SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 — Case No. 11440/2015, 11859/2018

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD	Applicant
and	
MICHAEL DAVIES	First Respondent
CLARE TAMAN	Second Respondent
CHARLES FRASER-MACNAMARA	Third Respondent
KATHERINE FRASER-MACNAMARA	Fourth Respondent

Before:

Mr B Forde (in the chair)
Ms A Horne
Mr R Slack

Date of Hearing: 14 February 2022

Appearances

There were no appearances as the matter was considered on the papers.

MEMORANDUM OF APPLICATION FOR NON-PARTY DISCLOSURE

Background (substantive proceedings)

1. There were two Tribunal hearings, in October and November 2016 (Case No. 11440/2015) and March 2019 (Case No. 11859/2018). Judgments were published following the hearings in accordance with the Tribunal's usual practice and procedure.

The Non-Party Disclosure Application

2. By an application dated 25 December 2021, an Application for Non-Party Disclosure of Tribunal Documents ("the Disclosure Application") was made by the Ecohouse Victims Pressure Group ("EVPG").

3. The Disclosure Application was submitted by Mr R and was said to be made on behalf of 130 named individuals who were members of the EVPG.

4. The Disclosure Application was for copies of:

In relation to Case No. 11440/2015:

- The Rule 5 statement with exhibit IGM/1 dated 26 October 2015
- Witness Statement of DC dated 26 February 2016
- Witness Statement of JR dated 25 February 2016
- Witness Statement of DH dated 4 March 2016
- Respondents' responses to Rule 5 statement
- Respondents' witness statements (all)
- A copy of Adam Howell's Forensic Investigation report into Sanders solicitor firm as mentioned in points 12. & 13. of the judgement
- A copy of all client complaints raised against the firm, as presented to the Tribunal and referred to during the judgements
- Authorities main document bundle.

In relation to Case No. 11859/2018

- The Rule 5 statement dated 16 August 2018 and exhibit NXB 1
- A copy of any FIO reports which were included in the trial bundle but do not appear in the documents referred to in 1 above
- Email chain between the Applicant and DS Ward dated 22 March 2019
- Authorities main document bundle.

5. Signed forms were included from three former clients of the Firm, DC, JR and DH, who had provided witness statements in the 2016 substantive proceedings, consenting to the disclosure of their witness statements and exhibits (including where extracts or references were included in other documents).

6. The Disclosure Application was supported by 152 pages of supporting documentation. Wide-ranging reasons in support of the application and why it was said to be necessary in the interests of procedural fairness, open justice, public trust in the profession and in and the administration of justice more generally were set out.

7. It was said, in summary, that the Disclosure Application sought "proper transparency" in order to:

- *"Reveal documentary evidence of criminal wrongdoing by Respondents that was concealed by the SRA.*
- *Comprehend why the regulatory system has become so dysfunctional and unjust that it no longer detects, prevents, delivers justice, or provides redress against fraud and money laundering in the solicitor profession.*
- *Correct significant shortcomings in a decrepit regulatory and prosecution system.*
- *Achieve "The correct administration of justice" and criminal prosecutions against the Ecohouse fraud.*
- *Provide long awaited redress towards the victims of the fraud in accordance with protections that are purported to exist under the auspices of the Legal Services Act 2007, but are being wholly misrepresented and undermined due to SRA duplicity on account of its severely conflicted position and its desire to evade claims for serious misconduct through its dubious implementation of its compensation scheme rules and its misinterpretation of the true spirit and intention behind protective legislation enshrined under the Act."*

The Applicable Policy

8. The applicable policy was the Tribunal's Policy on the Supply of Documents to a Non-Party from Tribunal Records, dated June 2020 ("the Policy").

