No. 9666-2007

IN THE MATTER OF JAMES RHODES BERESFORD AND
DOUGLAS HAROLD SMITH, solicitors

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

Mr D J Leverton (in the chair)
Miss J Devonish
Lady Bonham Carter

Dates of Hearing: 17th - 27th November & 11th December 2008

FINDINGS

of the Solicitors Disciplinary Tribunal
Constituted under the Solicitors Act 1974

An application was duly made on behalf of the Solicitors Regulation Authority by Peter Harland Cadman, solicitor and partner in the firm of Russell-Cooke Solicitors of 8 Bedford Row, London, WC1R 4BX on 31st January 2007 that James Rhodes Beresford, solicitor of Quay Point, Lakeside Boulevard, Doncaster, South Yorkshire, DN4 5PL and Douglas Harold Smith, solicitor of Quay Point, Lakeside Boulevard, Doncaster, South Yorkshire, DN4 5PL might be required to answer the allegations contained in the statement that accompanied the application and that such Order might be made as the Tribunal should think fit.

The allegations against the Respondents were that they had been guilty of conduct unbefitting a solicitor and had breached the rules as follows:-

(1) That they had acted and/or had continued to act in circumstances of conflict and/or significant risk of conflict of interest between:-

  (a) the interests of their clients and their own interests; and/or
  (b) the interests of their clients and the interests of the Union of Democratic Mineworkers/ Vendside Limited/ Walker & Co (Claim Services) Limited contrary to Rule 1(a), (c), (d) and (e) of the Solicitors' Practice Rules 1990;

(2) That they had failed to act in the best interests of their clients in that they had failed to give any or any adequate advice to clients on 'agreements' the clients had purportedly

entered into with UDM/Vendside contrary to Rule 1(a), (c), (d) and (e) of the Solicitors' Practice Rules 1990;

(3) That contrary to Rule 8 of the Solicitors' Practice Rules 1990 or otherwise they had entered into conditional fee agreements and contingency fee agreements with clients in circumstances that had not been in the best interests of clients and/or had been improper;

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

(5) That they had entered into arrangements with officers of the Union of Democratic Mineworkers ("UDM") / Vendside and Clare Walker of both UDM/Vendside and Walker & Co that had been a sham and had been intended to disguise their breaches of Rule 3 of the SPR and/or had been inherently improper or had carried such dubious or improper features that they should have declined to enter into such arrangements contrary to Rule 1(a) and (d) of the Solicitors' Practice Rules 1990;

(6) That contrary to Rule 9 of the Solicitors' Practice Rules 1990 they had entered into arrangements for the introduction of clients or had acted in association with persons (not being solicitors) whose business or any part of whose business had been to make, support or prosecute (whether by action or otherwise) claims arising as a result of death or personal injury and who, in the course of such business, had solicited or had received contingency fees in respect of such claims.

(7) That contrary to Rule 15 of the Solicitors' Practice Rules and the Solicitors' Costs Information and Client Care Code, they had failed to give sufficient information to clients about costs and/or the funding of claims generally contrary to Rule 1(a), (c), (d) and (e) of the Solicitors' Practice Rules 1990;

(8) That contrary to Rule 7 of the Solicitors' Practice Rules 1990 the Respondents had shared their professional fees with a non-solicitor, namely Walker & Co;

(9) That the Respondents had written a letter to a Parliamentary Under Secretary of State that had not been frank or open and/or had served to mislead contrary to Rule 1(a) and (d) of the Solicitors' Practice Rules;

(10) That the Respondents had improperly released confidential information about clients to a third party contrary to Rule 1(a), (c), (d) and (e) of the Solicitors' Practice Rules;

(11) That the Respondents had acted and/or had continued to act in circumstances of conflict and/or significant risk of conflict between the interests of their clients and their own interests contrary to Rule 1(a), (c), (d) and (e) of the Solicitors' Practice Rules 1990;

The application was heard at the Court Room, 3rd Floor, Gate House, 1 Farringdon Street, London, EC4M 7NS on 17th-27th November and 11th December 2008 when Timothy Dutton QC, Andrew MacNab and James McClelland of Counsel represented the Applicant and Alan Gourgey QC, Donald McCue and Phillipa Watson of Counsel represented the Respondents.

The evidence before the Tribunal included 15 lever arch files that comprised the agreed trial bundle of, inter alia, pleadings, including the amended Rule 4 Statement and further information and clarification in response to the Respondents' detailed request dated 18.09.07, the Forensic Investigation Report, case report and the Respondents' response of 07.02.06, Witness Statements on behalf of the Applicant and the Respondents, file reviews and both opening and closing written submissions from Counsel. Oral evidence was given by both Respondents, Mr Martyn Duerden, miner witnesses and witnesses on behalf of the Respondents.

It was agreed that the competition arguments should be dealt with by specialist Counsel as a discrete part of the Hearing in which Mr Middleton and Professor Peysner gave oral evidence. It was noted that if the Tribunal was satisfied that any of the rules referred to in the allegations breached the Competition Act or relevant European Law, while not having the judicial review power to declare a rule unlawful, it would be possible for the Tribunal to dis-apply such a rule. It was further noted that the Divisional Court had dismissed applications for judicial review because the relevant fact-finding, required in order to determine the issues that would arise on competition challenges, had not taken place.

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

The Tribunal Order that the respondent, James Rhodes Beresford of Quay Point, Lakeside Boulevard, Doncaster, South Yorkshire, DN4 5PL, solicitor, be Struck Off the Roll of Solicitors and it further Orders that he do pay the costs of and incidental to this application and enquiry to be subject to a detailed assessment unless agreed between the parties to include the costs of the Investigation Accountant of the Law Society. Both respondents are jointly and severally liable for costs.

The Tribunal Order that the respondent, Douglas Harold Smith of Quay Point, Lakeside Boulevard, Doncaster, South Yorkshire, DN4 5PL, solicitor, be Struck Off the Roll of Solicitors and it further Orders that he do pay the costs of and incidental to this application and enquiry to be subject to a detailed assessment unless agreed between the parties to include the costs of the Investigation Accountant of the Law Society. Both respondents are jointly and severally liable for costs.

Glossary

1.	BCC	The British Coal Corporation
2.	Contingency FA	Contingency Fee Agreement
3.	"The Client Care Code"	The Solicitors Costs Information & Client Care Code
4.	CFA	Conditional fee agreement
5.	CHAs	Claims Handling Agreements
6.	COPD	Chronic Obstructive Pulmonary Disease
7.	CSG	Claimants' Solicitors Group
8.	CA98	Competition Act 1998
9.	DTI	The Department of Trade and Industry
10.	EBS	Equity Business Services Ltd
11.	FIR	Forensic Investigation Report
12.	IRISC	Aon IRISC Claims-handlers for British Coal/DTI
13.	MAP	Medical Assessment Procedure
14.	MELEX	Melex Ltd
15.	OFT	Office of Fair Trading
16.	RD	Respiratory Diseases (chronic obstructive pulmonary disease, chronic bronchitis etc)

17.	"The referral code"	The Solicitors Introduction and Referral Code
18.	SPR	Solicitors Practice Rules 1990
19.	UDM	Union of Democratic Mineworkers
20.	Vendside	Vendside Ltd
21.	VWF	Vibration white finger
22.	Walker & Co.	Walker & Co. (Claim Services) Ltd
23.	DES	Deceased Expedited Settlements
24.	LES	Live Expedited Settlements

The facts are set out in paragraphs 1-23 hereunder:

1. Mr Beresford (the First Respondent) was born in 1950 and admitted to the Roll of Solicitors in 1976. His name remained on the Roll. Mr Smith (the Second Respondent) was born in 1956 and admitted in 1981. His name remained on the Roll of Solicitors.

2. The Respondents practised in partnership until 1st October 2002. On that date they began practising as Beresfords Solicitors LLP, a Limited Liability Practice. At all material times, the Respondents practised at Quay Point, Lakeside Boulevard, Doncaster, South Yorks, DN4 5PL with further offices at 63 Balby Court, Carhill, Doncaster.

3. An inspection of the books of account of the practice was commenced on 5th April 2004 with a resulting report dated 11th November 2004. That Forensic Investigation Report ("FIR") was followed by correspondence between the Law Society and the Respondents. On 27th February 2006, an Adjudicator referred the conduct of the Respondents to the Solicitors Disciplinary Tribunal. On 18th September 2007 the Respondents made detailed requests for further information. Further information and clarification was supplied by the Applicant and the Rule 4(2) Statement amended. The Respondents' response to the amended Rule 4(2) Statement was then filed and served.

4. The key background information in the hearing related to Mining Health Compensation Claims. The British Coal Corporation ("BCC") was found liable in two separate High Court group actions relating to the following medical conditions suffered by some of those employed in the mining industry:

   (a) Vibration White Finger ("VWF"); and
   (b) Respiratory Diseases (Chronic Obstructive Pulmonary Disease (COPD), Chronic Bronchitis etc) (RD). The Department of Trade and Industry (DTI), as successor to the business of the BCC, accepted liability for the medical conditions.

5. Following the admissions of liability and under the supervision of the High Court, Claims Handling Agreements ("CHAs") relating to VWF and RD were concluded on 22nd January 1999 and 24th September 1999 respectively. (The Tribunal had copies of these CHAs in the trial bundle.) The CHAs constituted a court-approved scheme that provided the framework for the conduct of all VWF and RD claims.

6. Under the CHAs there were time limits for bringing claims. Claims in respect of VWF were to be brought by 31st March 2003 and claims in respect of RD by 31st March 2004. The schemes are now closed.

7. A total of 750,000 claims were received – 580,000 for COPD and 170,000 for VWF. As at November 2005, about half of these had been settled. £2.6 billion had been paid out in compensation. It is estimated that the likely final cost of the schemes will be some £6.9 billion.

8. The CHAs had stipulated that all claims must be made through a firm of solicitors that had been appointed to the Panel by the DTI. An exception had been made for the Union of Democratic Mineworkers ("UDM") which was permitted to prosecute claims under its own separate CHA.

9. The President and General Secretary of the UDM was Mr Neil Greatrex. Mr Michael Stevens was the Vice-President of the UDM. Vendside was a company in which the two shareholders were Mr Greatrex and Mr Stevens, as nominees for the UDM. Vendside was a Claims Management Company, not a Trade Union. Ms Clare Nicola Walker was a claims handler with UDM/Vendside and the sole director and shareholder of Walker & Co.

10. The DTI appointed Aon IRISC ("IRISC") to administer the schemes under its supervision. The CHAs covered, in detail, inter alia, the medical evidence required to support a claim, the way in which a claim would be processed, the amount of damages to be paid on successful claims and the costs payable to the solicitors for prosecuting claims.

11. The RD CHA dealt with the payment of solicitors' costs for RD claims based on the type of RD claim and for further costs, dependant upon other factors, for example, if it was a posthumous claim and probate was required, or if there was an additional claim for special damages. No costs were payable by the DTI to the claimant's solicitors if a claim was unsuccessful. The arrangements provided for medical assessments to provide necessary evidence without any charge to claimants. Similarly, as regards VWF claims, the solicitor received costs at a particular level depending on the category of VWF claim and additional factors.

12. In all RD and VWF claims under the CHAs, the claimant was never at risk of a costs order against him/her. The CHAs ensured that solicitors' costs for successful claims were met by the DTI. The High Court had ordered deeming provisions for both RD and VWF actions.

13. In many cases the Respondents, through Beresfords LLP, had received instructions to act in RD and VWF claims by way of referrals of claims by UDM/Vendside. As at 19th August 2004, the Respondents had estimated that 80% of the firm's income was from mining health claims. The Respondents' firm had expanded rapidly. As at 30th April 2004, the firm had made 79,468 claims on behalf of miners in respect of RD under the CHA.

14. The Respondents had entered into conditional fee or contingency fee agreements with some clients with the result that costs had been deducted from the claimant's damages. The Respondents had deducted success fees in 1,015 miners' compensation claims involving a total deduction of just under £1,000,000. The individual deductions had ranged from £1.29 to £5,426.75. The last deduction, made by the Respondents, had been on 16th June 2003. The deductions have now been repaid.

15. During the Solicitors' Regulation Authority's ("SRA") inspection, 27 files had been reviewed in which the Respondents had entered into either conditional or contingency fee agreements. No evidence had been found on any of those files to suggest that the firm had made its clients aware that the Respondents would receive costs from the DTI on a fixed basis in successful cases.

16. Twenty CFAs had been reviewed during the inspection. 19 had provided for a success fee of 100% of the firm's profit costs limited to not more than 25% of the client's compensation. The CFAs used by Beresfords contained the standard clauses as to the payment of costs and disbursements in the event of an unsuccessful claim.

17. On 18 December 2003, Mr Nigel Griffiths MP, the Parliamentary Under Secretary of State for Coal Health, wrote to the Respondents. The Second Respondent replied by letter of 9th January 2004. Copies of both letters were before the Tribunal.

18. The Respondents received approximately 15,000 miners' compensation claims from UDM and/or a related company, Vendside. The shareholders of Vendside were Mr N Greatrex and Mr M L Stevens, both Union Officials. They held the shares of the company as nominees for the UDM Nottingham section, as previously stated. Although the UDM had its own CHA, it referred claimants to firms of solicitors, including the Respondents. The Respondents made payments (i.e. deductions) totalling £1,208,735.25 to the UDM from clients' damages where settlements had been agreed and paid by Aon IRISC.

19. Clients, referred to the Respondents by the UDM/Vendside, had already signed a document on UDM notepaper stating that the claimant agreed "if my claim is successful I will pay to Vendside Ltd, who administer these claims, a fee, to cover the cost of pursuing this claim on my behalf, within the following guidelines….." This document provided for payment on a sliding scale, depending upon the amount of damages received. £50 plus VAT was payable on a settlement of less than £500 and the fee increased by £50 for every £500 received, up to a maximum fee of £300 plus VAT on a settlement of £3,000 or more.

20. Walker & Co was incorporated on 9th January 2002 with Clare Nicola Walker as its sole director (according to a company search). At all material times, Clare Walker was also an employee of the UDM and/or Vendside and had formerly been employed by Aon IRISC. Beresfords made payments from their office bank account to Walker & Co totalling £736,186.30. Monies were paid under an agreement entitled "Beresfords Claims Handling Agreement" signed by both Respondents and Ms Walker.

21. The document entitled "Beresfords Claims Handling Agreement" provided, amongst other things:-

    (a) That in miners' compensation cases covered by the CHAs with the DTI: Beresfords would pay a "vetting/marketing/administration" fee as follows:-

        (i) £150 plus VAT for VWF cases……
        (ii) "Beresfords will pay the sum of
        £300 plus VAT in relation to cases settled at full MAP
        £150 plus VAT in relation to Deceased Expedited Settlements
        £100 plus VAT in relation to Live Expedited Settlements

The above COPD fees will be paid by Beresfords upon successful conclusion of the matter."

