SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12433-2023

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD Applicant

and

WILLIAM AMO Respondent

Before:

Ms A Banks (in the Chair)
Mr M N Millin
Mr C Childs

Date of Hearing: 3 April 2023

Appearances

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

MEMORANDUM OF CONSIDERATION OF A NON-PARTY DISCLOSURE APPLICATION & AN APPLICATION FOR NON-PARTY LEGAL REPRESENTATION

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1. The substantive hearing in this matter was listed for 11 and 12 May 2023.

Non-Party Disclosure Application

2. By way of an application dated 1 March 2023, Holland & Knight (UK) LLP applied for disclosure to its legal representatives of the following documents:

    - The Rule 12 Statement and any other documents in the Applicant's possession referred to therein;
    - Any supplemental statement issued pursuant to Rule 14 of the Solicitors (Disciplinary Proceedings) Rules 2019 ("SDPR");
    - Any orders for directions issues by the Tribunal;
    - The Respondent's Answer together with any additional statements or exhibits submitted by the Respondent; and
    - Correspondence between the SRA and the Respondent in which the Respondent made any submission in his defence or allegations in relation to the Firm.

3. The Firm stated that the reasons for the request were that (in summary):

    - Potential allegations against the Firm/witnesses from the Firm about the motivation of the Firm's report to the SRA dated 28 May 2020;
    - The risk to the reputation of the Firm due to the likely public interest in the proceedings;
    - The risk of the Firm's witnesses being unable to properly assist the Tribunal in the absence of knowledge of the full case against the Respondent and his Answer;
    - The likelihood of witness evidence having to deal with matters that were not contained in witness statements;
    - The likelihood that the Respondent would dispute facts contained in the witness statements of the Firm's witnesses.

4. It was further submitted that were the application for disclosure to be refused, this was likely to have a "chilling effect by discouraging other firms and/or their compliance officers from reporting their concerns about employees' honesty and integrity to the SRA". Additionally, witnesses would be prevented from properly assisting the Tribunal where matters in an Answer required them to check their records in relation to new allegations contained in an Answer.

5. The Firm submitted that the granting of the application would advance the principle of open justice as it would ensure that the Firm and its witnesses would not be unnecessarily exposed in cross-examination to allegations the Respondent might make in his defence on matters of which they were not aware. The witnesses were not in a neutral position; as the Respondent's former employer, the Firm and its witnesses were vulnerable to attacks on their credibility in an open forum. Thus, the Applicant's policy of not providing the witnesses with documents was inappropriate.

6. Natural justice, it was submitted, required the witnesses to be able to prepare for the hearing. To do so, the witnesses would need to understand the nature of the Respondent's defence. The Firm was akin to a party in the proceedings as it was the

Respondent's employer at the relevant time. In the circumstances, the application was not similar to one from the press or public.

The Applicant's Submissions

7. The Applicant opposed the application for non-party disclosure.

8. It was inappropriate to disclose the Rule 12 Statement and Exhibits (and any Rule 14 Statement) to a third party prior to the conclusion of the proceedings. To do so would be "akin to showing a witness the trial bundle before the day of the hearing". This would create a risk of influencing the witness's evidence and therefore the fairness of the trial.

9. As to any questions regarding the motive of the Firm and/or its witnesses, counsel for the Applicant would ensure that the questions asked of any witness were reasonable, fair and appropriate.

10. There was no benefit to the Firm in seeing the Tribunal's orders for directions. The Applicant would keep all witnesses updated as to when they would be required to give evidence.

11. It was inappropriate to disclose the Respondent's Answer and any correspondence between the SRA and the Respondent. Those documents were being sought in order to prevent the Firm's witnesses being unnecessarily exposed in cross-examination to allegations that the Respondent might make in his defence of matters that about which the witnesses were not aware. The Applicant, it was submitted, having received those documents, would make any necessary enquiries and obtain further witness statements it necessary. The Applicant had already determined that any of the issues raised in the Respondent's Answer required further witness evidence from the Firm's witnesses.

12. In all the circumstances, it was submitted, the documents requested were not required to be disclosed to enable the witnesses to give effective evidence.