9. The Policy sets out the principles and procedure to be adopted by the Tribunal. It also states:

> *"In the event that the Panel of the Tribunal determines that the requested disclosure, or any part of it should not be granted, the non-party applicant's right of challenge lies to the High Court by way of judicial review."*

Preliminary Issue

10. Before considering the substance of the Disclosure Application, the Tribunal considered whether or not it was a new application or was, in substance and effect, an appeal against an earlier decision. Given that the right of challenge to a decision under the Policy was by way of judicial review, this question had a direct bearing on how the Disclosure Application should be approached.

11. The Disclosure Application was submitted with a covering email headed "*Third Attempt To Seek Disclosure of Ecohouse Related Court Documents From Tribunal*".

12. The Disclosure Application was submitted, and signed on behalf of EVPG, by Mr R who had corresponded with the Tribunal between August and October in 2021 about an earlier disclosure application made by Transparency Task Force Ltd ("TTF").

13. The Disclosure Application sought the same 13 categories of documents which were the subject of the previous application made by TTF. The description of the documents sought was worded in exactly the same way.

14. The opening section of the supporting materials was headed "*Necessity For Further Disclosure Application Following Subversion of TTF Application*". Various reasons why the Tribunal's earlier decision on the TTF application was said to be procedurally unfair were set out.

15. The available mechanism of challenging the earlier disclosure decision through judicial review was described as "*inadequate, impractical, unaffordable and never once utilised" [to challenge Tribunal decisions on non-party disclosure]*.

16. It was contended within the Disclosure Application that the Tribunal's previous decision on the TTF disclosure application had turned in large part on the Tribunal's concerns about the confidentiality of the three witnesses whose statements were sought. These three witnesses had contacted the Tribunal by email, after the TTF disclosure application had been determined, to give their consent to disclosure of their witness statements and supporting documents. The Disclosure Application contained three identical "Ecohouse Witness Consent" documents, each signed by one of the three named witnesses (who had provided written statements but had not given oral evidence in the original hearing in 2016). It was suggested in the Disclosure Application that "*The Tribunal's task is straightforward here - it needs only to correct its baseless blanket refusal of items which it denied disclosure for on the grounds of witness confidentiality.*"

The Position of the Parties

17. In accordance with the Policy, the parties to the proceedings were invited to make submissions on the Disclosure Application. The Applicant and the First and Second Respondents made submissions on this preliminary point.

The Applicant (the SRA)

18. The Applicant's position was as follows:

> *"20. The SDT is invited to consider whether the application is an abuse of the SDT's process and if so, to dismiss it without consideration of its merits.*
>
> *21. The application made by the TTF and Ecohouse investors has already been adjudicated upon by the SDT. This further application is bought by [Mr R] and the Ecohouse investors for the same documents because of the SDT's refusal to disclose documents to TTF and the Ecohouse investors or carry out a review of its decision in respect of the same when presented with consent of DH, JR and DC.*
>
> *22. The statements of DH, JR and DC state the following "Knowing that the majority of items requested by TTF had been refused by the Tribunal for groundless reasons to the exclusion of witnesses, I proactively approached the Tribunal to give consent for my witness statements, exhibits and extracts appearing in other items (e.g ., Forensic Investigation Reports), to be disclosed to TTF (or whoever). I anticipated that the Tribunal would review its disclosure decision in light of this to exhibit procedural fairness."*

23. Effectively, it appears that the same or largely the same group of people are making this further application rather than seeking to challenge the SDT's earlier decision by way of judicial review. That would be the correct avenue of challenge to the earlier SDT decision and this further application by the same group of people, for largely the same reasons appears to be an abuse of process.

24 Evidence that the same group of investors is behind both applications includes:
Both applications are made by the Ecohouse Investors;
[Mr R's] email to the SDT attaching the current application refers to previous applications having been made in that he says:" this is the third time of asking the Tribunal for disclosure of Ecohouse related court documents";
The main arguments for disclosure in the applications are the same and the documents requested are identical; and
The current application has been prompted by the refusal of the SDT to review its decision in the previous application.
In this application, it is stated: "In light of the inadequate, impractical, unaffordable and never once utilised facility of the Judicial Review being the only route to challenge the unfair behaviour and unjust disclosure decisions by the Tribunal (and upon recommendation of its officer, Mr Waterworth, it has left the victims of the Ecohouse Fraud little alternative but to submit a further application for disclosure with witness consent pre-arranged in advance."

