Neutral Citation Number: [2009] EWCA Civ 443

Case No: A2/2009/0206

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT QUEEN'S BENCH DIVISON
Mr Justice Eady
[2009] EWHC 39 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2009

Before:

LORD JUSTICE HUGHES
LORD JUSTICE TOULSON
and
LORD JUSTICE SULLIVAN

- -

Between:

(1) MICHAEL NAPIER **(2) IRWIN MITCHELL**	**Appellants/ Claimants**
- and -	
PRESSDRAM LIMITED	**Respondent /Defendant**

- -
- -

Mr James Price QC (instructed by **Messrs Carter-Ruck**) for the **Appellants/Claimants**
Ms Heather Rogers QC and Anthony Hudson (instructed by **Messrs Davenport Lyons**) for the **Respondent/Defendant**

Hearing date: 26 March 2009

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Approved Judgment

Lord Justice Toulson :

1. This is an appeal from the refusal by Eady J to grant an injunction preventing Private Eye from publishing information (a) about the outcome of a complaint made to the Law Society against the appellants by a former client and (b) about an Ombudsman's report regarding the Law Society's handling of the complaint. The injunction was sought on grounds of confidentiality.

2. Eady J held that there was no duty of confidentiality owed to the appellants by either the complainant or the publishers of Private Eye, and therefore the appellants had not satisfied the test for an interim restraint order provided by s12(3) of the Human Rights Act 1998, as interpreted by the House of Lords in *Cream Holdings Limited v Banerjee* [2004] UKHL 44, [2005] 1 AC 253. Eady J also said, obiter, that he would probably not have held that any duty of confidentiality (if otherwise established) would have been defeated by a public interest defence. The appellants seek to challenge the judge's decision on the primary issue. The respondent has served a notice seeking to uphold his judgment on the additional ground of public interest.

3. The application for permission to appeal was adjourned by Richards LJ to an oral hearing on notice to the respondent, with the appeal to follow immediately if permission were granted. He also ordered that anonymity was to be preserved in the listing of the case, and that the hearing was to start as a hearing in private. The matter proceeded before us as if it were a full appeal hearing and I would formally grant permission to appeal. After some discussion we were persuaded by counsel for both parties that the entire hearing of the appeal should be in private on the ground that there was otherwise a real risk that the purpose of the appeal would be defeated before it was concluded.

The complaint against the solicitor

4. The first appellant is a solicitor and the senior partner of the second appellant. I will refer to them, as did the judge, as the solicitor and the firm. The complainant is a former Hong Kong barrister.

5. I take the following summary of the background from the judgment of Eady J:

> "3. The facts giving rise to the complaints which have been made about the solicitor and the firm go back quite a long way and are fairly complex. It is nonetheless necessary to attempt to summarise them so that the context of the present application can be properly understood. There was litigation in Hong Kong in the early 1990s, in which two subsidiaries of the Exxon Corporation sued the complainant, a former lawyer within that jurisdiction, over allegations of breach of confidence by him in respect of information obtained when acting on their behalf in his professional capacity. They had dispensed with his services and he was later suspended by the relevant professional body.

> 4. The solicitor and his firm came into the matter in 1996 when they acted for the complainant, on a pro bono basis, for the purposes of an appeal to the Privy Council against a judgment of the Hong Kong Court of Appeal. That appeal succeeded, as a result of which the matter was remitted to Hong Kong for reconsideration. Although it is not relevant for present purposes, the reconsideration by the Court of Appeal led to a similar outcome as on the first occasion.
>
> 5. The complaint against the claimants was not made until late 2003. It was based upon the fact that the firm had merged at or around the time of the Privy Council appeal, as a result of which some work was taken on for Esso Petroleum UK, which is another subsidiary of the Exxon Corporation (as were the corporations which had sued the complainant in Hong Kong). The work done in England for Esso Petroleum UK was carried out by a different partner."

6. Principle 15.01 of the Guide to the Professional Conduct of Solicitors, as it then was, provided:

> "A solicitor or a firm of solicitors should not accept instructions to act for two or more clients where there is a conflict or a significant risk of conflict between the interests of those clients."

7. The essence of the complainant's initial complaint was that the solicitor acted for him in circumstances where his interest conflicted with those of another client of the firm. He alleged that the firm's relationship with Esso led to the solicitor conducting the complainant's case in a way which was detrimental to the complainant and beneficial to Exxon and its wholly owned subsidiaries who were in litigation with him. The essence of the solicitor's defence was that there was no conflict of interest or significant risk of a conflict of interest. In response, the complainant alleged that this was a false and deceitful defence. He also made other allegations of dishonesty against the solicitor and the firm.

Outcome of the complaint

8. On 20 January 2005 an adjudication panel of the Law Society decided on consideration of the papers that there had been a breach of principle 15.01, but that there was no real evidence that it had affected the conduct of the complainant's case. It decided that there was insufficient evidence to support any of the remaining allegations which went to the honesty of the solicitor, and it resolved to take no further action in relation to them. It did not consider that the breach of principle 15.01 warranted referral of the solicitor's conduct to the Solicitors Disciplinary Tribunal and it imposed a reprimand for the breach.

9. The solicitor and the complainant both asked for a review of the decision. On 21 July 2005 the appeal panel rejected the solicitor's application. It concluded that, although

there was insufficient evidence of an actual conflict between the interests of Esso UK and the complainant, there was a significant risk of such a conflict. The appeal panel stood over consideration of the complainant's request for a review pending further investigation.