(b) That the claimant's Vendside Handling fee would be paid at the end of the claim to Vendside in the usual way.

(c) That all correspondence "in relation to the issue" be sent to Clare Walker, at her home address.

22. A Memorandum of a meeting that took place on 10th January 2002 between Mick Stevens (General Secretary of the UDM) Clare Walker and the Respondents stated that:

(a) In return for Beresfords having "exclusivity" on UDM claims, payments in respect of a "marketing/administration/investigative fee" would be made by Beresfords on the successful conclusion of each case.

(b) For VWF cases covered by the VWF CHA, the amount payable on successful conclusion would be £150 plus VAT.

(c) For RD cases covered by the RD CHA, the amount payable on successful conclusion would be £300 plus VAT in relation to cases settled at full MAP, £150 plus VAT in relation to deceased expedited cases and £100 plus VAT in relation to normal expedited cases.

(d) Non-schemed claims: (i) Traumatic - £200 plus VAT on successful conclusion, (ii) all other claims - £150 plus VAT on successful conclusion. "In addition, Clare Walker claims will receive £100 commission from CLE and £50 payment from Melex as an administration fee. The amount that Clare Walker/UDM charge to their individual claimants is a matter for them."

23. In an internal Beresfords memorandum, the Respondents stated, inter alia, that as from 1st December 2001, Walker & Co had effectively replaced Vendside as the marketing company entitled to the payments for the marketing/ vetting/ administrative work. However, Vendside remained the company entitled to a share of the clients' compensation.

The Opening Submissions on behalf of the Applicant

24. Mr Dutton, for the Applicant, made opening submissions with reference to his written document that was before the Tribunal. He stressed that the Respondents were facing 11 serious allegations. He outlined the background to the case, namely the two schemes. The first for VWF, involving a CHA under which miners, former miners or their estates could bring claims against the DTI as successors to British Coal. The second for COPD claims relating to breathing difficulties, involving a similar CHA. He explained that although there were other industrial disease claims in the background, most of the cases concerned VWF or COPD claims. Mr Dutton detailed the allegations, and submitted that the alleged breaches were serious enough to constitute conduct unbefitting.

25. Mr Dutton explained that there were four key issues between the parties. First, did the Respondents commit the breaches (or misconduct) alleged in allegations 1 to 11?

Second, were the Respondents guilty of conduct unbefitting a solicitor? This second issue involved the determination by the Tribunal of the seriousness of any breaches found. Third, should the Tribunal dis-apply Rules 3 and/or 9 of the Solicitors' Practice Rules ("SPR") because they are in breach of principles of competition and/or European Community Law? Fourth, what was the appropriate penalty?

26. Having explained the factual background of the development of Beresfords LLP, Mr Dutton turned to Equity Business Services Ltd ("EBS") and Melex Ltd (Melex). EBS was a company owned and controlled by the First Respondent and his wife. It was involved in medical referral work but is now dissolved. Melex was incorporated in 2001. Its shareholders were the Second Respondent, Mrs Beresford and prior to transferring shares at some point between July 2003 and July 2004, the First Respondent. Melex operated in the business of medical reports. It was an agency, owned by the Respondents, which organised medical reports and had a doctor as one of its directors.

27. As a practice, Beresfords underwent a remarkable expansion from 1998 onwards with the advent of coal claims. In 1999 Beresfords' annual fee income was £684,152. By 2004 the gross profit generated by the practice was £8,758,743. By 2006 the gross profit had risen to £36,205,805. In 2000 the partners' annual drawings were £182,052. In 2006 the two Respondents shared drawings of £23,273, 256. In 1998 Beresfords had 10 employees. By 2004 this had risen to 244 employees. The growth of the Practice was, in large part, due to Beresfords obtaining instructions in large numbers of industrial injury claims from former miners.

28. Mr Dutton turned to the SRA's investigation in April 2004. He explained that during that investigation, the Investigator, Mr Duerden, had inspected 64 client files of which 49 had been CHA scheme claims and 15 non-scheme claims. The Tribunal had copies of his file reviews and a summary results chart of the 64 files reviewed. Mr Dutton referred to the details of a claimant, Mr Bochenski, on the summary chart. He explained that Mr Bochenski would be one of the miners giving evidence to the Tribunal. He suffered from VWF and had a claim against British Coal but was not a UDM or Walker & Co referral. On 26th January 2000 he entered into a contingency fee agreement pursuant to which the Respondents received, on the success of the claim, 25% of his damages. Mr Dutton submitted that the information provided by Beresfords to Mr Bochenski was inappropriate and inadequate. This was because he had not been told that the DTI would be paying the Respondents' costs, if his claim was successful. Mr Dutton explained that the Respondents maintained that in every case their clients were told that the DTI would pay the solicitors' costs if the claim was successful. It was an issue that the Tribunal would need to resolve. He stressed that as far as the 64 claims reviewed by Mr Duerden were concerned, no letter to the client, advising the client about the DTI paying costs in successful cases, had been found on any of the files. Mr Dutton maintained this was because no such letter had ever been sent to their clients by Beresfords. Mr Bochenski obtained damages and paid £4,795.72 to Beresfords as a contingency fee. The practice also received costs from the DTI under the CHA arrangements. Mr Dutton referred the Tribunal to a number of other similar cases on the summary chart of the 64 files reviewed.

29. Mr Dutton asked the Tribunal to consider a Vendside referred case of a client RM, a pulmonary disease case. On this file there was a signed Vendside "agreement" dated 8th August 2000. Mr Dutton stressed that he always used the word "agreement" in a Vendside context in inverted commas. This was because the Applicant disputed

whether the "agreement" was legally binding on the claimants. In the RM case Mr Dutton submitted that again there had been inappropriate and inadequate treatment of the client in that no advice had been given in relation to the Vendside "agreement" and further there had been no disclosure of the DTI costs regime.

30. Mr Dutton explained that no deductions from compensation made under Vendside "agreements" were ever repaid by Beresfords. These deductions ranged from between £50 and £300, on successful cases. When claims were successful, clients were reminded by the Respondents that they had agreed to pay money to Vendside and usually payments would be made from clients' damages.

31. Mr Dutton reminded the Tribunal of the development of the CHAs from two separate High Court group actions. British Coal was found liable in negligence for both VWF and COPD. A VWF CHA was agreed on 22nd January 1999 and a COPD CHA agreed on 24th September 1999. The Tribunal had copies of both CHAs and was referred to the detailed provisions of both schemes. An Order had been made by Mr Justice Turner for the proper future conduct of the claims. There were provisions as to how people could join the schemes and, on registration, deeming provisions took effect, provided that certain conditions were satisfied. In effect the order provided for a mechanism under which claims could be notified and lodged and, provided this took place, proceedings were deemed to have been commenced. Negotiation and discussion about the claims could begin, as did the running of interest on the damages in successful cases.

32. Mr Dutton submitted that it was important to look at the scale of what had happened. There had been an unprecedented number of claims for compensation. In total some 750,000 claims were registered under the CHAs, 580,000 for COPD and 170,000 for VWF. By November 2005, approximately £2.6 billion had been paid by the Government. The total cost was anticipated at approximately £6.9 billion.

33. Mr Dutton stressed that the CHAs had been the subject of detailed negotiations between solicitors on both sides. The CHAs were intended to provide a comprehensive framework for the disposal of VWF and COPD claims. Negligence was no longer an issue as liability had been established in the test litigation. Mr Dutton submitted that this was very relevant to the use of conditional fee and contingent fee agreements. In addition, limitation had been waived, provided that claims were registered before the specified cut off dates. Initially, this was 30th September 2000 for VWF, later extended to 31st March 2003. The period for COPD was extended to 31st March 2004. Moreover, the CHAs set out detailed claims procedures; a step by step approach as to how claims should be processed. In addition, there was a no cost procedure for the obtaining of medical evidence. Mr Dutton referred the Tribunal to the relevant sections of the CHAs, including the schedules and tariffs within both schemes, dealing with each head of damages. There were detailed provisions for, inter alia, pain, suffering, loss of amenity, loss on the labour market, financial loss and special damages. He stressed that the schemes involved liability admitted, limitation not an issue, a cost-free procedure for obtaining and submitting standardised medical evidence and pre-formulated quantum set out in considerable detail as to ranges and types of evidence required.

34. Turning to costs, Mr Dutton referred the Tribunal to the detailed costs provisions of Schedule 17 of the COPD CHA. He noted the following in paragraph 14 of Schedule 17 to the COPD CHA, "The DTI anticipates that these agreed figures will represent

the total sums payable to claimants' representatives in relation to a claim. The DTI will not be liable for any additional fees or disbursements howsoever they might arise which have been paid to the claimants' representatives". Mr Dutton submitted that the charging of conditional or contingency fees, over and above the sums received under the CHAs, was unacceptable. He stressed that unsuccessful claimants had no adverse costs risks.

35. Mr Dutton explained that under the separate CHA, negotiated with the UDM, the only difference related to the costs/recovery ratio. This ratio was 16.7% lower for the UDM than it was for solicitors acting for claimants in non-UDM referred claims.

36. He noted that Beresfords had acted in 83,069 COPD claims and in 14,582 VWF claims. Prior to June 2002, Beresfords had required all clients, not referred by the UDM, to enter into CFAs or contingency fee agreements. The First Respondent had said this was because of the substantial risk of failure of these claims. Success fees were deducted by Beresfords in 1,015 scheme claims. The last deduction was made on 16th June 2003. However, Mr Dutton pointed out that Beresfords had not considered it necessary to enter into conditional or contingent fee agreements with UDM/Vendside referred clients. This was despite the fact that fees received for any of those clients, who were successful, would be 16.7% lower than the DTI/ solicitor cost regime.

37. Mr Dutton considered the information provided by Beresfords to clients who were entering into success fee agreements. While he acknowledged that there was some dispute as to what information had been provided, he noted that the Respondents admitted that they did not inform any of their clients that other firms were handling CHA cases without charging success fees. He stressed that the Respondents denied both that they had any duty to so inform clients or that they had been aware that other firms were not charging success fees. Both were issues for the Tribunal to determine. The Tribunal was referred to a template client care letter that alluded to the DTI paying Beresfords' costs. However, Mr Dutton submitted that no copy of such a letter or of any other client care letter with a client's name, reference or address had been found on any of the 64 files reviewed by Mr Duerden.

38. Mr Dutton detailed the case of Mr Bochenski. He was awarded £18,517.81 in damages of which £4,795.72 was deducted by Beresfords under a contingency fee agreement. Those fees were in addition to the fees paid to Beresfords by the DTI under the CHA. A file note, dated 12th January 2000, indicated that Mr Bochenski had agreed, by telephone, to proceed on a contingency fee basis. A letter to him, dated 24th January 2000, set out his funding options, including that of a contingency fee for non-contentious matters. Mr Dutton submitted that it was unlawful to charge contingency fees in CHA cases as they were "contentious" rather than "non-contentious" matters. Moreover, there was no documentary evidence that clients entering into contingency fee agreements were told that the DTI would be paying their solicitors' costs in successful cases. In particular there was no reference to the DTI paying costs in the funding options letter. The key paragraph in the funding options letter relating to contingency fees stated:

> "This applies to non-contentious matters which means those where commencement of proceedings is avoided. The majority of cases do not require proceedings to be commenced. In the event of our success we agree to charge a set percentage of the money recovered. The advantage of this method

> is simplicity and certainty. The client knows beforehand what deduction will be made, irrespective of the amount of work undertaken. Clearly there are winners and losers in circumstances such as these and as a firm we agree to make no charge for any disbursements which are not agreed at the outset and in this way, unlike conditional fees, the client is exposed to no financial risk whatsoever."

Mr Dutton submitted that there was a question over the presence of any risk because the DTI would pay the costs of the medical investigation in any event and the solicitor's costs if the claim was successful. Moreover, that the combination of not putting in writing to Mr Bochenski the fact that the DTI would be paying costs and not making it clear what those costs were, had given a misleading impression to the client.

39. Mr Dutton explained that Mr Bochenski's contingency fee agreement was dated 26th January 2000 although that date was added later in November 2003. He referred to the terms of the contingency fee agreement, in particular the following paragraph:

> "If we recover costs on your behalf, they belong to us. In other words, if you win, you will pay us our agreed share of your compensation whether or not we also recover any costs from your opponent."

However, Mr Dutton submitted that what Mr Bochenski ought to have been told, in writing, was that if successful, the costs would be paid by the DTI. Following an interim payment, a sum of £4,299.25 was deducted from Mr Bochenski's damages.

40. Having taken the Tribunal through the documents relating to Mr Bochenski's contingency fee case, Mr Dutton submitted that when the Respondents were making conditional fee or contingency fee agreements, they failed to consider the particular facts of any case when determining the percentage uplift. Beresfords had applied a standardised risk assessment containing irrelevant considerations. Mr Dutton referred to various schedules of risk to conditional fee agreements with assessments of 10% for limitation issues and 10% for a risk of failing to beat a Part 36 payment. Neither assessment could properly be relevant to risk in claims under CHAs. In addition, he referred the Tribunal to standard clauses in the conditional fee agreements used for CHA claims which were untrue in the context of scheme claims. For example, "if you lose, you pay your opponent's charges and disbursements. You may be able to take out an insurance policy against this risk. Please see condition 3J and 5". The true position was that scheme clients were never at risk of becoming liable for the DTI's costs and disbursements.

41. Mr Dutton highlighted the case of the estate of Mr I in which there was an offer, under the CHA, of £281.77. This was a conditional fee agreement case. Beresfords advised their client to accept the offer. Beresfords claimed costs of £2,431.08 from the DTI. In addition, the practice took a success fee of £64.40 from the compensation leaving £217.73 to the miner's widow.

42. Mr Dutton asked the Tribunal to consider the case of Mr F who had entered into a CFA. The Tribunal was referred to the relevant papers, including a letter from Beresfords in which Mr F was thanked for providing the names of three potential clients. Mr F was told that his success fee would be reduced from 25% to 20% because of the business he had put forward and that should he introduce another nine

clients, his success fee would be reduced to zero. Mr Dutton submitted that this was an example of an attempt by a solicitor to reward a person for making referrals; a breach of the Referral Code.

43. Mr Dutton explained that although Beresfords stopped entering into contingency fee agreements in scheme claims in 2000 and ceased entering into CFAs in June 2002 they continued to enforce success fee agreements until June 2003.

