Case No. 12629-2024

BEFORE THE SOLICTORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

BETWEEN:

SOLICITORS REGULATION AUTHORITY LIMITED

Applicant

-and-

CHRISTOPHER MARK HUTCHINGS

Respondent

APPLICANT'S REPLY TO RESPONDENT'S ANSWER
(2 October 2024)

CONTENTS

Introduction

1. This Reply addresses two issues of law and related fact raised in the Respondent's Answer: the Respondent's submissions with respect to delay; and the Respondent's submissions with respect to collateral gain. Each is addressed in turn.

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Delay

The Respondent's submissions

2. The Respondent complains that he has been prejudiced by the following periods of delay: the 4 years that it took for the complainant to complain to the SRA; the period of over a year that it took for the SRA to issue its notice recommending a referral to the Tribunal; the raising of a new Allegation in Allegation 1.1.2 in the Rule 12 Statement 3 months after the referral notice, which the Respondent contends is impermissible. (Answer, paras 11 – 19; and para 7 with respect to allegation 1.1.2).

The SRA's Reply

Law

3. The common law principles, developed in criminal cases, but applicable to disciplinary cases, where delay is advanced as a ground of abuse of process, are set out in ***Att Gen's Reference (No.1 of 1990)*** [1992] Q.B. 630 (CA) as restated, taking account of subsequent authorities, in ***R v S (SP)*** [2006] EWCA Crim 756 (CA). At para 21, the Court summarised the position as follows:

> "i. Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
>
> ii. where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;
>
> iii. no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
>
> iv. when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;
>
> v. if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

4. Delay due merely to the complexity of the case should never be the foundation for a stay: ***Att Gen's Reference (No.1 of 1990)*** at p.644A.

5. When viewed through the alternative lens of the Article 6 ECHR right to a trial within a reasonable time, the test for the granting of a stay is no different to the familiar two-limbed common law test, namely, that a stay should only be granted (a) where the defendant would not receive a fair trial, and (b) where a stay is

necessary to protect the integrity of the judicial system[1]: ***A-G's Ref (No.2 of 2001)*** (HL(E)) [2004] 2 A.C. at para 24. Time, for the purposes of Article 6, runs from the earliest time at which a person was officially alerted to the likelihood of proceedings being brought against him; and such period would ordinarily begin when an accused was formally charged: ibid, at para 29. In disciplinary proceedings, the equivalent time is when the registrant is formally notified that an allegation is being considered[2]. In the case of SRA proceedings, this equates to the notification provided to the solicitor under investigation under rule 3.3 of the SRA Regulatory and Disciplinary Procedure Rules of a decision to refer under rule 3.1(g) of those Rules. Absent the circumstances in which a stay would be granted in common law, as previously stated, a breach of Article 6 gives rise to a much more modest remedy: if the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach or action to expedite the hearing to the greatest extent practicable; if established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, or a reduction in the penalty imposed (***A-G's Ref (No.2 of 2001)*** at para 24).

6. Unjustified delay by the 'prosecutor' or the complainant can never by itself be a sufficient reason for a stay. Its only relevance to the question is in so far as it establishes irremediable prejudice: ***Regina v F (S)*** [2011] EWCA Crim 1844 at para 40.

7. The burden of establishing that the pursuit of particular proceedings would amount to an abuse of process is on the accused and the standard of proof is the balance of probabilities, although it is sometimes said that, in delay cases, the question is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence[3].

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[1] For the modest reformulation of the second limb, subsequent to A-G's Ref (No.2 of 2001), see Warren v Att.-Gen. for Jersey [2012] 1 A.C. 22, PC; ARCHBOLD Criminal Pleading, Evidence and Practice 2024, para 4-75.

[2] General Medical Council v Pembrey [2002] EWHC 1602 (Admin). In R (Gibson) v General Medical Council & Another [2004] EWHC 2781 (Admin)), Elias J, referring to Pembrey, stated at para.27: ''In the context of GMC proceedings, this has been held to be the date when the screener notifies the defendant that the matter will be referred to the PPC''.