25. If the SDT is satisfied that effectively the same group of people are behind both applications, it should dismiss this application as being an abuse of its process. The Ecohouse investors should have challenged the SDT's earlier decision by way of judicial review as they allege that there was procedural impropriety in failing to approach the Ecohouse investors for their consent to disclose their witness statements and the SDT's refusal to review its decision.

26. It is not appropriate for a second application to be bought [sic] in respect of the same documents because of a failure on the part of the Ecohouse investors to have given their evidence of consent to disclosure in the first application.

27. It is notable that the current applicants are silent as to whether they have in their possession any of the documents disclosed to the TTF because of the previous application, but the impression sought to be given by the current application is that it is a separate and new application."

The First and Second Respondents

19. The First and Second Respondents' position (on this preliminary issue) was as follows:

"We submit that this application amounts to a misuse of the Tribunal's procedures and is a blatant attempt to circumvent the original decision of the Tribunal in rejecting the initial application made by [Mr R] and/or is a collateral attack on the perceived insufficiency of the original order made by the SDT on application of TTF.

In those circumstances, we submit the application should be dismissed on the above grounds and costs awarded to all parties who have had to respond to this application by a third party which is tantamount to vexatious in nature."

The Tribunal's Decision

20. The Tribunal concluded that the Disclosure Application was, effectively, an appeal against the Tribunal's earlier decision on the TTF disclosure application. As set out above, it was made by or on behalf of people involved in the earlier application, was said to be necessary due to the deficiencies of the Tribunal's earlier decision, and sought disclosure of exactly the same documentation on essentially the same grounds.

21. The Policy contains no proscription against an individual or group submitting more than one disclosure application. What is not permitted and would amount to a misuse of the Tribunal's processes is for the same individual or group to repeatedly submit *the same* application for disclosure or to seek to challenge an outcome of a particular application by resubmitting it.

22. The Tribunal's decision following the TTF application was to direct wide-ranging disclosure of documents relating to the substantive proceedings. That application had received careful consideration, and the Tribunal's reasons were set out in detail in the memoranda dated 22 June and 13 September 2021. The fact that Mr R and the members of the EVPG did not consider judicial review to be an adequate remedy to challenge that decision did not alter the fact that seeking to challenge the Tribunal's earlier decision by submitting what was essentially an appeal in the guise of a new (virtually identical) application was a misuse of the Tribunal's processes.

23. The Tribunal's earlier decision followed lengthy and careful deliberation of a very substantial amount of documentation which fell within the scope of the TTF disclosure application. The parties had been put to the time and expense of responding to that earlier application. To some extent this was inevitable given the importance of public access to documents where this advances the open justice principle. However, the Tribunal considered that the parties being required to respond repeatedly on the same points (in response to requests for the same documents made by the same people/entities) risked becoming oppressive and unfair.

24. On the basis that the Disclosure Application was indeed a request for the same documents, made by the same people, and was in substance an attempt to challenge the earlier decision made by the Tribunal, the Tribunal determined that it was an abuse of its processes and would be dismissed without consideration of its merits (these having been addressed in detail previously).

The Witness Consents

25. As noted above, the Disclosure Application contained three signed statements which seemingly gave consent to the disclosure of the witness statements and exhibits of DH, JR and DC. These consents had not been present when the Tribunal determined the TTF application, and it was the Tribunal's refusal to take account of them after its earlier decision had been handed down which was said by Mr R to make the Disclosure Application necessary.

26. The Tribunal had some concern about the consent statements which were identically worded. It was not clear from the statements that those who signed them fully appreciated the extent of personal (particularly financial) information contained within the witness statements and their exhibits. The three witness statements and supporting exhibits ran to well over 1,000 pages. One of the three witnesses had confirmed to the Tribunal that he was aware of the contents of his witness statement and was content for it to be disclosed. A second witness had confirmed his consent to disclosure but asked for his address and other personal data to be redacted.

