CHAPTER 5 CONCLUSIONS – PERSONAL INJURY AND CONVEYANCING

1. Do you agree with our analysis of the operation of referral fees and arrangements?

Not entirely.

Weightmans is one of the largest Defendant litigation solicitors' practices dealing with liability, motor and disease claims on behalf of the general insurance industry, together with other compensators including NHSLA and many self insured commercial and public sector organisations such as Local Authorities and Primary Care Trusts.

Our interest in referral arrangements therefore stems from a number of client perspectives and the broader impact upon our profession and its standards. Weightmans has an interest as a user of the civil justice system to ensure that access to justice is achieved for our clients at proportionate cost. Some of our clients act as intermediaries and receive referral income. Some of those clients are also defendant compensators who ultimately pick up the tab for referral fees.

We have confined our comments to the personal injury market alone and do not respond to the questions around conveyancing transactions or criminal advocacy.

A more appropriate start point for this consultation is to analyse the comment and practical insight from Lord Justice Jackson. Greater weight could and should be attributed to his findings having regard to its empirical content, the coal face depositions he obtained and in the light of his conclusion at page 193 Ch 20 of his Final report that:

"Referral fees constitute a major head of expenditure in personal injuries litigation, which claimant solicitors have to recover from defendants if they are to operate profitably"

Weightmans supports the view that the paying of referral fees by

lawyers should be banned, and in tandem, legal fees should be reduced by a corresponding amount to ensure that any aspect that is intended to reflect a supposed marketing or acquisition cost is adjusted to a more appropriate level. This will ensure that any transactional savings to lawyers that come from banning referral fees are passed on and directly reduce the end legal cost to consumers which have become increasingly disproportionate over the last few years.

The legal fees charged by claimant solicitors within the personal injury market are not subject to sufficient or indeed any market constraints nor are the expenses incurred in marketing (e.g. referral fees) constrained by the claimant's willingness to pay. Within this structure, referral fees paid by solicitors are likely to be a minimum of at least the residual between the costs of actually processing the case and the costs that can be recovered from the defendant in non predictable costs cases.

The fact that referral fees appear to have increased over time further indicates that if claimant solicitors have been able to drive efficiencies as they contend, then this has not resulted in any savings to consumers in the form of reduced legal costs, because the present costs structure has referral fees factored into the fixed costs and hourly rates.

The costs system has in effect allowed them to increase their referral fees/marketing spend. The result as noted by Lord Justice Jackson in his preliminary report on the Review of Civil Litigation Costs (hereafter, CLCR) is that there are too many 'middle men' involved, adding no value.

In this scenario the following example can become the norm according to Jackson at page 203:

Under the present regime, solicitors are not competing to get business on price. Nor are they competing on quality of service. They are usually competing to see who can pay the highest

referral fee. Such competition is not beneficial to claimants or indeed to anybody else, apart from the referrers. Where cases fall under the fast track fixed recoverable costs scheme in CPR Part 45, the amount of costs available is a fixed sum. The more of that sum is paid to the referrer, the less are the resources available to devote to the handling of the case. In the context of fixed costs the effect of referral fees is either to drive up the level of fixed costs or to drive down the quality of service or both.

Whilst it is arguable that payment of referral fees may have enabled more people to become aware of their rights with regard to claiming compensation through advertising, this has come at a disproportionately high cost to the insurance industry and ultimately consumers, for example, the motoring public. Weightmans believes that referral fees can be removed without significantly affecting access to justice, with the added benefit of reducing legal costs.
Alternatives such as, a centralised education campaign led by government and supported by stakeholders could inform the same market which is currently targeted by those who receive referral fees at substantially lower cost.

In our view the research from Vanilla and Charles River Associates is inconclusive taking into account sample size and methodology when set against the investigations carried out under the CLCR carried out by Lord Justice Jackson.

Weightmans also considers that referral fees are best viewed when their part in the overall fabric of civil justice is factored in as was the case in the CLCR.

2. Do you have additional evidence about the operation of referral

fees and arrangements that should be considered by the LSB?

Yes

We believe that the findings of Lord Justice Jackson in Chapter 20 of his Final report need to be factored into the process of evaluation to be undertaken by the LSB.

He concludes at page 206;

In my view the fact that referral fees are paid as a matter of routine is one of the factors which contributes to the high costs of personal injuries litigation. The lifting of the ban on referral fees in 2004 has not proved to be of benefit either to claimants or to the providers of legal services. The only winners are the recipients of referral fees.

By banning the payment of referral fees, the associated issues such as persistent unwanted targeting of potential claimants and the potential incentives to bring spurious or fraudulent claims will be reduced. The incentive for a solicitor who bulk purchases referred claims to promulgate as many claims as possible to meet their quota also tends to lead to over fishing in a pool of claims where there could be declining stocks of valid claims. This situation can add to the business imperative and incentive for those solicitors to push on with unmeritorious claims. This potentially gives the lawyer a greater incentive or stake in taking on the claim than is merited by its facts.