44. Dealing with allegation (9) Mr Dutton referred the Tribunal to the letter, dated 18th December 2003, to Beresfords from Nigel Griffiths, the Parliamentary Under-Secretary of State for Coal Health. Following concerns raised at the highest ministerial levels, Mr Griffiths had written to ask firms if they had taken a fee from clients as well as costs from the DTI in respect of the same case. Mr Dutton also referred the Tribunal to Beresfords' reply dated 9th January 2004 and drafted by the Second Respondent. He submitted that taken as a whole it was a misleading letter. He referred, in particular, to the penultimate paragraph as follows:

> "I think it simply remains for me to point out that other organisations, such as Claims Management Companies and Trade Unions, are continuing to seek deductions of compensation from mining claimants. These organisations do not have to bear the cost of litigating claims for clients which subsequently turn out to be unsuccessful and one may therefore wonder exactly what justification they have for seeking deductions at all."

Mr Dutton noted that the paragraph was written by the Second Respondent in the knowledge that by December 2003, the UDM or UDM/Vendside had for years been making deductions from Beresfords' clients' compensation. Moreover, that the letter of 9th January 2004, when referring to no win no fee agreements, stated as follows:-

> "We have entered into no such agreements for over 18 months and our policy, which was established shortly prior to your recent request to firms of solicitors in this connection is to refund any such deductions."

However, Mr Dutton pointed out that Beresfords had not made any repayments by the time of Mr Griffiths' letter and had made only three repayments by the time of the Second Respondent's reply. He submitted that some 1,015 clients had had success fees deducted from their compensation and had not in fact begun to receive rebates, in any material respect, before the letter of 9th January 2004 was written and that therefore that letter gave a misleading impression to the MP. Mr Dutton submitted that the letter, as drafted by the Second Respondent, gave a materially false impression. This was because the letter referred to historical deductions of success fees and that Beresfords had not entered into such agreements for 18 months. That led to the impression that deductions were historical, in the sense of not having been made for 18 months, when in fact Beresfords had been enforcing success fees until the summer of 2003. As well as being misleading as to the actual repayment of success fees, the letter had been misleading as to Beresfords' involvement with the UDM, in that their clients had entered into "agreements" which had led to the UDM being paid costs, ostensibly for "services provided". Finally, Beresfords had been involved in the payment of referral fees both to the UDM/Vendside and to Walker & Co.

45. Mr Dutton then turned to the position of the UDM and the arrangements made by Beresfords with the UDM. He explained that the UDM grew out of the miners' strike of 1984 as a Trade Union for coal miners based in Nottinghamshire. The President of the Union, Neil Greatrex and the Vice-President, Michael Stephens, set up a company called Vendside and became its two nominee shareholders. Vendside was used, from about 1991, as a claims manager and referrer. In 1999, Clare Walker was employed by the UDM and/or Vendside. Previously she had worked for Aon IRISC. The UDM had its own CHA with the DTI and had been involved in negotiations for VWF and COPD claims. By late 1999, the First Respondent was aware that the UDM had a large number of potential claims that could be referred to his firm. Mr Dutton asked the Tribunal to look at a letter of 7th January 2000 from Michael Stephens to the First Respondent dealing with the basis for the referral by the UDM of VWF/COPD matters to Beresfords. That basis was (as detailed by the letter):-

> "1. Your legal costs and disbursements will be limited to a figure equal to the costs and disbursements recoverable from the DTI under the terms of the scheme.
> 2. Any costs and disbursements incurred over and above the sums recoverable from the DTI will be waived.
> 3. ……..no claim for any payment in respect of costs and disbursements will be made to the Union until such time as the costs are received under the scheme from the DTI.
> 4. The understanding must be that the purpose of this retainer is to ensure that no financial burden should fall on the Union or its members between receiving instructions and settlement. On settlement the extent of the financial burden will be in effect a sum not exceeding the amount payable by the DTI under the scheme.
>
> At no time will your firm seek to obtain any costs and disbursements from the Union. Any costs and disbursements for unsuccessful claims will be waived. The Union's marketing costs will be met on a claims ratio basis. This agreement will be sent to you under a separate cover."

Mr Dutton submitted that it was clear from the agreement of January 2000 that UDM referred clients were to be charged only what could be recovered from the DTI and that that fact gave lie to the Respondents' assertion that it might have been uneconomic to take VWF/COPD claims from non-UDM clients without charging success fees.

Dealing with the marketing costs part of the agreement, Mr Dutton explained that no separate agreement with UDM/Vendside had been disclosed. Mr Dutton submitted that a solicitor wanting to comply with the rules would have realised that an agreement with a referror under which payment would be made for claims on a claims ratio basis would present a fairly significant problem.

46. In due course, clients who were referred by UDM/Vendside to Beresfords paid a fee out of their damages to UDM/Vendside ranging between £50 to £300 per case and had arrived at the firm with the UDM/Vendside "agreement" already signed.

47. Mr Dutton referred the Tribunal to the "agreement" signed by Mr WH on 24th January 2002 as an example of the UDM/Vendside "agreement" in use until about mid-2002

when the wording was changed to refer to "Union subs". The heading was UDM, Nottingham section and the agreement contained two clauses. Clause 1 stated

> "I agree that if my claim is successful, I will pay to Vendside Ltd who administer these claims a fee to cover the cost of pursuing this claim on my behalf within the following guidelines……."

The scale fees were set out up to a maximum of £300 plus VAT on a settlement of £2,501 or more. Cheques were to be made payable to Vendside Ltd at the settlement of the claim. Clause 2 contained a confirmation that the person was a full financial member of the UDM Nottingham section in which case paragraph 1 did not apply.

48. Mr Dutton submitted that any solicitor considering the "agreement" would have noted that nothing in the "agreement" referred to what the UDM or Vendside would be doing for the money to be paid. No details were provided of the consideration or of the duties of UDM/Vendside. The words "to cover the cost of pursuing this claim on my behalf" did not reflect the true position as it was Beresfords who would be pursuing the claim. From their witness statements, Mr Dutton explained that he had noted that the Respondents believed the fee to be a payment in lieu of Union subscriptions but, he queried, if this had been the case why were the payments being made to Vendside, the claims handling company, rather than to the UDM. Moreover, why had the solicitors not ensured that the "agreement" reflected what they believed it meant. Further he noted that the "agreement" was signed only by the claimant and that the amount to be paid depended on the amount of the damages obtained. Mr Dutton submitted that the fee payable under the "agreement" had the hallmarks of a reward going to the UDM/Vendside commensurate with the value of the claim to both the client and to the solicitor and that a sliding scale based on quantum of damages did not look like a Union susbscription.

49. Turning to Beresfords' relationship with Walker & Co, Mr Dutton explained that Walker & Co was a company incorporated on 9th January 2002. On 10th January 2002 there had been a meeting followed by an agreed memorandum. Present at that meeting had been Mick Stephens, Clare Walker, the First Respondent and the Second Respondent. It had been agreed that, in return for Beresfords having exclusivity on UDM claims, Beresfords were to pay a marketing/administration/investigative fee for scheme claims of £300 plus VAT for a full MAP claim, £150 for a deceased/expedited claim and £100 plus VAT for a live/expedited claim. For non scheme claims; £200 plus VAT for traumatic and £150 plus VAT for all others. Clare Walker claims were to receive £100 commission from CLE (an insurer) and £50 from Melex as an admin fee. On 2nd July 2002 an agreement was signed by Clare Walker entitled "Beresfords claims-handling" agreement. In relation to payments at (i) "following acceptance of the claim, Beresfords are to pay the sum of £150 within 56 days of acceptance with regard to vetting/ marketing/ administration fee, a significant element of work having been carried out in relation to the completion and internal vetting of claimant questionnaires. In default Beresfords will pay interest at the rate of 4% over base." Mr Dutton submitted that that constituted a referral fee or at least a reward for a referral. At (j): "A further payment of £50 will be made from Melex Ltd within 14 days of receipt by Melex of its fee relating to medical services supplied in connection with any cases that we have referred." Under scheme cases "VWF scheme cases, Beresfords are to pay the following: vetting/marketing/administration fees - £150 plus VAT". For COPD claims the figures range from £300 for a full MAP, £100 for a live expedited settlement and £150 for a deceased expedited settlement.

Payments were to be made after the supply to Clare Walker, on the 1st of every month, of details of the N.I. number of the claimant, the claim type, the settlement date or discontinuance. A further clause excluded the right of the UDM/Vendside and Walker to audit the claims handled by Beresfords. The last phrase of the agreement stated:

> "All correspondence in relation to the issue to be made direct to Clare Walker at her home address."

In the course of the period after 9th June 2002 Beresfords paid, out of office account, a total of £736,186.30 to Walker & Co.

50. Mr Dutton noted that it was for the Tribunal to determine whether the fees paid to Walker & Co had been made in consideration of a service or as referral fees. He submitted that the scheme had been designed using the phrase "marketing/vetting/administrative work" so as to disguise the fact that it was a referral payment arrangement. In addition Mr Dutton referred to the following from an aide memoire drawn up by the Second Respondent to provide guidance to Beresfords' staff:

> "The payments are worked out on a sliding scale set out. In order to avoid us falling foul of a professional rule relating to our accepting work from introducers, Vendside has waived its entitlement to a share of the compensation if the claim became subject to the issue of court proceedings".

Mr Dutton further submitted that it was a striking consequence of the meeting of 10th January 2002 that payments relating to the introduction of clients that had hitherto been made to the UDM or Vendside were to go to a company privately owned and operated by a senior employee, a claims officer, of the UDM. The inference was that it was possible that those monies should have been going to the UDM or Vendside. Mr Dutton submitted that in these circumstances a solicitor should have been struck by the fact that payments that were being made apparently for the good of the UDM/Vendside were now in fact going to a company set up by an employee at her home address. He submitted that the situation would have given rise to serious questions in a solicitor's mind and that the failure, in the Respondents' case, to address these questions resulted in "conscious impropriety" on their part. Mr Dutton submitted that the Respondents had ensured not only that referral payments had been mis-described as "administration" payments but also that they were sent to the home address of a person who was an employee of the Union or of its claims handling company. Moreover, that in so doing the Respondents had acted with conscious impropriety so as to make it appropriate for the Tribunal to conclude that their actions were dishonest on the basis of the Twinsectra test. They were acting consciously with impropriety while knowing that they were acting in a dishonest way. An honest solicitor would have questioned why funds, hitherto going to the Union or its trading arm, Vendside, were being diverted to an employee's address and company.

51. Turning to EBS and Melex, Mr Dutton explained that initially Beresfords would seek a medical report from EBS and be invoiced by EBS. EBS was the Respondents' company. Subsequently Beresfords either instructed EBS, who in turn instructed Melex, or instructed Melex directly. It appeared that Melex ultimately took over all the medical report business. Beresfords was invoiced directly by the expert and the expert included in that invoice an administration fee that he/she had paid to Melex. Mr Dutton reminded the Tribunal that under the "Beresfords claims handling

agreement" Melex undertook that in all cases referred to Beresfords by Walker, it would pay a fee of £50 to Walker & Co within 14 days of receiving its own fees. Mr Dutton submitted that in substance the administration fee paid by the expert to Melex was, or was contributing to, the source of the £50 administration fee or commission that Melex was paying on to Walker & Co. The channelling of payments via Melex to Walker & Co was the channelling of a referral payment. Moreover, he noted that the Respondents contended that they had disclosed to clients their personal financial interest in Melex. Mr Dutton submitted that they were clearly bound to do so because they had an interest for reward in the company that was making profits as a result of supplying medical expertise. However, from the files reviewed by Mr Duerden, there was no evidence that relevant clients were advised of the Respondents' interests in EBS or Melex.

52. Turning to the second allegation, the failure to advise in relation to the UDM "agreement", Mr Dutton noted that it was admitted that the Respondents did not advise their clients about the "agreement". He stressed that the question for the Tribunal to determine was whether the Respondents had a duty to advise and if so how they should have advised and whether, if they had failed in that duty, the Respondents were in breach of Rule 1 SPR. Mr Dutton submitted that the "agreement", coupled with the knowledge the Respondents had, meant that they were under a duty to advise. The "agreements" were not in the best interests of the client and at least arguably, were unenforceable. They were not in the best interests of the client because these "agreements" did not involve the UDM or Vendside under-taking any obligation towards the client at all. To the extent that "agreements" described covering the costs of the claim, that was a misrepresentation because UDM/Vendside took no part in conducting the claim and the cost of the claim was bourne, ultimately, by the DTI under the CHAs. Moreover, Mr Dutton submitted that as the amount of the fee charged to an individual depended on the amount of damages received it was a contingent fee and a breach of Rule 9 SPR.

53. Mr Dutton stated that the solicitor's duty to advise meant that a client was entitled to the benefit of the solicitor's knowledge in so far as it affected the arrangements which the client had entered into for which he might or might not, at some future date, become liable. He stressed that this case involved not just one client with an "agreement" but every UDM referred client that came to Beresfords, a large volume of business. Counsel referred to Spector v Ageda as a foundation authority for recent law on the duty to share knowledge (copies were handed to the Tribunal). Mr Dutton submitted that as a matter of law and having regard to Practice Rule 1(a), (c), (d) and (e), the Respondents' duty was to advise clients that the UDM/Vendside "agreement" was not in the clients' best interests, and, at least arguably, unenforceable and to advise them of the ways in which they could advance their claims other than by entering into the UDM/Vendside "agreement".

54. Turning to the first allegation, relating to conflict of interest, Mr Dutton submitted that the interest that the Respondents had was in maintaining their relationship with Vendside/UDM/Walker. He referred to an exchange of letters between the Second Respondent and the Law Society indicating the Second Respondent's knowledge of the rules relating both to fee sharing arrangements and to referral fees and of the implications of those rules to a relationship with a major Trade Union. Mr Dutton submitted that the UDM/Vendside "agreement" conferred no obvious advantage on the client and that there was a conflict between the Respondents' interests in maintaining that source of referrals and their duty to advise clients independently.

55. In dealing with the allegation relating to breaches of Rule 9, Mr Dutton drew the Tribunal's attention to the wording of the Rule as follows:-

> "A solicitor shall not in respect of any claim or claims arising as a result of death or personal injury either enter into an arrangement for the introduction of clients with, or act in association with, any person, not being a solicitor, whose business or any part of whose business is to make, support or prosecute, whether by action or otherwise and whether by a solicitor or agent or otherwise, claims arising as a result of death or personal injury and who in the course of such business solicits or receives contingency fees in respect of such claims."

The rule was framed widely and envisaged a solicitor having an arrangement or an association with someone who, prospectively, because that person solicits the fees, supports or prosecutes by action or otherwise, claims arising as a result of death or personal injury. Mr Dutton submitted that UDM/Vendside and Walker & Co were such persons covered by Rule 9. Both the UDM and Vendside supported the making of such claims. Mr Dutton stressed that for Rule 9 to be breached it was not necessary for court action to have taken place. He submitted that the UDM, Vendside and Walker & Co all solicited contingency fees, fees that might become payable on the successful outcome of claims advanced "by way of court action or otherwise". Mr Dutton explained that the object of the rule was to ensure that a solicitor did not become involved with an intermediary in circumstances where that intermediary was soliciting or receiving a contingent fee. This was to avoid the risk that the solicitor could be compromised in his own need to preserve independence both as an individual and in the advice given.