10. On 29 March 2007 the adjudication panel made a further decision rejecting allegations of dishonesty made by the complainant against the solicitor and directed that no further complaints or referrals by the complainant in respect of his retainer of the firm would be entertained. On 28 June 2007 the appeal panel upheld the decision of the adjudication panel and confirmed that no further time or expense would be devoted to the determination of the complainant's concerns about the firm.

11. On 5 July 2007 the complainant wrote a letter of complaint to the Legal Services Ombudsman, appointed under s21 of the Courts and Legal Services Act 1990 ("CLSA 1990"). Under s22(8) of that Act the Ombudsman may arrange for the Scottish Ombudsman to investigate an allegation relating to a complaint made to a professional body in England and Wales. That was done in the present case because the solicitor held a position of prominence in the Law Society, as mentioned below. The functions and powers of the Scottish Legal Services Ombudsman were transferred to the Scottish Legal Complaints Commission ("SLCC") on 1 October 2008.

12. On 11 December 2008 the SLCC issued its report in the form of an opinion, which was highly critical of various aspects of the way in which the Law Society had handled the complaint. It considered that the findings and sanction in respect of the conflict of interest complaint could not be regarded as sufficiently sound. It accepted that the circumstances did not fall within the classic formulation of a conflict of interest, because the matters in which the firm acted for Esso were unrelated to the litigation in which it acted for the complainant. However, it said that it had difficulty in respect of the panel's conclusion that the breach of the conflict rules was (as the SLCC summarised it) "little more than a technical breach" and considered that this conclusion had been reached without due consideration of all the issues. The nature of the conflict of interest, if there was one, arose because of the nature of the clients involved, the litigation involved and the relative size of the respective clients. It considered that the Law Society had failed to see the complainant's conflict of interest complaint in the round and recommended that the matter be reinvestigated. The SLCC was also critical of the way in which the Law Society dealt with the complainant's allegation of lack of honesty in the solicitor's responses to the Law Society. It made no specific recommendation in relation to that issue, but said that it might require to be revisited in the light of any new evidence in the course of the re-investigation of the conflict of interest complaint. On other aspects of the complaints made by him the SLCC did not consider that there was any need for re-investigation.

13. On 10 March 2009 (after Eady J's judgment) the Solicitors Regulation Authority ("SRA") notified the SLCC and interested parties that it would reconsider what sanction ought to be imposed on the solicitor for having acted in breach of principle 15.01 by acting for the complainant in circumstances where there was a significant risk of a conflict of interest with another client of the firm. It did not propose to reopen the question whether there was a breach of that principle, nor the question whether the breach caused the solicitor to act in a manner contrary to the complainant's interest. In reconsidering the conflict of interest complaint, to the

extent indicated, it would consider whether any further information obtained was such as to demonstrate that the solicitor had given a dishonest response to the complaint. It would not reinvestigate the other aspects of the complaint about which the SLCC had not suggested that there was a need for reconsideration. In reconsidering the sanction for the breach of principle 15.01, the authority would consider whether the original sanction of a reprimand should be maintained, or whether some different (including a lesser) sanction would be appropriate, or whether the matter should be referred to the Solicitors Disciplinary Tribunal.

14. The court was told that the solicitor and the firm have more recently written to the SRA asking that the reconsideration should include the issue whether there was any breach of principle 15.01.

The information sought to be prohibited from publication

15. The appellants seek an order that Private Eye should be prohibited from publishing:

> "1. The fact that the Law Society adjudication panel found that the solicitor acted in breach of Law Society rules on conflict of interests, or the fact that it decided to sanction or reprimand him, or the basis of and reasons for such sanction or reprimand, and the fact that the Law Society appeal panel upheld the findings of the adjudication panel in respect of him.
>
> 2. Any information or other matter which leads or may reasonably lead to the identification of the solicitor or the firm as the subjects of, or as being referred to in, the opinion of the SLCC dated 11 December 2008."

Basis of the claim

16. The solicitor relies on the court's equitable jurisdiction to prevent the misuse of confidential information. In support of the argument that the information should be regarded as confidential, reliance is placed on the statutory framework (past and present) governing or affecting the processes for the professional supervision and disciplining of solicitors, but no claim is made that the solicitor was owed an express statutory duty of confidentiality. Reference was made to article 8 of the ECHR in the claim form but it does not appear to have formed part of the argument before Eady J. Reference was also made to it in this court, but that was in response to Private Eye's argument about public interest.

17. Mr Price QC argued that the complainant was under an equitable obligation to treat the outcome of the Law Society investigation as confidential between himself, the respondent and the Law Society for the following four reasons:

> 1. The procedure which led to it was conducted on a private and confidential basis.
>
> 2. The scheme established by the Law Society presupposed that, and was unworkable unless, the entire proceedings and

the outcome were treated by the parties and (subject to a qualification) by the Law Society as confidential. The complainant had notice of its confidentiality because it should have been obvious to him (if necessary after taking legal advice); and it was brought to his attention; and he was certainly aware of it by the time of the application to prevent publication. The qualification to the innate confidentiality of the scheme was that the Law Society might use the information received as a basis for instituting public proceedings against the solicitor before the Solicitors Disciplinary Tribunal and at its discretion might publish the panel's adjudication (although in practice before 1 January 2008 the Law Society did not publish internal sanctions, but treated them as confidential).

