SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12288-2021

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD Applicant

and

AZIZ-UR REHMAN Respondent

Before:

Mr A Ghosh (in the chair)
Ms A Horne
Ms J Rowe

Date of Consideration: 20 July 2022

MEMORANDUM OF CONSIDERATION OF AN APPLICATION FOR NON-PARTY DISCLOSURE

Background

1. The substantive hearing of this matter took place on the 5-6 of April 2022. The Tribunal's findings, decision and reasons were set out in its Judgment dated 3 May 2022.

2. The Tribunal received, by way of an application notice dated 20 May 2022, an application for non-party disclosure from Penningtons Manches Cooper LLP ("PMC").

3. On 27 May 2022 the Tribunal contacted the Solicitors Regulation Authority ("SRA") and Mr Rehman by e-mail in order to ascertain their views with regard to the application. On 23 June 2022 the SRA set out their position. As at the date of consideration Mr Rehman had not replied.

The Application

4. PMC requested three documents:

   - The Tremark Report, including Mr Rehman's last known address. [Tremark was a tracing agent instructed by the SRA to locate Mr Rehman's residential address as he did not engage with the Tribunal proceedings]

   - Memorandum dated 22 July 2019, produced following the Forensic Investigation Officer's (FIO's)first investigation commencing in April 2019

   - Final report dated 3 January 2020, produced following the FIO's intervention in August 2019 and second intervention in October 2019.

5. The reason advanced by PMC for the application was that:

   "… We act for a number of individuals bringing a claim against Morgan Mark Solicitors [Mr Rehman's previous firm] in respect of their purchases of one or more units in the failed Carlauren property developments. In relation to document 1, we are obliged to make reasonable attempts to ascertain Mr Rehman's current whereabouts in advance of service. In relation to documents 2 and 3, they are likely to be useful evidence in the claim…"

The SRA's Position

6. The SRA adopted the following approach in relation to the application:

   "… in relation to the document at 1 - Tremark Report, the SRA remains neutral on the disclosure of this document.

   With regard to the documents at 2 and 3, namely the memo and final report, the SRA does not consent to the disclosure of these documents as they contain confidential information relating to former clients of the firm. We note that PMC acts for a number of individuals who are bringing a claim against Morgan Mark Solicitors. However, it is unclear whether PMC's clients are former clients of Morgan Mark Solicitors. PMC has not adequately explained why they,

> or their clients, are entitled to the information, other than to state that they are likely to be useful evidence in the claim. An in depth review of the documents would need to be carried out to ensure that they are appropriately redacted to protect client confidentiality. The SRA does not consider that this would be a proportionate use of its time in the absence of any legal claim to a right to the information by the recipients and in circumstances where the primary reason for the disclosure appears to be ascertaining the respondent where abouts…"

Mr Rehman's Position

7. Mr Rehman did not respond to the Tribunal's e-mail of the 27 May 2022 which sought his view on PMC's application. Nor did he reply to the Tribunal's chase up e-mails of 16 June 2022 and 23 June 2022.

8. For the avoidance of doubt as at the date of consideration of the application, Mr Rehman's position was not known, and therefore could not be taken into account by the Tribunal on its consideration of the application.

The Tribunal's Decision

9. The Tribunal reminded itself of the allegations that were found proved against Mr Rehman at the substantive hearing. They related to causing or allowing improper transfers of at least £198,000.00 from the firm's client account, causing or allowing the misuse of the same, and having done so dishonestly.

10. In so finding, the Tribunal provided the following reasons:

> "… Mr Rehman (a) held all managerial positions within the firm, (b) Mr Rehman had sole custody and control of the firm's office and client accounts, (c) all financial transactions, be it transfers between or payments out of the firm's accounts, were undertaken by Mr Rehman and (d) responsibility for the management of client monies was vested in Mr Rehman…
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> ... In at least seven client matters, client monies, namely deposits made for the purchase of properties, were used for purposes other than the completion of the property purchase. The Forensic Investigation Officer examined only seven client files and, whilst the Tribunal did not speculate as to the true amount of client funds that were misused and/or misappropriated, it noted that as at 2 December 2021, the SRA had received 25 claims on the compensation fund from former clients of the firm totalling £751,989.30…
>
> ... Mr Rehman was (a) an experienced solicitor of 10 years qualification, (b) sole Principal at the firm, (c) the Compliance Officer for Legal Practice, (d) the Compliance Officer for Financial Administration and (e) the Money Laundering Reporting Officer. The Tribunal further determined that Mr Rehman had sole access to and control of the firm's accounts; none of his employees could effect any financial transaction without his knowledge. Against that factual backdrop at least £198,000.00 of improper transfers from the client account were made by Mr Rehman for purposes which, as Mr Rehman must have known, were unconnected with the underlying legal transaction, namely the purchase of

property, in respect of which the monies had been provided by the clients. The impropriety of those transfers would, as far as the Tribunal was concerned, being regarded as dishonest by ordinary reasonable people…"