56. Turning to allegation (4), dealing with referral arrangements in breach of Rule 3 of the SPR. Mr Dutton referred the Tribunal to section 23 of the Solicitors' Introduction and Referral Code and to the basic principles of the Code. He submitted that in deciding whether payments were referral payments it was the substance of what had happened that was key and that in the cases of Walker & Co, Vendside and the UDM payments had been clearly rewards for referrals. Moreover, the rule was breached if a material part of the payment constituted a payment for the referral. Mr Dutton submitted that there was no evidence of the sort of work alleged to have been undertaken for the payments because they were clearly referral payments and not payments for services.

57. In relation to allegation (5) Mr Dutton submitted that by entering into the Beresfords claims handling agreement that referred to payments for vetting/ marketing/ administration what had really been going on was the concealing of the fact that these payments were referral payments made in breach of the rules. Moreover, he submitted that participation in the potentially improper diversion of monies from Vendside, once the Respondents knew that an official of the UDM was receiving payments for work hitherto undertaken for the UDM, would at the very least have been thought by the Respondents to be a potentially improper arrangement. Mr Dutton referred the Tribunal to the case of Dooley in which the Divisional Court upheld the SDT decision when it said that a solicitor must not continue to act in circumstances where a transaction is dubious or suspicious.

58. Dealing with allegation (8), the sharing of professional fees with a non-solicitor, Mr Dutton submitted that there had been fee sharing with Walker & Co, in breach of Rule 7 SPR. Moreover, in breach of Rule 1, there had been a release of confidential information to Walker & Co, an intermediary, not a solicitor, and accordingly there had been no professional basis for information to be shared with Walker & Co.

59. In relation to allegation (7) and the provision of inadequate costs information, Mr Dutton submitted that Beresfords had been under a duty to disclose the details of the DTI funding arrangements. There was a duty under Rule 15 SPR to give clear advice in relation to funding arrangements. Mr Dutton submitted that not only was clear advice not given but that the agreements entered into with clients for contingency or conditional fees were misleading.

60. Dealing with allegation (3), Mr Dutton explained that while the same point was raised in relation to Rule 8 SPR it was slightly different from the construction point in Rule 9 SPR. He drew the Tribunal's attention to the wording of Rule 8 SPR:

> "A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceedings save one permitted under statute or by the common law."

Mr Dutton submitted that Beresfords' retainer included the prosecution of an action, suit or other contentious proceedings and therefore contingency fee agreements were a breach of Rule 8. He noted that the issue for the Tribunal was whether or not the retainer relating to the claims under the CHAs was a retainer to prosecute an action, suit or other contentious proceedings. Mr Dutton submitted that proceedings under CHAs were deemed to be proceedings that had started in the High Court under the order of 1st October 1998. Therefore, the retainer to prosecute them was regarded to be "other contentious proceedings". In other words, it was a deemed action and therefore "other contentious proceedings". Submitting claims under the CHA that were treated as if they were High Court actions meant that contingency fees were prohibited.

Oral Evidence on behalf of the Applicant

61. Martyn Peter Duerden, an Investigation Manager with the SRA, gave evidence on oath. He relied on his two Witness Statements dated 7th December 2007 and 7th November 2008 and their exhibits. Mr Duerden gave evidence about his investigations at Beresfords and the resultant Forensic Investigation Report ("FIR") dated 11th November 2004. He covered some of the issues highlighted in his report including his interviews with the Respondents. He stated that he did not find any letters to clients saying that if their claim was unsuccessful the DTI had agreed that they would not ask for costs, on any of the 64 files that he inspected. He explained that although he was told by the Respondents that the fee paid to Walker & Co was in respect of marketing, vetting and administration, he did not come across any evidence of those activities on the files or otherwise.

62. In cross-examination Mr Duerden explained that of the 64 files he analysed, 49 were in relation to scheme claims of which 27 related to CFAs or contingency fee agreements. He had become aware of firms making deductions for success fees from a previous investigation. He had also been aware of a debate in Parliament in which

firms were named. The decision to investigate Beresfords had been taken based on reports and complaints logged with the Legal Complaints Service and not because of any particular campaign. Mr Duerden had been looking at the issue of the deduction from compensation of success fees. He provided details about the Questionnaire sent to the 27 clients who had success fees deducted and the answers supplied by 12 of them. Mr Duerden explained that his analysis, based on the DTI figures, as at 31st December 2005, was prepared by him in 2006, not specifically for the Beresfords' case. His later statistics on successful claims were derived from a Parliamentary answer given by Peter Hain MP on 20th February 2001. Mr Duerden accepted that because of interim payments there could have been an element of double-counting. He was referred to and confirmed that he was aware of the Boyes Smith Report commissioned by the DTI and dated 4th November 2005.

63. John Straw, a former miner, gave evidence on oath. He relied on his Witness Statements dated 18th March 2008 and 7th November 2008. Mr Straw gave evidence about his claims for emphysema (COPD) and VWF in respect of which he had instructed Beresfords. He had believed that his costs would be no more than £1,000 for both cases because that was the figure he was given by Beresfords at his initial interview. However, sums of £1,445.25 + £800 were deducted from his compensation.

64. In cross-examination, Mr Straw insisted that he had understood that he was to pay no more than £1,000 for two cases.

65. Stephen Fountain, a miner, gave evidence on oath. He relied on his three Witness Statements of March 2008, 27th October 2008 and 13th November 2008. Mr Fountain gave evidence about his claim for VWF in respect of which he had instructed Beresfords. He had believed that his costs would be no more than 20% of the final claim because that was how Beresfords had explained it to him.

66. In cross-examination, he explained that he could not remember if the costs percentage was to be 20% or 25%. He was not told that the DTI would be paying Beresfords' costs. He received compensation of £10,822 from which Beresfords deducted their costs of £2,601.33.

67. Rodney Wladek Bochenski, a former miner, gave evidence on oath. He relied on his two Witness Statements dated 27th October 2008 and 8th November 2008. Mr Bochenski gave evidence about his claims for VWF and COPD in respect of which he had instructed Beresfords. He said that he was told by Beresfords that they would deduct up to 25% of his compensation as their fee. He dealt with Beresfords by phone and nobody explained to him the meaning of the documents that he was sent to sign. He was awarded damages of £17,197 of which £4,299.25 was deducted by Beresfords. He was not told that the DTI would be paying Beresford's costs.

68. In cross-examination Mr Bochenski stressed that his concerns were about the deduction from his VWF compensation. However, he was unable to remember the contents of documents sent to him by Beresfords in January 2000 explaining various funding options.

The Opening Submissions on behalf of the Respondents

69. Mr Gourgey, for the Respondents, made opening submissions with reference to his written document that was before the Tribunal. As part of his opening observations he described the background to the proceedings referring to a concerted campaign over a number of years by a handful of MPs and the Press, in particular the Times Newspaper, involving a substantial amount of misinformation. He stressed that there was nothing inherently wrong in a firm earning substantial fees from the conduct of its business. The large sums earned by Beresfords between 2004 and 2006 derived from fees received from the DTI. When negotiations were taking place to establish the CHAs there was considerable uncertainty as to the number of claims to be made, the amount of work involved in dealing with them and their success rate. Mr Gourgey noted that in fact the level of claims and the success rates were far higher than had been expected. It was because of this that solicitors, who had invested money in order to be able to manage large numbers of claims, had received substantial fees from the DTI.

70. Turning to the allegations relating to the deduction of success fees in scheme cases, Mr Gourgey reminded the Tribunal that they had amounted to less than one per cent of the scheme claims conducted by Beresfords. The first intimation that the Respondents received of alleged breaches of the rules was the Law Society's letter of 26th July 2005 that included the Forensic Investigation Report of November 2004. However, long before that, in June 2002, the Respondents had stopped entering into CFAs because the success rate had proved higher than expected. In December 2003, Beresfords had decided to refund all success fees deducted for scheme cases.

71. Mr Gourgey observed that the Applicant sought to hold the Respondents culpable on the basis of hindsight and of changing guidance. He referred to reliance on evidence of success rates at the end of 2005 to challenge the reasonableness of Beresfords' decision to charge success fees between 1999 and 2002. He stressed that the Law Society had been aware that success fees were being charged in these cases for many years and had provided no guidance at all until January 2004. That guidance, which required solicitors charging success fees in scheme cases to inform clients that other solicitors did not charge for taking on such claims, was clearly issued in the face of political pressure.

72. Further, referring to the allegations concerning improper diversion of union funds and the misleading of a Minister, Mr Gourgey observed that there was no cogent evidence to support the allegations, only a mixture of speculation or unsound inference.

73. Turning to the level of complaints, Mr Gourgey reminded the Tribunal that Beresfords had handled approximately 83,000 COPD and 14,000 VWF claims. There had been relatively few complaints until the blaze of publicity in 2005 involving active solicitation of complaints by MPs and the Law Society.

74. Mr Gourgey spoke about the nature of the schemes as being particularly relevant to the allegations of breaches of Rules 8 and 9 of the SPR. Rule 8 relating to contingency fee agreements and Rule 9 to having arrangements with persons who receive or solicit contingency fees. He referred to the judgement of Sir Michael Turner in AB v British Coal particularly at paragraph 38 and to the passage from one of the judgments of Mrs Justice Smith cited in a subsequent Court of Appeal case. Mr Gourgey submitted that there was a stay of all VWF and COPD claims on the basis

that there was an administrative scheme that allowed for claims to be made and resolved without resort to the court. It was therefore clear that Beresfords had been acting for claimants on scheme claims, who were not bringing claims by way of court proceedings i.e. not contentious business.

75. Turning to the topic of the alleged vulnerability of claimants, Mr Gourgey submitted that it was a misconception that claimants were a particularly sick and vulnerable group of individuals. For the most part, the claimants, represented by Beresfords, were as able intellectually as other clients.

76. Mr Gourgey asked the Tribunal to consider Re A Solicitor a decision of the Court of Appeal in 1972 with regard to conduct unbefitting a solicitor. He also referred to Cordery on Solicitors Vol 1, section 1, para 1409 and stressed that in judging whether or not conduct amounts to misconduct, the Tribunal had to have regard to the position as to the facts as they were or had appeared to the Respondents at the relevant time, not judging them with the benefit of hindsight.

77. Mr Gourgey then moved on to the first group of allegations concerning contingency fee and conditional fee agreements. He submitted firstly that there was no breach of Rule 8 SPR because the claims were not contentious business. Moreover, that the allegations were advanced with the benefit of hindsight and ignored the perception at the time as to likely success rates. Moreover, that the Respondents, in common with many other solicitors at the time, were fully entitled to require clients, who were not prepared to bear the costs of an unsuccessful claim, to enter into a CFA or contingency fee agreement, if they wished to retain the services of Beresfords.

78. Mr Gourgey referred to the wording of Rule 8 SPR and to the definitions of "contingency fee" and of "contentious business". The latter being defined in s. 87 of the Solicitors Act 1974, as follows:-

> "Business done where there is a solicitor or advocate in or for the purposes of proceedings begun before a court, or before an arbitrator appointed under the Arbitration Act 1950, not being business which falls within the definition of non-contentious or common form probate business."

He noted that it was for the Tribunal to decide if scheme claims were contentious business. Mr Gourgey referred to a book by Kerry Underwood, "No Win, No Fee, No Worries" first published in 1998. He explained that Beresfords had followed the guidance in that book and entered into contingency fee agreements on the basis that scheme claims were non-contentious business and that those agreements would be void if proceedings were subsequently issued. He also highlighted the preamble to the VWF CHA in which reference is made to resolving claims under the terms of the agreement. He stressed that it was the claims that had not resulted in the commencement of court proceedings that were pursued under the terms of the CHAs. Mr Gourgey also referred to the terms of the disputes procedure and the provisions for claims to be rejected and subsequently dealt with by the issue of court proceedings. He submitted that there was a clear distinction between claims resolved under the CHAs and those resolved by way of court proceedings. Mr Gourgey submitted that the judgment of Mr Justice Mitting on 1st May 2007 made the position clear. This was because the Judge referred to the object of the CHAs to be "to permit individual miners to recover compensation for injury without risk or the expense and inconvenience of litigation". Moreover, at paragraph 34 of his judgment, having made

it clear that he had not considered the application of the Solicitors Act to the CHA he expressed his view on the issue as follows:-

> "It is common ground that my supervision of this agreement does not amount to proceedings before a court or before an arbitrator and, in relation to category C claims with which I am concerned, none of them have resulted in or have been begun by court proceedings….. the DTI are liable to pay the solicitors' costs and so, surprising as it may seem, the CHA is a non-contentious business agreement between the DTI and the CSG".

However, in paragraph 38, Mr Justice Mitting did say as follows:-

> "I make it clear that I express those opinions not as part of my reasons for finding that the provisions for the costs are not subject to the indemnity principle because I can well understand that the conclusion that the CHA is a non-contentious business agreement appears surprising and may have ramifications which no one in this court room had fully thought through."

In referring to the terms of the COPD CHA Mr Gourgey referred to paragraph 65 of the agreement, "The date of receipt of claim is deemed to be the date of issue of proceedings". Mr Gourgey submitted that the deeming provision was purely for the purposes of the Limitation Act 1980 and for no other purpose. This was because the claimant was going to be deemed to have issued and served proceedings if his claim had been rejected and within 12 months of that rejection, proceedings were in fact served and that issuing and serving is a deeming solely for limitation purposes. Mr Gourgey also referred to paragraph 71 of the agreement:-

> "Under the jurisdiction, the parties do not by this agreement seek to oust the jurisdiction of the court, and nothing in this agreement shall prejudice a claimant's right to pursue legal proceedings against any defendant for respiratory cases."

He submitted that such a paragraph was inconsistent with the CHA being "contentious business". Finally, Mr Gourgey referred to the letter of information to potential CSG members in the schedule to the agreement. That letter referred to:-

> "The CHA forms the basis for settling all claims…….. and serves in effect as a pre-action protocol such that no litigation of COPD claims against British Coal will be possible without the express permission of Turner J."

Mr Gourgey submitted that claims under neither the VWF CHA or the COPD CHA were contentious business and therefore there was no breach of Rule 8. Moreover, he noted that neither of the UDM CHAs was approved by a court order.