3. Section 44D of the Solicitors Act 1974 (headed "Disciplinary powers of the [Law] Society"), which was inserted by the Legal Services Act 2007, s177, sch 16, but is not yet in force, presupposes that Law Society investigations have always been confidential, subject to the Law Society's power to refer the matter to a public tribunal and at its discretion to publish once the matter is finally concluded.

4. The provisions relating to the Legal Services Ombudsman in the CLSA 1990, s21 and following, allow very limited powers of publication to the Ombudsman or to the Lord Chancellor, by contrast with other Ombudsman's schemes, which often provide for wider publication. The restricted publication provisions in the case of the Legal Services Ombudsman Scheme imply Parliamentary recognition that wider publication would destroy or impair the confidentiality attaching to underlying Law Society investigations.

18. Mr Price argued that the complainant was under an equitable obligation to treat the SLCC's opinion as confidential between himself, the solicitor, the Law Society and the SLCC for two reasons:

1. If the complainant owed a duty of confidentiality in relation to the Law Society adjudication, he could not lawfully sidestep that duty by revealing the adjudication through the medium of the SLCC's opinion.

2. If the Ombudsman scheme was to work as Parliament intended, those to whom the report was sent must owe a duty of confidentiality not to publish it of their own initiative.

19. The first of those arguments is dependant on the existence of a duty of confidentiality in relation to the Law Society adjudication, but the second is not, and Mr Price

submitted that Private Eye should be restrained from publishing anything which would identify the solicitor as being referred to in the SLCC's opinion, even if it was free to publish the decision of the Law Society's adjudication panel.

20. In support of his arguments Mr Price made some general points about the nature of solicitors' disciplinary investigations. He submitted that such investigations generally have to be in private, up to the point at which the matter proceeds to a public hearing (if there is sufficient cause for a public hearing), in order to protect the integrity of the investigation and the interests of persons under investigation. There is therefore a need for some duty of confidentiality. In considering the scope of the duty, it was important to consider the regulatory regime as a whole. This comprised a number of stages or possible stages; the making of a complaint, its investigation, its consideration by a panel in private, a hearing before a public tribunal, a reference to the Ombudsman, an application for judicial review, an appeal and possibly the institution of proceedings at Strasbourg. The regime must be internally coherent, and confidentiality at an earlier stage should not be compromised in a way that would pre-empt a decision whether or not there should be publication for which provision is made at a later stage.

The Law Society scheme

21. The Law Society was founded in 1825 and acquired its first royal charter in 1831. It is not a statutory body but has been given statutory powers for the regulation of solicitors through successive Acts of Parliament. Section 31 of the Solicitors Act 1974 empowers the Law Society to make rules for regulating the professional practice, conduct and discipline of solictors. That provides the statutory foundation for the issuing of practice rules or codes of conduct.

22. The Solicitors Act 1919 granted powers to the Disciplinary Committee of the Law Society to strike solicitors from the Roll or to impose other penalties. That committee was not a committee of the Council of the Law Society but was a body whose members were appointed by the Master of the Rolls. It was replaced under the Solicitors Act 1974 by the Solicitors Disciplinary Tribunal. Its members continue to be appointed by the Master of the Rolls and it is entirely independent of the Law Society, although it is funded by the Law Society. By contrast with the Law Society's wide powers of regulation, until the Legal Services Act 2007 it had no statutory powers to impose disciplinary sanctions on solicitors. But for the last 40 years, and possibly much longer, the Law Society has operated an extra-statutory disciplinary process, which has gone through changes over time.

23. At the time when the complainant made his complaint and at the time of the panel adjudication, such complaints were handled by the Office for the Supervision of Solicitors ("OSS"), which was part of the Law Society but was set up so as to operate independently of the Law Society's other functions. In January 2006 the Law Society established in place of the OSS a body called the Law Society Regulation Board, which changed its name in January 2007 to the SRA. Like the OSS, the SRA is a branch of the Law Society but set up so as to operate independently. It has long been recognised that the Law Society is a public body and that the operation of its extra-statutory scheme for dealing with complaints against solicitors is subject to judicial review.

24. In *White v OSS* (unreported, 17 December 2001) Lightman J was critical of the absence of any document properly explaining the scheme for the benefit of interested parties. He said :

> "These proceedings have revealed that there is no single document setting out the procedure to be followed on the investigation and determination of such complaints against solicitors. There are merely a series of information sheets supplied by the Law Society to the parties at the various stages of the proceedings. The parties (and most particularly solicitors) are accordingly unable to find any statement in a single document of the procedures or any guidance in this regard in any authoritative Law Society publication or in any text book (e.g. Cordery on Solicitors). This lacuna is most unfortunate…"

25. When the complainant made his complaint in the present case there was still no official Law Society publication explaining the scheme, but the following description of the OSS appeared in Cordery from May 2004:

> "OSS is responsible for decisions:
>
> (a) to institute proceedings before the Solicitors' Disciplinary Tribunal;
>
> …
>
> (c) to resolve that a solicitor has not provided a sufficient and satisfactory explanation in answer to a complaint of misconduct …
>
> …
>
> Further, less formal decisions may be made for which there is no express statutory authority or requirement, but consistent with the general duties of OSS to deal with the conduct of solicitors. These include a requirement of a solicitor to … co-operate with the OSS in the investigation of matters of complaint, whether or not such a requirement is linked with an indication that disciplinary proceedings will follow in the absence of co-operation, and the imposition of a variety of disciplinary sanctions falling short of the institution of proceedings before the Disciplinary Tribunal…
>
> The current practice, on an ascending scale of disapproval, is to find a breach, express regret but take no further action; to express disapproval of the solicitor's conduct; to reprimand the solicitor or to reprimand severely; the last being one step short of a decision to refer the matter to the Solicitors Disciplinary Tribunal. None of these "sanctions" have any statutory force, nor indeed any consequences of themselves. A reprimand is no more and no less than an expression of the opinion of the solicitor's professional body, acting through the appropriate committee, that he was at fault in the context of the matter the subject of complaint. Reprimands receive no

> publicity and are known only to the parties to the complaint, the solicitor, his senior partner if appropriate, and the complainant or complainants…
>
> As between OSS and the solicitor, the imposition of a reprimand cleans the slate, and no further action of a disciplinary nature will generally flow from it, unless expressed to be without prejudice to any further action which may be justified in the light of continuing enquiries. However, if the solicitor rejects the reprimand on the basis of a disputed version of the facts, then it is generally regarded that the only way in which such a dispute can be resolved is by the withdrawal of the reprimand and the substitution of a decision that an application be made to the Solicitors Disciplinary Tribunal which will hear oral evidence. …
>
> With two exceptions all the first instance decisions are taken by adjudicators. The exceptions are…complaints made against members of the Council or Adjudicating Panel. First instance decisions, other than a decision to intervene, may be appealed (termed an application for a review) to the Adjudication Panel, which will be differently constituted if the Panel made the first instance decision…
>
> Neither the adjudicators nor the panels generally allow oral hearings, as opposed to the full opportunity to make written submissions, although they have a discretion to do so in appropriate cases…
>
> …
>
> Should a complaint be made to OSS concerning the conduct of a member of the Council of the Law Society, any partner in a council member's firm or any other solicitor where it is perceived that he may have an official or other close contact with the Law Society it is the current policy, in order to ensure that the investigation is seen to be conducted impartially, to instruct a solicitor independent of the Society to conduct the enquiry and report direct to the relevant adjudicator or panel."

What the complainant was told about the scheme

26. In this case the OSS instructed an independent solicitor to investigate the complaint because the solicitor was a member of the Council and a former president of the Law Society. During the protracted course of the investigation there was a change of independent solicitor. On 9 September 2004 the succeeding independent solicitor sent his report to the Law Society and informed the complainant that he had done so. On 10 September 2004 the complainant replied:

> "When I spoke with [the first independent solicitor] at our meeting earlier this year, he stated that in due course I would be entitled to receive a copy of the report. While I cannot recall his precise words, the effect was that as the complainant herein, I had a right to it so that I could be fully informed about any course taken. At that stage I was unsure if the investigation was "secret" or conducted openly in so far as I was concerned; but [the first independent solicitor] seemed to be in no doubt.

> That was why I contacted the OSS at Leamington Spa last month asking for a copy of the OSS enquiry procedural rules. I was told that there were none."

27. On 4 October 2004 the caseworker dealing with the matter at the OSS sent a copy of the report to the complainant with a letter which stated:

> "The conclusion in the report is simply a suggestion. The decision will be made by the Adjudication Panel.
>
> Both you and the solicitor now have 28 days from the date of this letter to send me your comments if you wish to…
>
> …
>
> Our investigations are confidential and we would prefer you not to disclose the contents of the report to anyone else.
>
> I will write to tell you the decision as soon as the decision is known to me."

28. On 5 November 2004 the complainant wrote to the caseworker reminding him of previous requests including

> "a copy of the rules governing this complaint process (for which I now make my fourth request) and my request for a public hearing in which oral evidence will be given."

His letter concluded:

> "As you will not provide me with any rules, I assume from your letter that you have put my complaint before an Adjudication Panel for a secret disposal of the matter. If so, by what Law Society rule or regulation have you done this?"

29. This elicited the following reply, dated 10 November 2004:

> "I will take the opportunity to explain that an Adjudication Panel is not a secret meeting. The outcome of the Panel is made known to the parties. The Adjudication Panel have before it the relevant information to enable them to consider the matter. If they feel that an oral hearing is required, they will not decide on the matter and request that the meeting be reconvened to hear oral evidence. This is not an opportunity to revisit the whole matter but to consider the issues of misconduct alone. However, Panel meetings do not generally take place orally, owing to the fact that there are a large number of complaints that require consideration by a Panel and they are too time consuming to be considered at oral hearings.
>
> You have requested rules governing this complaint process. I am not able to provide a copy of any rules as they are internal

documents only. However I am able to explain a little of how the process works.

As your complaint was about a former Law Society President, this office instructed an independent solicitor who was experienced in conduct matters to investigate your complaint. This was to avoid any inference that this office could be biased towards the subject solicitor…Once [his] report was received by this office, who have no involvement in the investigation of the matter, it was referred to me as a caseworker. My role was simply to place all the documents in the relevant order, number them according to the report prepared and disclose the report to the relevant parties.

Normally when a report is disclosed, the office gives 14 days for representations on it. However, owing to the number of additional papers attached to the report, I allowed 28 days. Once those representations are received, they are simultaneously copied to both parties for information only. The matter is then referred to be listed for consideration by the adjudication panel. The decision of the adjudication panel is disclosed once it has been received. The parties will then have a further period of review if they are not satisfied with the outcome. If a review is requested, grounds for review are disclosed to the other party for comments and a short report prepared for consideration by a further Panel. Once that decision is known, our involvement in the matter ends. The person bringing the complaint may then be entitled to refer the matter to the legal services ombudsman, if they are still not satisfied with our decision.