11. In considering the application, the Tribunal applied its Policy on the Supply of Documents from Tribunal Records to a Non-Party (June 2020). The Tribunal's starting point was that members of the public should have access to documents. This was important in order to advance the principle of open justice and was consistent with the principles promulgated in Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38.

12. The Tribunal's policy set out a non-exhaustive list of factors that would be taken into account in determining any application namely:

- The reasons for the request;
- The nature of the documents requested;
- The stage of the proceedings at which the request is made;
- Whether an application for the proceedings to be heard in private has been or is likely to be made;
- 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;
- Whether the information is confidential;
- Whether the information includes medical, financial or other sensitive personal information;
- Whether the information relates to a person with a particular vulnerability;
- Whether disclosure might impede any judicial process or the information includes legally privileged material;
- Whether the information concerns allegations against other persons which had not been explored and could be potentially damaging to them;
- Whether the information is of such peripheral, if any, relevance to the judicial process that it would be disproportionate to require its disclosure;
- The likely costs of complying with the application; and
- Whether the information is so voluminous and / or requires such editing or redaction before it could lawfully be disclosed, that the compliance with the request is not practicable or proportionate given the size and administrative resources of the tribunal.

13. The Tribunal was cognisant of that which was held by Mr Justice Kerr in Lu v SRA [2022] EWHC 1729 (Admin) with regard to the principle of "open justice". The Tribunal paid due regard to Kerr J's overriding concern that:

> "…
>
> §140 Courts and tribunals should not be squeamish about naming innocent people caught up in alleged wrongdoing of others. It is part of the price of open justice and there is no presumption that their privacy is more important than open justice…"

Tremark Report

14. The reason advanced for disclosure of this document was to locate Mr Rehman as PMC act for a number of individuals seeking to make a claim against his former Firm. The SRA were neutral with regards to disclosure of the same. The Tribunal noted that the content of the report related solely to Mr Rehman and contained no sensitive information regarding any third party.

15. Given those facts, the Tribunal granted the application for disclosure of the Tremark Report dated 9 March 2022.

Memorandum dated 22 July 2019

16. The memorandum sought contained the names of clients who did not expressly feature in the substantive proceedings, and were only referred to in the Judgment as Company T, Mr O and the "Firm's seven clients".

17. The reason advanced for disclosure of this document was that it was "likely to be useful evidence in the claim" on which PMC were instructed . The Tribunal noted that PMC had not named the individuals they represented, and had not provided any indication as to why the full memorandum was "likely to be useful evidence". It was not asserted that sight of the memorandum would assist in understanding the Tribunal's decision, or the basis for that decision.

18. The Tribunal carefully read the memorandum which was from the Forensic Investigation Officer to a Team Leader Supervision within the SRA. Reference was made therein to sensitive data relating to clients of the former Firm, and financial data relating to the former Firm, which caused the majority of the Tribunal to consider that a departure from the starting point of full disclosure may be justified. Notwithstanding that the Applicant had not asserted that the memorandum would aid its understanding of the Tribunal's Judgment, the Tribunal nevertheless considered whether redaction of the sensitive data and financial data would inhibit a proper understanding of that Judgment, and the majority of the Tribunal concluded that it would not.

19. The majority of the Tribunal therefore proceeded to apply their view of the principles promulgated in Dring (and, in their view, endorsed in the Policy on the Supply of Documents from Tribunal Records to a Non-Party). In so doing, the majority of the Tribunal determined that:

- The reason for the request did not provide adequate reasons as to why the full memorandum was sought.

- It was not possible to discern from the application the potential value of disclosing the full memorandum in advancing the principle of open justice.

- Client information relating to underlying transactions were confidential, subject to legal professional privilege and (in this case) also related to financial matters.

- The account numbers of various bank accounts held by the former Firm were confidential and related to financial matters.

- The cost of redacting the sensitive data set out above and the time it would take to effect the same was not disproportionate.