79. Mr Gourgey then turned to Beresford's policy of only taking on non-UDM referred cases on the basis of success fees to include both contingency and CFAs. He stressed that at the outset of the CHAs the First Respondent had believed that the success rate in COPD cases could be as low as 20%. The CHAs did not provide for payment of costs in unsuccessful claims. Moreover, there were a variety of heads of claim so in some cases there might only be partial success. Beresfords had to determine how to offset un-recovered costs in unsuccessful claims. Mr Gourgey submitted that the Respondents had acted perfectly properly in requiring clients to enter some form of

success arrangement if they wanted Beresfords to act for them. Moreover, if such agreements had been perfectly proper in 1999 then there was no reason why those same agreements should not have been enforced subsequently. What had changed by 2002 was that claims were succeeding at a much higher rate than anticipated hence Beresfords' decision to stop entering success fee arrangements. The position was that Beresfords stopped entering success fee arrangements in 2002, in mid 2003 decided not to enforce payment of success fee deductions and on 12th December 2003 decided to refund all monies that had been deducted as success fees. Mr Gourgey submitted that Beresfords had been doing no more than other solicitors would do in similar situations i.e using success fees to offset the costs of unsuccessful claims as referred to in Callery v Gray to which case the Tribunal was referred. Moreover, as from April 2000, the position on the recovery of success fees changed and Beresfords, as well as other solicitors, sought unsuccessfully to recover 90% of the uplift from the DTI. Mr Gourgey referred to a letter sent to the Treasury Solicitor by the Second Respondent, dated 8th December 2003, which set out the history of Beresfords' approach to the policy of requiring success fees. He also referred to a letter, dated 15th November 1999, from the Claimants' Solicitors Group to Yvette Cooper MP which dealt with the range of funding options open to claimants, the need for an agreed retainer and the reasons for the use of success fees. Mr Gourgey submitted that it was abundantly clear that the Law Society was well aware from 1999 that success fees were being charged in relation to scheme claims. He noted that, at the time, the Law Society did not produce any guidance saying either that success fees should not be charged or that it would be considered to be a breach of some rule if such fees were charged, unless certain steps had been followed. In fact no guidance was issued until January 2004. Mr Gourgey stressed that statistics relating to success rates published in 2005 could not be relevant to decisions taken in 1999. The calculation for the 2001 figures made by Mr Duerden was not accepted as accurate. He submitted that what had to be proved was that having regard to the Respondents' perceptions, based on the facts known to them at the time, their policy of charging success fees was misconduct and in breach of the rules.

80. Mr Gourgey referred the Tribunal to the details of the Compliance Board Statement of 23rd January 2004. He submitted that its requirements could not apply retrospectively. He also referred to the change in the Law Society's position as recorded at paragraph 19.4 of the Boyes report, a copy of which was before the Tribunal. Finally, Mr Gourgey referred to a transcript from a recording of an interview that took place on 22nd June 2004 involving Keith Barron MP and Janet Paraskeva, the then Chief Executive of the Law Society, that was also before the Tribunal. Mr Gourgey submitted that the Law Society's policy statement, requiring solicitors to advise their clients that other solicitors were not charging success fees, represented a change of policy brought in for the first time in January 2004. Moreover, that solicitors should not be required, as a rule of conduct, to inform clients that another firm can provide the service more cheaply. Mr Gourgey referred to a letter dated 20th February 2004 from the Second Respondent to the Chief Executive of the Law Society on this issue.

81. Mr Gourgey explained that oral evidence would support the fact that explanations were provided to clients in relation to success fee agreements. He accepted however that the CFAs used by Beresfords had not been sufficiently adapted to take into account all the aspects of scheme claims. Two errors had been fully accepted; the statement that clients would be liable for Beresfords' costs and disbursements in the event of failure and that they would be liable for the DTI's costs in the event of failure. Mr Gourgey submitted that these errors had arisen because Beresfords had

followed too closely the standard form of CFA but that there was no evidence that anyone had actually been misled by the errors.

82. Mr Gourgey explained the process of the repayment of deductions. It was agreed that any question as to the time taken was an issue for the Tribunal to determine. Some £200,000 more had been repaid since the information schedule provided to the Law Society in September 2005. The Tribunal had both schedules before it.

83. Turning to the Second Respondent's response to the Minister Nigel Griffiths' letter, copies of both were before the Tribunal, Mr Gourgey noted that while there was no allegation of dishonesty, it was alleged that the letter had "the effect of misleading". However, Mr Gourgey submitted that there was no evidence before the Tribunal that the letter did have the effect of misleading Mr Griffiths and that proof that he was in fact misled was essential to establish the allegation. He submitted that there were no false representations in the letter and moreover that the allegation had been answered fully in correspondence. Consequently, it was astonishing that the allegation was still being pursued by the Applicant.

84. Mr Gourgey turned to the arrangements with the UDM. Beresfords had accepted that they had not carried out a six monthly review. He noted that the wider case against the Respondents involved allegations of conflict of interest and sacrifice of professional independence. However, dealing with the narrower case i.e. the breach of the rule prohibiting referral payments and applying a misleading description to them (as marketing, vetting and administration fees) Mr Gourgey referred to the First Respondent's Witness Statement. This explained that the initial sum of £10 had been a payment for the vetting, marketing and collecting of the claim, and the subsequent larger sums for marketing, administration and investigation. He explained that Beresfords regarded the payments as in respect of genuine services. It was not until the position changed in January 2003, because of the judgment of Chief Master Hurst in the Claims Direct Litigation, that Beresfords understood that their payments, albeit for genuine services, were in breach of the Code. Mr Gourgey explained that Master Hurst's judgment brought to an end referrals from the UDM. He submitted that Beresfords' action indicated their concern to be compliant with the rules and gave lie to the suggestion that Beresfords were so tied into the UDM and so keen to get their business that they had been willing to sacrifice the interests of their clients.

85. Turning to allegation (5), Mr Gourgey noted that there were two aspects to the allegation; the disguising of the breaches of Rule 3 SPR and the diversion of Union funds. He referred the Tribunal in detail to the relevant allegation in the Rule 4(2) Statement and to the fact that it was presented as an allegation of dishonesty. Mr Gourgey referred the Tribunal to the Respondents' request for further information and clarification and the Applicant's detailed response, clarifying the basis of allegation (5). He submitted that there was no evidence to support either improper or potentially improper diversion of monies. Mr Gourgey stressed that the discussions leading to the arrangement for payments to Walker & Co involved not only Clare Walker but also Mick Stephens, the General Secretary of the UDM with effective control of the running of the Union's affairs. Mr Gourgey submitted that there was no concealment from the UDM and no evidence of any such concealment. In fact there was no evidence of any unlawful activity and the allegation of dishonesty against the Respondents for their supposed involvement was without substance, should never have been advanced and should be dismissed. Moreover, there was insufficient inference even to allege potential unlawful diversion of monies.

86. Turning to the allegation that Beresfords was in breach of various obligations to its clients in not giving them advice in relation to the unenforceability of their agreements with UDM/Vendside to make payments out of their compensation, Mr Gourgey referred both to relevant sections in the First Respondent's Witness Statement and in his opening submissions. He noted that the practice of Union members making payments to their Union out of compensation was commonplace and that the Respondents had understood, at the material time, that the payment was levied by the Union as a fee for affiliated membership of the Union for the life of the claim and would be used for the benefit of the wider union membership to assist in the pursuing of other claims in further litigation. Moreover, the Respondents had not considered it appropriate to question agreements of a familiar sort entered into prior to their retainer by capable clients. The fee had been modest, the clients were happy to pay it and the agreement had been in the interests of the client. Mr Gourgey submitted that it had been perfectly proper for the Respondents to charge conditional fees to non-UDM referred clients. So the absence of a success fee had been a material benefit for UDM referred clients. Mr Gourgey submitted that the case of Spector could be distinguished because in that case the solicitor knew an obligation to be wholly or partly unenforceable or void whereas the Respondents were not alleged to have known that the agreement was unenforceable but that they suspected that it might be unenforceable and failed to advise their clients of that suspicion.

87. Mr Gourgey moved on to the allegation of the breach of Rule 9 SPR. He referred to the two elements of the Rule. First, in terms of the persons with who the arrangement is made: "The person's business must be to make, support or prosecute whether by action or otherwise claims arising as a result of death or personal injury". Second: "That person must in the course of such business solicit or receive contingency fees in respect of such claims". He submitted that the "contingency fees" within the Rule must relate to contentious business and that claims under CHAs were not contentious business within the relevant definitions. However, Mr Gourgey further submitted, even if the main CHAs were found to be contentious business, that finding could not relate to the UDM CHAs because they were not subject to the approval of any court order at the material time up to and until after 2005.

88. Turning to allegation (7), failing to advise about costs and funding, Mr Gourgey stressed that in addition to his earlier submissions he needed to add that in relation to the advice given to UDM-referred clients, reliance was placed on the client care letter that was sent out to all clients referred to Beresfrods by the UDM.

89. Turning to allegation (8), sharing professional fees with a non-solicitor, Mr Gourgey submitted that the evidence and submissions made in relation to the alleged breaches of Rule 3 SPR were relevant. He submitted that there was no sharing of fees because the payments made were for genuine services and that Beresfords treated the service they got from UDM/Vendside and Walker & Co as one. Essentially, the services had been provided by Clare Walker and her team and that what they had been doing had not been the Respondents' concern, but a matter of internal organisation between UDM/Vendside and Walker & Co.

90. Allegation (10) related to the improper release of confidential information concerning Mr H. Mr Gourgey submitted that Mr H gave his authority for his UDM fee to be paid to Vendside Ltd on 19th April 2003. Because of this Vendside were entitled to be, and were, informed that an offer had been accepted. However, there was no breach of

confidentiality because Clare Walker was running both Vendside Ltd and Walker & Co.

91. In conclusion, Mr Gourgey dealt with the allegations relating to ATE Insurance, Melex, EBS and the panel scheme. He submitted that it was good practice, at the material time and continued to be good practice, to recommend to clients to take out after the event insurance as soon as they entered into CFAs. The payment of commission to Beresfords had been cleared by the Law Society and the client's consent had been obtained in each case. Moreover, reviews had been carried out periodically by the Second Respondent to ensure that the best after the event ("ATE") insurance product was offered to clients. In relation to the services offered by EBS and the much wider services offered by Melex, Mr Gourgey submitted that those services were of benefit to clients and to the medical consultants, that the interests of the Respondents had been disclosed to the clients and that it had been perfectly proper for fees to be charged by EBS and Melex, whether to the client or to the consultant concerned. In relation to the panel scheme, there had been no condition imposed on the members of the panel requiring them either to take out ATE insurance or to use the services of Melex.

Oral evidence on behalf of the Respondents

92. James Rhodes Beresford (the First Respondent) gave evidence on oath. In response to the allegations he relied on his Witness Statement dated 16th October 2008, subject to some minor corrections. The First Respondent explained that he had retired from Beresfords on 31st October 2008 and had not renewed his Practising Certificate.

93. In cross-examination, inter alia, the First Respondent confirmed that he was aware that payments for referrals were prohibited in 1999 and that it would be dishonest to disguise a bare referral payment as something else. Moreover, he believed that the payments made under the Vendside Agreement in some 15,000 claims would be going towards the greater good of UDM members although he had never thought to check that they had done so or to ascertain what membership rights people were getting for the Vendside Agreement. The Agreement, signed by the Claimants, led to a deduction from their damages on a sliding scale. The First Respondent stressed that UDM clients went to the Union first and entered into the Vendside Agreement before Beresfords were involved. The payments were from the client to the Union and not subject to the Solicitors Rules.

94. The First Respondent believed that fee-earners in Beresfords provided clients with a large number of fee options to enable them to choose the one they preferred. He confirmed that he had considered that scheme claims presented a substantial financial risk to the firm, at least until the middle of 2002. The First Respondent gave detailed evidence about Beresfords' accounts confirming the level of profit shares for both partners and the continuation of CFAs based on risk until June 2002. He explained his knowledge and understanding of the details of the VWF and COPD CHAs. He said that he regarded the initial fee of £10 per referral paid to the UDM until early 2002 as "de minimis" and to do with postage and stationary. He had agreed to take referred UDM cases under the UDM CHA because he had been told that under that scheme cases would be expedited. This happened from at least mid March 2000 and UDM referrals benefited from not being charged a success fee.

95. The First Respondent agreed that as from 1st April 2000, apart from 10% from the client, the success fee was recoverable only from the Defendant. He also agreed that Beresfords had failed to draft its CFA agreements to fit the facts on the coal scheme cases and that the firm had charged the maximum amount of success fees. The First Respondent explained that even if the client had been unaware that the DTI would be paying Beresfords' costs, a contingency fee agreement was still effective because those costs might not have justified the risk of failure and a type of retainer had to be chosen by the client in order to cover the risk. The First Respondent explained that while the firm only ever expected to recover the 10% that represented deferral of payment after April 2000, the CHAs still showed a 100% uplift to comply with the indemnity principle so as to enable the firm to recover 90% of the success fee from the DTI.

96. Although the UDM/Vendside/Walker & Co referrals stopped in early 2003, the First Respondent confirmed that Beresfords continued to make payments to Clare Walker for the cases referred before 20th January 2003 through into 2005 because of contractual obligations. He explained that Walker & Co had carried out marketing to attract clients that would then be sent to Beresfords having completed a work history form following vetting. Payment by Beresfords for this work was back dated to 1st December 2001. He agreed that as from about January 2002 Vendside continued to receive a deduction from the clients' damages and Walker & Co received a similar sum from Beresfords' office account for marketing, administration and vetting. He stressed that Beresfords made payments to Walker & Co on the specific instructions of Mick Stephens, the Trade Union Secretary who ran the UDM. The First Respondent confirmed that individual clients referred were not made aware of the firm's payments to Walker & Co. Answering questions relating to Melex, the First Respondent described the arrangements, the administration fees paid by the Melex panel members and the payments to Walker & Co.

97. Douglas Harold Smith (the Second Respondent) gave evidence on oath. In response to the allegations he relied upon his Witness Statement dated 16th October 2008. He explained that the firm had stockpiled claims around February 2000 so that clients could take advantage of the change in the law in April 2000 enabling 90% of the success fee to be claimed from unsuccessful defendants.

98. In cross-examination, the Second Respondent was taken through various documents and asked about issues relating to the allegations. He explained that he had not been involved in person in advising mining compensation clients but had come to realise that some claims could be quite complicated. He confirmed that the Law Society's form of agreement was used for all CFAs with a basic costs uplift of 100% being standard policy for miners' scheme cases. The Second Respondent agreed that in scheme cases limitation was unlikely to be an issue and the DTI paid for medical reports. He confirmed that he was consulted about using CFAs in coal claim cases to ensure that the indemnity principle was satisfied. However he had not been aware of the details of the CHAs for VWF or COPD. The Second Respondent agreed that the firm's standard contingent fee agreements and CFA agreements should have been amended to deal with scheme claims and that they did not explain that the DTI would pay costs in successful cases under the CHAs. However he stressed that the cost risk for the claimant did not influence the calculation of the success fees.