This is borne out by the CRA report at page 83 which suggests that whilst, for example RTA`s have been declining, personal injury claims arising have increased from 400,000 in 2000/1 to 625,000 in 2008/9.

This also emphasises the fact that once you “sell” anything (such as a claim) you potentially create a market for that product. Market forces and market dynamics (led by Solicitors buying claims and not directly in response to consumer/ client demand) if untrammelled by regulation then take over which means these markets are forced to grow. The natural business imperative is to

grow a market. That does not sit easily with justice. The referral market is now estimated at £300m and supported by £40m of advertising. Unless it is adequately controlled it will grow (because it has to) so that access to justice becomes an inducement to litigate. Surely that is not what justice is about.

CHAPTER 6 CONCLUSIONS – CRIMINAL ADVOCACY

3. Do you agree with our analysis of the operation of referral fees or fee sharing arrangements in criminal advocacy?

This is not an area where Weightmans LLP practice

4. Do you have additional evidence about the operation of referral fees or fee sharing arrangements that should be considered by the LSB?

See 3 above

5. In particular, do you have evidence about the impact of referral fees or fee sharing arrangements on the quality of criminal advocacy?

See 3 above

CHAPTER 7 RECOMMENDATIONS FOR IMPROVING TRANSPARENCY AND DISCLOSURE

6. Will the proposals assist in improving disclosure to consumers?

The current operating position can be summarised as follows;

In March 2004 the Solicitors Conduct Rules were amended to allow

solicitors to pay referral fees, subject to certain conditions and safeguards.

Current rules. Rule 9 of the Solicitors Code of Conduct 2007 governs the referrals of business to and from solicitors. Rule 9.01 provides that, when making or receiving referrals of clients to or from third parties, a solicitor must do nothing which would compromise their independence or ability to act and advise in the best interests of their clients. Rule 9.02 includes additional requirements where a solicitor enters into a financial arrangement with an introducer. The agreement between the solicitor and the introducer must be in writing. Before accepting instructions to act for a client referred in these circumstances, the solicitor must give to the client in writing all relevant information concerning the fact that they have a financial arrangement with the introducer and the amount of any payment to the introducer which is calculated by reference to that referral.

This has palpably not worked since de regulation in 2004 for the reasons set out above. If implemented therefore the regulation described should give no more than minimal cause for cautious optimism that advice on referral fees would be given in a uniform way. The bare minimum requirement for transparency could be modelled upon the FSA guidance which regulates the requirement for IFA`s to provide information upon the financial rewards they obtain from the investment products they recommend or refer to their clients.

However, the mere giving of information will not in itself ensure transparency or tackle the cost of claims spawned through this process.

7. Are there other options for disclosure that ARs should consider?

See 12 below - If referral fees are not banned then we regard it as essential that over time it becomes a requirement to deliver information to consumers around the outcomes of claims sold to a particular firm of solicitors by a particular referrer and the referral

claim arrangements they operate.

A requirement should be placed upon the lawyer to obtain the written consent from the referred Claimant as a condition precedent for payment of the referral fee and as evidence that the claimant had been transparently advised of these arrangements. The lawyer could then have a further obligation to maintain disclosable details of all contracts with referrers and the extent of any payments made under those arrangements to the regulators.

This may also be of increasing importance in tightening up procedures in new claims framework areas such as the motor claims portal which look set to be extended from motor arena to EL and Pl claims. Early anecdotal evidence from the Motor portal would suggest that there are sometimes disagreements between claimant solicitors and liability insurers surrounding whether the client has been “signed up” properly before the claim is put through the portal. The requirement for written consent to be provided by a claimant may end this ambiguity. Completion of the referral force should become mandatory on the CNF.

8. What are the issues relating to the disclosure of referral contracts by firms to approved regulators and their publication by approved regulators?

We can foresee no reasonable objection particularly if it informs consumer choice so that only those referrers and solicitors who deliver what they promise through viable and efficient structures and service contracts continue to thrive in a Darwinist claims environment that the LSA may usher in.

Conversely if referral fees are banned contrary to the initial conclusions outlined we would echo the caution expressed by Lord Justice Jackson at page 205 of his final report that care must be taken as to what does and does not constitute a referral fee.

"The SRA makes the point that defining what a referral fee is requires

some care, in order to catch disguised referral fees but to permit legitimate marketing."

9. How should these issues be addressed?

These issues need to be dealt with and enshrined in a referral code of conduct and policed by the regulators. Those who do not agree to comply should be prevented from delivering claims management services.

