Neutral Citation Number: [2009] EWHC 3155 (Admin)

Case No: CO/4142/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2009

Before :

THE PRESIDENT OF THE QUEENS BENCH DIVISION
MR JUSTICE SILBER
MR JUSTICE DAVID CLARKE

- -

Between :

JAMES RHODES BERESFORD (1) **DOUGLAS HAROLD SMITH (2)**	**Appellants**
- and -	
THE SOLICITORS REGULATION AUTHORITY (1) **THE LAW SOCIETY (2)**	**Respondents**

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Alan Gourgey QC (instructed by **Beresfords**) for the **Appellants**
Timothy Dutton QC and James McClelland (instructed by **Russell - Cooke LLP**) for the **Respondents**

Hearing dates: 20 and 21 October 2009

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Judgment

This is the judgment of the Court.

Introduction

1. James Rhodes Beresford and Douglas Harold Smith were partners in the solicitors firm of Beresfords and, from October 2002, members of Beresfords LLP, who acted for numerous former miners in respect of claims for industrial injuries. As a result of complaints which were made by the Solicitors Regulation Authority (SRA), the Solicitors Disciplinary Tribunal considered allegations that Mr Beresford and Mr Smith had each been guilty of conduct unbefitting a solicitor and they had acted in breach of the Solicitors Practice Rules 1990 (SPR). By orders dated 11 December 2008, the Tribunal ordered that both Mr Beresford and Mr Smith be struck off the Roll of Solicitors and that they pay the costs of the Solicitors Regulation Authority. The detailed findings of the Tribunal were filed on 9 April 2009.

2. Mr Beresford and Mr Smith appeal against the decision of the Tribunal. When we refer to the firm of Beresfords, this means the appellants.

3. The broad nature of the allegations includes that Beresfords, who received in each successful case proper fees paid by the defendants, charged their clients in addition illegitimate success fees payable out of their compensation without properly informing their clients of the fee arrangement with the defendants; and that they paid impermissible referral fees to those who introduced miner clients to them, to whom they also in some instances paid out of the client's compensation sums for which the clients received no benefit.

The Background

(i) The Claims Handling Agreements

4. In 1998, in two separate High Court group actions, the British Coal Corporation ("British Coal") was found liable in negligence for causing two different serious debilitating industrial diseases in coal miners. These were chronic obstructive pulmonary disease (COPD) and vibration white finger (VWF). In the light of the judgments, there was a need, first, to regularise the processing of the very many claims by those suffering from these diseases and, second, to expedite the payment of compensation to the victims of these diseases, especially as many of them were elderly and/or infirm. For those reasons, the Department of Trade and Industry (DTI), as the successor to the liabilities of British Coal, negotiated under the supervision of the High Court two Claims Handling Agreements (CHAs) with a group of solicitors representing the miner claimants. The agreements relating to VWF and COPD were concluded respectively on 22 January 1999 and 24 September 1999. Shortly afterwards, separate CHAs were agreed with the Union of Democratic Mine Workers (UDM) enabling claims to be brought through the UDM rather than a solicitor on the CHA panel.

5. Each of the non-UDM CHAs constituted a court-approved scheme, which provided the framework for the conduct of VWF and COPD claims. There were provisions in the orders of the High Court, which preceded each CHA that any party who subsequently notified the DTI of a claim under the CHA would be regarded as a plaintiff in that action. Each of the CHAs contained time limits for bringing claims.

Claims in respect of VWF had to be brought by 31 March 2003; claims in respect of COPD had to be brought by 31 March 2004.

6. In all, a total of some 750,000 claims were received and of those 580,000 were for COPD and 170,000 for VWF. It is estimated that the likely final cost would be £6.9 billion.

7. The CHAs provided a step-by-step procedure for the registration, and classification of claims. They included:

    (i) a detailed procedure for making reports to be obtained and paid for by the DTI;

    (ii) a pre-formulated scale of general damages linked to the nature and extent of the condition diagnosed;

    (iii) a list of the evidence required to obtain special damages; and

    (iv) detailed provisions for the payment by the DTI of the costs of the claimants' solicitors.

8. The CHAs had the purpose and the function of processing and resolving the claims for compensation in the light of the findings on liability which had been made against British Coal. A striking feature of the CHA was that the claimants had the great advantage that the DTI was precluded from raising many of the defences frequently relied on by defendants to claims for industrial injuries. Indeed Mr. Alan Gourgey QC, counsel for the appellants, has accepted that the CHAs had a number of significant features which included that: -

    (a) if VWF or COPD was diagnosed in a mine worker who had worked in a qualifying occupation the liability of the DTI would not be in dispute;

    (b) no disbursements were incurred in diagnosing the condition because medical teams were appointed and paid for by the DTI. The appellants contend that there was the risk that the medical team would not accept that a particular claimant did suffer from VWF or COPD;

    (c) because liability was established, it was unnecessary for the claimants to adduce evidence of the kind which might normally be used to establish negligent exposure in an industrial disease case, such as expert engineering evidence or witnesses giving evidence of fact; and

    (d) limitation issues would not realistically arise in practice as long as a claim was registered before the prescribed cut-off points to which we have referred.

9. As this case relates to the professional charges made by the appellants, it is necessary to explain that the costs of the solicitors of the claimant miners and their estates were calculated according to a pre-determined tariff. The costs in the tariff were geared to a number of factors intended to reflect the extent and nature of the involvement of the solicitors which included considering the type of the condition involved, whether the claimant was alive or deceased and whether it involved an assessment of special damages.

10. These provisions were intended to ensure that the payment to the lawyers reflected the nature and extent of the professional services which they rendered. The claimant miners themselves were never at risk in relation to the costs of the DTI and indeed no costs were to be paid to the DTI by any unsuccessful claimant.

11. There is, as we will explain, a substantial dispute as to the costs properly payable to the respondents and so it is noteworthy that the COPD CHA stated in respect of the costs payable to the legal representatives of the claimants 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 claimant's representatives".

(ii)The role of Beresfords

12. According to Mr Beresford, the firm of Beresfords acted in some 83,069 COPD claims and 14,582 VWF claims. Not surprisingly, this work formed the vast bulk of the work carried out by Beresfords. In 1999 the annual fee income of Beresfords was £684,152, but this had increased so as to produce an annual gross profit of £8,758,743 in 2004 and a profit of £36,205,805 in 2006. This increase was reflected in the drawings of the partners, which had increased from £182,053 in 2000 to £23,273,256 in 2006 for the two appellants and Mr Beresford's daughter.

13. The miners' claims handled by Beresford came from two different sources. The first was the UDM either through its captive claims management company, Vendside Limited which was effectively owned by the UDM, or through another company, Walker & Co. (Claims Services) Limited which was owned and operated by an employee of Vendside, Ms Claire Walker. The second source of claims was the remaining claims which did not originate from the UDM. Some of these claims were self-referrals. Beresfords handled the UDM claims and the non-UDM claims differently.

14. An important finding of the Tribunal, unchallenged in this appeal was that:

> "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". (paragraph 149)

(iii) The claims by non-UDM claimants

15. Between 1999 and June 2002, Beresfords required all non-UDM CHA claimants to enter into success-fee agreements either in the form of conditional fee agreements (CFAs) or contingency fee agreements (contingency FA"). In consequence Beresfords received success fees in some 1,015 CHA cases which amounted to a total deduction of just under £1 million from awards to their clients. The individual deductions ranged between £5,426.75 and £1.29. The last deduction was made on 16 June 2003. All these deductions have now been repaid.

16. In each of these cases, Beresfords received, not only the success fees which had been deducted from the damages of their clients, but also the full CHA fee, which had been paid by the DTI. Between October 1999 and March 2000 the success fee agreements included a contingency fee agreement pursuant to which Beresfords deducted between 25% and 30% of the damages received by their clients. The remaining success fee agreements were CFAs in which Beresfords invariably required the maximum 100% CFA success uplift, but which was capped at 25% of the damages. These factors have to be considered against the background that the awards under the CHAs were not large with the result that the deductions from the success fees substantially reduced the sums recovered by the appellants' client.

17. The Tribunal gave an instance of a claim made by the estate of Mr I who had entered into a CFA with Beresfords. The estate was advised by the appellants to accept an offer under the CHA of £281.77. Beresfords were paid costs of £2,431.08 by the DTI and they also took a success fee of £65.40 from the compensation with the result that the miner's widow received £217.73 and Beresfords were paid £2,495.48.

