SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11995-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

ANDREW JAMES DAVERSON Respondent

Before:

Mr J. P. Davies (in the chair)
Mr E. Nally
Mr S. Howe

Date of Hearing: 28 May 2020

Appearances

There were no appearances as the matter was dealt with on the papers.

MEMORANDUM OF APPLICATION FOR NON-PARTY DISCLOSURE

Background (substantive proceedings)

1. Allegations were brought by the SRA against the Respondent in a Rule 5 Statement dated 29 July 2019. On 2 December 2019 a Panel of the Tribunal granted an application for the proceedings to be resolved by way of an Agreed Outcome. Under this process, the Respondent made admissions and the parties proposed a sanction for the Tribunal's consideration. The Tribunal was satisfied that the sanction was appropriate and proportionate and this decision was recorded in a Judgment dated 13 December 2019. The Tribunal's Judgment, together with the Statement of Agreed Facts and Indicated Outcome submitted by the parties, was published on the Tribunal's website in accordance with its Judgment Publication Policy.

The Non-Party Disclosure Application

2. On 9 April 2020 an Application for Non-Party Disclosure of Tribunal Documents ("the Disclosure Application") was made by Ms E. Ms E sought copies of "[a]ll material available to SDT to make its judgment inc [sic] evidence/views of all consulted regulators, any ICO view, police/law enforcement, Financial Ombudsman reports". The reason for the request was stated to be "[i]nterest in regulatory and authority recognition of and application of legislation, protocols, law, codes of conduct, principles, criminal acts and any conflicts therein".

3. The application covered the originating Rule 5 Application and Statement setting out the allegations, the exhibits to the application (the documents relied upon by the SRA to seek to substantiate the allegations made), the Respondent's Answer to the documents, the Statement of Agreed Facts and Indicated Outcome submitted by the parties together with a memorandum from an earlier application. The relevant documents comprised 239 pages.

The Applicable Policy

4. The Tribunal's Policy on the Supply of Documents to a Non-Party from Tribunal Records, dated 10 July 2017 ("the Policy") sets out the Tribunal's approach to such applications. At the date of consideration of this application, a revised policy had been approved by the Tribunal's Policy Committee and was due to take effect from 1 June 2020. The Panel of the Tribunal which considered the application from Ms E applied the policy in force as at their consideration and had regard to the Supreme Court decision in Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38 to which prominent reference is made in the revised policy dated 1 June 2020.

The Position of the Parties

5. In accordance with the Policy, the parties to the proceedings were invited to make submissions on the Disclosure Application. Representations made on behalf of the Respondent queried whether Mr X and Ms Y had been invited to make submissions given they appeared to be persons who could be affected by disclosure. The concern was expressed that, in the absence of more information about the reasons behind the Disclosure Application, the request could be an attempt by a media organisation to identify the client at the centre of the case (a high-profile individual identified as 'Mr X' in the publicly available Agreed Outcome). By reference to the Policy, it was

submitted that the reason for the request was not clear; it was difficult to see what value the documents would have in advancing the purpose of open justice given the detailed Statement of Agreed Facts appended to the publicly available judgment; the documents had the potential to harm the interests of Mr X and Ms Y; and the disclosure appeared to be disproportionate.

6. The SRA broadly supported the concerns raised on behalf of the Respondent. It was submitted that the Policy stated that the Tribunal would have regard to the important principles of open justice and transparency but also to the "interests of third parties referred to or otherwise involved in the disciplinary process". It was submitted that both Mr X and Ms Y had a clear interest in this matter – with nearly all documentation within the exhibit bundle disclosing their identities. It was submitted that disclosure of such documents outside the Tribunal process may potentially cause harm to their legitimate interests (or to the interests of family members).

7. The SRA stated that nearly all of the underlying documentation covered by the Disclosure Application was provided to the SRA for the purposes of the public interest disciplinary action, by the legal profession (i.e. the Respondent's former firm), or by a private individual, with no documents being provided by other regulators or authorities. The SRA's views as a regulator of professional misconduct were clearly and openly set out in the publicly available Judgment/Agreed Outcome. Many of the documents contained personal information (albeit some has been redacted and some may be out of date), as well as a complete copy of the underlying electronic file from the transaction (some of which the client(s) may hold privilege over in relation to general disclosure – but which for the purposes of investigating the misconduct the SRA was able to obtain using statutory powers under s.44B of the Solicitors Act 1974). It was submitted that it was difficult to see significant additional value being added to the purpose of open justice by all the documentation being disclosed as requested.

8. It was submitted that the concerns summarised directly above, which may be valid in other cases, were heightened in this case by potential media interest. The SRA took steps within the Rule 5 Statement and the subsequent Agreed Outcome to anonymise the clients, but it was submitted that in the absence of a disproportionate redaction of almost all the papers, such anonymity would be lost if disclosure of all papers were made.

