remarks could be taken out of context, but was satisfied that on reading the relevant sections of the transcript the First Respondent had demonstrated that he was aware that there was something improper in the relationship with Mr Harrold and his receipt of payments.

125.8 Whatever complexion could be put on the police interview, it was incontrovertible that monies had been routed to the First Respondent by a circuitous route, as set out at paragraphs 90 to 100 above. In short, BCR received payments from the Firm (and others) in respect of insurance premiums which had been recovered in successful claims brought for clients of the Firm (or clients of other firms). BCR also received monies from Dr A, being a proportion of his fee when that fee was recovered from the defendant's insurers in relation to successful claims brought by clients of the Firm. From that "pot", monies were paid by companies under Mr Harrold's control (Utopian, FH Consulting, AS Limited and WMO) to NDB Consulting Services, in the total sum of £2.4 million (including VAT) in a three year period.

125.9 This was an artificial arrangement, particularly when it was clear from all of the evidence that NB herself had played a very limited role in the business which was in her name. The Tribunal noted that the First Respondent's explanation that the business had been set up as a project for his then wife but it had snowballed and

generated income far higher than expected might have been correct. Nevertheless, the evidence read and heard showed that quite soon after the business started it was being operated by the First Respondent and was a means by which he could receive significant payments from his associate, Mr Harrold. The First Respondent had not informed Mr McKeown of the arrangement; both the First Respondent and Mr Harrold had indicated this in their interviews with the police in March 2009 as set out, for example at paragraph 109 above although both had submitted evidence to the Tribunal to the effect that Mr McKeown knew of the arrangement. As noted above at paragraph 72, the Tribunal was satisfied that whilst Mr McKeown was aware of a working relationship between the First Respondent and Mr Harrold, he was unaware of the financial arrangements in place. It would be expected that a solicitor acting in good faith would be completely frank with a business partner. It was incredible to suggest that Mr McKeown had been aware of a financial relationship under which his professional partner was being paid significant sums without seeking to regulate that arrangement or ensure that the Firm benefited.

125.10 The Tribunal was satisfied to the highest standard, in the light of the findings above and throughout this Judgment, that:

- The First Respondent had created false documents, being the emails purporting to be from NB, which appeared to suggest a legitimate consultancy arrangement;

- There were no reliable documents confirming the purported consultancy;

- The mechanism of payment – from BCR to various companies, then to NB, whilst being for the benefit of the First Respondent – was deliberately circuitous and avoided direct receipt by the First Respondent of money from BCR;

- The arrangement had not been declared to and agreed by the First Respondent's business partner, Mr McKeown;

- The arrangement had not been disclosed to clients of the Firm and commissions received had not been paid to clients – indeed, they were unaware that a principal of the Firm was receiving payments arising from their instructions to the Firm;

- Referrals were made to Dr A when a) there was some question about his integrity (see paragraph 99) and b) the First Respondent stood to gain financially from the referrals;

- The First Respondent had been aware when interviewed by the police that he had been receiving commissions and that Mr McKeown and others were unaware of this.

These factors demonstrated that the arrangement had been concealed, deliberately, and would create at least a smoke-screen to any casual investigation. As the First Respondent commented, it was not a well-concealed arrangement as the payments from BCR went to the First Respondent's then wife, in her proper name.

Nevertheless, there would be nothing to show in the Firm's records that the First Respondent was being enriched in any way by BCR/Mr Harrold. The Tribunal determined that the First Respondent had concealed the arrangement, in particular from Mr McKeown who was his fellow principal in the Firm.

125.11 The Tribunal was satisfied to the highest standard that in:

a) receiving commissions;

b) making referrals other than in good faith;

c) using his position to take unfair advantage of clients of his Firm; and

d) taking the steps outlined at paragraph 125.10 to conceal his arrangements with Mr Harrold

the First Respondent had behaved dishonestly by the standards of reasonable and honest people.

Further, by concealing his receipt of significant sums of commissions from his business partner and failing to declare those receipts to clients of the Firm the First Respondent knew that what he was doing was dishonest by the standards of reasonable and honest people.