18. There was also an instance of a VWF case brought by Mr Bochenski, who gave evidence before the Tribunal. He was awarded £18,517.81, from which Beresfords deducted and received £4,795.72, which was 25.9% under a CFA as well as being the fees recovered from the DTI. It appears that Mr. Bochenski did not have a face-to-face meeting with any representative of Beresfords, but he merely received an information sheet entitled "The Legal Costs we Charge and your Choices". This set out funding options such as legal aid, a traditional "pay as you go" retainer, a CFA and a contingency FA but no indication was given of the arrangements for the DTI to pay fees. Thus Mr Bochenski was invited to sign either a contingent FA or CFA without being given any explanation whatever in relation to the obligations taken on by the DTI to pay fees. In the result, Beresford received both the undisclosed fees paid by the DTI and the success fee deducted from their client's compensation.

19. The Tribunal made a number of criticisms of the appellants in relation to the way in which deductions were made from the sums due to their non-UDM clients. First it concluded (paragraph 155) 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."

20. Having then pointed out that, of the 44 firms investigated by the Law Society, some two thirds of them did not use contingency or conditional fee agreements, the Tribunal added that "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 in the post" (paragraph 155)

21. The significance of this criticism is that Mr Beresford exhibited to his witness statements "client care" letters, which were sent to non-UDM clients between 1999 and 2002. None of the pre-2002 letters refer to the fact that the CHAs provided for Beresfords to receive costs from the DTI and therefore those clients who signed up to success fee agreements before 2002 did not know that the DTI would pay Beresford's fee under the CHA. It is noteworthy that Beresfords did not advise any of their clients that in the light of the agreed fee regime operated under the CHAs, there might be other firms, which would act for them without demanding success fees. Furthermore the Tribunal found that, during the SRA's inspection, 27 files of the appellants were reviewed in which the appellants had entered into either conditional or contingency fee agreements, but no evidence was found in any of the files that the appellants had made its clients aware that they would receive costs on a fixed basis from the DTI in successful cases.

22. The Tribunal found that the various agreements used by Beresfords were in part misleading and inappropriate and that little attention had been paid to using properly worded documents and letters. Paragraph 181 of the findings continued by stating that: -

> "The careless use of inappropriate documents was an illustration of [Beresfords] 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)".

23. The SRA's investigating officer had collated a number of examples of mis-statements produced by the appellants, a sample of which was before the Tribunal. Notwithstanding that it was a fundamental feature of the CHA that there was no adverse cost risk for unsuccessful claimants and that the costs would always be paid on an agreed scale in successful claims, some of the documents supplied by Beresfords contained inaccurate statements to their clients that if their claims failed, they would be liable for the DTI's legal costs and disbursements or that they would be liable for Beresford's costs.

24. Another feature of the appellants' success fee agreements was that they contained misleading representations as to the risks involved in the CHA claim. The pro-forma documents contained boxes requiring the solicitor to identify factors which justified the success risks. In the case of the claim of the estate of Mr I, crosses were placed so as to identify as risk factors "limitation issues" and "risk of failing to beat [a] Part 36 payment" as forming part of "our assessment of the risks of your case". In fact, these were not risks material to the CHA claim because a Part 36 procedure did not apply under the CHAs and the DTI had waived limitations subject to the claims being registered by the specified cut-off dates. These irrelevant risk factors might appear to justify the success fee that Beresfords were demanding and so they were misleading.

25. A final and crucial criticism of the appellants made by the Tribunal was that the appellants acted in breach of the SPR rules 1, 3 and 8 (which we set out in Section III below) by charging contingency FAs and CFAs in circumstances where they were not in the best interests of their clients and were improper.

26. Beresfords stopped entering into contingency FAs in CHA claims in 2000 and ceased entering into CFAs in June 2002 but they enforced the existing agreements until 16 June 2003. The reason why Beresfords stopped enforcing the agreement in June 2003 was because of intense criticism in the media. As we have explained, the Tribunal found that the deductions have been repaid.

(iv) UDM Clients

27. There were two other CHAs registered between the DTI and UDM, which were not at the material time subject to court orders approving them. Beresfords received about 15,000 CHA claims from UDM clients or Vendside.

28. Mr Beresford first learnt that the UDM was soliciting CHA clients from the mining community in 1999 and he immediately identified it as a target for potential introductions to Beresfords. Having become a member of the UDM-Vendside panel in late 1999, Beresfords later in January 2002 succeeded in becoming the exclusive firm used by the UDM for referrals

29. The Tribunal found that clients referred to the appellant by UDM/Vendside had already 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 document set a sliding scale depending on the amount of damages received varying from £50 plus VAT on a settlement of less than £500 to a maximum fee of £300 plus VAT on a settlement of £3,000 or more.

30. The appellants entered into a document entitled "Beresfords Claim Handling Agreement" under which Beresford paid a "vetting/marketing/administration" fee of £150 plus VAT for VWF cases, and fees for COPD cases of £300 plus VAT for cases settled at full medical assessment procedure, £150 plus VAT in relation to deceased expedited settlements and £100 plus VAT in relation to live expedited settlements. The COPD fees were to be paid on successful completion of cases.

31. An internal Beresford document stated that as from 1 December 2001, Walker & Co had effectively replaced Vendside as the marketing company entitled to payment for

the marketing, vetting and administrative functions but Vendside remained the company entitled to a share of the clients' compensation.

32. There was a memorandum of a meeting which took place on 10 January 2002 between the appellants, Mick Stevens, who was the General Secretary of the UDM, and Clare Walker which shows that it was agreed that in return for Beresfords having "exclusivity" on UDM claims, payments in respect of a "marketing/administration/investigative fee" would be made by Beresfords in the sums set out in paragraph 30 above. There were also provisions in the memorandum for payments for claims outside the schemes but the Tribunal did not make any relevant findings in respect of them.

33. Evidence was given to the Tribunal that although the UDM/Vendside/Walker & Co referrals stopped in early 2003, Beresfords continued to make payments to Clare Walker until 2005 because of their contractual obligations. Beresfords paid from their office account in total £736,186.30 to Walker & Co. Further the appellants made payments (i.e. deductions) totalling £1,208,735.25 to the UDM from their clients' damages where settlement had been agreed.

34. The Tribunal were very critical of the way in which the appellants failed to discharge their duties to their client miners in that:

a) they failed to give sufficient information to them about the fees paid to Vendside and Walker & Co;

b) the payments made by them to Vendside and Walker & Co were not for "genuine services";

c) they "had been taking part in a sham arrangement [such that] the Tribunal was satisfied that the [appellants] knew it was such an arrangement and knew that no genuine services were supplied";

d) by dressing up the referral fees as "marketing / administration / vetting fees", they "were dishonest by the ordinary standards of reasonable and honest people";

e) they had shared their fess with a non–solicitor namely Walker & Co as the services allegedly performed by that "had not been genuine services";

f) they had wrongly released confidential information to a third party, Walker & Co, as there was no basis on which such information could be released without the informed and written consent of the client which the appellants did not have; and

g) they had acted in conflict of their duties to their UDM clients by making payments to Walker & Co.

The Solicitors Practice Rules

35. There are basic principles, to be found in Rule 1 of the Solicitors' Practice Rules 1990 that:

"A solicitor shall not do anything in the course of practicing as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair any of the following: -

(a) the solicitor's independence or integrity;
(b) a person's freedom to instruct a solicitor of his or her choice;
(c) the solicitor's duty to act in the best interests of the client;
(d) the good repute of the solicitor or of the solicitor's profession;
(e) the solicitor's proper standard of work; and
…".

36. The SPR also limit the way in which a solicitor can accept referrals and share fees. The following rules are relevant.

Rule 3 provides that:

"solicitors may accept introductions and referrals of business from other persons and may make introductions and refer business to other persons, provided there is compliance with a Solicitors' Introduction and Referral Code promulgated from time to time by the Council of the Law Society with the concurrence of the Master of the Rolls."

Rule 7 limits the classes of person with whom a solicitor may share or agree to share fees.

Rule 8 is concerned with contingency fees. It forbids a solicitor from entering into an arrangement to receive a contingency fee, unless it is permitted under statute or common law, where the solicitor is "retained or employed to prosecute or defend an action, suit or other contentious proceedings".

Rule 9 relates to claims assessors. It provides that:

"(1) 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."

37. Rule 15 provides that solicitors shall give information about costs and other matters in accordance with a Solicitors' Costs Information and Client Care Code. This provides in paragraph 3 that :-

"(a) Costs information must not be inaccurate or misleading;"

(b) Any costs information required to be given by the code must be given clearly, in a way and at a level which is appropriate to the particular client. Any terms with which the client may be unfamiliar, for example "disbursement", should be explained.