20. The majority of the Tribunal distinguished the principles promulgated in Lu from the instant application, as they were predicated on anonymity/privacy in respect of individuals and law firms against whom allegations were made by Ms Lu within her pleadings and during the course of the substantive hearing. Those individuals and entities were granted anonymity (absent any application for the same) whilst Ms Lu was not (despite having been acquitted of all misconduct alleged) which Kerr J held to have been unfair and contrary to the principle of open justice. In the present case, the identity of the clients, whose files gave rise to the Forensic Investigation Officer's concerns about financial mismanagement at the former Firm, was not material either to the Tribunal's consideration of the allegations, nor to its Judgment. The majority of the Tribunal therefore considered that the principle of open justice would not be sufficiently advanced by disclosure of the sensitive information relating to those clients so as to justify disregarding the entitlement of the clients to confidentiality and privilege, when those clients had not brought complaints about the conduct of their matters, they had played no part in the Tribunal proceedings, and as far as the Tribunal was aware may well have had no knowledge even that their matters had been the subject of consideration by the Tribunal.

21. Given the matters set out above, the majority of the Tribunal granted the application for disclosure of a redacted version of the Memorandum dated 22 July 2019. Redactions were required in relation to all client names and financial information, and bank account details of the former Firm.

Forensic Investigation Report dated 3 January 2020

22. The Forensic Investigation Report sought contained the names of clients who did not expressly feature in the substantive proceedings and were only referred to in the Judgment as Company T, Mr O and the "Firm's seven clients".

23. The reason advanced for disclosure of this document was that it was "likely to be useful evidence in the claim" which PMC were instructed on. The Tribunal noted that PMC had not named the individuals they represented, and had not provided any indication as to why the full memorandum was "likely to be useful evidence". It was not asserted that sight of the FI Report would assist in understanding the Tribunal's decision, or the basis for that decision.

24. The Tribunal carefully read the Forensic Investigation Report. The majority of the Tribunal was of the view that reference was made therein to sensitive data relating to clients, and financial data relating to the former Firm, which caused the majority of the Tribunal to consider that a departure from the starting point of full disclosure may be justified. Notwithstanding that the Applicant had not, in the opinion of the majority of the Tribunal, asserted that the FI Report would aid its understanding of the Tribunal's Judgment, the Tribunal nevertheless considered whether redaction of the sensitive data and financial data would inhibit a proper understanding of that Judgment, and the majority of the Tribunal concluded that it would not.

25. The majority of the Tribunal therefore proceeded to apply the principles promulgated in Dring (and endorsed in the Policy on the Supply of Documents from Tribunal Records to a Non-Party). In so doing, the majority of the Tribunal determined that:

- The reason for the request did not provide adequate reasons as to why the full memorandum was sought.
- It was not possible to discern from the application the potential value of disclosing the full memorandum in advancing the principle of open justice.
- Client information relating to underlying transactions were confidential, subject to legal professional privilege and (in this case) also related to financial matters.
- The bank account numbers of various accounts held by the former Firm were confidential and related to financial matters.
- The cost of redacting the sensitive data set out above and the time it would take to effect the same was not disproportionate.

26. The majority of the Tribunal distinguished the principles promulgated in Lu from the instant application as they were predicated on anonymity/privacy in respect of individuals and law firms against whom allegations were made by Ms Lu within her pleadings and during the course of the substantive hearing. Those individuals and entities were granted anonymity (absent any application for the same) whilst Ms Lu was not (despite having been acquitted of all misconduct alleged) which Kerr J held to have been unfair and contrary to the principle of open justice. In the present case, the identity of the clients, whose files gave rise to the Forensic Investigation Officer's concerns about financial mismanagement at the former Firm, was not, in the opinion of the majority of the Tribunal, material either to the Tribunal's consideration of the allegations, nor to its Judgment. The majority of the Tribunal therefore considered that the principle of open justice would not be sufficiently advanced by disclosure of the sensitive information relating to those clients so as to justify disregarding the entitlement of the clients to confidentiality and privilege, when those clients had not brought complaints about the conduct of their matters, they had played no part in the Tribunal proceedings, and as far as the Tribunal was aware may well have had no knowledge even that their matters had been the subject of consideration by the Tribunal.

27. Given the matters set out above, the majority of the Tribunal granted the application for disclosure of a redacted version of the Forensic Investigation Report dated 3 January 2020. Redactions were required in relation to all client names and identifying or financial information, and bank account details of the former Firm.

28. For the avoidance of doubt, the Administrative Office of the Tribunal was required to undertake the redactions alluded to above.

The Chair's Dissenting View

29. The Chair dissented from the view of the majority of the Tribunal as to redaction of the documents. He was of the opinion that all the documents requested should be disclosed without redaction. The reasons for his opinion have been set out by him below. All

underscoring below in passages cited from judgments are made by the Chair.

