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OHPA - A PROGRESS REPORT

In less than a year's time – on 1 April next – the Office of the Health Professions Adjudicator will take over responsibility for fitness to practise decision making from the General Medical Council. The following year we do the same for the General Optical Council and, beyond that, the government expects that we will do the same for other health profession regulators. The regulators will, as now, present their allegations, but the judicial decision-making will be that of an independent body. Significant reforms beckon - and I invite ARDL members to contribute their thoughts to help shape these changes.

How will the changes happen? Initially there will be a transitional period of continuity since we will inherit the entire caseload of the GMC - including cases that are part heard on that day - but after that we have the opportunity to implement the new range of powers given to us by our legislation. These include the power to hold preliminary hearings, to make directions as to the conduct of the proceedings and as to the consequences of non-compliance, and to make costs

award orders – including wasted costs orders. Many of these powers were unavailable to the GMC itself since it was case presenter, case administrator and responsible for adjudication.

We have been encouraged by a wide range of commentators to bring about a regime of more active case management buttressed by the kind of overriding principles of speed and proportionality found in the rules of other courts and tribunals. This could bring about major changes in the administration and adjudication of fitness to practise cases; we hope they can speed up the disposal of these cases and reduce their cost. We will be able to set time-scales for the mutual disclosure of evidence and require both parties to cooperate; to make directions on how expert evidence should be handled; and to insist on realistic hearing time estimates; and seek to manage hearings in order to hold parties to them. GMC case hearings now average over eight days – considerably longer than the average for contested Crown Court cases.

The current GMC panels consist of both doctors and non-doctors (some of whom are lawyers but most are not) and the panels are advised by legal assessors. Our legislation gives us the opportunity to adopt the model found in other tribunals - a legally qualified chair together with a professional and a lay member thus dispensing with a legal assessor. The Act allows us to undertake a pilot to test this if we wish. Many people have said to us that legal chairs would be essential to exercise judicially the powers that we have been given.

During the summer we will be consulting on the transitional rules we will need and also on the kind of case management policies that could be embodied in a further set of procedural rules. These rules need to be fit not only for handling GMC cases but those of the GOC and potentially of other regulators. The Department of Health has made clear its expectation that in due course other regulators would release their adjudication functions to OHPA. So, we see the expertise and experience of ARDL members - both those who sit judicially in courts and tribunals and those who are regularly instructed in healthcare regulators' cases (as advocates or assessors) - as potentially of great value in contributing to the planning and future personnel of our new regime. We will be looking for ideas, either now or when the consultation is under way, and while there may be a

reduced demand for legal assessors, in time there may be a requirement for part time and full time legally qualified chairs interested in specialising in fitness to practise adjudication.

Although the originating proposal for OHPA was by Dame Janet Smith in her Shipman Inquiry report, and was largely based on the principle of separating the function of case presentation from that of adjudication, we see the benefits of OHPA also in the more efficient and speedier administration of justice. It is not just the public who should benefit from this: the cases of those health professional registrants who appear before panels should be dealt with more quickly, and the vast majority who do not should see the costs of their regulatory bodies reduced.

ARDL members are very welcome to input ideas to inform our emerging thinking – by emailing our consultation inbox at info@ohpa.org.uk. Do watch our progress at <http://ohpa.org.uk/>.

Walter Merricks CBE

Chair of the Office of Health Professions Adjudicator

BERESFORD, SMITH V SOLICITORS REGULATION AUTHORITY [2009] EWHC 3155 (ADMIN)

At the turn of last year the Divisional Court (May LJ; Silber J; David Clarke J) gave judgment in the case of *James Beresford & Douglas Smith v The Solicitors Regulation Authority [2009] EWHC 3155 (Admin)*. That decision, on appeal from the Solicitors Disciplinary Tribunal (the Tribunal), may well prove to be the final chapter in the long-running saga over solicitor misconduct concerning the coal miners' compensation schemes. The decision is significant both on its own terms, as marking an emphatic disciplinary response to “*very serious misconduct on a huge scale and in relation to thousands of vulnerable clients*” (Judgment, para 120), and, more broadly, as containing a restatement of basic principles of conduct which lie at the root of solicitor-client relationships.

This article summarises the Divisional Court's decision, and the relevant background to it, and also considers the wider significance of certain aspects of the court's reasoning.

Background: The miners' compensation schemes

The background to the disciplinary proceedings lay in earlier test cases in the mid-1990s in which British Coal had been found liable for causing debilitating industrial injuries to coal miners. The relevant injuries were respiratory disorders caused by the inhalation of

coal dust collectively known as chronic obstructive pulmonary disease (COPD) and a nerve and circulatory disorder, termed “vibration white finger” (VWF), caused by the prolonged use of vibrating hand-held machinery. Following those judgments and in order to expedite the payment of compensation to the large number of victims, many of whom were both elderly and infirm, the Department of Trade and Industry (DTI) and solicitors representing the victims, negotiated two court-approved schemes, or Claims Handling Agreements (CHAs), which provided a framework for the registration, classification and disposal of qualifying claims.

The CHAs were detailed documents and were subject to numerous revisions. However, amongst other things, they provided for claimants to register, obtain medical reports at the DTI's expense and, if successful, obtain general damages calculated on a predetermined scale depending upon the nature and extent of the condition diagnosed. Importantly, they also provided for the costs of claimants' solicitors to be paid by the DTI according to a predetermined tariff.

The court accepted that the purpose and effect of the CHAs had been to ensure both that the costs of diagnosing a relevant disease were born by the DTI and that once a worker from a qualifying mining occupation was diagnosed with a relevant disease, the liability of the DTI would cease to be in dispute.