(c) The information required by paragraphs 4 and 5 of the code should be given to a client at the outset of, and at appropriate stages throughout, the matter. All information given orally, should be confirmed in writing to the client as soon as possible.

The Hearing

38. This hearing lasted for 9 days during which the Tribunal heard from 15 witnesses and received detailed oral and written submissions with 15 bundles of documentary evidence.

39. Of the 11 allegations against Beresfords the Tribunal, applying the criminal standard of proof, found two of them not to be proved and one only partially proved. The findings which form the subject of the appeal are that the appellants: -

(1) breached SPR rules 1, 3 and 8 and were guilty of conduct unbefitting a solicitor by charging contingency FAs and CFAs in circumstances that had not been in the best interests of clients and were improper: Allegation (3);

(2) breached SPR rule 1 and were guilty of conduct unbefitting by acting in circumstances of a conflict interest between themselves and their miner clients and between the interests of their miner clients and those of the UDM/Vendside and Walker & Co.: Allegation (1);

(3) breached SPR rule 1 and were guilty of conduct unbefitting in that they failed to act in their clients best interest and had failed to give any advice to UDM clients on the Vendside Agreements: Allegation (2);

(4) breached SPR rules 1 and 15, and the Solicitors' Costs Information and Client Care Code, and were guilty of conduct unbefitting a solicitor in that they failed to give sufficient information to clients about costs and the funding of claims generally: Allegation (7);

(5) breached SPR rules 3 and 1 and were guilty of conduct unbefitting in that they accepted referrals of business in breach of the Solicitors' Introduction and Referral Code: Allegation (4);

(6) breached SPR rule 1 and were guilty of conduct unbefitting in that their referral arrangement with the UDM/Vendside/Walker & Co was a dishonest sham which had been intended to disguise their breaches of SPR rule 3: Allegation (5) (in part only);

(7) breached SPR rule 9 and were guilty of conduct unbefitting in that they had entered into arrangements for the introduction of clients and had 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: Allegation (6); and that they

(8) breached SPR rule 7 and were guilty of conduct unbefitting a solicitor in that they shared their professional fees with a non-solicitor, viz. by making payments of referral fees to Walker & Co: Allegation (8).

40. The Tribunal also ordered the appellants to pay the full costs of the application to be paid by both appellant such costs to the subject of a detailed assessment unless previously agreed.

The appeal

41. The appellants appeal under section 49(1)(b) of the Solicitors' Act 1974 against 7 of the 9 allegations found against them. They do not challenge the Tribunal's findings against them in allegations 7 (in part) and 10. Allegation 7 is significant in that it is now accepted that the appellants failed to give their miner clients sufficient information about costs or the funding of claims generally. This lies at the heart of some of the unbefitting conduct alleged, although it does not of course by itself comprise all of it. These allegations apart, it is submitted that the Tribunal's findings were wrong in law and in fact.

42. General and particular submissions are made that the Tribunal's factual findings and reasoning were inadequate. Mr Gourgey made a number of submissions which relied on a contention that, since the Tribunal did not specifically reject evidence given by or on behalf of the appellants, that evidence must be regarded as correct and acceptable. Speaking generally, we found this line of reasoning unconvincing when the Tribunal expressly concluded (paragraph 149) that the appellants' evidence was not always believable, and when the Tribunal made findings against the appellants on particular allegations which necessarily entailed rejecting those parts of their evidence, which had been adequately summarised earlier in the Tribunal's findings, which were inconsistent with the findings.

43. Speaking generally, there is, in our view, no persuasive case that the Tribunal failed properly to consider factual matters which are relied on in this appeal. In the course of its lengthy findings, the Tribunal set out extensively each party's opening and closing submissions and the oral evidence that was given. The Tribunal then made findings of fact in relation to each allegation which necessarily related back to the evidence and submissions which they had set out.

44. Mr Dutton referred us to the Privy Council case of *Gupta v General Medical Council* [2002] 1 WLR 1691 for the proposition that there was no general duty on the Professional Conduct Committee of the General Medical Council to give reasons for its decisions on matters of fact, especially on questions depending on the credibility of witnesses. *Gupta* was considered at some length in the judgment of Wall LJ in *Phipps v The General Medical Council* [2006] EWCA Civ 397 in the light of *English v Emery Reimbold Strick* [2002] 1 WLR 2409. Wall LJ expressed in paragraph 85 a provisional view that paragraph 14 of *Gupta* identifies an approach which reflects current norms of judicial behaviour. In every case, every Tribunal needs to ask itself whether what they have decided is clear; and whether they have explained their decision and how they have reached it in such a way that the parties can understand why they have won and why they have lost. In our judgment, the findings of the Tribunal in the present case achieve that test. Such particular points as Mr Gourgey makes are more in the nature of forensic textual criticism than a substantial case that the reasons for the findings are unclear.

Allegation 3

45. Between late 1999 and April 2000, Beresfords entered into contingency fee agreements with non-UDM clients under which they were to be paid an agreed share of 25% of successfully recovered compensation. If the claim failed the client paid nothing. There is a separate question, which we deal with under allegation 6, whether this was an improper contingency fee agreement in breach of SPR 8.

46. From April 2000, when recovery of CFA success fees from a losing party became available under section 58A of the Courts and Legal Services Act 1990 as amended by sections 27 and 28 of the Access to Justice Act 1999, and until July 2002, Beresfords entered into CFA agreements with their non-UDM clients in a largely unamended Law Society Conditional Fee Agreement form for use in personal injury cases. This was unsuitable and misleading in a number of material respects for circumstances in which the risks were limited to the clients not establishing that they suffered from a stipulated medical condition; Beresfords' costs of a successful claim were to be paid by the DTI; and the client was never at risk of paying disbursements or the DTI's costs. The success fee was set at 100% with reference to a schedule of supposed risks, many of which were under the CHAs non-existent or illusory. Only those for deferment of costs and carrying overheads until the conclusion of the case, totalling 10%, were arguably supportable. It is now accepted by the appellants that inadequate explanations were given to their unsophisticated miner clients as to the effect of these agreement. After July 2002, Beresfords undertook scheme claims without a success fee payable by the client, but they continued to enforce payment of success fees under earlier agreements until June 2003.

47. The essence of the case against the appellants was that it was professionally and seriously improper to deduct conditional or contingency success fees from clients either at all, when fully adequate costs intended by the DTI to be "the total sums payable to a claimant's representative in relation to a claim" were paid under the CHAs, when the clients were not told about the recovery of costs from the DTI; or when they applied the highest possible success fee uplifts for claims with very low risk of failure; and when the CFA agreements were misleadingly inappropriate to CHA claims.

48. It was further the SRA's case that the appellants were from the outset on notice that it would not be reasonable or appropriate to make success fee deductions from CHA clients' compensation. The facts relied on included the terms of paragraph 14 of Appendix 17 of the COPD CHA which we have quoted in paragraph 11 above; the fact that the costs payable by the DTI were generous; and the fact that from October 1999 there was published parliamentary concern about lawyers in some of these cases deducting success fees from their clients' compensation.

49. The Tribunal found, in paragraph 155 of its findings, that Beresfords should have had a full interview with each miner, explaining in plain and simple language the way in which the scheme worked including proper explanations of the position with costs. They found in paragraph 159 that both the contingency and conditional fee agreements were not in the clients' best interest as deductions were made from the miners' compensation. The miners had not been properly advised that under the CHA the solicitors' costs were paid by the DTI. The compensation was not large and it had been clearly intended from the CHAs that the miners should receive their compensation in full. There was little or no risk of failure to justify a success fee if medical evidence acquired very early on met the necessary criteria,

> "… 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 fee 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."

The reference to referrals from the UDM is to Beresfords' arrangements with the UDM, Vendside and Walker & Co under which, for the same work, Beresfords received from the DTI fees of 83% only of the non-UDM CHA costs payments with no success fee, and they themselves paid what the Tribunal held to be referral fees to Vendside or Walker & Co.

50. The appellants' first two grounds of appeal are that the Tribunal was wrong to find that the contingency fee agreements were entered into in breach of SPR 8 because, properly understood this was non-contentious business; or, if that is not correct, because the appellants honestly believed that the agreements did not offend Rule 8, so that the breach should not be regarded as conduct unbefitting a solicitor. We deal with this, as did the Tribunal, in our consideration of allegation 6, and only observe here that the breach of Rule 8 was not the only, nor, we think, the most serious aspect of allegation 3.