The Respondent's Submissions

13. Mr Beaumont opposed the application.

14. The application for the Respondent's Answer was, it was submitted, misconceived, wholly inappropriate and wholly irregular. In making the application the Firm (and its witnesses) were requesting advanced notice of the Respondent's defence so that it could be prepared for cross-examination. The request in itself demonstrated a misunderstanding on the part of the Firm of the role and function of a witness.

15. The Applicant, it was submitted, had correctly identified that witness coaching was unlawful. In R v Momodou [2005] EWCA 177 it was held that coaching for witnesses was not permitted. "Discussions between witnesses should not take place" and "the statements and proofs of one witness should not be disclosed to any other witness". Judge LJ stated:

> "The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved"."

16. In trying to procure a full rehearsal of the issues, there was a real risk or "trimming or tailoring" in a case that was wholly dependent on recollections of conversations that took place 3 years previously.

17. The application was worrying in circumstances in which there was a strong suspicion that the witnesses would almost inevitably have communicated with each other on the question of the duplicity allegedly practised on them by the Respondent.

<u>The Tribunal's Decision</u>

18. The Tribunal had regard to its Policy of the Supply of Documents to a Non-Party from Tribunal records dated June 2020, and the overarching principles of open justice, transparency in the Tribunal's decision-making process and the interests of the parties and relevant third parties.

19. The Tribunal did not accept that there would be a chilling effect in the event that disclosure was refused. Firms and compliance officers were under a duty to report misconduct. That duty could not be ignored due to the possibility of criticism of that report by a Respondent. The Tribunal did not accept that the possibility of criticism would lead to Firms and compliance officers breaching their regulatory duties. Such a submission, the Tribunal found, was wholly without merit.

20. The Tribunal did not consider that in order to properly assist the Tribunal, the witnesses needed sight of any documents other than their witness statements prior to the hearing. Their witness statements contained the facts upon which they relied. Should they need to see any other documents, they would be taken to them in the course of their evidence as was the normal procedure at the Tribunal.

21. Should it transpire, during the course of a witness's evidence that there were further documents that a party considered relevant, that party could make an application for the document to be adduced. It was not for the witnesses to seek out additional documents after their witness statements and exhibits had been filed and served.

22. The Firm submitted that natural justice required the witnesses to be able to prepare for the hearing. The Tribunal found that in circumstances where the witnesses would be giving evidence based on their witness statements, the only preparation necessary for

those witnesses was to be familiar with the contents of their statements. The witnesses were not party to the proceedings. It was therefore not necessary for the witnesses to understand the nature of the Respondent's defence. The witnesses simply needed to understand their own evidence.

23. The Tribunal rejected, in its entirety, the submission that as the Firm and its witnesses were the Respondent's former employer, they were akin to being parties to the proceedings. Such a submission, it was determined, was without foundation.

24. The Firm submitted that disclosure of the requested documents advanced the principle of open justice by avoiding the witnesses being exposed unnecessarily to allegations the Respondent might make in his defence. The Tribunal considered that the potential risk in disclosing the case to witnesses far outweighed any risk to the witnesses in cross-examination. As per Judge LH in Momodou:

> "The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so". (Tribunal's emphasis).

25. The Tribunal found that the risk of there being or appearing to be collusion between the witnesses, far outweighed the risk that the witnesses might be subject to unnecessary cross-examination. The Applicant, as a party to the proceedings, and as the party calling the Firm's witnesses, would be represented at the hearing. The Applicant's representatives would ensure that questions asked were relevant to the issues to be determined. Further, the Tribunal would not permit the asking of questions that did not go to an issue in the case. The Firm's witnesses would be afforded the same protection as all witnesses that appeared before the Tribunal. Accordingly, the Tribunal did not find that disclosure of the documents requested advanced the principle of open justice as submitted.

26. The likelihood of the Respondent disputing the facts that were contained in the witness statements was not, the Tribunal found, a sufficient reason to grant the requested disclosure. In fact, in cases where the allegations were denied, it was usual for any Respondent to deny the facts presented by the Applicant.