In assessing the role of solicitors under the CHAs, the court accepted that the only substantial work undertaken in (and therefore at risk of being thrown away,) in an unsuccessful case would have been for the solicitor to send a standard letter to a medical expert and receive and review the resulting report. Accordingly, the court reasoned, CHA claims were, from the solicitors' point of view, “*quite obviously [...]* low risk”. In relation to the costs paid to solicitors under the CHAs, the Tribunal, and later the Divisional Court, thought it significant that one of the CHAs provided that “*The DTI anticipates that these agreed fees will represent the total sums payable to a claimant's 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*”. If this did not technically prohibit solicitors from seeking further costs from their clients, it nevertheless had a significant bearing upon the propriety of their doing so.

The number of claims brought under the CHAs is, on any view, staggering and makes the CHAs by far the largest personal injury compensation scheme in the world: in total over 750,000 claims were registered and it is predicted that the final cost of the scheme will run

to some £6.9 billion. It is perhaps proper to observe that the uptake under the CHAs has brought to light the previously unacknowledged extent of the afflictions suffered due to working practices within the mining industry in the middle and latter part of the last century.

Beresfords' involvement in the miners' compensation claims

The appellants' firm, Beresfords, acted for 96,000 of the CHA claimants and profited enormously from this work. In 1999, the two-partner firm had an annual fee-income of less than £700,000; by 2006 the firm recorded a gross profit of over £36m and the following year Mr Beresford was profiled in *The Lawyer* as the highest-earning lawyer in the UK.

The CHA claims handled by Beresfords came from two different sources and it was an important feature of the case that they had treated claims from these two sources differently. The first source was the Union of Democratic Miners (UDM) either through its captive claims management company, Vendside Limited (Vendside), or through another company, Walker & Co (Claims Services) Limited (Walker & Co) which was owned and operated by Ms Claire Walker, a Vendside employee. The second source of claims was, compendiously, non-UDM sources, that is clients coming from various channels, including self-referrals.

Non-UDM clients and success fees

Between 1999 and June 2002, all non-UDM clients were required by Beresfords to enter into success-fee agreements, either in the form of a conditional fee agreement (CFA) or a contingency fee agreement. There was then, and is now, a restriction on the use of contingency fee agreements where solicitors are retained in relation to contentious proceedings, and there was an issue in the Beresfords case as to whether CHA claims were "contentious proceedings" for this purpose (see the old SPR rule 8; and the current Code Rule 2.04). However, there were also a wider issue as to the propriety of charging success fees *per se* in CHA cases, given the particular features of the CHAs summarised above. Success fees were not recoverable from the DTI under the CHAs and, in consequence, in just over 1,000 cases, Beresfords deducted success fees directly from clients' damages. In total deductions of just under £1 million were made in this way. In each of these cases, Beresfords received, in addition to the success fee itself, the fees paid by the DTI under the CHAs.

Importantly, the Tribunal found that prior to 2002, none of Beresfords' client care documentation had explained to non-UDM clients that the DTI paid fees under the CHAs. Also, by their own admission, Beresfords never

advised any non-UDM clients that other firms might be willing to act for them without charging success fees, on the basis of the CHA fees alone.

The Tribunal also found that Beresfords' success fee documentation itself contained inapt, and therefore misleading, representations as to the risks involved in the CHA claim. Specifically, the appellants had used pro-forma success fee documentation drafted for use in conventional litigation which, as part of a risk assessment, identified various risk factors that could not realistically arise in CHA claims (eg limitation, or failing to beat a Part 36 offer/payment). The Tribunal had concluded that these irrelevant risk factors might themselves have appeared to justify the success fee that Beresfords were demanding and were therefore misleading.

UDM clients and deductions from clients' damages paid to introducers of work

UDM clients were treated differently in that, pursuant to an understanding with the UDM, Beresfords never charged UDM clients success fees. Not only did Beresfords forego a success fee, but UDM cases were intrinsically less remunerative for at least two additional reasons. First, the CHAs under which UDM cases were brought differed from the CHAs for non-UDM cases, one relevant distinction being that Beresfords received a substantially lower fee: the fee on UDM cases was approximately 83% of the fees paid under the "normal" CHAs. Second, Beresfords had to pay Vendside/Walker & Co a fee in relation to the cases they referred. The fee, which was styled compendiously as a "vetting/marketing/administration" fee (but which the Tribunal found to be a bare referral fee), was initially £10 per case, payable in any event and later rose to a figure of between £100-£300, varying according to the type of case, and being payable only in the event of success.

Notwithstanding these disadvantageous features of UDM cases, Beresfords remained keen to take them on, and having joined the UDM/Vendside panel in late 1999 had, by January 2002, negotiated an exclusivity arrangement pursuant to which it was the only firm to which UDM cases would be referred. In total the firm received approximately 15,000 CHA claims from UDM/Vendside.

A crucial feature of the UDM cases was that, before being referred to Beresfords, UDM clients had signed a document on UDM notepaper in which the client had agreed 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 fee was calculated on a sliding scale and varied between £50-

£300 according to the amount of damages received (the Vendside fee). Accordingly, although UDM clients never paid a success fee to Beresfords, they did pay a fee in the event of success to Vendside. The Vendside fees were deducted by Beresfords from clients' damages and remitted to the UDM/Vendside; in total in excess of £1.2m was deducted from clients' damages in this way.