51. The appellants' grounds of appeal relating to the unbefitting conduct findings are that they were under no obligation to advise clients that other solicitors, of whom the appellants were unaware, were willing to undertake their claims at lower costs; that a solicitor is not obliged to prefer a client's interest to his own in the matter of costs; that it was not open to the Tribunal to find that the miners generally were intellectually vulnerable on the basis of evidence from three miners only; that the Tribunal misconstrued paragraph 14 of schedule 17 of the COPD CHA and the

equivalent provisions of the VWF CHA; that the Tribunal's findings were inconsistent with the Court of Appeal decision in *AB and Others v British Coal Corporation* [2006] EWCA Civ. 1357, [2007] PIQR P8 page 93; that the Tribunal failed to take account of views expressed in a letter of 15th November 1999 by the Claimants' Solicitors' Group and by the Law Society that charging success fees under conditional fee agreements was permissible and not excluded by the CHAs; and that the Tribunal should have found that the risks attendant on these claims as perceived in the early stages justified a high success fee. The grounds of appeal do not, as we understand them, seek to defend the allegation of charging clients substantial success fee payable out of their compensation without explaining to them that Beresfords were to receive generous fees for successful claims from the DTI.

52. As to the provision in paragraph 14 of schedule 17 of the COPD CHA, Mr Gourgey submits that this only set out the limit of the DTI's own costs responsibility and did not preclude a solicitor from charging a success fee to his client. We do not agree. The second sentence limits the DTI's costs liability. The first sentence would be redundant if Mr Gourgey's submission were correct. The first sentence relates to "the total sums payable to a claimant's representatives in relation to a claim", and is intended as a statement of the DTI's expectation as to fees receivable from whatever source. If, perhaps, this sentence might not, on an academic analysis, enforceably forbid Beresfords from receiving fees from a person other than the DTI in successful cases, it nevertheless has a considerable bearing on the propriety of Beresfords doing so, when they did not explain the position properly to their clients.

53. In our judgment, the Court of Appeal decision in *AB v British Coal* has no bearing on this issue. In that case, claimants under a 2005 version of the VWF CHA (not the version in issue in this appeal) successfully contended that in principle they were not precluded from claiming a success fee against the DTI for costs which under the CHA were to be assessed by a costs judge. The issue turned on the meaning of the word "costs" in section 12.1 and Schedule 9(1) of the 2005 CHA, which was held to be capable of extending, after the inception of section 58A of the Courts and Legal Services Act 1990 as amended, to the recovery on a costs assessment of a success fee. The case concerned recovery of a success fee from the DTI, not from the solicitor's client. It concerned costs to be assessed by a costs judge, not fixed costs payable without an assessment. Paragraph 14 of schedule 17 of the 1999 COPD CHA was not referred to. An argument was advanced at paragraph 40 and, so far as it goes, not dissented from by the court, that, where fixed costs are payable, no success fee is possible. Further, the appellants' reliance on this authority is not assisted by Rix LJ's view at paragraphs 59 and 60 that the provision in section 12.1 of the CHA that an unsuccessful claimant "will bear his own costs" meant that success fees should not bring with them the costs of unsuccessful claims.

54. The letter of 15th November 1999 from Irwin Mitchell to Yvette Cooper MP is relied on as a contemporary expression of opinion that, in the context of the DTI paying solicitors' fees and expenses, it was legitimate for individual claimants and their solicitors to enter into CFAs with a success fee calculated with reference to the risks involved. Reliance is also placed on a sentence in the November 2005 Boyes Report that the Law Society concluded, that in the earlier life of the schemes, it was permissible for a solicitor to invite a claimant to pay a further fee for handling the claim. These matters do not, in our view, take the submission very far in the present

appeal, when Beresfords accept that they did not properly explain to their clients the import of the costs agreements they were requiring them to enter into.

55. It is submitted that the Tribunal were not justified in finding that Beresfords were under a duty to advise potential clients that they would be able to obtain a similar service elsewhere for nothing – a duty with which incidentally the Boyes Report at paragraph 19.5 had considerable sympathy. We are not entirely clear that paragraph 159 of the Tribunal's findings in fact makes that finding, although it does appear in paragraph 155. In paragraph 159 the "alternative way of obtaining compensation" was "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." It is also submitted that there was no basis for assuming that there were other solicitors who were willing and available to undertake the claims without a success fee or that Beresfords were aware that there were. Mr Gourgey refers to certain aspects of the evidence of Mr Duerden about other solicitors' firms that were investigated.

56. As to the risks of failure, although it is accepted that after a time it became clear that the large majority of claims was successful, this was not evident at the outset. Mr Beresford's evidence was that he regarded the risk of failure as substantial. A parliamentary answer in February 2001 indicated that the rate of success generally may have been less than 46%. It was submitted that the prospect of success depended on positive medical evidence; that the successful outcome of accelerated medical procedures was not great; and that a significant amount of solicitors' work was needed before this could be obtained, which would be unremunerated if the claim had to be withdrawn at that stage.

57. The outstanding feature of this case which, in our view, runs directly counter to much of the matter relied on in defence of allegation 3, is that Beresfords themselves were keen to undertake, and did undertake, UDM claims under arrangements by which they received only 83% of the non-UDM CHA fees from the DTI, with no success fee and an obligation to make payments to Vendside or Walker & Co. They did not therefore need to know that there were other solicitors prepared to undertake the claims for no success fee paid by the client. They were doing it themselves. Their own general assessment of the commercial risk of these cases did not deter them from taking the UDM cases with no success fee at all. They must further have regarded less than 83% of the CHA fees paid by the DTI as the profitable remuneration which it plainly became. It scarcely needed the evidence of a Beresford employee of what Mr Beresford had said to him at a recruitment interview in July 2000 to conclude that the cases referred by the UDM were huge and financially attractive to the firm.

58. This alone, in our judgment, justifies the Tribunal's conclusions in paragraph 159 of the findings, to the effect, as we think, that it was unconscionable to require unsophisticated miners - for such they plainly were, notwithstanding Mr Gourgey's submission in this respect – to enter into an agreement for any success fee (let alone 100%) to be paid from their compensation, without at least full and proper individual explanation that the DTI were paying ample fees for successful cases and that a proper assessment of risk would scarcely justify any success fee. Although no doubt there might be some cases where the requisite medical evidence was not forthcoming so that the early stages of handling a claim resulting in failure went unremunerated, the features of the CHAs removed most of the risks associated with fully contested litigation. The claims were quite obviously from the solicitors' point of view low

risk. As we understand it, the only substantial solicitor's work necessary in unsuccessful cases was sending a standard letter to a known medical expert and receiving the resulting report.

59. The Tribunal did not in fact find that there was little or no risk of failure, but that there was little or no risk of failure if the medical evidence acquired very early on met the criteria. This finding was, in our judgment, entirely justified and is not displaced by such apparent complication as might appear from somewhat artificially constructed flow charts.

60. In our judgment, the Tribunal was fully entitled to reach the conclusions which they did on allegation 3 for the reasons which they gave. The grounds of appeal fail. The appellants' case here was not assisted by the fact that Mr Beresford initially conceded that his firm's practice of deducting success fees in full from clients' interim damages intended to alleviate suffering was completely unacceptable; and that he only tried to defend the indefensible when it was shown that the case put to him was not an isolated incident.

Allegations 1 and 2

61. The Tribunal considered these allegations together with allegation 7 and described the substance of the three allegations in paragraph 148 of their findings as follow:

> "The three allegations alleged conflicts of interest between the Respondents and their clients; between the interests of their clients and the interests of 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."

The Tribunal found the three allegations proved. They observed in paragraph 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."

62. Before they were referred to Beresfords, UDM clients signed a form of agreement with UDM agreeing that, if their claim was successful, they would pay Vendside "who administer these claims, a fee to cover the cost of pursuing this claim on my behalf". The fee payable was on a sliding scale referable to the amount of compensation with a maximum of £300 + VAT for compensation of over £2,500. Vendside did not administer the claims other than to receive them and refer them to Beresfords. They did not incur the costs of pursuing the claims. Beresfords did. Beresfords nevertheless deducted the Vendside fee from the client compensation and paid it to Vendside.

63. Under the "Beresfords' Claim Handling Agreement", Beresfords were to pay fees to Vendside for "Vetting/marketing/administration" for VWF and COPD cases. From 10th January 2002, Beresfords agreed to make equivalent payments to Walker & Co as a "marketing/administration/investigative fee". Allegation 8 alleged that these were illegitimate referral fees. Allegation 1 alleged that they gave rise to a conflict of interest.