125.12 The Tribunal was satisfied to the highest standard that the First Respondent had been dishonest in respect of all three principle allegations and the allegation of dishonesty was proved.

126. Allegation 3.1 (As against the Second Respondent): By virtue of his position within a legal practice made secret profits by retaining commissions in respect of client matters received directly from a third party, contrary to Rules 1.02 and 1.04 SCC.

126.1 The Second Respondent had admitted the facts and matters set out at paragraph 35 above.

126.2 Having reviewed the evidence and the admissions, the Tribunal was satisfied to the required standard that the allegation had been proved.

127. Allegation 4.1 As against the Third Respondent): By virtue of his position within a legal practice made secret profits by retaining commissions in respect of client matters received directly from a third party, contrary to Rules 1.02 and 1.04 SCC.

127.1 The Third Respondent had admitted the facts and matters set out at paragraph 36 above.

127.2 Having reviewed the evidence and the admissions, the Tribunal was satisfied to the required standard that the allegation had been proved.

Previous Disciplinary Matters

128. There were no previous matters in which findings had been made against any of the Respondents.

Mitigation

129. The First Respondent's evidence on the substantive matters was taken into account, where relevant to mitigation.

130. The Respondent submitted that he had been through hell and back both professionally and personally. The Respondent told the Tribunal he had not practised as a solicitor since March 2009. His problems had begun from about 2007, at which point he had "taken his eye off the ball." The Respondent told the Tribunal he would have to find a way to earn a living to support his family.

131. The Tribunal also took into account the testimonials submitted on behalf of the First Respondent, including from his ex-wife.

132. There was no specific mitigation on behalf of the Second or Third Respondents, as they had agreed that it was proper s43 Orders should be made in respect of each of them.

Sanction

133. The Tribunal had regard to its Guidance Note on Sanctions (September 2013) and to the mitigation submitted on behalf of the First Respondent. The Tribunal also considered the Respondent's mitigation, the matters raised by him throughout the hearing and the character references handed in during the course of the Tribunal's deliberations.

134. The First Respondent had been found to be dishonest in relation to the receipt of commissions into his then wife's bank account of approximately £2.4 million, which he had not disclosed to clients of the Firm and about which he had not been open and frank with his business partner. The Respondent's conduct had involved serious breaches of the core principles of professional behaviour. Even if dishonesty had not been proved, the lack of integrity shown by the First Respondent placed his conduct at the top end of the scale of seriousness. He had allowed his own financial interests to take precedence over his professional obligations and his duties to his own Firm.

135. The finding of dishonesty indicated that striking off the Roll would be the only appropriate and proportionate sanction. The Tribunal did not find there to be any exceptional circumstances which would justify any lesser sanction.

136. The Second and Third Respondents had accepted that in the circumstances of the case it was appropriate for the Tribunal to make an order under s43 of the Solicitors Act 1974 (as amended) in the usual form. The Tribunal was satisfied that in the light of the admissions made and the facts found proved in this case it was reasonable and proportionate to make an order against each Respondent to control their practise within the legal profession.

Costs

137. The Applicant presented a claim for costs in respect of all three Respondents in the total sum of £136,719.20 (including SRA costs, legal costs and VAT). It was confirmed that the costs to be claimed against the Second and Third Respondents in respect of the hearing itself would be limited as they had not taken part in much of the hearing.

138. The Tribunal was informed that the First Respondent had provided to the Applicant a schedule of means (a copy of which was also provided to the Tribunal) but supporting documents had not been provided prior to the hearing. The First Respondent indicated that the relevant documents were available for copying.

139. The Tribunal was further informed that the Second and Third Respondents had provided information about their financial circumstances to the Applicant. Mr Hansen for the Second and Third Respondents confirmed that it had been agreed in principle that the Second and Third Respondents should each pay 10% of the overall costs, as assessed. Mr Hansen submitted that it may be appropriate for the costs to be subject to detailed assessment. The Tribunal noted that detailed assessment could be expensive and time consuming, that it may be possible for the parties to agree the costs and that in any event the Tribunal may be able summarily to assess costs, as it usually did.