99. Commenting on the case of the widow, Mrs C, the Second Respondent explained that at one point Beresfords had a policy of one of the partners looking at a small value

claim to determine if the success fee should be waived. The purpose was to ensure that the client had at least £100 after the success fee had been applied. He had decided in the case of Mrs C that the success fee to which Beresfords were entitled should be deducted. The Second Respondent explained that he had not been aware of the case of Anwad v Geraghty (2001) and conditional normal fee arrangements. He had believed that even in scheme cases, it was a requirement for clients to have valid retainers and that once Legal Aid had been withdrawn for personal injury cases, the only type of retainer left was in practice a CFA. The Second Respondent agreed that it appeared from relevant documents that in some cases the 25% success fee was taken from initial awards of interim damages. However, he stressed that any shortfall on basic costs could also be recovered from the client under a CFA.

100. The Second Respondent explained that he became aware of the deduction of the Vendside fee based on a sliding scale from referred clients in May 2000. He had believed that the Vendside fee was in lieu of a membership subscription. He had also been aware of payments of fees for vetting, administration and marketing of £10 for each referral but he stressed those were just nominal payments for postage and given little consideration. From January 2002 higher sums were paid up to £352.50. The Second Respondent explained these higher sums reflected the true cost of the work carried out by UDM/Vendside, for example radio advertising, leaflet dropping, call-filtering, in the production of the cases. He denied that the payments were referral fees. By agreement the fees were in fact paid to Walker & Co. The Second Respondent explained that Beresfords saw Vendside and Walker & Co as indivisible and agreed that the work carried out by them before and after 10th January 2002 was the same.

101. The Second Respondent explained that from 2002 Walker & Co were paid £50 from Melex for referred cases. The £50 was reflective of work carried out and not a referral payment. It related to a Union medical facility that in some way overlapped with Melex. Moreover, he stressed that Beresfords considered that information about clients could be sent to Walker & Co because those clients had signed the Vendside agreements and Clare Walker was an employee of the UDM. Dealing with CLE, the Second Respondent said that it was the best product on the market, that he was very aware of the available products and clients authorised the receipt of commission. He denied any conflict of interest.

102. Jacqui Hutchinson gave evidence on oath. She relied upon her Witness Statement dated 10th October 2008. As an employee of Beresfords, she explained how Vendside referred cases were handled by the firm. All clients were sent a bundle of standard documents.

103. Tracy Thornton gave evidence on oath. She relied upon her Witness Statement dated 10th October 2008. As a former employee of Beresfords, she explained how she had been responsible for setting up a UDM department in terms of staffing and administration. Initially she was a practice manager and later the HR Director.

104. Andrew Robert Barnes gave evidence on oath. He relied upon his Witness Statement dated 10th October 2008. As an employee of Beresfords in the position of a database administrator in the IT department, he explained what the computer system revealed about a document dated 27th March 2000.

105. Stella Crookes gave evidence on oath. She relied on her Witness Statement dated 10th October 2008. As a former employee of Beresfords, she explained that she had also worked as a consultant for both EBS and Melex and gave evidence about the payments by Melex to Walker & Co. In addition Ms Crookes explained that as from March 2004 she had been responsible for the process under which miners were reimbursed for success fees deductions.

106. Simon Mathew McMillan, a solicitor qualified in September 2002, gave evidence on oath. He relied on his Witness Statement dated 10th October 2008. As a former employee of Beresfords, he gave evidence about the operation of CFAs and contingency fee agreements with clients. He stressed that the firm wanted to have retainers in place and that as at 1999 the level of success in mining cases was unclear. He was not involved in miners' scheme cases after early 2001.

107. Mark Shaw gave evidence on oath. He relied on his Witness Statement dated 10th October 2008. As a former employee of Beresfords (a team manager) he gave evidence about UDM referred miners' scheme claims processed by the firm.

108. Sandra Lisa Liddle gave evidence on oath. She relied on her Witness Statement dated 10th October 2008. She explained that she was employed as business leader in Quaypoint Ltd a company in which the First Respondent had an interest. She gave evidence about the processing of questionnaires from Walker & Co and the administration of non-UDM British Coal cases.

Oral evidence relating to the competition and EC Law issues

109. Professor John Colin Peysner affirmed. He relied on his Report of 23rd October 2008 which was before the Tribunal. As an expert, he gave evidence in relation to the financing and costs of litigation, the business of litigation, particularly non-commercial personal injury litigation and the development of policy and regulation in the area. Professor Peysner explained about the market for lower value personal injury cases – the commoditised market. He confirmed that he was not an expert in competition law. The purpose of his Report was to demonstrate to the Tribunal that the operation of the Solicitors' Practice Rules, in particular Rules 3 and 9, in the post Access to Justice world, distorted competition.

110. David James Middleton affirmed. He relied on his Witness Statement subject to a minor alteration. As the Legal Director with the SRA, Mr Middleton gave evidence inter alia about the history and objectives of Solicitors' Practice Rules 3 and 9, and the Solicitors' Introduction and Referral Code. He stressed the importance of solicitors' independence and their ability to give independent advice to their clients as well as the avoidance of damage to public confidence in the profession. Mr Middleton explained the background to the changes to the Referral Code from March 2004. He stressed that he drafted his Witness Statement to deal with the challenge to Rules 3 and 9 and to demonstrate that the issues were responsibly wrestled with by the Law Society and many other people.

Submissions on behalf of the Respondents relating to the Competition and EU Law issues

111. Ms Watson of Counsel made oral submissions with reference to her skeleton argument dated 13th November 2008 relating to the Competition Act 1998 and

Articles 81, 43 and 49 of the EU Treaty, a copy of which was before the Tribunal. She explained that the Respondents' case was that Rule 3 of the Solicitors' Practice Rules 1990, Section 2.3 of the Referral Code and Rule 9 of the Solicitors' Practice Rules 1990 were void by virtue of s. 4 of the Competition Act 1998. She submitted that the rules were restrictive of competition within the meaning of Article 81 of the EC Treaty and consequently void by virtue of Article 81 paragraph 2. In addition that Solicitors' Practice Rules 3 and 9 were incompatible with Articles 39 and 53 of the EC Treaty. In the circumstances, she submitted that the Tribunal should dis-apply Rules 3 and 9 of the SPRs and s 2.3 of the Referral Code.

112. Counsel referred to the details in the four sections of her skeleton argument; Section A dealt with the Competition Act 1998, Section B analysed Rules 3 and 9 under Article 81 of the EC Treaty and Sections C and D were concerned respectively with the applicability of Articles 43 and 49 of the EC Treaty.

113. Dealing with her argument and submissions relating to Section A, Counsel submitted that during the relevant period Rules 3 and 9 of the SPRs 1990 were restrictive of competition within the meaning of the Competition Act 1998 and could not be exempt from the Chapter 1 prohibition nor justified as being within the public interest. She stressed that following the abolition of Legal Aid for personal injuries claims, the market for personal injuries became a commodity market with consequences and challenges for solicitors. Counsel considered in detail the relevant correspondence between the Office of Fair Trading ("OFT") and the Law Society relating to referral fees. She also referred to the correspondence between the Law Society and the Master of the Rolls and the details of the amendment of Rule 3 in March 2004. Counsel submitted that it was clear from the correspondence and from meetings between the OFT and the Law Society that whilst the Law Society did not consider the ban on referrals was contrary to the Competition Act, the OFT felt that it was more restrictive than was necessary to protect the public interest and invited the Law Society to consider alternatives to a complete ban. In considering the Wouters case, Counsel submitted that a balancing exercise had to be carried out between the rule requirements for the proper exercise of the profession and the restriction of competition. Such rules had to be proportionate, and that both Rule 3 and Rule 9 of the SPR restricted competition.

114. Dealing with her skeleton argument and submissions relating to the application of Article 81 (Section B) paragraph 1 of the EC Treaty to Rules 3 and 9, Counsel explained the need for consistency with the Competition Act. The Law Society was an association of undertakings, s.2 of the Competition Act applied to the SPR and Article 81, under which the Wouters case was decided, also applied to the SPR. While it was for the Respondents to prove that Rules 3 and 9 were restrictive of competition, it was for the Law Society to justify those rules as being necessary for the integrity of the profession and the independence of solicitors.

115. Counsel referred to sections C and D of her skeleton argument. Article 43 prohibited restrictions on the freedom of establishment of nationals of a member state in another member state and Article 49 prohibited restrictions on the freedom to provide cross-border services. Counsel argued that the prohibition on referral fees could constitute a restriction on market entry for the service provider situate in another member state and for the service recipient in another member state identifying suitable providers of the service. She submitted that Rules 3 and 9 constituted a restriction on the provision

of services and a restriction on the provision of the right of establishment simply because they made it more difficult for non-nationals to operate in the market.

Submissions on behalf of the Applicant relating to the Competition and EU Law issues

116. Mr McNab of Counsel made oral submissions with reference to his amended skeleton argument handed to the Tribunal on 26th November 2008. He submitted that the Respondents had failed to make out any case that Rules 3 and 9 and section 2.3 of the Code infringed Article 81 or the Chapter 1 prohibition contained in section 2 of the Competition Act 1998 or any right under Article 43 or 49 EC such as to require the Rules to be dis-applied. Moreover, Counsel submitted that the challenges on both grounds were conclusively answered by the case of Wouters. (A copy of which was before the Tribunal).

117. Counsel explained that there were two relevant regimes; Article 81 EC and the Chapter 1 prohibition contained in section 2 of the Competition Act. However, the definition of the relevant economic product and geographic market was central to any competition law analysis. This was because the effect on competition could not be assessed without first defining the affected market.

118. Turning to the Wouters case, Counsel reminded the Tribunal that the case concerned the rules of the Dutch Bar that prohibited members of the Bar from entering into partnerships with non-lawyers. The ECJ held that the national provisions in question constituted a decision by an association of undertakings. The ECJ further concluded that the provisions restricted competition. However, the Court found that the rules of the Dutch Bar did not infringe Article 81.1 of the Treaty because the Bar could reasonably have considered that the rules, despite the effects restrictive of competition inherent in them, were necessary for the proper practice of the legal profession as organised in Holland. Following the Wouters case, Counsel submitted that in determining whether the rules in issue fell within the prohibitions of Article 81 or of Chapter 1 it was both legitimate and necessary for the Tribunal to have regard to the Law Society's view of the necessity of the rules for the proper practice of the Solicitors' Profession. He further submitted that the rules could only infringe the relevant prohibitions if the Law Society could not reasonably have considered those rules necessary for the proper practice of the legal profession, despite any inherent effects restrictive of competition. Counsel referred in particular to paragraph 110 of the Wouters judgment. He stressed that the Wouters exception emphasised that what was reasonably necessary in the proper practice of the legal profession was essentially a matter for the expert judgment of the relevant professional body.

119. Turning to Articles 43 and 49, Counsel submitted that the facts and the dispute in the proceedings were wholly internal to the UK. Consequently community law was not engaged and the Respondents had no directly effective community law right to assert that would require the rules in issue to be dis-applied.

The Closing Submissions on behalf of the Applicant

120. Mr Dutton, for the Applicant, made closing submissions with reference to his written document dated 27th November 2008 which was before the Tribunal. He submitted that the Respondents' professional judgment had been overborne by their entrepreneurial instincts and a desire for profit. The Respondents had used both CFAs

and the mechanism of referral through UDM/Vendside and Walker & Co in order to expand the firm's profitability on a grand scale and not in the best interests of their clients.

121. Turning to the standard of proof, Counsel accepted that the standard of proof of dishonesty was a high one. However, it was not accepted that the case of Campbell v Hamlet correctly set out the law in relation to cases before the Solicitors' Disciplinary Tribunal. This was because it was a Privy Council case and the Tribunal was operating a civil jurisdiction as was established in Pine v The Law Society in the Court of Appeal. However, to find dishonesty the Tribunal must be sure of dishonesty although the process remained a conventional evidential process whereby the Tribunal made primary findings of fact and determined what inferences could properly be drawn from the established primary facts.

122. Counsel refuted any assertions of unfairness in the conduct of the prosecution. He stressed that it was a case with serious and admitted shortcomings by the Respondents and their aggressive approach towards the Regulator reflected their commercially aggressive approach to the conduct of the claims under the schemes. He commented upon the way both Respondents gave their evidence and noted unwillingness by both, on occasions, to answer questions. Turning to the files, he noted the rarity of either file or attendance notes. Moreover, no qualified solicitor appeared to have sat down with any of the individuals whose files were before the Tribunal and explained the Claims Handling Agreement Scheme and the costs methodology that would apply to it and followed that explanation up with a relevant letter. There was an absence of any appropriate letters to clients entering into contingent or conditional fee agreements. Moreover, such agreements were wholly unjustified and inappropriate for scheme claims. This was because there was no limitation risk, no real medical costs or need for other expert evidence and no dispute on liability if the claimants had worked for British Coal. The agreements themselves were incorrect and misleading. They were documents that appeared to justify fees that were unjustifiable.

123. Turning to the evidence of the three miners, Counsel submitted that each had needed, but had not been given, a careful explanation about the scheme and each had been hopelessly confused about what they had or had not agreed by signing agreements with the Respondents.

124. Counsel noted that concern about deductions from compensation had been raised in 1999 by Yvette Cooper MP but the Respondents had failed to heed that concern. This was because, Counsel submitted, of self-interest dominating professional judgment. CFAs continued to be used until mid 2002.

125. Turning to Allegation (5) Counsel said that the Tribunal would have to determine whether the payments to Walker & Co were rewards for referral? If so, did the Respondents intentionally dress the payments up as payments for marketing, vetting or administration, when they knew they were payments for referrals? A further issue was, did the Respondents make the payments knowing that there was a diversion or a possible diversion of funds that should have been going to UDM/Vendside.

126. Counsel submitted that the evidence showed that the arrangements made orally on 10th January 2002 and in writing in July 2002 were for referral payments. Inter alia, Counsel referred to the cross-examination of the First Respondent who, when referring to the increase from £10 to the tariff, spoke of the value to Beresfords of the

claims as the reason for the escalation of the payments. He also referred to the lack of any evidence of a genuine marketing operation for Beresfords. Counsel reminded the Tribunal that as much as £352.50 would be paid for certain cases.

127. In relation to the contingent and conditional fee agreements signed by 1,164 clients, Counsel submitted that such retainers were both unnecessary and inappropriate. Neither Respondent appeared to have a detailed working knowledge of the claims handling agreements before asking clients to enter success fee agreements with 100% mark up on basic costs. Moreover, 15,000 clients signed the Vendside Agreement. Altogether very large numbers of clients were affected by the misconduct of the Respondents.