64. As to allegation 2, the SRA's case was that the agreement by which UDM clients agreed to pay money to Vendside was plainly not in the clients' best interests and arguably unenforceable. The agreement contained a clear mis-statement that the fee covered the costs of Vendside pursing the client's claim. Vendside undertook no obligation to the miner in exchange for the fee. It bore all the hallmarks of a sliding scale commission payment. Although each client signed the agreement before being referred to Beresfords, Beresfords received thousands of such clients and should have advised them that the agreement was against their interest and arguably unenforceable. There was a clear conflict of interest, because Beresfords were receiving a large volume of highly remunerative work from UDM/Vendside to whom they were themselves paying referral fees. The case against the appellants included the fact that, in a letter dated 9th January 2004 to the Parliamentary Under-Secretary of State for Coal Health, Mr Smith, the second appellant, had written that organisations, including Trade Unions, who continued to seek deductions from compensation of mining claimants did 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." The Tribunal found in paragraph 169 that this letter gave Mr Smith's honest view of payments made to Trade Unions and Claims Management concerns.

65. The Tribunal found in paragraph 156 as follows:

> "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"."

66. The grounds of appeal for allegation 2 are that the Tribunal was wrong to find that Beresfords should have advised their clients about their agreement with Vendside. These agreements had been made before each miner became a client of Beresfords.

Beresfords were retained to pursue claims under the CHAs, not to advise about existing agreements. Union members often make payments to their union out of compensation received for a successful claim. The appellants' evidence was that they understood that the payments were made as a fee for affiliated membership of the union during the life of the claim to be used for the benefit of other members generally. Their evidence was that it did not occur to them that the Vendside agreement might be unenforceable. The grounds also rely on evidence from Beresford employees, not specifically rejected by the Tribunal, that all UDM members were sent a "Client Care Letter" saying that Beresfords' costs were to be paid by the DTI at the conclusion of the claim if it was successful, and that their costs would not exceed the amount recoverable under the CHA, so that the client would not pay them any costs at the conclusion of the case. This was, of course, the case with UDM clients, where there was no success fee. The letter, if it was sent (see findings paragraph 158), had no reference to Vendside and is not centrally relevant to allegations 1 and 2. It is said that the Tribunal was wrong to find that Beresfords acted in circumstances of conflict between their own and their clients' interest. The clients' interest was the proper conduct of the CHA claim in which Beresford had a similar interest. The Tribunal were further wrong to find that Beresfords were acting in circumstances of conflict between their clients and UDM/Vendside. As to allegation 2, it is said that the Tribunal made no sufficient findings of fact as to Beresfords' knowledge to sustain the allegation.

67. Mr Gourgey submits that a solicitor is not a general insurer of his client's legal problems and is not required to spend time and effort on matters outside that for which he is retained. He refers to *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 passage referred to in the *Mortgage Express* case at 842d is not unqualified. Sir Thomas Bingham MR there said:

> "A client cannot expect a solicitor to undertake work he has not asked him to do, and will not wish to pay him for such work. But if in the course of doing the work he is instructed to do the solicitor comes into possession of information which is not confidential and which is clearly of potential significance to the client I think that the client would reasonably expect the solicitor to pass it on and feel understandably aggrieved if he did not."

Equally in the *Credit Lyonnais* case, Laddie J, having referred to relevant authorities including *Mortgage Express*, held that a solicitor was under no general duty to spend time and money on issues outside his retainer; but if, in the course of doing that for which he was retained, he became aware of a risk or a potential risk to the client, it was his duty to inform the client. Further, if a lawyer carrying out his instructions noticed or ought to notice a problem or risk for the client which it was reasonable to assume the client did not know about, the lawyer must warn him – see also *County Personnel v Pulver* [1987] 1 WLR 916 at 922E.

68. In the present case, the payments which the clients had agreed to make to Vendside were not so much a risk, as an obligation which it was arguable they should not have been induced to undertake. Mr Gourgey submits that there was no evidence nor finding by the Tribunal that Beresfords were aware of this. Accordingly, no

obligation to give advice on a matter outside their retainer arose. He submits again that there was no evidential basis for the Tribunal to make general findings about the intellectual capacity and understanding of the clients from the evidence of the three miners only, none of whom had entered into a Vendside agreement. He submits that therefore the Tribunal was wrong to find that Beresfords acted in circumstance of conflict. No conflict arose because Beresfords' retainer was limited to the conduct of the client's claim under the CHA. Equally, there was no conflict between their clients and UDM/Vendside. Mr Gourgey submits alternatively that, if Beresfords were aware that the Vendside Agreement was or might be unenforceable, there was no finding that they consciously refrained from giving advice. The Tribunal should not have found their conduct unbefitting.

69. As to Beresfords' duties in relation to the Vendside agreement, Mr Dutton relies on the authorities to which we have referred above. He submits correctly 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 experience client (*Carradine v DJ Freeman* [1999] Lloyds LR PN 483 at 487). Mr Dutton further submits that a solicitor has always a fiduciary duty of loyalty to his client to put at his disposal not only his skill but his relevant knowledge. If the solicitor acts to discharge a client's existing obligation and becomes aware that the obligation is wholly or partly unenforceable, he has a duty to inform the client. Mr Dutton relies here on Megarry J's judgment in *Spector v Ageda* [1973] 1 Ch 30 at 48, a case where the solicitor plainly had actual knowledge of facts plainly relevant to the enforceability of the obligations in question.

70. Mr Dutton submits that the appellants knew from the outset of the referral arrangements that UDM clients would be required to pay fees to Vendside. They knew that the agreements misstated that the fee was to cover the cost of pursuing the claim – this until after 2 ½ years the form of agreement was later changed to refer to union membership. Beresfords were instrumental in the client performing the agreement by deducting the Vendside fee from their compensation. They were therefore acting as the client's agent for payment. The appellants knew that the Vendside agreement was not in the client's best interest and was arguably unenforceable. The knowledge was established by the terms of Mr Smith's letter of 9th January 2004 to which we have referred. They therefore had a duty to share their knowledge with the clients and give them advice, and it was inexcusable not to do so.

71. Mr Beresford had defended in cross examination the Vendside allegation by saying that the agreements were historical because they were dealt with before Beresfords were involved. It would have been different, if the agreements had been entered into contemporaneously. But Mr Dutton refers to evidence which showed that Beresfords were fully aware of the Vendside fee agreement before any UDM referrals were made, and knew that their own deduction of the fees were to be an integral part of the arrangement. The details of this evidence refer to the appellants' witness, Tracy Thornton, and a letter of 7th January 2000 from the Vice-President of the UDM to Mr Beresford referring to meetings which had taken place about Claims Handling matters. As to the deductions, some 15,000 clients were referred from whom Beresfords deducted some £1.2m in Vendside fees.

72. Mr Dutton says that Beresfords have advanced in the course of the proceedings various spurious reasons aimed at showing that the clients obtained a value from the Vendside fee. These are apparently now abandoned, with the union affiliated membership the only remaining reason advanced – but that did not appear in the agreement until mid-2002. Mr Dutton submits that that too is unsustainable.

73. As to the proposition that payments to unions out of members' compensation was commonplace, Mr Dutton accepts that this can happen where the union funds the costs and provides an indemnity against adverse costs orders; but not, as here, where the costs were paid by the DTI and there was no adverse costs exposure of any kind.

74. As to Beresfords' knowledge, Mr Dutton points out that the Tribunal specifically found that the letter of 9th January 2004 represented Mr Smith's honest view, and for the reasons given Beresfords were from the outset aware of the Vendside agreement and of the way it fitted into the UDM/Vendside referral arrangements. In any event, Mr Dutton submits that there is no requirement for conscious impropriety or conscious default as a prerequisite for unbefitting conduct. It is sufficient if the relevant conduct would be considered deplorable by fellow solicitors – see *In re a Solicitor* [1972] 1 WLR 869 at 873, 874.