27. Unambiguous consent to disclosure had thus been received from one of the three witnesses. The Tribunal considered that this individual was fully entitled to disclose his statement and exhibits to Mr R (as were the other two witnesses if they so wished). The confidentiality of the personal and financial information was his, and he was entitled to give that up. The redaction exercise which would be required to track through every reference to this witness, amongst all of the papers falling within the scope of the Disclosure Application (and the TTF application) was an enormous task, and a thoroughly disproportionate undertaking, which the Tribunal was not equipped to undertake even had the Disclosure Application not been dismissed. The task would be even greater for the second witness who had requested that some of their personal data be redacted.

28. The Disclosure Application was not a new application for disclosure of the witness statements based on the unambiguous consent of the witnesses; it was an attempt to remake the same application and to challenge the entirety of the Tribunal's earlier decision.

Procedural requests

29. Mr R had requested copies of the responses provided by the parties to the Disclosure Application before it was determined by the Tribunal. The Policy does not provide for such an additional step. The process for arranging public access to documents from Tribunal proceedings is intended to be straightforward and proportionate, and not something which resembles the litigation involving the parties themselves. Were the Tribunal to invite comments from the EVPG on the parties' responses to the Disclosure Application, it would then be necessary to seek the parties' further representations on EVPG's representations. This would mean that a satellite process out of all proportion to the intended simple mechanism to provide public access to documents, where warranted, would come into being. In any event, the parties' responses were not determinative in this case as set out above.

30. Mr R also requested that a hearing be held at which he could put forward his position. The Policy states:

> *"The application will be considered on the papers unless there are exceptional circumstances which justify an oral hearing. If the non-party, any of the parties or a third party considers that an oral hearing is required they should notify the Clerk to the Tribunal at the earliest opportunity, and a Panel will determine how to proceed."*

The Tribunal did not consider that there was any good reason to depart from the Policy in this case in circumstances where the Disclosure Application was found to be a misuse of the Tribunal's processes.

Costs

31. As stated above, the First and Second Respondents had sought the costs of responding to the Disclosure Application on the basis that it was a misuse of the Tribunal's Policy and procedures and was "tantamount to vexatious in nature".

32. None of the other parties raised the issue of costs.

33. The Policy states:

> *"In the interests of proportionality, in furtherance of the principle of open justice, and to reflect the fact that the non-party disclosure application will be determined on the papers in all but the most exceptional cases, no order as to the recovery of any legal costs will be made (save where it is necessary to do so to prevent injustice)."*

34. The threshold for the award of costs was accordingly high. The Disclosure Application was an extremely prolix document which the Tribunal had found to be a misuse of its processes. Necessitating responses from the parties in these circumstances came close to meeting the threshold where the award of costs might be appropriate. However, it was clear from the supporting material that the EVPG considered that the Tribunal had unfairly failed to take account of the witness consents (submitted after the determination of the TTF disclosure application) and that this conviction had played a major part in the submission of the Disclosure Application. Whilst the EVPG had been free to obtain the witness statements directly from the witnesses themselves, and there was no reason why this issue should have prompted the challenge to every aspect of the earlier decision, the Tribunal considered that it was plain that those bringing the Disclosure Application felt it to be a significant point. On that basis the Tribunal considered, on balance, that there should be no order for costs. If the same application was submitted again, by way of a further attempt to appeal all of the same matters, it was likely that the high threshold in the Policy for the award of costs would be met.

35. **The Tribunal Directed**:

35.1 The Disclosure Application be dismissed as a misuse of the Tribunal's Policy and procedures on the basis it amounts to an attempt to appeal/renew matters previously adjudicated upon.

35.2 There be no order as to costs.

Dated this 25th day of February 2022
On behalf of the Tribunal

B. Forde
Chair