This is an outline of how your complaint will be considered. At all times, responses and documents are disclosed to the relevant parties. The matter has not therefore been sent for "a secret disposal" as suggested in your letter. [The independent solicitor] suggested that the matter be considered and that an internal disciplinary sanction be imposed. This office has the power to discipline solicitors without the need for a hearing before the Solicitors Disciplinary Tribunal. [He] was not suggesting that the matter be disposed of in secret but that a sanction from this office may be more appropriate than the time and cost of placing the matter before the Tribunal. A reprimand from this office has the same effect as that of a reprimand from the Tribunal.

I hope that this letter adequately explains our procedures and the course that will be taken to deal with this matter. I also hope that it allays your fears that the matter will be disposed of "in secret" as at all times disclosure is made."

30. This was the only letter received by the complainant from the Law Society explaining how the complaint process operated and what was its effect. It will be noted that there is a significant difference between the commentary in Cordery to the effect that an internal reprimand was nothing more than an expression of an opinion by the Law Society through an appropriate committee, the result of which was to "clean the slate", and the caseworker's statement that a reprimand from the OSS had the same effect as a reprimand from the Solicitors Disciplinary Tribunal. It does not affect the outcome of this appeal, but as a matter of accuracy the Law Society has confirmed, and counsel for both parties accept, that the caseworker was wrong in saying that there was no difference in effect between an extra-statutory reprimand and a reprimand by the Solicitors Disciplinary Tribunal. Apart from any questions of publicity, a reprimand by the Solicitors Disciplinary Tribunal could lead to the imposition of conditions on the solicitor's practising certificate which an informal reprimand could not.

31. Counsels' arguments have highlighted various other features of the correspondence on which one or other party relies.

32. First, letters from the OSS and the independent solicitor to the complainant were routinely headed "Private and Confidential".

33. Secondly, the details of the adjudication panel's determination were supplied by the OSS to the complainant in a letter dated 21 February 2005 which stated (as had the earlier letter to him enclosing the independent solicitor's report) "Our investigations are confidential and we would prefer you not to disclose the contents of this letter to anyone else".

34. Thirdly, in December 2005 the firm complained to the complainant and to the Law Society that he had disclosed the result of his complaint to the press. The Law Society asked the independent solicitor to take the matter up with the complainant. On 13 January 2006 the independent solicitor wrote to him:

> "…I believe that as a professional man, you should be aware of and recognise that complaints dealt with by the Law Society are by their very nature confidential with regard to the complaint process as is the decision by an Adjudicator or an Adjudication Panel of the Law Society.
>
> The reasons for this are self evident, and if it is the case that you have been leaking confidential information to the press…then you are in clear breach of that duty of confidentiality.
>
> The investigation being conducted by the Law Society in your particular case is complicated, and involves events which involved [sic] many years ago. Breaches of a confidential duty you owe with regard to the investigation could result in the investigation taking longer than otherwise would be the case, and could result in an inherent unfairness for the parties concerned."

35. The complainant replied on 2 February 2006, saying:

> "There are no rules either about press coverage or "confidentiality"
>
> On one occasion …the OSS commented in a letter to me "*we would prefer you to keep this confidential"*. The import was plain; confidentiality was no more than optional.
>
> …
>
> For these reasons, my respectful response to you is that;
>
> (a) There were never any Rules governing this investigation. If any did exist, I was refused access to them…
>
> (b) You have no legal authority to impose confidentiality in 2006 when it was at best no more than "optional" in 2004 and 2005." (original emphasis)

36. In further correspondence the independent solicitor continued to assert, and the complainant continued to deny, that the complainant owed a duty to treat the adjudication as confidential.

Disciplinary powers of Law Society introduced by the Legal Services Act 2007

37. The Legal Services Act 2007 ("LSA 2007") followed a review by Sir David Clementi. Part 6 of the Act introduced new provisions for dealing with legal complaints. At the apex of the system is the Legal Services Board (to which the solicitor was appointed as a member in July 2008). The Act gives new disciplinary powers to the Law Society by inserting ss44D and 44E into the Solicitors Act 1974. These provisions are not yet in force and have no direct relevance in the present case. I refer to them because of an argument which Mr Price based on them.

38. Under the new scheme the Law Society will have statutory power, if satisfied that a solicitor has failed to comply with a requirement arising under the Solicitors Act or under rules made by the Law Society or has been guilty of professional misconduct, to issue a written rebuke or impose a fine. In such a case it may also publish details of the action which it has taken, if it considers it to be in the public interest to do so. Any decision by the Law Society to issue a rebuke or impose a penalty or publish details of the action taken by it is subject to appeal to the Solicitors Disciplinary Tribunal, and the Law Society may not publish such details during the period within which an appeal may be brought or until any appeal has been determined or withdrawn.