The Tribunal's Decision

9. The overarching principles to which the Tribunal had regard in adopting the Policy, and which are set out in the preamble to the Policy, were the principle of open justice, the importance of transparency in the Tribunal's decision-making processes and the interests of the parties or relevant third parties. The Tribunal accepted the default position set out by Lady Hale in Cape v Dring: "the default position is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing" as its starting point in determining the Disclosure Application. Whilst there had been no substantive hearing in these proceedings, by virtue of an Agreed Outcome having been reached, the Tribunal considered that this default

starting position applied to the documents which were before the Tribunal that had approved the proposed Agreed Outcome.

10. The request was for all documentation which had been before the Tribunal when the Agreed Outcome was approved. The Panel of the Tribunal considering the Disclosure Application was the same Panel that had approved the Agreed Outcome. For the purposes of determining the Disclosure Application, which covered all material which had previously been available, the Panel again had available and reviewed all of the material which had been available when the Agreed Outcome was approved.

11. Having regard to the factors listed in the Policy under "The Tribunal's Decision", the Tribunal considered the following factors to be relevant:

- the nature of the documents requested;
- the potential value of the material in advancing the purpose of open justice;
- any risk of harm which access to the documents may cause to the legitimate interests of others; and
- whether the information is of such peripheral, if any, relevance to the judicial process that it would be disproportionate to require its disclosure.

The nature of the documents requested

12. The Tribunal noted that the exhibits to the application (the bulk of the documents within the scope of the request) were littered with personal information about Mr X. Beyond his name, there were financial details and details about a family member. A new address for Ms Y was included together with medical and business information. The Tribunal considered that very extensive redactions would be required, due in part to the fact that Mr X was a high-profile individual and so additional material would need to be removed, to prevent identification.

13. The Tribunal accepted that the SRA had used its statutory powers in order to gather many of the documents and that the relevant clients may hold legal privilege over those documents in relation to general disclosure. The Tribunal considered that the protection of such privilege was an important principle to which it was obliged to have close regard.

The potential value of the material in advancing the purpose of open justice

14. The Tribunal noted the documentation relating to the proceedings already available in the public domain. The Judgment and appended Statement of Agreed Facts and Indicated Outcome were available on the Tribunal's website in accordance with the Judgment Publication policy. These documents contained a summary of the facts giving rise to the regulatory proceedings, the basis on which admissions were made and the rationale for the sanction applied. Such documents were published to ensure that the Tribunal's processes were transparent and to assist in informing and educating users of legal services, the profession and the wider public. The Tribunal considered that a potential user of legal services or other interested member of the public would obtain a clear understanding of the events, issues and outcome of the regulatory proceedings from these publicly available documents.

15. The Tribunal considered the documents and information to which a public observer of a contested substantive hearing would have had access. Steps would have been taken to protect the identity of Mr X and Ms Y in any live proceedings; their identification was not necessary for the regulatory proceedings to be brought, determined or understood. Their identities and personal information were incidental to the proceedings the Tribunal exists to determine.

Any risk of harm to the legitimate interests of others

16. The Tribunal accepted the submission made by both parties to the substantive litigation that there was a clear risk of harm to Mr X and Ms Y. The harm was potentially significant in the case of Mr X. The Tribunal considered that it was incumbent on it to take reasonable steps to protect a third party not directly involved in any of the regulatory issues raised from such potential harm.

Whether it would be disproportionate to require disclosure

17. The fact that personal information was spread so widely throughout the 239 pages covered by the Disclosure Application inevitably meant the redaction exercise required to protect the personal and legally privileged information mentioned above would be extensive. Any redaction directed by the Tribunal would be carried out by the Tribunal's administrative staff, the Tribunal having no legal power to require the parties to proceedings to do so. Given the risk of potentially significant harm referred to above, such an exercise would need to be very thorough as well as extensive.

18. The Tribunal sought to balance the principles and factors summarised above. For what it considered to be a modest benefit in terms of public understanding of the proceedings, and noting that Ms E had access to the Judgment and Statement of Agreed Facts and Indicated Outcome, the Tribunal considered that conducting such an exercise covering all available documents was disproportionate, bearing in mind the limited administrative resources of the Tribunal. The Tribunal accordingly determined that a blanket disclosure of the wide category of information requested should not be made.

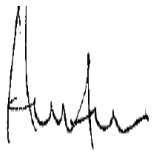
19. However, seeking to apply the principles set out in Cape v Dring, the Tribunal went on to consider whether, taking due account of the factors summarised above, it was nevertheless possible to provide some disclosure. The Tribunal considered that the Rule 5 Statement (setting out the SRA's allegations and a summary of the background to them) and the Respondent's formal Answer to those allegations required only minor redaction of details which may identify Mr X and/or Ms Y. The Tribunal considered that it would be proportionate for those documents to be redacted and disclosed. As the formal legal pleadings of both parties these documents would provide direct and authoritative information about the facts and issues involved in the proceedings.

20. The Tribunal Directed:-

20.1 The Disclosure Application for all documentation which had been before the Tribunal when the Agreed Outcome was approved be dismissed.

20.2 Subject to redactions being made to protect the identities of Mr X and Ms Y, disclosure of the Rule 5 Statement and the Respondent's Answer should be made to Ms E.

Dated this 9th day of June 2020
On behalf of the Tribunal



J. P. Davies
Chair