[3] ARCHBOLD Criminal Pleading, Evidence and Practice 2024, para 4-102. However, some of the commentary suggests that there is no difference of substance between the two: see the analysis in Gomez, The Regulation of Healthcare Professionals: Law Principle and Process (Sweet & Maxwell 2nd Ed), para 27-004 to 27-005.

Application to these facts

8. The delay[4] in the complainant complaining to the SRA is incapable of giving rise by itself to a stay. If that delay is unjustifiable, it is a matter that merely goes to the credibility of the complainant. It has no impact on the Respondent's Article 6 ECHR right to a hearing within a reasonable time, because time does not begin to run, for that purpose, until the time of referral.

9. A stay on the ground of delay can only be granted where the Respondent can establish an evidential foundation for the conclusion that he would suffer irremediable prejudice were the case to proceed to a hearing. The Respondent advances nothing of substance in his Answer in support of such an assertion.

10. It is not reasonably arguable that the year that it took for the SRA to issue its notice recommending a referral was unjustified in the context of a case of complexity; and, in any event, the proper focus is not on the justifiability of the delay but rather on its impact.

11. In reality, the Respondent's alternative submission under Article 6 ECHR adds nothing. Under Article 6 ECHR, the delay is in fact much shorter than that applicable under the common law, running from March 2024, and, in the case of Allegation 1.1.2, running from June 2024. In any event, an Article 6 ECHR breach is incapable of giving rise to a stay unless the common law test is met.

12. The Respondent's contention that the addition of Allegation 1.1.2 is impermissible at the Rule 12 statement stage is misconceived. There is nothing in the wording of Rule 12 which confines the allegations to those that have been referred, and it is common practice for refinement and augmentation of the referral allegations to occur at the Rule 12 statement stage. The matter alleged is within the 4 corners of the essential matters raised by the complaint. The gap in time between the referral and the Rule 12 statement, of 3 months, is inconsequential. There is no conceivable prejudice that arises.

[4] The word “delay” is used, for convenience, in the neutral sense of denoting the effluxion of time.

Collateral gain/ purpose

The SRA's case

13. The allegation of using contempt proceedings for the purpose of obtaining a copyright licence is not to be found in the wording of any of the Allegations in the Rule 12 statement. However, it is central to the Allegation in 1.2 of making an improper threat of litigation. The allegation, essentially, is that the Respondent's threat of contempt litigation with respect to passages in Client B's [redacted] Publication 2 [redacted], was a tactic to try to persuade Client B to provide a copyright licence with respect to content in B's previously published articles, when Client A had no intention of litigating the contempt proceedings, and that course was contrary to the advice given to the Respondent by counsel that using the threat of contempt proceedings for that purpose was inappropriate.

14. Relevant passages in the Rule 12 statement include:

14.1. Passages that assert, with reference to the underlying documentation, that the Respondent was aware that Client A never intended to litigate the case, but merely to apply pressure to Client B, with the threat of contempt proceeding, to take alternative action: see esp. paras 21, 23, 27, 51.

14.2. paras 76 – 82, and esp. para 76 (the case, formulated in relation to allegation 1.2) and para 81 (reference to The SRA's paper, *"Walking the line: The balancing of duties in litigation"*, and, inter alia, the injunction against using the threat of litigation to obtain settlement);

14.3. para 13 (advice to Client A by the Respondent's colleague, copied to the Respondent, on seeking a copyright licence 26/9/18, that *"I would advise you against demanding something when the legal basis is weak and likely to be rejected in any event"*);

14.4. para 16 (advice by Respondent to Client A, 2/10/18, on seeking counsel's advice on the proposal of an offer to Client B that B provide a copyright licence in return for them not bringing the claim to court);

14.5. para 18 (Respondent's email to counsel, 3/10/18, outlining the objective to put Client B under sufficient pressure so as to obtain a licence to copyright in Client B's articles)

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14.6. para 20.7 (internal note of counsel's advice on 4/10/18 on the point, that *"Any inference at all that we are doing this as a way to get some sort of collateral gain would not be taken kindly by the Court ... If [Client A]'s objective is to get the copyright, this is not a recommended option"*);

14.7. para 25 (note of counsel's further advice on 10/10/18, that *"The letter cannot be seen to be offering a ticket out – there can be no possibility at all of it appearing as blackmail, or contempt proceedings will be thrown out ... there is no collateral gain, only* Client B *being imprisoned"*).