The Tribunal found that Vendside did not in fact "administer" the claims (other than to receive them and refer them to Beresfords,) nor did it incur the "cost of pursuing" them - on the contrary Beresfords did. The agreement which clients had signed was therefore wrong on its face as to the basis and purpose of the Vendside fee. The appellants claimed that they had understood that the payments were made as a fee for affiliated membership of the UDM during the life of the claim and that the payments were used for the benefit of the membership as a whole. However, the Tribunal found that the second appellant's real view of the payments had been reflected in a letter disclosed in the proceedings in which he had observed that "[Trade unions] 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." By their own admission the appellants never advised clients concerning the validity or justification for the Vendside fees.

Decision of the Solicitors Disciplinary Tribunal

Following a 9 day hearing, during which the Tribunal heard from 15 witnesses, including 3 miner clients, the Tribunal found that the appellants had:

- charged non-UDM clients conditional and contingency fees in circumstances that had not been in the best interests of clients and were improper (contrary to rules 1, 3 and 8 Solicitors Practice Rules 1990 (SPR) and in a manner amounting to conduct unbecoming a solicitor);
- failed to act in non-UDM clients' best interests by failing to advise them regarding the Vendside fee and, specifically, failing to advise that there was some uncertainty surrounding it (contrary to SPR rule 1 and in a manner amounting to conduct unbecoming);
- acted in circumstances of a conflict of interest between themselves and their UDM clients; and between their UDM clients and the UDM/Vendside and Walker & Co (contrary to SPR rule 1 and in a manner amounting to conduct unbecoming);
- failed to give sufficient information to clients about costs and the funding of claims generally (contrary

to SPR rules 1 and 15; the Solicitors' Costs Information and Client Care Code; and in a manner amounting to conduct unbecoming);

- accepted referrals of business from UDM/Vendside/Walker & Co in breach of the Solicitors' Introduction and Referral Code, in particular in that they had paid unlawful referral fees (contrary to SPR rules 3 and 1 and in a manner amounting to conduct unbecoming);
- participated in an arrangement with the UDM/Vendside/Walker & Co which was a dishonest sham in that they paid sums described as "vetting/marketing/administration" fees, which were in fact referral fees used to disguise their breaches of SPR rule 3 (contrary to SPR rule 1 and in a manner amounting to conduct unbecoming);
- shared their professional fees with a non-solicitor, viz by making payments of referral fees to Walker & Co (contrary to SPR rule 7 and in a manner amounting to conduct unbecoming);
- improperly released confidential information about clients to a third party, viz Walker & Co. (contrary to SPR rule 1);
- entered into arrangements for the introduction of clients and acted in association with UDM/Vendside and Walker & Co, each of whom were 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 (contrary to SPR rule 9 and in a manner amounting to conduct unbecoming).

In light of these findings, the Tribunal ordered that the solicitors be struck from the roll and pay the entirety of the SRA's costs.

Beresfords' appeal

The appellants did not appeal against the finding on breach of confidentiality, nor did they challenge the finding that the costs information provided to non-UDM clients (viz clients paying success fees,) had been inadequate. That aside, however, they challenged substantially all of the Tribunal's findings.

The Divisional Court rejected the appeal in its entirety. The court's judgment is lengthy and certain parts of the reasoning are concerned with matters specific to the construction and nature of the CHAs, in particular whether CHA claims were contentious proceedings for

the purposes of SPR Rules 8-9; suffice it to say that the court found that they were. These matters, which are peculiar to the CHAs themselves, may be of limited wider significance. However, issues of wider interest were traversed in the court's decision on the propriety of the success fees; the appellants' duties to advise clients concerning their pre-existing agreements with third parties (viz the Vendside fee); referral fees and the award of costs in disciplinary proceedings. These aspects of the court's decision are considered in turn.

Success fees contrary to non-UDM clients' best interests

In relation to success fees, the court rejected the appellants' argument that they had apprehended a substantial risk in taking on CHA cases, particularly in the early period of the CHAs when their provisions and effect were still being worked out. The court concluded that the decisive consideration lay in the appellants' different treatment of non-UDM and UDM cases: Beresfords assessment of the commercial risk did not deter them from taking on UDM clients without charging success fees, and on terms that they would not only receive a substantially reduced CHA fee but would in addition pay a referral fee to the UDM/Vendside.

This alone, the court reasoned, was sufficient to justify the conclusion that it had been unconscionable for the appellants to require unsophisticated miners to enter into *any* success fee agreement (let alone involving a 100% fee uplift), without at least first providing a full and proper individual explanation not only that the DTI were paying fees for successful cases but that a proper risk assessment would not have justified any success fee.

In relation to the provision of costs advice generally, the court appears to have approved the Tribunal's finding that:

The procedure which should have been adopted by Beresfords was to have a full interview with each miner. They should have clearly explained 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 the 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 agreement with them.

Although these findings clearly turn upon the facts of the Beresfords case and, in particular, the bespoke features of the miners' compensation CHAs, they give renewed prominence to at least three wider considerations. First, where a solicitor negotiates a success fee that purports to reflect her assessment of the risks in the client's case, she may be in breach of her professional duties if the fee is objectively unjustified, and if she fails to inform her client to this effect. Second, a solicitor's duty to provide her client with full and proper costs information will in practice require her not only to explain the fees and expenses for which the client may be liable, but also any sums that the solicitor may herself obtain from other sources as a consequence of representing that particular client. Third, depending upon the circumstances of the case, the level of the sophistication of the client and the complexity of the funding arrangements in issue, a solicitor may not be able to discharge her advisory responsibilities without a full face-to-face interview with her client. This has potential significance for the largely paper-based operations of some solicitors operating in the high volume personal injuries market.