75. In our judgment, the Tribunal were correct to take allegations 1 and 2 together (with allegation 7). It is necessary to stand back and look at the case against the appellants in the round. It is of course appropriate to examine, so far as is necessary, individual parts of the case so long as that process does not distract attention from the larger picture. It would for instance be a distraction to set about determining whether the Vendside agreements were indeed unenforceable in law. They were certainly questionable, as Beresfords knew or ought to have known. Vendside were not providing the services for which the fee was stated to be payable. The larger picture was that Beresfords made agreements with their non-UDM clients in circumstances where they should not have done so (allegation 3). They received a very large number of UDM clients for which they paid referral fees to UDM/Vendside or Walker & Co (allegation 4, yet to be considered). The work for these clients was hugely beneficial to Beresfords. Part of the structure established at the outset was that the UDM unsophisticated clients were to pay a fee to Vendside out of their compensation which Mr Smith at least knew was for practical purposes gratuitous. In these circumstances, there was a plain conflict of interest between Beresfords and their clients because Beresfords had an interest in maintaining the flow of UDM clients, but the clients had an interest in being advised that the Vendside deduction from their damages was at best questionable. There was a plain conflict between the clients and UDM/Vendside in the matter of the Vendside fee. Beresfords ought to have advised their clients about the Vendside fee, which should be seen in all the circumstances as well within the scope of their retainer by anyone not wearing blinkers. Beresfords should never have put themselves into the whole UDM/Vendside situation in the first place, with its combination of client duties and conflicts.

76. It will be evident that in our judgment the appeal fails on allegations 1 and 2. The Tribunal reached the right conclusion upon sufficient findings of fact and adequate reasoning. The view we have expressed in the previous paragraph is derivable from the findings and in the main contained in the reasons. We are not persuaded that some evidence which they did not specifically reject must be taken as established,

when it is inconsistent with the Tribunal's findings and contrary to powerful other evidence which has been drawn to our attention.

Allegation 7

77. Allegation 7 was that Beresfords failed to give sufficient information to clients about costs and the funding of claims generally. The Tribunal upheld this allegation (paragraph 158). The appellants do not contest the finding that there was a breach of SPR15 for non-UDM clients, and we have already referred to this as an important element of allegation 3. The appellants, however, appeal the finding for UDM/Vendside referred clients. They rely on evidence that the "Client Care Letter" referred to in paragraph 65 above was sent to each UDM client and they say that, in circumstances in which the client had no liability to pay Beresfords' costs, SPR15 was complied with. The appellants also say that a failure to give adequate costs information was not also unbefitting conduct within SPR1. We have already dealt with this last submission for non-UDM miners under allegation 3. For them, it is a wholly unrealistic submission.

78. The Tribunal noted in paragraph 88 the appellants claim that the Client Care Letter had been sent to all UDM clients. However, the Law Society's inspection of the client files had disclosed no documentary substantiation for the claim that Beresfords had informed clients of the costs paid by the DTI under the CHAs. The Tribunal also noted the submission that, even if it was sent, the Client Care Letter was inadequate and that no qualified solicitor had explained the costs arrangements orally or by letter. The Tribunal also found that the miners as a group were vulnerable. The Tribunal concluded that Beresfords should have had a full explanatory interview with each miner (paragraph 155). Their findings in paragraph 158 which we have quoted in paragraph 61 above were tantamount to a finding that the Client Care Letters were not sent, or, if they were, they were inadequate.

79. Mr Dutton submits that there was no sufficient evidence to establish that the Client Care Letter was sent and that in any event it was inadequate. He refers to various provisions of the Client Care Code and the accompanying guidance, which includes a requirement (paragraph 4(h)) for the solicitor to explain what reasonably foreseeable payments a client may have to make either to the solicitor or a third party, which in this instance would include payments to Vendside.

80. In our judgment, the Tribunal was entitled to reach the conclusion they did on allegation 7 for UDM/Vendside clients, as well as, and cumulatively with, their conclusion for non-UDM clients for the reasons which they gave and for the reasons advanced by Mr Dutton. Mr Dutton submits that the allegation 7 failures were so serious as to constitute unbefitting conduct, which is a matter of fact and degree. We agree. We regard this as obvious for non-UDM clients. The finding for UDM/Vendside clients is not perhaps to be separated from the whole. But, if it should be, it was conduct which in the circumstances taken as a whole, was well capable of being unbefitting.

Allegations 4 and 5

81. These allegations concerned Beresfords' arrangements with UDM, Vendside and Walker & Co.

82. Allegation 4 was that, contrary to SPR 3, Beresfords accepted instructions and referrals of business from UDM/Vendside/Walker & Co in breach of and otherwise than in compliance with the Solicitors' Introduction and Referral Code 1990.

83. Allegation 5 was that, contrary to SPR 1, Beresfords entered into arrangements with UDM/Vendside/Walker & Co and their officers which were a sham and had been intended to disguise the breaches of SPR 3, and that the arrangements were inherently improper or had such dubious or improper features that they should have declined to enter into them. These were allegations of dishonesty.

84. SPR3 permits a solicitor to accept introduction and referrals of business provided that there is no breach of the Rules and provided there is compliance with the 1990 Referral Code. Section 2(3) of the Code provides that solicitors must not reward introducers by payment of commission or otherwise.

85. We have referred to the "Beresfords' Claims Handing Agreement" in paragraph 30 above under which Beresfords paid a fee on the successful completion of each case initially to Vendside for "vetting/marketing/administration". Clare Walker was the Vendside contact. After the meeting on 10th January 2002 (paragraph 32 above), the payments were made to Walker & Co as a "marketing/administration/investigative fee".

86. The questions for the Tribunal were whether these payments were in truth a reward for referral in breach of the Referral Code (allegation 4) and whether Beresfords knowingly dressed up that reward to look like a fee for services. If so, the appellants on their own admission would have acted dishonestly (allegation 5).

87. As to allegation 4, the Tribunal found in paragraph 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 contend 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 insure 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."

88. As to allegation 5, the Tribunal referred to the meeting on 10th January 2002 at which the General Secretary of the UDM announced that in future payments were to be made to Walker & Co in addition to the payments to the UDM. The Tribunal found at paragraphs 164 and 165:

> "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.
>
> 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 Tribunal were not satisfied that a second part of allegation 5 had been established.

89. The grounds of appeal for allegation 4 rely on evidence from each of the appellants that UDM/Vendside did carry out a marketing campaign which attracted miners with claims from which Beresfords benefited, although the campaign was not carried out specifically for them. The Tribunal should have found that vetting of claims was of benefit to Beresfords. The Tribunal should not have found that work histories were completed by the claimants. Objection is also taken to a finding of the Tribunal in paragraph 172 about payments by Melex (a Beresford organisation conducting medical referrals) in relation to allegation 11, which the Tribunal found not proved.

90. As to allegation 5, the grounds of appeal repeat the allegation 4 submissions that the Tribunal were wrong to find that no services were provided by Vendside/UDM to Beresfords. It is further submitted that the Tribunal overlooked or failed sufficiently to have regard to

a) evidence that Mr Smith understood from correspondence with the Law Society in the summer of 2000 that payments to an introducer for genuine marketing were permissible;

b) evidence that after a decision of the Senior Costs Master in January 2003 in the *Claims Direct* litigation suggesting that payments to Walker & Co might not be permissible, Beresfords suspended the payments and soon terminated the relationship; and

c) evidence that before the decision of the Senior Costs Master payments of this kind were commonplace.

91. It is submitted that the Tribunal were wrong to find that the arrangement was a sham. To be satisfied that it was a sham, not only was it necessary for the Tribunal to find

that the documents falsely recorded the true position, but that the parties intended that the documents should give third parties a false appearance of legitimacy. It was never suggested that the documents were intended to be seen by third parties and there was no evidence on which this could have been found. The Tribunal should not have found that the arrangements were a sham. Mr Gourgey refers to the definition of a sham in the judgment of Diplock LJ in *Snooks v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802D as including documents intended by the parties to them to give to third parties or to the court the appearance of creating legal rights and obligations different from those which the parties intended to create. Mr Gourgey submits that the Tribunal's relevant finding on allegation 5 was surprisingly brief.

92. The appellants did not distinguish between Vendside and Walker & Co. Mr Gourgey says that before its amendment in March 2004, the precise scope of SPR 3 was unclear. He refers to certain documents in this respect. Beresfords had understood until January 2003 that the payments they were making were permissible. They expressed their understanding to the Law Society in a letter of 12th June 2000 with reference to "introducers [who] carry out genuine marketing functions". The submission is that UDM/Vendside did carry out genuine marketing functions and that therefore Beresfords were not dishonest.

93. Mr Dutton submits that the prohibition in paragraph 2(3) of the 1990 Referral Code is unambiguous. We agree. He submits that there will be a breach, if any material payment or consideration constitutes a referral fee – see *Sharratt v London Central Bus Company* [2004] EWCA Civ 575 at paragraph 41, where one of the four factors which Buxton LJ considered pointed strongly to the fee in that case being an impermissible referral fee was that it was, as here, standard in all cases. In the present case, the fee was on a sliding scale referable, not to the value of any services provided, but to the amount of the claimant's compensation.