The Respondent's case

15. The Respondent contends (Answer, section E.1, para 167 et seq.) that there is direct authority as to what constitutes a *"collateral advantage"*, amounting to an abuse of process, in the context of a libel action, in the form of the dictum of Bridge LJ in ***Goldsmith v Sperrings Ltd*** [1977] 1 WLR 478, At 503DH. In that case, Bridge LJ formulated the test that *"when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance"*. Bridge LJ made it clear that matters that satisfy the test (and hence are not collateral advantages) include settlement terms that provide redress for the grievance but are matters that no court could order. Conversely, he formulated the test, that *"if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process"*. (In fact, as the preceding passage at page 503 B – D shows, this is an application of a more general rule in litigation, derived from the dictum of Lord Evershed M.R. in ***In re Majory*** [1955] Ch. 600, 623, branded by Bridge LJ as *"Lord Evershed's general rule"*.) Further, he doubted, obiter, whether the pursuit of an ulterior motive as a desired byproduct of the pursuit by a litigant of a genuine cause of action, *"which he would wish to pursue in any event"* would debar the litigant from proceeding.

16. The Respondent contends, in effect, that the purpose of obtaining the copyright licence was not collateral (i.e. it was *'reasonably related to the provision of some form of redress for that grievance'*) in that the Respondent's underlying purpose

was to use the copyright licence as a *'take down'* remedy to address the grievance of, and remove, the defamatory content in the articles (Answer, para 169 – 190).

17. The Respondent maintains that the evidence does not demonstrate that Client A had ruled out bringing proceedings in all circumstances, as evidenced by the issuing and service of proceedings (Answer, part E.2, paras 191 – 201).

18. The Respondent maintains that the advice of counsel was primarily addressed to the adverse perception of the court that would occur in pursuing litigation for the purpose of seeking a copyright licence, which did not preclude or render improper the seeking of a copyright licence in the course of without prejudice settlement discussions. In the alternative, the Respondent contends that, if counsel did voice views deprecating the pursuit of a copyright licence in such settlement discussions, that did not amount to advising that such a course was professionally improper. In the alternative, if counsel did advise that such a course was professionally improper, counsel was wrong. (Answer, part E.3, paras 202 – 210.)

The SRA's Submissions in Reply

19. 'Lord Evershed's general rule', as developed in ***Goldsmith v Sperrings***, is capable of applying in all civil litigation, where its conditions are met, so as to render the pursuit of a collateral advantage an abuse of process.

20. It reflects, although it is not identical to, the obligation to balance duties in litigation set out in the SRA's report, *'Walking the line: The balancing of duties in litigation'* (March 2015) and the 2 prohibitions set out therein at page 2 [X 433] pleaded in the rule 12 statement (para 81) of unduly prioritising the solicitor's client's interest over their other duties, by (i) predatory litigation against third parties and (ii) abuse of the litigation process.

21. The fallacy in the Respondent's Answer is that the grievance pursued by the threatened litigation was the breach of the consent order occasioned by the Publication 2, for which the potential remedy was the pulping of Publication 2 or the committal of Client B for contempt, whereas the copyright licence sought related to the different grievance of the contended defamatory comments in Client B's previously published articles. There was, therefore, no alignment between the grievance behind the threatened litigation relating to Publication 2 and the grievance behind the gain sought in procuring a copyright licence in the previously published

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articles, capable of rendering the pursuit of the latter a form of redress reasonably related to the former.

22. The Respondent's submissions to the contrary, and to the effect that the two were inextricably linked (Answer, section E.1, paras 167 – 190), are rebutted, inter alia, by the following considerations. These considerations point to the grievance relating to Publication 2 being disconnected from the grievance relating to the articles, and the latter alone being the Respondent's true object in threatening contempt proceedings relating to Publication 2.

22.1. The background to the telephone call is the advice of counsel, to the Respondent, that the copyright licence would constitute a *"collateral gain"*, in the eyes of the court, for the purposes of the contemplated litigation [X 45].

22.2. The final version of the Respondent's script for the call [X 60] referred to Publication 2 as *"a new issue [that] has been drawn to our client's attention"*, which indicates that Publication 2 was being regarded as, or was being presented as, a distinct breach.