Duty to advise UDM clients concerning their pre-existing agreements with UDM/Vendside

In finding that the appellants had culpably failed to advise their clients concerning the Vendside fees, the Tribunal held that providing such advice had formed part of the appellants' retainer. On appeal, the appellants challenged this conclusion as wrong in law. They contended that, in each case, Beresfords' clients had signed up to pay the Vendside fee *before* they were referred to Beresfords and that, following the referral, their retainer had been confined to pursuing the client's claim under the CHAs, rather than providing advice in relation to any pre-existing agreements. To this end, the appellants relied upon the leading authorities for the proposition that a solicitor is not obliged to take upon himself work falling outside the four-corners of his retainer: see *Mortgage Express v Bowerman* [1996] 1 All ER 836 at 842 and *Credit Lyonnais v Russell Jones & Walker* [2002] EWHC 1310 (Ch) at paragraph 21.

The court declined to follow the appellants in this narrow delineation of their retainer and emphasised that the proper approach must be "*to stand back and look at the case against the appellants in the round*". It noted that the CHA cases referred by the UDM had been hugely beneficial to Beresfords and that part of the referral structure had from the outset involved clients agreeing to pay fees to Vendside which the second appellant (at least) knew were for all practical purposes gratuitous. It was unnecessary, and it would be a distraction, the court concluded, to examine whether

the Vendside agreements actually were unenforceable in law (for example due to misrepresentation, or lack of consideration); it was sufficient that they were questionable, and that Beresfords knew or ought to have known this. The court repeated the familiar precept that the precise scope of the relevant duty to advise will depend on the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of the retainer and of his duties than will be the case with an experienced client: *Carradine v DJ Freeman* [1999] Lloyds LR PN 483 at 487. The Tribunal had noted that the miners who had given evidence had demonstrated an extremely limited understanding of legal documents and advice and observed that: “*if ever there was a group of persons who had needed the full care, skill and attention from solicitors, it was those miners*”. In all the circumstances, the court concluded that “*anyone not wearing blinkers*” would have seen it as part of Beresfords' retainer to advise regarding the Vendside fee. Further, since UDM clients had an interest in being advised that the Vendside fees were at best questionable, and Beresfords had a countervailing interest in maintaining the flow of UDM/Vendside clients, there was a plain conflict of interests between Beresfords and their clients.

The decision on this issue is an important and salutary reminder that *ex post facto* attempts to confine a solicitor's retainer, particularly in relation to vulnerable or unsophisticated clients, will be deprecated by the courts. However, aside from reinforcing this commonplace, there is an interesting aspect to the court's reasoning which may be of wider significance when examining the propriety of other relationships between solicitors and regular introducers of work. Specifically, in preferring a wider construction of the appellants' retainer, the court refused to assess each solicitor-client relationship on its own terms, severed from the wider referral structure from which it had arisen. Taken in isolation, it was indeed the case that each client had entered into an agreement to pay the Vendside fee before being referred to Beresfords. However, the bigger picture was that Beresfords had entered into a referral arrangement in which they knew that clients would be signed-up to pay Vendside fees before they were referred. Viewed in this wider context, the court saw it as self-evident that the retainer extended to advising concerning the Vendside Agreement.

It might be wondered whether a different view might have been taken if, in the absence of a referral arrangement, handfuls of self-referring clients had wandered into Beresfords' offices seeking representation and, amongst other papers, had disclosed

to Beresfords the agreement to pay the Vendside Fee. Different considerations might arise in such circumstances, although these questions will be fact sensitive. It might also be asked whether Beresfords might have escaped a duty to advise had it included a simple exclusion in its client care documentation purporting to relieve itself from advising in relation to the Vendside fee. The propriety and effectiveness of exclusions of this sort is overdue for clarification. However, it is submitted that the simple answer is that a solicitor cannot by excluding a duty to advise, facilitate the imposition upon a client of an agreement, which she knows, or should know is contrary to the client's best interests: see *Re Tilbury*, Solicitors Disciplinary Tribunal, 8 January 2009, No 9880-2008; see also the court's wider observation in *Beresfords* that: “*[the appellants] should never have put themselves into the whole UDM/Vendside situation in the first place, with its combination of client duties and conflicts*”.

Referral fees and a dishonest sham

The appellants challenged the Tribunal's finding that the fees they paid to Vendside/Walker & Co were referral fees and, further, that if they were, by characterising them as fees for “marketing/administration/vetting”, they had participated in a dishonest sham.

As above, in reaching its finding, the Tribunal had concluded that there was no evidence of “marketing” by the UDM for Beresfords; that the “administration” had been confined to obtaining handwritten work histories from miners; and that the “vetting” of claims had simply been to ensure that no hopeless claims sent to the appellants. In the round, the tribunal had concluded that the UDM services were in substance merely a cover for the payment of referral fees.

By their appeal, the appellants maintained that the UDM/Vendside had in fact carried out services for Beresfords and had, in particular, carried out a marketing campaign which had attracted miners with claims from which Beresfords had in turn benefited, although the campaign had been to attract miner claimants, and not specifically to market their particular firm.

The court rejected these arguments in short order. In particular, while it accepted that the UDM had marketed for CHA claimants, this had not been marketing for Beresfords, and there was no evidence of any attempt to relate the value of the marketing or other services allegedly provided to the fees actually paid. On the contrary, the court found it strongly persuasive that the payments were made on a case by case basis, and (as from January 2002,) had been conditional upon

the success of the claim and therefore upon the receipt of fee income by Beresfords. Such an arrangement effectively geared the payment of the fee to the value of the cases referred to Beresfords.