94. Mr Dutton points to the context of the referral arrangements as including that the UDM referrals were huge and financially attractive. Mr Smith's letter to the Law Society of 12th June 2000 noted that Beresfords received thousands of referrals from a major trade union and that Beresfords were keen to provide the trade union introducer with an appropriate consideration such as they might expect. At that stage, Beresfords were paying UDM/Vendside £10 per case. Mr Smith sought approval for a structure under which a separate company controlled by Beresfords charged the client for obtaining medical reports and then remitted part of the sum to the union introducer. The Law Society's reply of 16th August 2000 did not approve such an arrangement, because the solicitor was receiving work from the introducer and the solicitor's company was rewarding the introducer.

95. Mr Dutton submits that the arrangement was for payment on a case by case basis and, as it became with Walker & Co, was conditional on the success of the claim. It was calculated on a formula related for COPD cases to mirror the costs Beresfords themselves would recover from the DTI. The fee was therefore structured with regard to the economic value to Beresfords of the claim referred and not to the value of any services allegedly provided. Walker & Co accordingly received a carved out proportion of the costs received by Beresfords. This was in structure a fee sharing arrangement. Further, if the payments were for services, there was no explanation for the massive increase from £10 in January 2002. Mr Dutton submits that the obvious true reason was because Beresfords were buying exclusivity for hugely profitable

referrals. Mr Beresford conceded in cross-examination that the fees had been revised upwards to reflect the value to Beresfords of the claims referred.

96. Mr Dutton submits that the Tribunal were fully entitled to find for the reasons it gave that the "vetting/marketing/administrationfee" was simply a misleading label adopted to obscure the underlying purpose of the payment. There was for practical purposes no evidence of vetting or administration, let alone such as would justify payment. The appellants' evidence of UDM marketing from which Beresfords benefited was, submits Mr Dutton, absurd. The benefit to Beresford was the referral. The marketing was to enable UDM/Vendside/Walker & Co to sell clients to Beresfords. The marketing was in truth claims farming.

97. In our judgment, the first question for allegations 4 and 5 is whether objectively the payments in question were in the nature of commission payments and unrelated to the value of any services for which they were said to be paid. The second question (for allegation 5) is whether the appellants knew that they were in truth referral fees, but knowingly assented to the terms of the document of 2nd July 2002 in particular stating that the fees were for vetting/marketing/administration when they were in truth impermissible referral fees, with the intention of using the document, if necessary, to mislead.

98. The Tribunal found each of these issues against the appellants. In so far as the finding on the second issue is quite short, the Tribunal had properly set out the background and basis for the allegation; they had rehearsed the heart of Mr Dutton's submission at paragraphs 125 and 126 of their findings; and referred specifically to the appellants' acceptance that if they did dress up referral fees as marketing/vetting/administration fees they would have been dishonest.

99. As to Mr Gourgey's submission with reference to *Snooks v London and West Riding Investments* about the constituents of a sham, in the present context at least there has to be a dishonest intention to mislead third parties or the court if the occasion arises to do so – for a sham may never see the light of day. The blunt fact is that, on the Tribunal's findings (if this court upholds them), the appellants have used the document in an attempt to mislead the SRA, the Tribunal and the court. No doubt, on the Tribunal's findings, that was their intention from the start.

100. The central (and in the end, in our view, the only) point of substance is whether these were genuine payments for genuine services. If they were not, they were referral fees. If they were not, it is fanciful to suppose that Mr Beresford and Mr Smith did not know they were not. Mr Smith's correspondence with the Law Society in the summer of 2000 went no further than to assert that payments for *genuine* marketing services should be regarded as legitimate. In our judgment, the Tribunal was amply justified in finding that there was no evidence to support the contention of genuine services supplied (paragraph 164). The UDM/Vendside may have carried out marketing, as the appellants contended. But it was not for Beresfords, and there was no semblance of any evidence which attempted to relate the value of the marketing or other services allegedly provided with the commission fee paid. Mr Dutton's submissions relating to the implication of the structure of the arrangements are highly persuasive. In our judgment, the Tribunal was fully entitled to find as they did on both allegations 4 and 5. The finding of dishonesty was a finding of fact which the Tribunal was entitled to make, rejecting, as they must have done, the appellants' evidence.

101. In so far as our review on appeal of their decision may entail any separate judgment of our own, we specifically direct ourselves to apply the criminal standard of proof in particular (but not only) to the allegation of dishonesty. Doing so, we are sure that these were not genuine payments for genuine services and that the appellants knew that they were not. They dishonestly assented to the terms of the document intending, if necessary, to mislead anyone who might question the genuineness of the payments. The Tribunal properly found against the appellants on these allegations and the appeals in respect of them are dismissed.

Allegation 6

102. This allegation alleged breach of SPR 9, the terms of which we have set out in paragraph 36 above. It forbids a solicitor from entering into an arrangement for the introduction of clients with personal injury claims with claims assessors as described in the Rule who solicit or receive contingency fees in respect of such claims. The Tribunal found (paragraph 167) that the payments to Vendside and Walker & Co were in breach of SPR 9. The essence of the allegation, as we understand it, was that Vendside and Walker & Co introduced clients with personal injury claims, and that they were undertaking a business of supporting such claims and that they solicited and received from Beresfords contingency fees. On the Tribunal's finding on allegations 4 and 5, Vendside and Walker & Co plainly were receiving contingency fees in the sense that their fee from Beresfords was contingent on the result of the claim, as was the fee which the clients paid to Vendside out of their compensation.

103. As part of their findings on allegation 6, the Tribunal also addressed the question, which was in fact more relevant to allegation 3, whether the CHAs under which the miners' compensation was paid was contentious business. If it was, Beresfords themselves had been in breach of SPR 8 when, between the autumn of 1999 and April 2000, they entered into contingency fee agreements with their non-UDM clients. We are not convinced that contingency fees under Rule 8 are necessarily of the same scope as contingency fees for the purpose of claims assessors under Rule 9. The issue for Rule 8 specifically turns on whether claims under the CHAs were contentious business. For Rule 9, the person in question is not a solicitor and the expression "contentious business" does not appear in Rule 9. However that may be, the possible point of distinction was not argued before us, and it is not necessary to decide it, if, as will appear, we consider that for the purposes of Rule 8, Beresfords were retained to conduct contentious business.

104. SPR Rule 8(1) provides that 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 proceeding. SPR 18 defines contingency fee as being a sum payable only in the event of success in the prosecution of any action, suit or other contentious proceeding. It defines contentious proceeding as having the meaning in section 87 of the Solicitors' Act 1974. Section 87 of the 1974 Act defines "contentious business" as "business done, whether as a solicitor or advocate, in or for the purpose of proceedings begun before a court or before an arbitrator … not being … non-contentious or common form probate business". The question for Beresfords therefore was whether they were retained as a solicitor to prosecute an action or proceedings begun before a court or if the fee was payable only in the event of success in the prosecution of an action or proceedings begun before a court.

105. Mr Gourgey submits that the pursuit of a claim under either of the main CHAs was not the pursuit of a claim by way of court proceedings. The CHAs were agreements between the DTI and the CSG designed to enable claims for compensation to be agreed administratively without litigation or resort to the court. He refers to two judgments of Mitting J, [2006] EWHC 1154 and the unreported decision of 12th April 2006, in which Mitting J set out the structure of the CHAs, and in the first of which he expressed the obiter view that, surprisingly, proceedings under the CHAs might be non-contentious business. Mitting J made clear that his opinions were not part of his reasons and that they might have ramifications which no one before him had properly thought through. Mr Gourgey also refers to a judgment in the British Coal litigation of Sir Michael Turner ([2004] EWHC 1372 QB at paragraph 18) indicating that the CHAs were intended to enable awards to miners to be assessed without the need for further court proceedings and describing how the claims against British Coal were stayed to enable the CHAs to take effect.

106. Mr Gourgey submits therefore that an agreement between a solicitor and his client to pursue a claim under the main CHAs was non-contentious business. This somewhat extends what Mitting J said. He said that the CHA was a non-contentious business agreement between the DTI and the CSG. The present issue concerns the agreements between Beresfords and their clients. Mr Gourgey submits that a client's claim could only become contentious business in the unlikely event that it was not resolved under the relevant CHA so that proceedings had to be issued. He says that the Tribunal did not address the structure of the CHAs but merely described the process as having procedural features similar with those in court proceedings. In the alternative, Mr Gourgey submits that this should not have been regarded as unbefitting conduct because Beresfords had followed the contemporary view of a solicitor with expertise in the field, so that their view was honestly and reasonably held.