140. The Tribunal indicated that the parties should seek to agree costs and that the Tribunal could then consider any such agreement; otherwise, the Tribunal would determine the appropriate costs order.

141. The Tribunal was informed, during the course of its deliberations, that the Second and Third Respondents had reached an agreement concerning the quantum of costs and that the costs would be paid by instalments. The Tribunal was also informed that the First Respondent did not seek to rely on his financial position in relation to the amount or type of costs order which the Tribunal should make. The Tribunal was further informed that the First Respondent had agreed to pay costs in the all-inclusive sum of £100,000.

142. The Tribunal considered the schedule of costs. It determined that the charging rate used was reasonable and overall the costs did not appear disproportionate to the issues in the case and its complexity. However, in cases of this kind there was almost inevitably some element of duplication of work; for example, the schedule included costs of attending the hearing of two solicitors and the time spent at the hearing had been slightly overestimated. The Tribunal assessed that overall the costs, including VAT and disbursements should be fixed at £120,640.

143. It was right that the First Respondent should pay the overwhelming bulk of the costs as his culpability was greater than that of the Second and Third Respondents and the costs incurred in prosecuting the case against him were also greater. The Tribunal determined that the First Respondent should pay costs of £100,000 (including disbursements and VAT), as the First Respondent had agreed. As the First Respondent had not asked for his means to be taken into account it was not appropriate for the Tribunal to make any order concerning the enforceability of the

costs order; however, it would be expected that the Applicant and Respondent would discuss and agree the manner and timing of the payment of costs.

144. So far as the Second and Third Respondents were concerned, it was appropriate that each should pay the same amount as the other. It was noted that neither would be able to pay the costs order in full immediately but it would be expected that the Second and Third Respondents would negotiate with the Applicant concerning the manner and timing of the payment of costs, e.g. by instalments. There was no need for the Tribunal to insert into the Order any particular requirements concerning the payment of costs. The Tribunal determined that in the light of the schedule of costs, and with regard to the proportion of costs which should be paid by these Respondents, it was proportionate for each of the Second and Third Respondents to pay costs of £10,320 (including disbursements and VAT).

145. The Tribunal informed the parties that due to a technical problem it had not been possible to produce the orders in relation to the Second and Third Respondents but these would be produced later in the day and sent to the parties.

Statement of Full Order

146. The Tribunal Ordered that the Respondent, BRIAN LEWIS BARSO, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the agreed sum of £100,000.

147. The Tribunal Ordered that as from 28th November 2013 except in accordance with Law Society permission:-

(i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor KEVIN UNDERWOOD;

(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice the said Kevin Underwood

(iii) no recognised body shall employ or remunerate the said Kevin Underwood;

(iv) no manager or employee of a recognised body shall employ or remunerate the said Kevin Underwood in connection with the business of that body;

(v) no recognised body or manager or employee of such a body shall permit the said Kevin Underwood to be a manager of the body;

(vi) no recognised body or manager or employee of such a body shall permit the said Kevin Underwood to have an interest in the body;

And the Tribunal further Ordered that the said Kevin Underwood do pay the costs of and incidental to this application and enquiry fixed in the agreed sum of £10,320.00.

148. The Tribunal Ordered that as from 28th November 2013 except in accordance with Law Society permission:-

(i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor MATTHEW PHILLIPS;

(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice the said Matthew Phillips

(iii) no recognised body shall employ or remunerate the said Matthew Phillips;

(iv) no manager or employee of a recognised body shall employ or remunerate the said Matthew Phillips in connection with the business of that body;

(v) no recognised body or manager or employee of such a body shall permit the said Matthew Phillips to be a manager of the body;

(vi) no recognised body or manager or employee of such a body shall permit the said Matthew Phillips to have an interest in the body;

And the Tribunal further Ordered that the said Matthew Phillips do pay the costs of and incidental to this application and enquiry fixed in the agreed sum of £10,320.00.

DATED this 4th day of March 2014
On behalf of the Tribunal

K.W. Duncan
Chairman