The court's reasoning on this issue may be of diminished practical importance in light of the current dispensation permitting the payment of referral fees subject to conditions (see Rule 9.02, Code of Conduct 2007). That said, however, the referral fee prohibition continues in place for criminal and publicly funded work (see Rule 9.02(h)) and it remains to be seen whether Lord Justice Jackson's proposal that the ban be re-introduced for personal injury work will be adopted (See Review of Civil Litigation Costs, Part 4, para. 20). What is clear, however, is that where an introducer markets for claims this marketing function will not itself prevent the payments made by a solicitor being characterised as bare referral fees. It is submitted, with respect, that this must be correct: where this occurs the "marketing" function is in reality claims-farming and is merely an act-preparatory to the onward sale of the claim to the panel solicitor. The decision in Beresfords is also a reminder of the wider risk of seeking to bend or circumvent regulatory prohibitions by attempting to re-characterise offending activities with legitimate labels. Professionals who do so risk not only being found in breach of the relevant prohibition, but being found to have behaved dishonestly.

Non-discounted costs awards in disciplinary proceedings

The Beresfords decision also included an interesting and potentially significant decision in relation to the costs payable in disciplinary proceedings. Before the Tribunal, the appellants had successfully defended three of the allegations originally made against them, including one allegation of dishonesty. The Tribunal had nevertheless declined to make a discounted order in respect of costs. In apparent reliance upon the case of *Baxendale-Walker v The Law Society* [2007] EWCA civ 233, the Tribunal had reasoned that all of the allegations had been properly investigated by the SRA and that, as such, it was not appropriate to make any discount in favour of the solicitors. On appeal the appellants argued that this was a misapplication of *Baxendale-Walker*, which was authority that the regulator might be protected from *adverse* costs awards but provided no support for the proposition that the Tribunal should go beyond this and actually award the regulator its own costs in relation to allegations that had been unsuccessfully pursued.

The Court accepted that the Tribunal may have misapplied *Baxendale-Walker*. However, it then proceeded to exercise its own discretion in relation to

costs against the appellants. Having noted that it was permitted to consider the appellants' conduct, not just of the disciplinary proceedings themselves, but in relation to the underlying misconduct itself, the court concluded as follows:

Taken in the round, the Tribunal made against Beresfords a cumulative series of findings of very serious misconduct on a huge scale and in relation to thousands of vulnerable clients in proceedings which were expensively contested in nearly every particular. The allegations which Beresfords successfully defended were but a small fraction of a very serious whole. We consider that an undiscounted costs order was justified.

This may be an important caution to respondents in disciplinary proceedings: even if they are confident of successfully defending particular allegations, they nevertheless should not proceed in the expectation that they will obtain a discount on costs if other allegations of serious misconduct are made out.

James McClelland
 Fountain Court Chambers

LEGAL REPRESENTATION IN INTERNAL DISCIPLINARY PROCEEDINGS

The Court of Appeal has upheld the Administrative Court's judgment in **R (on the application of G) v Governors of X School** [2010] IRLR 222 that a teaching assistant had a right to legal representation in internal disciplinary proceedings under Article 6 ECHR.

G was a teaching assistant at X school. He was dismissed for allegedly kissing a 15 year old male work experience student and the dismissal was reported to the Independent Safeguarding Authority (the ISA) to determine whether he should be placed on a "barred" list of those unsuitable to work with children.

G brought judicial review proceedings challenging the governor's decision not to allow legal representation at the disciplinary hearing under Article 6 of the ECHR, which was successful in the High Court.

In upholding the High Court's decision in the Court of Appeal, Lord Justice Laws held that Article 6 was engaged because the disciplinary proceedings would have a "substantial influence or effect" on the teacher's right to practise his profession. Further, that the right to bring unfair dismissal proceedings in the employment tribunal would not provide an adequate alternative remedy for the purposes of Article 6. Moreover, Lord Justice Laws suggests that a right to legal representation entails a right to cross-examination.

This decision follows hot on the heels of *Kulkarni v Milton Keynes Hospital NHS Trust* (2009) IRLR 829 in which the Court of Appeal held obiter that the right to legal representation could be triggered if a doctor or dentist faced disciplinary proceedings that could lead to her or him losing the right to practise their profession.

Comment

The effect of both cases is that public sector employers should seriously consider allowing employees the right to legal representation if the result of disciplinary proceedings may lead to a severe restriction or ban being placed on their right to practise in the future. Practitioners need to consider the scope of external regulations and/or codes of practice which might be relevant.

What about the impact for private sector employers? Private employers are not directly bound by the ECHR but courts and tribunals are. Since domestic legislation including unfair dismissal law must be interpreted in a way that is compatible with the ECHR, private employers might be vulnerable.

The extent to which employees regulated by the Financial Services Authority might be entitled to legal representation in disciplinary proceedings remains to be seen. Often dismissals in the FSA context involve criminal allegations which might lead to a prohibition from working in the financial services industry. Given the recent fall out from the credit crisis and the potential impact for such highly paid employees, it is only a matter of time before the point is litigated.

Tariq Sadiq
Devereux Chambers

BOOK REVIEW

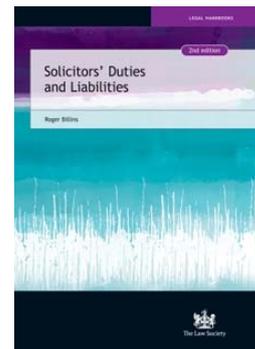
Solicitors' Duties and Liabilities, 2nd Edition, by Roger Billins

It is 11 years since Roger Billins wrote the first version of this book for Sweet & Maxwell, and the second edition, published in December 2009 by Law Society Publishing, comprehensively updates the duties and liabilities owed by a solicitor in private practice. This authoritative and impressive work examines the responsibilities placed on solicitors and the principal obligations owed in private practice to their clients, third parties, the court and the state, and the liabilities for failing to meet these obligations. It provides a thorough analysis of the obligations that arise from the relationship between a solicitor and his or her client, from the retainer to the termination of the retainer. In addition to duties that have been created by regulation,

the book looks in depth at the many instances where they have been created and extended through common law by decisions of the courts.