30. "Lady Hale, in the opening paragraph of her judgment in the Supreme Court in *Dring* observed - *"As Lord Hewart CJ famously declared, in R v Sussex Magistrates, Ex p McCarthy [1924] 1 KB 256, 259, "... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".. That was in the context of an appearance of bias, but the principle is of broader application. With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done. But whereas in the olden days civil proceedings were dominated by the spoken word - oral evidence and oral argument, followed by an oral judgment, which anyone in the court room could hear, these days civil proceedings generate a great deal of written material - statements of case, witness statements, and the documents exhibited to them, documents disclosed by each party, skeleton arguments and written submissions, leading eventually to a written judgment. It is standard practice to collect all the written material which is likely to be relevant in a hearing into a "bundle" - which may range from a single ring binder to many, many volumes of lever arch files. Increasingly, these bundles may be digitised and presented electronically, either instead of or as well as in hard copy."*

31. Open justice is, of course, a cornerstone of English common law.

32. It is also an essential element of Article 6 of the European Convention on Human Rights. The Tribunal has a duty under section 6 of the Human Rights Act 1998, to act in a manner which is compatible with the Convention. It must balance any countervailing rights under other Articles, such as the right to respect for family and private life under Article 8. In my opinion there are no competing rights sufficient to countervail the principle of open justice in this case and in these circumstances.

33. As Nicklin J. observed in *Lupu and Others v Rakoff, Not Buying It Ltd. and Others [2019] EWHC 2525 (QB)* at paragraph 24 *"The burden of establishing any derogation from the general principle [of open justice] lies on the person seeking it. It must be established by clear and cogent evidence."*

34. In her email to the Tribunal of 23rd June 2022, Ms. Trench of the SRA states that the SRA is opposed to the disclosure of the Memorandum dated 22nd July 2019 and the Final Report dated 3rd January 2020, both being from its Forensic Investigation Officer. She says "An in-depth review of documents would need to be carried out to ensure that they are appropriately redacted to protect client confidentiality". No other reason is given by the SRA for its opposition to disclosure; nor is any evidence adduced in support of the SRA's contention that these documents require redaction. The SRA relies merely on a bald assertion that disclosure might endanger "client confidentiality". That is a far cry from the "clear and cogent evidence" referred to by Nicklin J.

35. Both documents are expressly cited in the Tribunal's judgment at, respectively, paragraphs 32.1 and 32.2. They formed an integral part of the judgment and the case.

36. The redaction of the account numbers of various bank accounts held by the former Firm, is, in my opinion, not only unjustified, but also otiose. The Firm has been defunct for some time. It was closed down by the SRA.

37. Since the Firm has ceased to exist, it is also difficult to see how legal professional privilege can have any relevance.

38. Full disclosure in respect of all the underlying financial transactions is intrinsic to open justice, in view of the fact that the case essentially concerned dishonesty in relation to underlying financial transactions.

39. Names should not be redacted for the reasons so powerfully expressed by Kerr J. at paragraphs 6 and 7 in *Lu,* where he held *"A common misconception is that if the identity of a person in legal proceedings is not directly relevant, there is no public interest in that person's name being known. The justice system thrives on fearless naming of people, whether bit part players or a protagonist…Open reporting is discouraged by what George Orwell once called a "plague of initials"... Clarity and a sense of purpose are lost. Reading or writing reports about nameless people is tedious. The applicable principles are clear at the highest level. The common law principle of open justice is well known. The jurisprudence on articles 8 and 10 of the European Convention is quite well known. Procedural rules such as CPR 39.2 which reflect the law correctly, work reasonably well if properly applied. Yet, the inexorable trend seems to be towards less open justice and more anonymity. I doubt that this is a good direction of travel for the law."*

Directions

40. The Tribunal directed that:

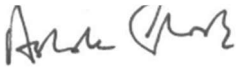
40.1 within 7 days of receipt of the memorandum of consideration of an application for non-party disclosure, the parties must review and comment in writing to the Tribunal upon the proposed redactions before the documents are disclosed;

40.2 the Administrative Office of the Tribunal must undertake the redactions required to the Memorandum dated 22 July 2019 and the Forensic Investigation Report dated 3 January 2020; and

40.3 the Tremark Report dated 9 March 2022 be disclosed to Pennington Manches Cooper in its original form.

29.4 PMC is reminded that any challenge against the Tribunal's decision is to the High Court by way of judicial review.

Dated this 21st day of July 2022
On behalf of the Tribunal



A Ghosh
Chair