Legal Services Ombudsman

39. The essential function of the Legal Services Ombudsman is to investigate allegations relating to the way in which a legal professional body has dealt with complaints made to it about the conduct of its members or their employees (CLSA 1990 s22). CLSA s23 provides:

> "(1). Where the Legal Services Ombudsman has completed an investigation under this Act he shall send a written report of his conclusions to –
>
> (a) the person making the allegation;
>
> (b) the person with respect to whom the complaint was made;
>
> (c) any other person with respect to whom the Ombudsman makes a recommendation under subsection (2); and
>
> (d) the professional body concerned.
>
> (2) In reporting his conclusions, the Ombudsman may recommend –
>
> (a) that the complaint be reconsidered by the professional body concerned;
>
> …
>
> (5) For the purposes of the law of defamation the publication of any report of the Ombudsman under this section and any publicity given under subsection (9) shall be absolutely privileged.
>
> …
>
> (8) Any person who fails to comply (whether wholly or in part) with a recommendation under subsection (2) shall publicise that failure, and the reasons for it, in such manner as the Ombudsman may specify.
>
> (9) Where a person is required by subsection (8) to publicise any failure, the Ombudsman may take such steps as he considers reasonable to publicise that failure if-
>
> (a) [within 3 months] that person has not complied with subsection (8); or
>
> (b) the Ombudsman has reasonable cause for believing that that person will not comply with subsection (8) before the end of that period."

40. The SLCC sent a copy of its opinion to the complainant on 12 December 2008. Neither the opinion nor the covering letter made any reference to confidentiality. On 12 December 2008 the complainant emailed the SLCC expressing the hope that "no one threatens to gag the Opinion". The SLCC's complaints investigator replied by email saying:

> "As regards gagging of the Opinion, as the Opinion is now issued there is very little – if anything – anyone could do to gag the Opinion. You are entitled to use it as you see fit and I am

> not aware of any limitations placed upon recipients as to how they might use the Opinion."

Discussion

41. I begin with the question whether the complainant owed a duty to the solicitor not to reveal to others the fact that the adjudication panel found that the solicitor acted in breach of the Law Society's conflict of interest rules and decided to reprimand him, or the fact that its findings were upheld by the appeal panel.

42. The answer to that question depends on the application of simple principles. For a duty of confidentiality to be owed (other than under a contract or statute), the information in question must be of a nature and obtained in circumstances such that any reasonable person in the position of the recipient ought to recognise that it should be treated as confidential. As Cross J observed in *Printers and Finishers Limited v Holloway* [1965] RPC 239, 256, the law would defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary person. Freedom to report the truth is a precious thing both for the liberty of the individual (the libertarian principle) and for the sake of wider society (the democratic principle), and it would be unduly eroded if the law of confidentiality were to prevent a person from reporting facts which a reasonable person in his position would not perceive to be confidential.

43. It is important to be clear about the nature of the information with which this appeal is concerned. It is possible to envisage cases where a solicitor might disclose information of an intrinsically private nature (for example, relating to his health) in response to a complaint made to the Law Society by a client, and to which reference might be mentioned in the adjudication. But this is not such a case and it is not necessary to consider the issues which might arise in such a case.

44. The subject matter underlying the adjudication was nothing private to the solicitor. The subject matter was the conduct of the solicitor in relation to the complainant, about which the complainant was free (subject to the law of defamation) to broadcast his grounds of complaint as widely as he wished. He was similarly free to broadcast the fact that he had complained about the solicitor to the Law Society. The critical issue is whether he was entitled also to reveal to others the fact that the Law Society found in his favour on part of his complaint and issued a reprimand to the solicitor.

45. The solicitor has to show why any reasonable person in the position of the complainant ought to have regarded that fact as something which he was bound to treat as confidential. It cannot be because reporting the decision would involve the disclosure of underlying subject matter which was itself intrinsically confidential, for reasons already stated. The case made on behalf of the solicitor is that the duty of confidentiality arose because of the *nature of the process* rather than because of the *nature of the underlying subject matter* or *the nature of anything disclosed in the course of the Law Society investigation.* I will come to Mr Price's four arguments referred to in para 17 but begin by looking at the matter on a broader basis.

46. It is possible for parties to agree on a method of settling differences, or attempting to settle differences, which is to be treated as confidential by all concerned. A classic example is arbitration. It has been held that privacy and confidentiality are features

long assumed to be implicit in parties' choice to arbitrate in England (*Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, para 2, per Mance LJ). There are interesting questions about the nature and breadth of obligations of confidence in the context of arbitration proceedings, but they are not of present relevance. The important point is that the duty of confidentiality in that area arises by the parties' choice.

47. I see no analogy between that type of contractual arrangement and the present case.

48. A characteristic of a grievance or dispute resolution procedure chosen by the parties so as to provide confidentiality is that such confidentiality will be respected by all concerned, including the arbitrator or equivalent. In relation to the present scheme it was the practice of the Law Society not to publish its adjudication, but that seems to have been its policy choice rather than because of any appreciation that it owed a legal duty not to do so. In January 2007 the SRA issued a news release announcing that it was proposing to publish findings of misconduct that resulted in a reprimand and inviting comments from the public. It said that it believed that the proposed measures would increase public confidence in the solicitors' profession and the way it is regulated. This accords with the Law Society's perception that it was free to publish the result of any adjudication according to its view of the public interest; it does not accord with an analysis of the scheme as one selected by the interested parties so as to assure confidentiality.

49. More fundamentally, I do not believe that it can be said that the complainant subscribed to a duty to treat the panel adjudication as confidential by his conduct in invoking the Law Society's extra-statutory scheme for investigating complaints against solicitors; and I cannot see any other basis on which any reasonable person in his position would have regarded himself as being under such a duty.