Roger Billins trained at Herbert Smith and is now a partner in the contentious rights and dispute resolution department of Davenport Lyons, where he specialises in commercial litigation and professional negligence cases. In the preface the author says that the book does not set out to be a complete handbook for solicitors but rather a guide to the principal obligations of a solicitor in private practice. This is perhaps an understatement. The book is well researched and written in a clear style. It takes account of relevant case law and has a table of cases that includes a number of unreported decisions.

The commentary consisting of 255 pages is divided into 9 chapters. 1. The solicitor's retainer; 2. The authority of a solicitor; 3. A solicitor's fiduciary duty to his client; 4. A solicitor's duty of skill and care; 5. Duty to third parties; 6. Public duties and liabilities; 7. Costs; 8. Liens; and 9. Matters of practice management.



Each chapter begins with a helpful list of topics that are relevant to the subject matter of the chapter. For example, the chapter on a solicitor's retainer discusses the form of the retainer; circumstances when the court may imply a retainer; retainer by particular persons; and the duration of a solicitor's retainer, a corresponding issue covered in chapter 8 on liens. The chapter on a solicitor's fiduciary duty to his client includes such matters as the protection of confidence, duty of disclosure, privilege and conflicts of interest, and the author offers practical guidance and advice on such key topics. The chapter on a solicitor's duty of skill and care fully covers areas such as the extent of the duty, standard of care, breach of duty in respect of contentious and non-contentious matters, and such issues as defences, contributory negligence, apportionment of liability and damages. And the commentaries on a solicitor's duties to third parties, and public duties and liabilities, contain helpful advice particularly in the areas of liability for undertakings and money laundering.

A regular feature of the modern specialist textbook is appendices containing statutory provisions and regulatory guidance. The book is supported with material that includes the updated Solicitors' Code of Conduct 2007, the Solicitors' Indemnity Insurance Rules 2009, the Solicitors' Compensation Fund Rules 2009, and the Solicitors Act 1974 (as amended at November 2009). *Solicitors' Duties and Liabilities* by Roger Billins is the sort of book I and fellow practitioners will want to consult on a regular basis.

Published by Law Society Publishing. Hardback £130.00 (768 pages) copies can be obtained from all good bookshops or direct (telephone: 0870 850 1422, email: lawsociety@prolog.uk.com or on line at www.lawsociety.org.uk/bookshop).

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LEGAL UPDATE

- *R (Sinha) v General Medical Council [2009] EWCA Civ 80*
- *R (Jenkinson) v Nursing & Midwifery Council [2009] EWHC 1111 (Admin)*

These two cases raise different issues arising from earlier criminal proceedings. In *Sinha*, criminal proceedings against the doctor of inappropriate sexual behaviour towards female patients were discontinued following an extensive *voire dire* in the absence of the jury. The *voire dire* focused on the conduct of the investigation by the police and the suggestion that the evidence of the complainants may have been contaminated, or that the complainants may have colluded, meaning that their evidence against the defendant was unreliable. In subsequent disciplinary proceedings based on the same allegations the practitioner claimed that no investigation by the GMC could remedy the failures of or undo the damage caused by the flawed police investigation which included losing material evidence. The panel found the allegations proved, and in dismissing the practitioner's appeal Irwin J held that there was no strict rule of double jeopardy in relation to the dismissal of criminal proceedings in subsequent disciplinary proceedings. Dr Sinha's renewed application to the Court of Appeal for permission to appeal was dismissed by Wall LJ. In a reserved judgment, Wall LJ said:

“A moment's thought will suffice to demonstrate that the mere fact of an acquittal in criminal proceedings cannot be the be all and end all of the matter for other purposes. Supposing, for example, that a professional

man is acquitted of murder or grievous bodily harm by a jury on the direction of the judge on a purely technical and unmeritorious point. He is not guilty in the eyes of the criminal law. But that would not stop – nor should it stop – his professional body re-investigating the matter and deciding both that he had been guilty of serious professional misconduct, and that he should be disciplined according to the rules of the profession concerned. A professional body is, after all, charged with the duty to protect the public from members of the profession which fall below its standards.”

As to the doctor's assertion that if there could not be a fair criminal trial then how could there be a fair hearing by the professional body, Wall LJ said that the answer was that the functions of the Crown Court and the GMC were different. The hearing before the Fitness to Practise Panel was not a second criminal trial. It was an investigation into the applicant's professional conduct. The mere fact that the applicant had been acquitted in the criminal proceedings was plainly a factor in the matters the panel had to consider. But it was not conclusive in the applicant's favour.

In *Jenkinson*, following her conviction for grievous bodily harm with intent the claimant had been found guilty of misconduct by an earlier committee of the NMC and struck off the nursing register. Her conviction was subsequently quashed by the Court of Appeal, Criminal Division, when it became clear that the expert evidence founding the conviction, namely, how the ventilator of a patient in her charge operated, was erroneous. A subsequent fitness to practise committee accepted the advice of its legal assessor that it had no jurisdiction to set aside its original decision. In judicial review proceedings brought by the registrant the NMC supported the claimant's application, and sought guidance as to how it should deal with situations such as this. Cranston J, in granting the application and quashing the original decision to strike the claimant off the nursing register, said that it was unwise for the court to provide specific guidelines. However, in the instant case, once the conviction was quashed by the Court of Appeal, Criminal Division, the subsequent finding of misconduct and sanction by the original committee fell away, and accordingly the original decision amounted to a miscarriage of justice based upon a mistake.

