

Case No: 12612-2024

BEFORE THE SOLICITORS DISCIPLINARY TRIBUNAL
IN THE MATTER OF THE SOLICITORS ACT 1974 (as amended)
BETWEEN:

SOLICITORS REGULATION AUTHORITY LIMITED

Applicant

and

ASHLEY SIMON HURST

Respondent

APPLICANT'S REPLY TO THE RESPONDENT'S ANSWER

1. The Applicant seeks to confine its Reply to matters that are judged to be of possible assistance to the Tribunal. The SRA's case is set out in the Rule 12 Statement and was further clarified in correspondence at the request of the Respondent. It is only repeated below, insofar as is judged necessary.
2. The Respondent's Answer is lengthy and, in substantial parts, irrelevant to the gravamen of the Application, which is that the Respondent sought to impose duties of confidence on Dan Neidle in relation to the threatened defamation claim without any properly arguable basis.

The Implicit Threat

3. Central to this attempt is the implicit threat in the Email ("the Implicit Threat"): *"It is up to you whether you respond to this email but you are not entitled to publish it or refer to it other than for the purposes of seeking legal advice. That would be a serious matter as you know"*. The "Without Prejudice" and "Confidential" labelling was relied on to justify the Implicit Threat.

4. Paragraph 70(1) of the Answer avers that the “*reference to it being a “serious matter” simply indicated the importance attached by Mr Zahawi to the without prejudice (and confidential) nature of the correspondence and that it would be a serious matter for Mr Neidle (a former partner of a city law firm) to publish it; the reference had no menacing tone or imputation of any threat*”. This is circular. Why it would be a “*serious matter*” for Mr Neidle to publish is not explained. Further, the instruction was not to publish “*or refer to it*”.
5. If a solicitor informs a potential defendant that they are not entitled to publish or refer to an email and that to do so would be a serious matter that plainly contains an implicit threat of legal action should they do so.

Alleged common practice

6. The Respondent suggests at paragraph 3(3) that heading a defamation letter of claim “Private & Confidential” is common practice. However, the Respondent went well beyond this. There are a number of highly unusual features of the Respondent’s approach.
 - 6.1. As previously stated, the Email contained the Implicit Threat. This did not merely relate to publishing the Email. It sought to prevent Mr Neidle from referring to it, thereby keeping the defamation claim a secret. A threat of this kind appears to be unprecedented in communications giving notification of a defamation claim in the absence of any suggestion that the claim also involves confidential or private information. There was no such suggestion in the Email, nor could there have been. The information relating to the YouGov shareholding and related tax liability had already been put in the public domain by Mr Zahawi;
 - 6.2. The notification of the defamation claim was made in a communication headed “without prejudice”. The extract from *Gatley on Libel and Slander* relied on by the Respondent includes: *For obvious reasons, the letter should not be headed “without prejudice”*;
 - 6.3. The Respondent’s client was the Chancellor of Exchequer and potential Prime Minister whose tax affairs were coming under increased scrutiny

as a result of Mr Neidle's exposure. Defamation claims brought by very senior politicians are highly unusual. The Respondent's correspondence was seeking to prevent Mr Neidle from disclosing to anyone other than a legal representative that Mr Zahawi was threatening to sue him for defamation. The defamation claim was plainly a matter of legitimate public interest, irrespective of whether the narrow allegation of dishonesty selected for complaint was true or false.

7. In any event, the attempt to keep the defamation claim secret was purely tactical. As the Respondent must have been aware, there was no prospect of Mr Zahawi taking any action if Mr Neidle published or referred to the Email. This is evidenced by the Respondent's unconvincing assertion in paragraph 70(1), cited above, that the Implicit Threat was not a threat.

Alleged change of position – Without prejudice labelling

8. The Answer contains repeated assertions of a change of position by the Applicant and attempts to make points about what is not alleged in the Rule 12 Statement. The gravamen identified above has been consistent from the outset of Mr Neidle's first contact with the SRA (see **X123**). Particularisation of why there is no arguable basis to impose duties of confidence on Mr Neidle is provided in the Rule 12 Statement, Capsticks' letter of 2 July 2024 (described as the Clarification Letter, made in answer to questions raised by the Respondent in relation to the Rule 12 Statement), and its letter of 21 June 2024 (in response to the Respondent's application for a preliminary issue determination as to whether there were arguably such duties).
9. The Clarification Letter explained why it was not necessary for the Applicant to allege that the Email was wrongly headed "Without Prejudice". The impropriety in the present case arises from the reliance on the "Without Prejudice" and "Private & Confidential" labelling to justify the Implicit Threat and to seek to prevent Mr Neidle from disclosing the threatened defamation claim.
10. As explained in the Clarification Letter, the Applicant accepts that it is possible for without prejudice communications to give rise to duties of confidence on the part of the recipient. However, there is no properly arguable basis that labelling

the Email without prejudice meant that Mr Neidle was “*not entitled to publish it or refer to it other than for the purposes of seeking legal advice*”. There are two fundamental objections to the reliance on without prejudice labelling for this purpose:

- 10.1. It is clear that the jurisprudential basis of any duties of confidence in relation to without prejudice communications is the express or implied agreement of the parties to participate in such communications. Mr Neidle’s unequivocal statement that he would not receive such communications [X897] is fatal to the imposition of any duties of confidence on him arising from the Respondent’s decision to so label the Email;
 - 10.2. In any event, it is the SRA’s contention that any such duties of confidence have never (and could not) extend to the fact that the claimant was advancing a claim against the defendant. The words “*or refer to it*” sought to prevent Mr Neidle even from referring to the fact of the claim.
11. The Clarification Letter also indicated that if the Respondent asserted in the Answer that the Email was correctly labelled “without prejudice” it was likely that this would be opposed in the Reply. The Applicant therefore advances the submissions below as to why there was no proper basis for the “without prejudice” labelling. This is without prejudice to its primary submission that the labelling was incapable of giving rise to any duties of confidence on Mr Neidle.
- 11.1. The proper purpose of “without prejudice” labelling is to prevent communications relating to settlement being admissible against the maker in subsequent proceedings. The labelling of the Email was not motivated by a concern that it could be used against Mr Zahawi in subsequent defamation proceedings and/or be seen as a sign of weakness. It was motivated by Mr Zahawi’s desire that his threatened defamation claim should be kept secret;
 - 11.2. The email did not contain any concession or other material that could be prejudicial to Mr Zahawi in any subsequent litigation. There are suggestions in the Answer that the Email could be seen as a sign of

weakness and/or undermine Mr Zahawi's subsequent position, presumably because he was willing to accept a retraction and no damages. Defamation letters of claim commonly state (on an open basis) that the claimant will not seek any damages if the defendant promptly retracts. This is particularly so with wealthy public figures, where the expectation is that they should seek to avoid bringing a defamation claim unless strictly necessary and they do not need the money. The making of such an offer is generally to the claimant's advantage and the defendant's disadvantage from the perspective of the court and public opinion.

11.3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Labelling the Letter "Private and Confidential"

12. Paragraph 31 of the Answer avers that the "SRA no longer pursues the allegation that the Letter was improperly labelled "private"". In this context, "private" does not add anything to "confidential". Paragraph 31 does not identify any difference. If there is no arguable duty of confidence in relation to the Letter, there can be no arguable expectation of privacy. If the Respondent now wishes to contend for a discrete basis in misuse of private information to justify the attempt to prevent disclosure of the Letter (having not done so in lengthy correspondence prior to the Rule 12 Statement) he should particularise it forthwith.

Dan Neidle

13. Paragraph 3(4) of the Answer avers that there is no suggestion that Mr Neidle was in fact oppressed or intimidated or taken advantage of. It is not necessary for the SRA to demonstrate any impact on Mr Neidle. Without prejudice to this, Mr Neidle regarded the Implicit Threat to be a threat. He took it seriously as it referred to a "serious matter" (thereby implying serious consequences), was being made by a reputable law firm on behalf of a very powerful and wealthy

client and Mr Neidle had no legal expertise in the relevant area. It caused him concern for a time until he became convinced that it was a bluff.

Mr Zahawi's "personal tax affairs"

14. Paragraphs 41 and 43 of the Answer appear to suggest that the fact that the subject matter of the defamation claim related to Mr Zahawi's "personal tax affairs" is a sufficient basis for confidentiality in the Email and Letter. The Applicant does not take issue with the statements of principle in the relevant authorities relied on by the Respondent to the effect that financial and tax information may well be confidential. However, all the information in the Email and Letter about Mr Zahawi's "personal tax affairs" had already been put into the public domain by him. Accordingly, there was no basis on which it could be regarded as confidential.
15. Paragraph 50 of the Rule 12 Statement averred: *"It is common ground that there is nothing confidential in the information relating to Mr Zahawi's tax affairs"*. This is denied at paragraph 59(2) of the Answer and was denied in the Respondent's application for the determination of a preliminary issue. But there is no particularisation in the Answer, or elsewhere, as to what information about the "tax affairs" in the Email or Letter was not already in the public domain. As was stated in the Clarification Letter: *"References to generalised categories of confidential information in the case law do not assist when the relevant information is already in the public domain."*

Conclusion

16. It is clear (and must have been known to the Respondent at the time) that the reason for the attempt to prevent disclosure of the threatened defamation claim was that it would otherwise be reported on and Mr Zahawi judged that such reporting was likely to be politically and reputationally damaging to him. That may have been a realistic concern. But the threatened defamation claim did not involve any confidential information. Any perceived political or reputational

damage to Mr Zahawi from publicity given to it was incapable of giving rise to a legal basis to make Mr Neidle keep it secret.

David Price KC
Capsticks Solicitors LLP
9 September 2024