50. The complainant was given little information about the nature of the scheme, despite making enquires of the Law Society. Mr Price submitted that he should, if necessary, have taken legal advice about his obligations of confidentiality. I regard that submission as far fetched. It also makes an unjustified assumption about the nature of the advice which any competent lawyer would, if asked, have given to the complainant. Private Eye filed a witness statement from Mr Ian Ryan, a partner in a firm of solicitors, the majority of whose work for over 10 years has been related to SRA and Solicitors Disciplinary Tribunal matters. In his statement he said:

> "From my knowledge and experience of the Law Society and the SRA, I can confirm that so far as I am aware there was and is no obligation on either a solicitor or a complainant to keep a reprimand imposed by the Law Society or SRA confidential and I am not aware that the Law Society or the SRA had or has any power to prohibit a complainant from disclosing or publicising either the fact that a complaint has been made, or the outcome or any sanction imposed."

51. Eady J received written submissions from the SRA, which commented on Mr Ryan's statement as follows:

> "a. It is correct for Mr Ryan to say…that there are no formal rules or practice directions requiring a complainant to keep information relating to an investigation confidential.
>
> b. It is also correct for him to point out … that the SRA does not in practice seek to enforce any confidentiality.
>
> c. However, the SRA does not accept that it necessarily follows from the above two points that "there was and is no obligation on either a solicitor or a complainant to keep a reprimand imposed by the Law Society or SRA confidential". Instead, the SRA's position is that whether the investigative process and its outcome is in fact confidential depends, on a case by case basis, on whether the relevant information had the necessary quality of confidence about it and was imparted in circumstances importing an obligation of confidence."

52. The last passage is drawn from the judgment of Megarry J in *Coco v A N Clarke (Engineers) Limited* [1969] RPC 41, 47. It is significant that the SRA did not submit that the issue of a reprimand by the Law Society or SRA is, by its nature, a fact which the solicitor and complainant are required to keep confidential, but rather that the question of any duty of confidentiality depends in any particular case on whether the relevant information was of a kind and imparted in circumstances such as to give rise to such an obligation. I repeat that in this case no information has been identified as confidential other than the fact of the adjudication of a breach of the rules and imposition of a reprimand.

53. As I have said (paras 31-36), counsels' arguments highlighted a number of references to confidentiality in the correspondence, about which I should state my conclusions. First, I would not attach significance to the fact that correspondence was headed "Private and Confidential". Many letters are marked in that way when they are intended by the sender to be for the eyes of the person to whom they are addressed, without prior reading by others, but without necessarily intending to limit the use which the receiver may decide to make of them. Secondly, the natural meaning of the statement in the letter to the complainant notifying him of the panel adjudication "Our investigations are confidential and we would prefer you not to disclose the contents of this letter to anyone else" was that it was an expression of a request rather than a requirement that he should not disclose the result of the adjudication to others. Thirdly, the later correspondence between the independent solicitor and the complainant, in which the independent solicitor asserted that an obligation by the complainant to treat the adjudication as confidential, was an expression of legal opinion which is contentious.

54. Mr Price submitted that the fact that the third category of correspondence came after the complainant had been notified of the decisions of the adjudication panel and the appeal panel is immaterial, because it served to put him on notice of his duty of confidentiality prior to the publication which is now sought to be restrained.

55. There is, I think, some confusion in this regard. Mr Price submitted that if A discloses to B information about C, in respect of which C has a right to confidentiality, the fact that B may have received the information in good faith and

without any awareness of the rights of C should not prevent C from requiring B to treat the information as confidential, subject to any defence which B may have, for example, arising from a change of position. I agree with that statement in general terms, but I do not consider it relevant in this case. In this case, the whole claim to confidentiality is based on an assertion about the intrinsically confidential nature of the Law Society scheme. We are not concerned with information in respect of which the solicitor has any other right to assert confidentiality. So we are brought back full circle to considering the nature of the scheme provided by the Law Society, and whether any reasonable person in the position of the complainant ought to have perceived that he was under a duty to the solicitor not to disclose the decision of the adjudication panel to anyone else. If the body responsible for the scheme had wished to impose a duty of confidentiality on complainants and solicitors against whom complaints were made (and assuming for this purpose that it had power to do so), I agree with Eady J that the time for doing so would have been at the outset of the complaint process.

56. I would go further. In investigating the complaint made by the complainant, the Law Society was performing a public function. I cannot see any basis on which it could have imposed on the complainant, involuntarily, a duty not to disclose the outcome of the investigation, even if it had wished to do so. (I stress again, for the avoidance of doubt, that I am not here considering the position where intrinsically confidential information is supplied in the course of such an investigation. I am concerned only with a case where the only suggested basis of confidentiality is the procedural nature of the investigation itself.) I cannot see what right it would have had to do so.

57. In this context I observe that the Solicitors Disciplinary Tribunal has jurisdiction to entertain applications by any person (subject to certain immaterial exceptions), but, according to Cordery (issue 45, para 2057), in practice the overwhelming majority are made on behalf of the SRA. If the complainant had been told that he had a choice whether to make his complaint to the Solicitors Disciplinary Tribunal or to the Law Society, and that if he made it to the tribunal the hearing would almost certainly be in public, but that if he chose the less formal procedure of the Law Society it was a part of that scheme that the entire proceedings, including the result, should be treated as confidential to the interested parties, I could see that in such circumstances an election in favour of the informal process could be said to carry with it the obligation to treat the result as confidential. But he was not presented with an option of that kind, and from the correspondence it would appear highly probable that, if he had been, he would have opted for a public hearing, since he asked the Law Society for a public hearing.