22.3. The telephone attendance note (TAN) of Solicitor G [X 79, at X 80] records that the Respondent proposed, subject to instructions, that cooperation by Client B (effectively, through Client B granting a copyright licence in the articles in return for Client A not bringing contempt proceedings in relation to Publication 2) would mean that Client A would be content to leave Publication 2 published and unamended. That extraordinary position caused Solicitor G to note in the TAN that G made the observation to the Respondent at the time that *"this was a somewhat unusual proposal to say the least"*.

22.4. The correspondence following the call indicates that Solicitor G asserted the disconnection between the threat relating to Publication 2 and the gain sought, relating to the copyright licence in the articles, and that the factual contentions underlying that assertion, were not subsequently substantially disputed by the Respondent[5].

[5] Solicitor G email 22/10/21 stated: *"You said that (1) your client has a strong basis for bringing committal proceedings against our client for contempt of court over certain passages of* Publication 2

22.5. When [Solicitor G], having taken instructions, responded to the Respondent with the assertion that the Respondent's proposal amounted to *"blackmail"* [X382], the Respondent replied in terms that withdrew the proposal but persisted with the threat of litigation[6].

22.6. The reality of the matter was that the threat of litigation was a contrivance, advanced by the Respondent solely for the purpose of extracting, through the leverage of threatened criminal sanctions relating to [Publication 2], the copyright licence in the articles, without any intention of following through with litigation in connection with [Publication 2]: see the documents referred to in the rule 12 Statement at paras 21 – 32.

23. Further, the rules in ***Goldsmith v Sperrings*** do not directly apply to the context in question: the conduct of settlement discussions in relation to threatened, but not commenced, civil proceedings. The rules give rise to a *'plea in bar'* in answer to litigation, which has no purchase on pre-litigation discussions, which are necessarily outwith the control of the court. Whilst the rules are indicative of the standards of conduct that are abusive and professionally improper in settlement discussions, the proper prism for viewing such conduct is the SRA principles and related guidance.

24. Viewed through that correct prism, the alleged conduct constituted the pleaded breaches and failures in the allegations stated in the rule 12 Statement (para 1) and were within the mischief of the pleaded prohibitions therein (para 81) against predatory litigation against third parties and against abuse of the litigation process. In particular, the latter is framed as a prohibition against using *"the courts or general litigation process for purposes that are not directly connected to resolving*

[Publication2] *which you say breach the consent order dated* [Date 65] *and undertakings our client gave to court in that order; but (2) that your client would be amenable to not pursuing those committal proceedings if our client agrees to help your client with removing content from certain US websites, reproduced from our client's website, by granting your client a carefully-confined copyright licence …It is improper to use the threat of committal proceedings to compel our client into agreeing to a copyright licence. The threat of criminal sanction cannot be used to extract an ancillary or unwarranted benefit, however deftly that demand is made."* [x380]. The Respondent's email in reply stated *"Your email suggests that my client has raised the spectre of Committal proceedings so as to improperly extract a collateral benefit. This is not correct and, in any event, my client seeks removal of the offending references to* [A] *from within* [Publication 2]*, as was made clear on the call. Your client has failed to address this (no doubt tactically)."* [X381-382]

[6] *"For the avoidance of any doubt, our client does not seek any copyright licence as referred to in your earlier correspondence but this is not because we consider that your legal arguments have merit, we do not."*

a specific dispute" (emphasis added), similarly, indicating that the resolution of disputes collateral to the specific dispute in question is an impermissible purpose. In this instance, the threatened litigation was a sham device used solely for a purpose collateral to the grievance pursued, and one that the Respondent knew was improper. The SRA maintains its assertions as to the critical relevant facts: that counsel gave clear advice that the pursuit of a copyright licence relating to the previously published articles, mounted on the back of contempt proceedings directed at [redacted], constituted an impermissible collateral gain; that Client A's clear instructions to the Respondent were that the proceedings would be used solely for that purpose, and without any intention of carrying on with the litigation; and that the threat of litigation deployed by the Respondent to secure that collateral gain, was of the gravest kind, the criminal sanction of committal for contempt.

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2 October 2024

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