128. Counsel submitted that the 15,000 Vendside clients needed advice as to whether the agreement for the deductions from their compensation to be made on a sliding scale was in their best interests. However, the Respondents' interest in the valuable referrals from Vendside prevented them from giving such advice. They failed to act as independent solicitors in the best interests of their individual clients. There was a conflict between their commercial interests and their duty to advise their clients. Counsel submitted that in reality the deduction was a commission payment coming out of client damages on a sliding scale – not a Union membership. The Tribunal was referred to the detailed written submissions relating to the "client care letter".

129. Counsel addressed the tribunal on the issue of ATE insurance again referring to closing submissions highlighting the commission of £615,751 from CLE in 2002.

130. Turning to Rule 9 (Allegation 6) Counsel submitted that on its proper construction Rule 9 prohibited an association with a person or organisation that solicits contingency fees. Whether or not claims under the CHAs were contentious proceedings, UDM/Vendside and Walker & Co had not limited themselves to recovery of their contingency fees only in circumstances where proceedings were not issued. However, he stressed that the rule extended beyond court proceedings.

131. Counsel referred to the judgment of Mr Justice Mitting and stressed again that he had not been dealing with Rules 8 and 9 of the SPR. Mr Justice Mitting had been dealing with a short point on the indemnity principle in relation to recovery of DTI costs and he had limited the scope of his judgment. Counsel submitted that on a proper construction of Rule 9, business may be "contentious" without proceedings being issued. Hence the phrase in Rule 9.1 "whether by action or otherwise". Indeed, under the claims handling agreement, the claims were deemed to be issued High Court Claims. Counsel also referred to a previous decision of the Tribunal, Robinson King, in which it was found that Rule 9 applies even where proceedings are not issued.

132. Turning to the alleged breach of Rule 15 – inadequate costs information (Allegation 7), Counsel referred to numerous admissions in the evidence. He stressed the misleading nature of the various CFAs and contingency fee agreements, the lack of consideration by the Respondents of the appropriateness of the agreements and the total lack of any written indication to clients of what the DTI had agreed to pay in costs. Counsel referred to the relevant paragraphs of his written closing submissions relating to the other allegations.

The Closing Submissions on behalf of the Respondents

133. Mr Gourgey, for the Respondents, made closing submissions with reference to his written document dated 26th November 2008 which was before the Tribunal. Counsel again raised the issue of the standard of proof. However, the Chairman confirmed that the Tribunal would be applying the criminal standard to all the allegations made against the Respondents. Counsel stressed that it was not accepted that the Respondents were combative in giving evidence but that they were strident to reject the challenges to their honesty and integrity. Moreover, there was nothing inherently wrong with the Respondents being ambitious for the development of their business.

134. Counsel was concerned to ensure that when looking at the Applicant's written closing submissions, the Tribunal would check that relevant issues were put to the Respondents and that there was a proper factual basis for allegations advanced in closing submissions.

135. Counsel submitted that there was no breach of Rule 8. Moreover, that allegations had been advanced with the benefit of hindsight, ignoring the perception at the time as to the likely success rate, and that the Respondents, in common with many other solicitors at the time acting for scheme clients, were fully entitled to have required clients, not prepared to bear the costs of unsuccessful claims, to enter into funding agreements. Counsel stressed that for CFAs entered after April 2000, Beresfords sought only to recover 10% from the client. After June 2002 Beresfords undertook all scheme claims on a no-win, no-fee basis without any success fee. After June 2003 the firm ceased to enforce payment of any success fees and on 12th December 2003 resolved that it would refund all success fees.

136. Counsel considered the operation of conditional fee agreements at the material time as detailed in his closing submissions. He stressed the purpose of the success fee; to enable solicitors to earn enough in successful cases to compensate for the fact that they would receive no fees at all in unsuccessful cases. Turning to claims under the scheme, Counsel reminded the Tribunal that the DTI paid only for successful claims and that the whole purpose of the success fee was to compensate solicitors for the cost of unsuccessful claims as referred to in Callery v Gray. Counsel referred to the Respondents' evidence relating to the uncertainty as to success rates under the scheme and submitted that given their knowledge at the relevant time, it had been perfectly proper to charge a success fee with 100% uplift. Counsel submitted that the fact that the DTI would not seek to recover its costs against claimants did not impact on the assessment of the success fee. Indeed Counsel referred to the Claimants Solicitors Group's response to Yvette Cooper MP's letter as being a justification for success fees. Counsel's final point on success fees was that the Law Society was aware of all the relevant correspondence and made no challenge to it in terms of the right to charge success fees. Beresfords accepted that they should have amended the terms of the standard CFA agreements but Counsel submitted that there was no evidence that anyone was misled into thinking that they would be responsible for costs in the event of the claim failing.

137. Turning to Rules 8 and 9, Counsel submitted that the definition of "contingency fee" was important for the consideration of Rule 8, with the result that if the relevant work was found to be non-contentious Rule 8 would not apply. He referred to his closing submissions in relation to the detail of his arguments. Essentially, he submitted that from the terms of the CHA it was clear that it was an administrative scheme for the

resolution of claims without the need for matters to be determined by a court and that the deeming provisions were purely for the purposes of dealing with the Limitation Act. The proceedings were stayed and claims were dealt with within an administrative scheme. UDM CHA's were non-contentious proceedings. There was no breach of Rule 8 and Rule 9.

138. Counsel dealt with allegation (9), misleading the Minister in detail in both his opening and closing submissions. He stressed that there was no misrepresentation in the letter and moreover there was no evidence that Mr Griffiths had been misled in any way.

139. In relation to referral fees, Counsel referred the Tribunal to Mr Smith's Witness Statement in which he explained that initially £10 per case had been paid to Vendside, the marketing arm of UDM, but that from the end of 2001 a commercial rate was to be paid for marketing/vetting/administration services and that he had been satisfied that the services justified such fees. Those services had included marketing, taking 'phone calls and vetting. Counsel also referred to Mr Smith's evidence on the costs of and the skills involved in the acquisition of work. However, he stressed that in January 2003, as a result of Chief Master Hurst's decision, Beresfords stopped their arrangements with UDM/Vendside, Walker & Co because of their concern to act within the relevant rules.

140. In relation to the second allegation of dishonesty, relating to the arrangements with Walker & Co, Counsel referred both to his opening and closing submissions. He stressed that there was no evidence whatsoever of an unlawful diversion nor of any concealment from the UDM. Counsel submitted that there was no conscious impropriety.

141. Finally, dealing with the Vendside fee, Counsel stressed that sums earned by Vendside were assets of the UDM. Moreover, the practice of Union Members making payments to their unions out of compensation received in successful claims had been common place. The Respondents understood that the fee was for affiliate membership of the UDM and had not picked up on the inappropriate wording as to costs until 2002, when it was changed. The UDM was a respected union that had played a significant part in negotiations with the DTI and separate CHAs had been entered into between the DTI and UDM/Vendside. Counsel submitted that the scope of Beresfords' retainer was limited to the claims under the CHAs and did not extend to giving advice to their clients about an agreement already entered into with the UDM. Counsel concluded with submissions relating to allegation (11) – the ATE insurance position, early stage insurance, commission, Melex and panel schemes.

The Findings of the Tribunal

142. The Tribunal noted that the case had generated a great deal of interest and there had been, over a period of time, press and media coverage of the way in which miners' compensation claims had been dealt with.

143. The Tribunal had the task of dealing with the allegations which had been made against Mr Beresford and Mr Smith under the Solicitors Practice Rules 1990 and other regulations.

144. The Tribunal was not dealing with any questions of negligence or criminal offences and was limited to dealing with the matters in question under the Rules of Professional Conduct of Solicitors.

145. The Tribunal had first to evaluate the documents and witness evidence called before it and to consider inferences which could be drawn from the facts established. The primary findings of fact were therefore very important. The Tribunal also had to consider the relevant case law in dealing with the various issues raised in the case.

146. The eleven allegations made in the case against the two solicitor Respondents, were set out in the Amended Rule 4 Statement and in the Further Information and Clarification document served by the Applicant in response to a request by the Respondents.

147. Although the allegations were separately set out and particularised, the Tribunal considered it appropriate to deal with a number of allegations together. The Tribunal dealt with allegations 1, 2 and 7 together.

Allegations 1,2 and 7

148. The three allegations alleged conflicts of interest between the Respondents and their clients; between the interests of their clients and the interests of the UDM, Vendside Limited and Walker & Co, and the failure of the Respondents to give proper or adequate advice about the agreements entered into by the miners with UDM/Vendside, and the failure to give sufficient information to the miners about costs and funding of the claims for compensation.

149. The Tribunal had the advantage of seeing the two Respondents, three miners, various members of Beresfords' staff and Mr Duerden and of hearing their evidence. Mr Beresford and Mr Smith maintained throughout that they had in effect done nothing wrong but there were a number of important insights gained from their answers. The Tribunal concluded that their evidence was not always believable. Mr Duerden gave his evidence in an honest and fair way, and the members of Beresfords' staff did the best they could in assisting the Tribunal and answering questions. The question of the vulnerability of the miners had been canvassed before the Tribunal. In the view of the Tribunal, the miners had not been, in the main, vulnerable by reason of poor health but had been vulnerable by reason of an understandable inability to appreciate legal documents and concepts. Having seen the three miners give evidence, it was quite clear to the Tribunal that their understanding of documents and advice was extremely limited and if ever there was a group of persons who had needed the full care, skill and attention from solicitors, it was those miners.

150. The procedure under which miners could claim for compensation for two medical conditions, Vibration White Finger (VWF) and Chronic Obstructive Pulmonary Disease, (COPD) stemmed from two Claims Handling Agreements (CHAs) set up in 1999 following negotiations between the Department of Trade and Industry (DTI) and a panel of solicitors dealing with such claims at that time. It should be noted that the CHAs provided a comprehensive framework for dealing with miners' claims. The CHAs provided that there would be no contest on liability or time limitation; they set out a detailed procedure for medical reports to be obtained and paid for; schedules to the CHAs set out the types of injury and the compensation to be paid and also the costs to be paid to solicitors for dealing with the various claims. The CHAs also

provided for interim awards of compensation and costs to be paid. It had been anticipated that the agreed schedule of fees paid by the DTI would represent the total sums paid to the Claimants' solicitors.

151. The UDM had its own CHA approved by the DTI and set up through Vendside Limited which was a company set up and owned by the UDM.

152. Beresfords were not on the original panel of solicitors who negotiated the CHAs with the DTI but Mr Beresford saw an opportunity to deal with the forthcoming miners' claims and he approached the UDM and joined their panel of solicitors who would be referred work by them. His evidence was that he had read the CHA's and understood them before joining the panel.

153. When miners were referred to Beresfords they brought with them or there was sent to the firm, a document referred to as the "Vendside Agreement" together with a simple questionnaire, completed by the miner, as to his employment history. The Vendside Agreement recited that the miner had agreed to pay to Vendside, in the event of his claim being successful, a fee based upon a sliding scale of compensation.

154. The basis of Beresfords handling of the claims from the UDM for UDM miners was that they would receive, in payment of their costs, some 83 % of their fees from the DTI and they were not allowed by the UDM to charge any success fees in addition. Beresfords would also pay a fee to the UDM in respect of each referral.

155. The procedure which should have been adopted by Beresfords was to have a full interview with each miner. They should have made clear to the miner, in plain and simple language, the way in which the scheme worked and the various stages of it. They should have clearly explained the various ways in which the costs of making the claims were funded including the CHA scheme for the payment of solicitors' costs. In particular they should have clearly told non-UDM miners that the DTI paid their costs and that it might well be possible to instruct solicitors who did not insist, as Beresfords did, in the miner entering into conditional fee or contingency fee agreements with them. It was noteworthy that Mr Duerden's evidence was that out of the forty four firms investigated by the Law Society some 2/3^{rds} of them did not use Contingency or Conditional Fee Agreements in acting for miners and only took the DTI costs that were paid to them under the CHAs. It was also not appropriate for costs matters to be discussed merely in a telephone conversation followed by a pack of documents sent to the miner by post.

156. Much was said about the Vendside Agreement and whether Beresfords should have advised the miners about it. The Tribunal had no doubt that it was part of Beresfords' retainer for them to read the agreement and comment on it to ensure that the miners fully understood what they had agreed to and to indicate to them that there was some uncertainty about the agreement and therefore about the deductions from their compensation. The agreement was also wrong on the face of it as the fees charged by the UDM to the miner were certainly not "to cover the cost of pursuing this claim on my behalf".

157. The attitude of the Respondents was that the Vendside Agreement was entered into by the miners before they instructed the firm and therefore they had not been concerned with it. In the circumstances of the case, the Tribunal did not find this acceptable.

158. There was no real evidence that the Respondents or their staff properly discharged all their duties to the miners. No proper attendance notes had been kept on the files of a full first interview. No proper client care letters had been sent to the miners and no letters confirming the explanations, particularly on costs and funding alternatives, had ever been sent out so that the miners would have a comprehensive note of the advice given and the options available on costs. In the absence of those factors the miner had not been in a position to make an informed decision. Beresfords' interests had been in obtaining and in maintaining a flow of work from the UDM and in ensuring that non-UDM miners entered into contingency or conditional fee agreements. The Tribunal found that the Respondents had acted in circumstances of conflict between themselves and their clients and in conflict between their clients and the UDM/Vendside. They also clearly had failed to act in the best interests of their clients and had failed to give sufficient information to the miners about costs and the funding of claims. The Tribunal found the three allegations proved.

Allegation 3

159. As indicated, the Tribunal found both contingency and conditional fee arrangements not to have been in the best interest of the client as deductions were made from the miner's compensation. The miners had not been properly advised that there was an alternative way of obtaining their compensation by relying on the CHA under which the solicitors' costs were paid by the DTI and no deduction would have been made from their compensation. The Tribunal noted that the amount of compensation paid in the miners' cases was not large and that it had been clearly intended from the CHAs that the miners should obtain their compensation in full. The reason advanced by Mr Beresford for insisting on having his contingency or conditional fee agreements had been that he had wanted a full indemnity for all his costs and that he did not know at the outset how many of the claims would succeed. Given the way in which the CHAs had been drawn up there was little or no risk of failure if the medical evidence acquired very early on met the criteria necessary, and the Tribunal found it difficult to accept Mr Beresford's attempted justification for having the agreements. He had been quite prepared, in contrast, to accept referrals from the UDM for their members on the basis of no success fees and a deduction from his DTI costs. Rule 8 of the SPR states that contingency agreements are not permitted in contentious matters. It was clear to the Tribunal that the Respondents were in breach of Rule 8 and in breach of Rule 1. The construction of Rule 8 is dealt with by the Tribunal under allegation 6.

Allegation 4

160. This related to the allegation that the Respondents had accepted referrals of business from other persons in breach of the Solicitors' Introduction and Referral Code 1990.