Enforcement action and publication of evidence of malpractice by Firms with appropriate sanctions being applied would also help to encourage the perception that the need for transparency required a change of approach and not just lip service.

CHAPTER 8 RECOMMENDATIONS FOR DELIVERING ACTIVE REGULATION

10. Will the proposals assist in improving compliance and enforcement of referral fee rules?

The context of any change to the regulation of the legal profession must be viewed against the changing of the future legal landscape as provided for under the provisions of the Legal Services Act 2007. This Act provides the framework for multi disciplinary law firms, non lawyer owners and managers, external investment in law firms from other industries and new entrants into the legal services market.

Absent a ban then these proposals may improve compliance and enforcement with rules but regulation must also be about achieving outcomes. To do otherwise would be to regulate for regulations sake. The introduction of a code for referrals and the collation of an auditable or discloseable "referral document pack" must go beyond delivering a veneer of compliance.

11. What measures should be the subject of key performance indicators or targets?

See 12 below but more generally we take the view that the Solicitors Regulation Authority ("SRA") own code of conduct is viewed by much of the profession from a compliance perspective rather than a service proposition perspective. If referral arrangements are to be allowed then service levels need to become universally incorporated into arrangements that deliver and ensure the best possible service for clients at proportionate cost.

12. What metrics should be used to measure consumer confidence?

The LSB should monitor through surveys the impact of referral arrangements on levels of client satisfaction with outcomes and service

We support a ban upon referral fees. If however referral fees are introduced then we think the following issues should be introduced to measure consumer confidence.

Importantly, if safeguards for claims referrals are to be seen to work then the acid test must be a reduction in the incidence and throughput of potentially fraudulent claims.

Weightmans experience suggests that the impact of activities of intermediaries involved in referral arrangements impacts on the genuine claimant. The referral arrangements, particularly those involving claims management companies (CMCs), present opportunities for those without integrity to take advantage of claimants, solicitors, insurers, and other service providers. For example, some referral arrangements work on the promise of a minimum volume of referrals. Given the variable frequency of genuine accidents, this practice represents a higher than average risk

of producing spurious or even fraudulent claims to meet agreed volumes. This combination of factors means that there is a risk that those involved in CMCs may engage in suspect practices. This impacts on the genuine claimant accessing justice where a spurious or fraudulent claim takes precedence and on a defendant who must seek to rebut the spurious or fraudulent claim, or unknowingly compensates a fraudulent claim."

One way to tackle this is to establish a process of rating the personal injury claims solicitor with reference to the outcome of their referred or "bought claims" book of business.

If such a register were to be introduced then this would enable regulators, compensators, referrers and critically, consumers in their widest sense to track the performance of any solicitor through from sign up to the ultimate conclusion of the claim. This data should lead the referrer and consumer to be able to properly evaluate their choice of solicitor objectively based upon the type of case rather than having their claim bought by the highest bidder

In this way the above groups could also get a feel for the portfolio of risks that any particular solicitor was visiting upon the claims market.

This would enable them to benchmark claims success and failure rates across the personal injury market. Those failures could be broken down into "discontinuances" or losses at trial to give further delineation to the veracity of the claims referred.

As data grew this could inform consumer choice as to the more successful and preferred solicitor arrangements across various segments of the personal injury market.

A compensation recovered to claims brought ratio for solicitors could be just one simple output from this but more sophisticated data capture could also tailor information to deliver wider market intelligence through transparency which could be tapped into by Regulators and consumers alike.

The information this delivered to consumers could be used by

aggregators of lawyers or referrers to rate their solicitors. Those who were rated poorly under this system would be encouraged by economics and consumer feedback to improve their claims screening processes. Failure to do so could jeopardise their business model in the long term.

This could also prevent claims being sold to the highest Solicitor bidder irrespective of whether that Solicitor had the relevant expertise to deal with a particular claim.

This approach would also be totally consistent with forcing the client to take a direct interest not just in the cost of their claim but in its very outcome.

Such a scheme would also be imperative if the suggestion for Qualified One Way Costs Shifting (QOCS) were to be introduced in the personal injury market. Absent this safeguard then the requirement to "test" any claim referred would disappear.

With the removal of the costs sanction for claims which fail it is easy to foresee how an unregulated claims referral market could once again become stoked and choked by unmeritorious claims. Certain categories of clients, Local Authorities for example may need to stand firm for a period in the face of what could be a substantial onslaught of increased claims volume. It would be necessary to defeat these claims if referrers and solicitors are to be persuaded to apply a natural filter to the quality of claims they put forward for consideration.

In these circumstances any decision not to ban referral fees must be revisited in the light of a decision to introduce QOCS

This perhaps emphasises the point from the Jackson review that his suggestions like consultations need to be implemented as a complementary package of reforms so as not to produce possible unintended consequences such as the one highlighted above.