- *Ogbonna v Nursing & Midwifery Council [2010] EWHC 272 (Admin)*
- *R (Dutt) v General Medical Council [2009] EWHC 3613 (Admin)*

These two cases each raised procedural problems. In *Ogbonna*, the NMC's sole witness of fact in respect of

one of the charges resided in Trinidad and Tobago, and at the hearing the NMC made an application to read the statement of the witness. The evidence was crucial, and the appellant, a registered midwife, made clear that she wanted to test the evidence of the witness by way of cross-examination. The witness was the appellant's co-ordinator on the day of the incident involved in the charge. In allowing the appellant's appeal, Nicola Davies J said that fairness required that the appellant was entitled to test the evidence of the witness, and that the NMC had failed to make any effort to secure the attendance of the witness once it was learnt that she was living in Trinidad and Tobago. It made no plan for her attendance or for a video link. If the charge was not regarded as sufficiently important to warrant the attendance of the sole witness of fact, the fair course was not to proceed with that charge. The judge was also critical of the legal assessor. Part of the witness statement read to the panel included details of other incidents alleged against the appellant which were not covered by the charges. The learned judge said that these paragraphs were irrelevant and prejudicial to the appellant, and that either the NMC or the legal assessor should have sought the redaction of them before the statement was read to the panel. The appellant, who appeared in person before the fitness to practise panel, was disadvantaged by reason of being unrepresented.

In *Dutt*, the hearing proceeded over 14 days. After all the evidence had been heard the practitioner and his legal representatives parted company. In dismissing his appeal, Cranston J said that the practitioner had provided no evidence to support his allegation that his legal team had been incompetent or failed to provide adequate representation. When he dispensed with the assistance of his legal representatives he was given a lengthy adjournment. That adjournment involved a week-end and also two-and-a-half days of the following week. The learned judge found that the appellant had had sufficient time to prepare his submissions in relation not only to findings of fact but also impairment and sanction. The appellant in fact had adduced further evidence from some 6 witnesses after his legal representatives had departed. There was nothing, said the judge, that in his view was procedurally unfair in the way the panel went about the hearing of the matter.

- ***Financial Services Authority v Amro International SA [2010] EWCA Civ 123***

The Financial Services Authority was entitled under the Financial Services and Markets Act 2000 to appoint investigators and to issue notices to order production of documents from a firm of accountants at the request of the United States Securities and Exchange Commission without subjecting the request to critical examination.

The Court of Appeal (Sir Anthony May P, Stanley Burnton and Jackson LJ) said that financial transactions were increasingly international and it was of the greatest importance that national financial regulators co-operated, particularly where fraud was suspected. There was nothing in the Financial Services and Markets Act 2000 that required the FSA to second-guess a foreign regulator as to its own laws and procedures, or as to the genuineness or validity of its requirement for information or documents. The FSA had to, and did, consider the request when deciding whether to exercise its statutory discretion by the exercise of its investigative powers. It was clear that the FSA decided to exercise its investigative powers having considered the matters required by the Act of 2000. Accordingly, there was no error of law or principle in the FSA's decision to appoint the investigators who were appointed to assist the SEC with its ongoing civil action in New York.

- ***Balamoody v Nursing & Midwifery Council [2009] EWHC 3235 (Admin)***

This was a restoration case. Mr Balamoody was struck off the NMC register for matters which arose many years previously. In April 1993 he was convicted of six offences contrary to the Registered Homes Act 1984. Three of the offences related to his conduct and management of a nursing home and not more generally to his nursing practice. Those which related to patients involved small quantities of drugs, and so far as was known, no patient harm was suffered in consequence. In allowing Mr Balamoody's appeal against the committee's refusal of restoration, and directing that the matter be reheard by a fresh committee, Langstaff J said that the panel had three options: whether or not to restore Mr Balamoody to the register unconditionally; whether to restore him subject to suitable conditions of practice; or thirdly, to reject his application. The fundamental question was whether Mr Balamoody was now safe to practise. It was not difficult to see that a practitioner who was not up-to-date may not be safe because he will not have practised nursing in accordance with up-to-date standards. However, this, if it was a valid observation in the case of Mr Balamoody, was a matter which was easily remedied by ensuring that as a condition of restoration to the register he would undergo or be required to undergo further training to the satisfaction of the NMC.

The learned judge was critical of the panel's concentration on the use of the word "insight". Requiring a practitioner to think how his or her actions had affected others and the full ramifications of that was not a helpful definition. It was compounded in the instant case by the panel's observations that they expected Mr Balamoody to have insight to appreciate

what evidence would be helpful to his application for restoration. This, said the judge, is “insight” used in a different context and sense. In the context of someone who was a caring person, whose offences had caused no actual harm that could be established, the panel’s use of the word “insight” was singularly unhelpful, bearing in mind the consequences of a refusal of restoration to the individual. The panel could and should have considered in greater detail whether conditions would be appropriate to ensure that the practitioner returned to safe practice.