107. For present purposes, the CHAs may be seen as analogous with a Tomlin order staying court proceedings for the implementation of a settlement agreement, but in Group Litigation. The natural general expectation would be that the implementation of the terms of a Tomlin order was the continuation and completion of contentious court proceedings, and that the business would not change from contentious to non-contentious business upon the making of the order. The question might doubtless turn on the facts and circumstances of each case. Normally, however, a solicitor's original retainer to conduct court proceedings would carry through.

108. Here there had undoubtedly been contentious court proceedings – "proceedings begun before a court" as the definition in section 87 of the 1974 Act expresses it – to determine liability in Group Litigation and the CHAs both stayed the litigation and provided for the resolution (in essentially contentious circumstances) under court supervision of the claims of individual miners. Many of these first advanced their claims under the CHAs after the liability issues had been determined. However, Mr Dutton submits that there are High Court orders covering both the VWF and COPD CHAs the effect of which is to deem CHA claims to be court proceedings. In addition, he submits that the Court of Appeal in [2006] EWCA 1357 concluded that the CHAs were to all intents and purposes court proceedings; and that the effect of s.58(1) of the Courts and Legal Services Act 1990 was that contingency fee agreements were impermissible.

109. The High Court order dated 1st October 1998 for the COPD CHA provided for the DTI to keep a register of claims so that within 14 days of service of notice of a claim the "plaintiff … shall be deemed to be a plaintiff on the writ herein". The order for VWF claims dated 21st July 1994 provided for further plaintiffs to join the "British Coal Vibration White Finger Litigation". Mr Gourgey says that the only purpose of these provisions was for limitation purposes and the calculation of interest. He refers also to passages in the CHAs which characterise them as serving as a pre-action protocol and which preserve the subsequent possibility of individual court proceedings.

110. As to the decision of the Court in [2006] EWCA 1357, one of the issues was whether the court could award interest under the VWF CHA for claims said to be stalled with the DTI's claims handling agency. Mitting J at first instance had concluded that it could not, in part because the CHA was not litigation and simply involved the carrying into effect of an agreement, with the result that the court's powers were limited to the construction and enforcement of the CHA. The Court of Appeal reversed this decision. In doing so, Pill LJ (with whom Arden and Rix LJJ agreed) recognised that the appeal gave rise to a question as to the source and extent of the courts powers in supervising the VWF CHA. On this issue he substantially accepted submissions on behalf of the CSG, to the effect that the court was supervising litigation, albeit stayed litigation, and that, although the CHAs predated the Group Litigation rules, they were to all intents and purposes group litigation. Pill LJ noted in paragraph 24 of his judgment that the court had been closely involved from the start in the management of the claims. This included practice directions by successive Lord Chief Justices and active management by successive supervising judges, including substantive and procedural rulings.

111. In our judgment, as between Beresfords and their clients, conducting claims under the main CHAs was contentious business within SPR 8. The claim until it was determined was contentious. The claimants were formally joined as plaintiffs to existing proceedings begun before a court, albeit they were stayed. The stayed proceedings operated under the supervision of the court and the court was in substance supervising litigation. Although the majority of potential issues was determined so that consequences flowed without dispute, there were areas of potential or actual dispute such that the working out of the CHAs was not merely consensual and administrative. We consider that the Tribunal reached the correct conclusion on this issue, and it is not necessary to determine the question raised in paragraph 16 of the respondent's notice relating to s. 58(1) of the Courts and Legal Services Act 1990.

112. As to the breach of SPR 9, the appellants contend that the Tribunal were wrong to conclude as they did. The basis of their finding was the same as that upon which they found a breach of SPR 8. Further the UDM CHAs were not at the time subject to a court order. The Tribunal were further wrong to find that fees were recovered by UDM/Vendside/Walker & Co from the miners' compensation regardless of how that compensation was achieved. There was no evidence that any UDM miner started individual proceedings after rejection of their claim under the CHAs. Mr Dutton's point here, however, is not that individual claims were issued, but that the agreement permitted deduction of the fee from the compensation regardless of the means by which the compensation was received. SPR rule 9 applied to soliciting contingency fees as well as receiving them. Mr Dutton says that this is a complete answer to this

ground of appeal in relation to SPR 9. He further points out that SPR 9 relates to those non-solicitors who support or prosecute claims "whether by action or otherwise". Thus SPR 9 applies to personal injury claims brought by way of CHAs, as was accepted by the Tribunal in an earlier case of *Robinson* No 9365-2005. The definition of contingency fee in SPR 18 with reference to "contentious proceedings" as defined applies "except where the context otherwise requires", which it does for SPR 9. Mr Dutton also advances submissions about the mischief at which SPR 9 is directed.

113. In our judgment, our finding that Beresfords were engaged by the miners to conduct contentious business under the CHAs for the purposes of SPR rule 8 is determinative of the issue under SPR 9, as Mr Gourgey in effect recognised. It was, after all, the same business for the purpose of both issues. UDM/Vendside/Walker & Co were not themselves solicitors or advocates but they were soliciting personal injury claims to be advanced in contentious business and their fees were payable only in the event of success.

114. As to the submission that the Tribunal should not have found the breach of SPR 9 unbefitting conduct, because Beresfords honestly and reasonably considered that the CHAs were non-contentious business, the Tribunal specifically recorded this contention in paragraph 78 of their findings. Mr Dutton submits that the Tribunal were fully entitled to find as they did. Beresfords' clients were subjected to obviously inappropriate and unnecessary payments to claims management organisations, in circumstances where Beresfords were themselves acting under a conflict of interest. In the result, sums in excess of £1.5m. were deducted from their clients' compensation, none of which, we are told, has ever been repaid. We accept this submission and, in the result, this ground of appeal fails.

Allegation 8

115. Allegation 8 was that Berefords had, contrary to SPR 7 shared their professional fees with a non-solicitor namely Walker & Co. The Tribunal found that the payments to Walker & Co were clearly fee sharing. Walker & Co had provided no genuine services. The grounds of appeal repeat contentions advanced under allegation 4, which we have rejected. This ground of appeal fails.

Costs

116. The Tribunal made a full costs order against the appellants, although three of the allegations against them were successfully defended in whole or in part. It had been submitted on their behalf that there should be a percentage reduction. The Tribunal considered that all the allegations had been properly investigated by the Law Society in the interests of both the profession and the public.

117. Mr Gourgey submits that the Tribunal were wrong to have made a full costs order. He says that the principle to be found in *Baxendale-Walker v The Law Society* [2007] EWCA civ 233, to which the Tribunal referred, may protect the SRA from an adverse costs order against them, but does not support positive recovery of costs by the SRA where some of the allegations on which costs have been incurred have been successfully defended. Mr Gourgey says that the Tribunal made an error of principle. He submits that the costs award should not have exceeded 65% - an optimistically low

percentage in the light of Mr Dutton's persuasive reasons in the alternative that, if there were to be a discount, it should not exceed 10%.

118. So far as it goes, we consider that the Tribunal may have misapplied *Baxendale-Walker v the Law Society*. If that is to be regarded as an error of principle, it would enable this court to review the costs decision in the exercise of our discretion. We express it thus, acknowledging Mr Dutton's submission that a court will be slow to interfere with the exercise of the Tribunal's discretion as to costs, pointing to the general reluctance to reopen decisions of the Tribunal (*Bolton v the Law Society* [1994] 1 WLR 512 at 516F). Mr Dutton cites *Rowe v Lindsay* [2001] EWHC 783 Admin for the proposition that the court will only reopen decisions as to costs if they are plainly wrong.

119. Mr Dutton also points to Rule 22 of the Solicitors' Disciplinary Rules 1994, now Rule 18 of the Solicitors' (Disciplinary Proceedings) Rules 2007, SI 2007/3588, under which the Tribunal may award costs against a respondent even if it makes no finding of misconduct "if having regard to his conduct or to all the circumstances, or both, the Tribunal shall think fit". No doubt in this respect consideration is first, and perhaps mainly, directed towards the conduct of the proceedings, but it may also relate to the conduct under investigation.

120. Exercising, if it is appropriate, our own discretion, we are not persuaded that the Tribunal's undiscounted costs order was wrong. 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.

Conclusion

121. For these reasons, the appeal fails.