161. The Respondents had paid a fee to the UDM for each case referred. Originally it had been £10 per case but it was later increased on a sliding scale by reference to the value of the case, on a case by case basis. The Respondents contended that they had paid for genuine services by the UDM, that was for "marketing/ administration/ vetting". The £10 fee was also described as being for "postages". Having listened to the evidence it was clear to the Tribunal that the alleged services by the UDM were in fact a cover for referral fees. There was absolutely no evidence of a marketing campaign by the UDM for Beresfords. There was no correspondence, marketing strategy or documentation to support their contention and the administration appeared solely to be the obtaining from the miner of his handwritten work history and sending

it on to the Respondents. Vetting carried out by the Union of claims had been to ensure that no hopeless claims (and therefore no payment to them) were sent on to the Respondents. The Tribunal concluded that the payments made to the UDM had been referral fees and a breach of the Code. The same consideration applied to fees paid to Walker & Co for the same alleged services. Again there was no evidence at all to support the contention of genuine services supplied and fees paid to Walker & Co had been referral fees and a breach of the Code. The Tribunal found the allegations proved and rejected the contentions of the Respondents.

Allegation 5

162. This allegation related to the arrangements made with UDM/Vendside and Walker & Co. and arose from a meeting on 10th January 2002 at the UDM's offices. Both Respondents had been present plus the General Secretary of the UDM and Clare Walker. It appeared that the General Secretary announced at the meeting that in future a payment was to be made to Walker & Co by Beresfords in addition to the payments they made to the UDM, on cases referred by Walker & Co. This was illustrated by Annex C prepared by the Applicant and handed to the Tribunal. A "Beresford Claims Handling Agreement" with Walker & Co had been signed in July 2002. Payments had been made under those arrangements, and the Tribunal found that no genuine services had been provided by Walker & Co and that referral fees had been paid by the Respondents.

163. The allegation as set out in more detail in the Further Information and Clarification document alleged (i) that the arrangements with Walker & Co had been dishonest in that the arrangements had been a sham and intended to conceal the fact that the payments made to Walker & Co had been referral fees and (ii) that the Respondents had been involved with Clare Walker in the payment of monies which had constituted the improper diversion or potential diversion of monies payable to Vendside.

164. In making the payments to Walker & Co for no genuine services supplied, the Tribunal found that the Respondents had been taking part in a sham arrangement. The Tribunal was satisfied that the Respondents knew that it was such an arrangement and knew that no genuine services were supplied.

165. The Respondents had known and had admitted in cross-examination that if they did dress up referral fees as "marketing/administration/vetting fees" that would have been dishonest. The relevant authority for the test of dishonest behaviour was set out in Twinsectra -v- Yardley and Others [2002] UKHL 12 and the Tribunal found that the Respondents were dishonest by the ordinary standards of reasonable and honest people and that they themselves realised that by those standards their conduct had been dishonest.

166. As to the participation in the improper diversion or potential diversion of monies payable to Vendside, the Tribunal was not satisfied that that part of the allegation had been made out. In reality there had been no credible evidence to support the allegation. No witness from the UDM or from Walker & Co had been called to give evidence and the Tribunal was not persuaded that the allegation had been proved.

Allegation 6

167. This allegation related to a breach of Rule 9 of SPR in that Beresfords had acted in association with UDM/Vendside and with Walker & Co who had respectively received deductions from compensation and referral fees. The Tribunal has already dealt with the questions of referral fees and deductions from miners' compensation and now deals with whether the CHAs under which the miners' compensation had been paid were contentious or non-contentious. The Tribunal heard considerable argument on the issue but it seemed to the Tribunal that the arrangements made were as to claims made in contentious proceedings. The fees had been recovered from the relevant miner's compensation regardless of how that compensation had been achieved, whether by proceedings or otherwise. The UDM/Vendside and Walker & Co were not limiting themselves to recovery of contingency fees where proceedings had not been issued. The judgment of Mitting J. which was referred to, was not dealing with Rule 9 and the Judge had limited the scope of his judgment and also had commented that it could lead to difficulty in other issues. The Tribunal was also referred to the case of Robinson previously dealt with by the Tribunal. In all the circumstances the Tribunal found the allegation proved and that the CHAs were contentious matters. The whole process involving proof of claims and dealing with disputes over medical reports and Co-Defendants, for example was dealt with on a litigious basis. For the avoidance of doubt the Tribunal found the payments to Vendside Ltd, a claims management company, and to Walker & Co., had involved a breach of Rule 9.

Allegation 8

168. The allegation related to sharing professional fees with a non-solicitor namely Walker & Co. The sharing of fees with Walker & Co after the agreement was entered into in 2002 clearly had amounted to a breach of Rule 7 of the SPR and the Tribunal found the allegation proved. The services provided by Walker & Co had not been genuine services.

Allegation 9

169. The allegation related to a letter written by Mr Smith to a Parliamentary Under Secretary of State. It was alleged that the letter had not been frank or open or had served to mislead. Having carefully considered the matter the Tribunal was not satisfied that the allegation was made out. The Tribunal was not convinced that the letter was really misleading. The real relevance of the letter was that in the last paragraph Mr Smith gave his honest view of payments made to Trade Unions and Claims Management concerns.

Allegation 10

170. The allegation related to Beresfords releasing confidential information to a third party. Walker & Co had been intermediaries and not solicitors and there had been no basis on which such information could have been released without the informed and written consent of the client. Beresfords did not have such consent and the allegation was therefore proved.

Allegation 11

171. The final allegation alleged that the Respondents had acted in circumstances of conflict between the interests of their clients and their own interests. These matters related to ATE Insurance and to the use of EBS and then Melex. The Respondents, it was alleged, were in conflict with their clients in non-CHA scheme cases as they had received a commission from the relevant insurance company in arranging ATE insurance and had used an insurance company paying a higher commission than the previous company used by them. Beresfords had advised clients to take out ATE insurance at an early stage and it had been in the clients' interests to do so. The clients had been informed that Beresfords was paid a commission for this by the insurer. There was no evidence to counter the Respondents' evidence that they had regularly surveyed the insurance market for the best products or that the insurer used was not the best one. The allegation concerning ATE insurance commission therefore failed.

172. The second area related to Melex in which Mr Beresford had had an interest and both Respondents had had an interest in EBS, its predecessor. The companies had been set up to provide medical reports for clients. The Respondents' evidence was that they had disclosed their interests in Melex to their clients and they had been entitled to use the services of Melex. The service had been of benefit to clients and any fee charged had been recoverable on a costs assessment in the event of a successful claim. A panel scheme for other Solicitors who had wanted to participate in claims referred to them by Beresfords had been set up and the use of Melex made available to them. There had been however no condition that the other solicitors had to use Melex (and a proportion did not) nor any condition that the solicitors should take out ATE insurance through Beresfords. The Tribunal did not, in all the circumstances, find these allegations proved save to the extent of payments to Walker & Co which had been referral fees and not for genuine services.

173. The Tribunal now deal with further matters relating to allegations 4 and 6. As part of the Respondents' defence to their breach of Rules 3 and 9 of the SPR or Section 2(3) of the Introduction and Referral Code 1990, they had contended that those Rules and Section were void by reason of Section 2(4) of the Competition Act 1998 and Article 81 of the EC Treaty, and that Rules 3 and 9 were incompatible with Articles 43 and 49 of the EC Treaty.

174. The Tribunal had been supplied with separate skeleton arguments by both sides on the issues and had seen Professor Peysner and Mr Middleton give evidence in these matters. The Tribunal had also listened carefully to lengthy submissions made on the issues by separate Counsel.

175. As far as the witness evidence was concerned, the Tribunal found that Professor Peysner's evidence had not been of great help to the Tribunal. The Tribunal did not think that his evidence had really been directed to the issues before it and no reference to EC law had been contained in his evidence. In contrast the Tribunal preferred the evidence of Mr Middleton.

176. The burden of proof, the Tribunal believed, was on the Respondents to establish that Rule 3 and Section 2(3) and/or Rule 9 infringed Article 81of the EC Treaty and/or the Chapter 1 prohibition in the Competition Act 1998.

177. Article 81(1) of the EC Treaty and Section 2(4) of the Competition Act 1998 both drew a distinction between agreements that had as their "object" the restriction of competition and those that had the "effect" of the restriction of competition Rule 3 and Section 2(3) and/or Rule 9 had as their object the regulation of Professional Conduct to ensure the proper practice of the profession, not the restriction of competition.

178. The Tribunal had been referred to the case of Wouters decided by a full Court of the ECJ in 2002. The Court in that case had held that in spite of the restrictions of competition that the rules of the Dutch Bar may have had, account had to be taken of its objectives which had been connected with the need to make rules relating to the profession in order to ensure that the ultimate consumers of legal services and the sound administration of justice were provided with the necessary guarantees in relation to integrity and experience. In the event, the Court had unanimously held that the rules of the Dutch profession were a proper exception to and did not infringe Article 81(1) of the Treaty. The Tribunal found that the case of Wouters was a proper precedent for the case where the Law Society made Rules for the proper practice of the legal profession. The Tribunal considered that Wouters also answered the question of whether the rules were restrictive of competition under the CA98. The Tribunal took the view that it had been legitimate and necessary for the Law Society to have had rules to regulate the proper practise of the profession. The Respondents had not shown that the Law Society could not reasonably have considered the rules to be necessary.

179. The Tribunal did not consider that the arguments advanced by the Respondents had established that Rule 3 or 9 or Section 2(3) had any real effect on competition or that they had infringed Article 81(1) or the Chapter 1 prohibition. As regards Articles 43 and 49 of the EC Treaty, the conduct in issue did not involve the right to establish in another member state and the facts and circumstances of the proceedings were wholly internal to the UK. There was no cross border element. Again the Tribunal found that the judgment in Wouters conclusively dealt with the Respondents' contentions. In the view of the Tribunal therefore the Respondents' defence on the matters failed and the Tribunal did not regard Rules 3 and 9 as unenforceable.

180. The Tribunal found that the conduct of the Respondents fell below the standards required of the profession and that their conduct was unbefitting of a solicitor in each allegation proved. In dealing with the dishonesty allegation the Tribunal had used the criminal standard of proof and a similar high standard in the other allegations. Putting matters in context the Tribunal noted that Beresfords had handled just under 80,000 claims as at 30th April 2004. They had deducted success fees in over 1,000 compensation claims with a total deduction of over £718,000. The deductions had continued up to June 2003. The deductions made on behalf of the UDM and paid to them pursuant to the Vendside Agreement were over £1,200,000 and the amounts paid to Walker & Co had totalled some £736,000. The claims handled by Beresfords had been cases from the UDM and their own cases generated by their own advertising and TV campaign. Beresfords had repaid deductions made by them from miners compensation claims by way of Contingency or Conditional Fee agreements. The re-payments were made from January 2004 until June 2007 and had totalled just under £1m. The Tribunal did not find that the time taken for repayment was an aggravating feature of the Respondents' conduct. The Tribunal felt however that the decision to re-pay had been clearly brought about by complaints and media and other pressures.

181. The Tribunal also noted that the various forms of agreements and documents used by Beresfords in the miners' scheme cases had been in part misleading and inappropriate and little attention had been paid to using properly worded documents and letters. The careless use of inappropriate documents was an illustration of their attitude to the needs of their clients. They also, in some cases, had deducted the whole of their success fees or contingency fees from interim awards to miners. (The reference to miners in this case included, where relevant, the Personal Representatives of deceased miners.)

182. Mr Beresford had described himself as an entrepreneur. Unfortunately it was the Tribunal's view that his commercial attitude had allowed both Mr Beresford and Mr Smith to put commercial goals before their clients' best interests.

Submissions as to mitigation and costs

183. Counsel for the Applicant made an application for costs in what he stressed had been long and complex proceedings. He referred to Bolton v the Law Society and Baxendale v Walker and maintained that all the allegations had been properly brought by the Regulator acting in the public interest. Counsel for the Respondents sought a percentage reduction because the Applicant had not proved all of the allegations.

184. Turning to mitigation, Counsel for the Respondents stressed that Beresfords had been successful in securing compensation for a very large number of clients. They had dealt with almost 100,000 claims and recovered some £221 million in compensation for clients. Only 1% of claims had involved success fees and all fees charged had been refunded. Some 16% of claims had been UDM referred claims. While 384 complaints had been made after July 2005, many of those complaints had been solicited by Members of Parliament and by the Law Society. Beresfords had dealt with all the complaints and paid some £100,000 as compensation.

185. Counsel also referred to the length of time that had passed since the initial inspection in April 2004. The FIR dated 11th November 2004 had been provided to the Respondents in July 2005. The Respondents had co-operated fully throughout the investigations although proceedings had not been commenced before the Tribunal until 2007. The allegations had been hanging over the Respondents who had been in the glare of media publicity for some four and a half years. Counsel asked the Tribunal to take into account the huge stress created by the serious allegations and the media campaign. Both Respondents had terminated their partnerships. In reality irreparable damage had been done to Beresfords which was a shadow of what it had been. Neither Respondent had appeared before the Tribunal before or ever had any conditions attached to their practicing certificates. Both were now facing a huge liability for both sides' costs.

186. Counsel drew the Tribunal's attention to the difference in equity holdings, both in Beresfords and in Melex, of the Respondents and in their responsibilities in relation to the miners' compensation claims. He stressed that the dishonesty found did not involve any misappropriation of clients' funds. Moreover, all arrangements with UDM/Vendside and Walker & Co had been brought to an end following the decision of Master Hurst in January 2003 notwithstanding the loss of substantial amounts of future work. All success fees were refunded between January 2004-July 2007 with all but some £20,000 refunded by July 2005.

The decision of the Tribunal as to penalty and costs

187. The Tribunal had carefully considered all that was said in mitigation on behalf of the Respondents. The allegations that had been proved had been serious allegations involving breaches of Regulations and Rules that existed to ensure the proper conduct of members of the Profession. The one offence of proved dishonesty had been an additional serious matter. The proceedings had reflected upon the whole Profession and its standing in the eyes of the public. Maintaining the reputation of the Solicitors' Profession was fundamental and it had been said that the Profession should be "one in which every member of whatever standing, may be trusted to the ends of the earth". The Tribunal referred to the decision in Bolton relating to solicitors' conduct. Any solicitor who was shown to have discharged his or her professional duties with anything other than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed. Notwithstanding what had been said on behalf of the Respondents, the Tribunal Ordered that both Respondents be Struck Off the Roll with immediate effect. The Tribunal did not consider that there should be any differentiation between the two Respondents. Having heard their evidence, the Tribunal held them jointly liable. In addition, the Tribunal Ordered that the costs of the application were to be paid by both Respondents, jointly and severally, to be the subject of a detailed assessment unless previously agreed. The Tribunal considered that the case and all the allegations had been properly investigated by the Law Society in the interests of both the Profession and the Public and as such the Tribunal did not consider it appropriate to make any discount of costs in favour of the Respondents.

Dated this 9th day of April 2009
On behalf of the Tribunal

D J Leverton
Chairman