- *Virdi v Law Society* [2010] EWCA Civ 100
- *R (Kaftan) v General Medical Council* [2009] EWHC 3585 (Admin)
- *Southall v General Medical Council* [2010] EWCA Civ 407
- *Saha v General Medical Council* [2009] EWHC 1907 (Admin)

These four cases deal with different aspects of decisions made by disciplinary panels. In the *Virdi* case, the appeal raised the issue as to the lawfulness of the part played by the clerk to the tribunal in drafting the tribunal’s reasons. At the conclusion of the hearing before the Solicitors Disciplinary Tribunal the chairman gave an extempore judgment finding the appellant grossly reckless and ordering his suspension from practice. The tribunal’s written reasons were not delivered until almost one year after conclusion of the hearing. The court said that this was both inordinate and inexcusable. It emerged also that the tribunal’s clerk had assisted substantially in drafting the reasons. In dismissing Mr Virdi’s appeal from the decision of the Divisional Court [2009] EWHC 918 (Admin), the Court of Appeal (Jacob, Lloyd and Stanley Burnton LJ) held that the important basic fact was that the tribunal gave its decision orally and outlined its reasons for it, and on the evidence the clerk took no part in the decision-making process. The order was drawn up immediately following the hearing and the appellant’s suspension began to run at that point. Thereafter the tribunal was functus officio. The Court of Appeal distinguished two Hong Kong Court of Appeal cases of *Au Wing Lun v Solicitors Disciplinary Tribunal* CACV 4154/2001 and *A&B Solicitors v Law Society of Hong Kong* CACV 269/2004 where the clerk had retired with the tribunal and drafted its findings before it had given its decision and made its order. In such circumstances there was a grave suspicion that justice had not been done, in that it was unclear whether the reasons for the decision of the tribunal were in fact its reasons rather than the clerk’s. Stanley Burnton LJ at [39] said that the facts in those cases differed from the

present case where the findings of the tribunal were clearly their own findings.

In *Kaftan* and *Southall*, the issue was whether the panel had given sufficient reasons to justify its findings and to support its decision. In *Kaftan*, Hickinbottom J, in dismissing the criticism of the panel’s factual findings, said that whilst professional bodies are under a duty to give reasons, that duty does not require them to give a judgment which might be expected of a court of law. The parties must simply be able to understand why one party has won and the other lost on a particular issue: see *English v Emery Reinbold and Strick* [2002] 1 WLR 2409; *Phipps v General Medical Council* [2006] EWCA Civ 297 and *R (Luthra) v General Medical Council* [2006] EWHC 458 (Admin). In the instant case, the panel accepted the evidence of the witness called by the GMC and rejected the appellant’s account. On the evidence before them, they were entitled to come to that conclusion and were not required to give more elaborate reasons for their finding than those they gave. It was clear why, on the issue, the appellant had lost.

In *Southall*, the Court of Appeal (Waller, Dyson and Leveson LJ) said that in straightforward cases, setting out the facts to be proved and finding them proved or not proved would generally be sufficient both to demonstrate to the parties why they had won or lost and to explain to any appellant tribunal the facts found. In most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it would be obvious whose evidence had been rejected and why. However, when the case was not straightforward and therefore was exceptional, the position was different: see *Gupta (Prabha) v General Medical Council* [2002] 1 WLR 1691. The instant case was far more complex than a simple issue of fact. The appellant was a well-known consultant paediatrician and an expert on child abuse. The appellant was instructed as an expert on behalf of a local authority to give a medical opinion concerning a child’s death. Following an interview with the mother, the mother complained to the GMC that the appellant had accused her of murdering her son. That allegation, amongst others, was considered by a fitness to practise panel which found that the appellant had made that accusation. The appellant’s defence was that the mother had thought that she had been accused, whereas he had merely investigated her account of her son’s death, and that a child psychologist who was present at the interview supported the appellant’s account. The Court of Appeal, in allowing the appellant’s appeal, said that the panel’s reasons in preferring the mother’s account of the interview to the appellant’s was simply inadequate and did not start to do justice to the case. Although entitled to conclude that the mother was an

honest and credible witness, the panel did not specifically deal with the suggestion that she perceived herself to be accused, which would be entirely understandable in the circumstances and could explain why she reported the interview in the way she did. The appellant was entitled to know why that possibility was discounted by the panel, and if they disbelieved him, he was entitled to know why. The panel should also have given some reason for their discounting the evidence of the child psychologist.

In *Saha*, the issue arose to the extent to which a disciplinary panel is required to give separate consideration to issues of “misconduct” and “impairment” at stage 2 of fitness to practise proceedings. Mr Stephen Morris QC, sitting as a deputy High Court Judge, held that there was no requirement in all cases for there to be a formal two-stage process in considering the issues of misconduct and impairment and no requirement that, in all cases, the reasons for a finding of impairment had to be distinct from the reasons of a finding of misconduct. The panel was required to consider whether there had been misconduct and, further, whether that misconduct is such as to impair the practitioner’s fitness to practise. Often a finding of impairment would follow from one of misconduct. In the instant case, the panel had considered both issues and found, broadly, that one and the same facts gave rise to misconduct and impairment. That approach was not erroneous as a matter of law. The learned judge said that it would have been better, particularly in the light of *Zygmunt v GMC* [2008] EWHC 2642 (Admin) and *Cohen v GMC* [2008] EWHC 581 (Admin), if the panel, in the instant case, had clearly indicated distinct consideration of the two issues of “misconduct” and “impairment”. However, as a matter of law, there is no requirement in *all* cases for there to be a formal “two-stage” process. It is necessary to distinguish between cases where misconduct is, of itself, likely to lead to a finding of impairment and cases where misconduct does not necessarily lead to a finding of impairment because of other facts to be taken into account. Such factors usually comprise events between the date of misconduct and the date of the panel hearing, such as a one-off event of misconduct followed by a passage of substantial time, and an otherwise unblemished record, or subsequent retraining.

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REQUEST FOR COMMENTS AND CONTRIBUTORS

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