27. As to the submission that the Respondent might make allegations against the Firm or its witnesses, the disclosure of the documents did not remove the Respondent's ability to do so. The Tribunal did not accept that knowing the detail of the Respondent's defence (or indeed the Applicant's case), or the risk of reputational damage to the Firm advanced the principle of open justice particularly when having regard to the inherent risks that granting such disclosure to witnesses in the proceedings posed.

28. The witnesses, the Tribunal found, could only assist the Tribunal with regards to their recollection of events. If they were asked questions of which they had no knowledge, they would not be able to assist the Tribunal. That remained the position irrespective of whether or not those witnesses had advanced notice of the entirety of the case against

the Respondent and his defence. Accordingly, the Tribunal found that this reason did not advance the principle of open justice as submitted.

29. It was not necessary, the Tribunal determined, for the witnesses or the Firm to "understand the Respondent's case", or to "understand the totality of the Respondent's position" in order for those witnesses to give evidence at the proceedings. Those witnesses were giving evidence of their recollection of events. How the Respondent chose to put his case and what his position was should not affect that evidence.

30. In its application, the Firm stated that it did not "understand why a different approach is taken in respect of the evidence of the Respondent himself, who had of course been provided with all the statements prepared by the LLP". The Tribunal found such a submission to be astonishing. Either the Firm was suggesting that the Respondent as a party to the proceedings and the person who had to answer the allegations should not have sight of the evidence upon which the Applicant would rely at the hearing, or it was being suggested that the Firm ought to be in the same position as regards the evidence notwithstanding that it was not a party to the proceedings. The Tribunal found both submissions to be extraordinary in all the circumstances.

31. The Tribunal determined that the grounds advanced for disclosure did not advance the principle of open justice. On the contrary, to grant the disclosure requested could render the proceedings unfair. The Tribunal found that there was no reason for it to depart from its usual process of granting witnesses access to their witness statements only. Accordingly, the application for non-party disclosure was refused.

Application for Non-Parties to be legally represented at the substantive hearing

The Application

32. The Firm submitted that it would be "wrong and not in accordance with justice if the members of the LLP, attending at the request of the SRA, had their reputations attacked and their integrity questioned, without the ability to have their own representation. Further, it is likely that the Tribunal will be assisted by representation on behalf of witnesses, who will be able to give instructions to their representative in a manner which they would not be able to do for the SRA."

The Applicant's Submissions

33. The Applicant was neutral in relation to the request for legal representation by the Firm.

The Respondent's Submissions

34. Mr Beaumont opposed the application on the grounds that legal representation for the witnesses would "lead to an unworkable side-show, which will distract from the issues, create delay and unnecessary cost and potentially waste tribunal time."

The Tribunal's Decision

35. In making the application for legal representation, the Firm relied on the reasons submitted for the making of disclosure. The Tribunal, having found that disclosure of

the documents did not advance the Principle of open justice, had rejected those reasons. For the same reasons, the Tribunal rejected those submissions as regards representation at the substantive hearing for the witnesses.

36. The application was, to a large extent, predicated on the potential reputational damage that the Firm might suffer as a result of questions to be asked in cross-examination. For the reasons detailed above, the Tribunal did not accept those submissions.

37. The Tribunal noted that the application referred to the witnesses 'giving instructions' to counsel that it would not be able to give to the SRA. The suggestion that instructions would be given to counsel during the course of a hearing in which they witnesses appeared as witnesses and not parties evidenced, the Tribunal found, the Firm's misapprehension of the role that the witnesses were to play in the proceedings before the Tribunal. The Tribunal did not see, (and it was not fully particularised) how it could be assisted in this case by the witnesses being separately represented.

38. The Tribunal found that none of the reasons advanced for the Firm's witnesses having their own representation taking an active part in the proceedings were meritorious. Accordingly, the application for legal representation was refused. It was, of course, open for the Firm to have its own lawyers in attendance at the proceedings as observers.

39. For the reasons detailed, both applications were refused.

Dated this 13th day of April 2023
On behalf of the Tribunal

A E Banks
Chair