58. I come to Mr Price's four arguments referred to in para 17. I do not accept the first argument that because the investigation was carried out on paper, it followed that the interested parties must treat the adjudication panel's decision as confidential to themselves. Many disciplinary inquiries are carried out in private without it being a necessary requirement that the result of the inquiry should be treated as confidential to the interested parties.

59. Nor do I accept the second argument that the scheme would be unworkable unless the interested parties were required to treat the adjudication panel's decision as confidential to themselves. I do not see why the fact that either party might inform others of the outcome need impair the integrity of the investigation, and I can see

obvious reasons why either party might legitimately wish to inform others of the result.

60. As to potential impairment of the integrity of the process, I note that when the SRA put forward its proposal routinely to publish any decision to reprimand a solicitor, it foresaw no impairment to the integrity of the process but, on the contrary, considered that public confidence would be increased in the solicitors' profession and the way it is regulated.

61. As to legitimate reasons for either of the interested parties wishing to disclose the outcome, one obvious example would be a solicitor against whom highly publicised allegations of misconduct were made by an aggrieved client and which were dismissed after investigation by the Law Society. The solicitor or firm might well wish to clear their name by making the result known. I do not see why any reasonable person in that position would consider himself to be precluded from doing so by a duty of confidentiality owed to the former client, who had made public allegations which had been rejected by an independent body after investigation.

62. That example also deals with Mr Price's argument that confidentiality should be regarded as necessary for the protection of the solicitor under investigation. It would only serve to assist the solicitor if the complaint is found to be justified. If unjustified, the duty would be contrary to the interests of the solicitor. And it is singularly unattractive to argue that confidentiality should be recognised by the law in order to protect the interests of a solicitor against whom an adverse finding has been made. The purpose of the scheme is not to protect the reputations of solicitors against whom adverse findings are made. The purpose of the scheme is to provide a proper means of regulating the profession and maintaining public confidence in it.

63. The third argument is based on the provisions of s44D and 44E of the Solicitors Act 1974. Since they were not in force at the relevant time (and are not yet in force), I do not see how they can properly be used, so to speak retrospectively, as a reason for holding the complainant to have been under the alleged duty of confidentiality to the solicitor. However, I am also not persuaded that the result would have been different if the investigation had been under s44D. A publication of an adjudication by the Law Society authorised under the terms of that section would entitle the Law Society to claim at least qualified privilege, and it is understandable that Parliament should set limits to such publication. As I see it, that has nothing to do with publication by the interested parties. In this regard it is worth noting that s44D and 44E were introduced by the LSA 2007 and that other provisions of the same Act relating to a new Ombudsman scheme (not yet in force) contain restrictions on the information obtained during an investigation under that scheme which may be disclosed and by whom (ss151-152). If Parliament had wished to impose publication restrictions on parties other than the Law Society in relation to Law Society disciplinary scheme introduced by the Act, analogous to those imposed by it as part of the Ombudsman scheme, it would have been expected to do so.

64. The fourth argument relates to the limited powers of publication of the Legal Services Ombudsman under the present Ombudsman scheme. As previously noted, s23(5) creates absolute privilege for any publication made under that section, and it is readily understandable that such publication should be carefully circumscribed. As I see it, there is nothing in that section which implicitly prevents the complainant or the

respondent to the complaint from publishing the Ombudsman's report, but no privilege will attach to such publication. It is still more tenuous to argue, as Mr Price seeks to do, that it is to be inferred from the limited publication powers of the Ombudsman that the fact that the Law Society made an adjudication against the solicitor, and issued a reprimand, is itself the subject of a duty of confidentiality owed by the complainant to the solicitor.

65. Despite the intricacies and technicalities of the arguments which have been advanced, the essential point in this case is really quite simple. The Law Society established a scheme for investigating complaints against solicitors. It was conducted privately in the sense that it was conducted through correspondence. But the Law Society's caseworker, in his letter dated 10 November 2004, reassured the complainant that the process was not intended to end with a "secret disposal" and that if the solicitor was reprimanded (as the independent solicitor was recommending) this would have the same effect as a reprimand from the Solicitors Disciplinary Tribunal. I can see no arguable basis for considering that any reasonable person in the position of the complainant would have considered himself under a duty to the solicitor not to disclose the outcome of the proceedings to anyone else.

66. The solicitor's evidence is that if he had realised that the result of the adjudication might be publicised by the complainant, he would have applied for judicial review of the adjudication, and that his main reason for not doing so was in order to avoid publicity. That is unfortunate but cannot affect the outcome of the appeal. Whether it might provide a reason for the Administrative Court to entertain an application for judicial review out of time is another question with which we are not concerned.

67. My conclusion about the absence of a duty of confidentiality owed by the complainant to the solicitor in relation to the decision of the adjudication panel means that there was no breach of duty by him in passing the information to Private Eye and it is unnecessary to consider the respondent's notice.

68. I turn finally to the appeal in relation to the SLCC's opinion, which is based on the arguments referred to in para 18. The appellants do not seek to prevent Private Eye from publishing the criticisms made by the SLCC of the Law Society's investigation, but only their identification as the solicitor and firm referred to in the SLCC's opinion. It would be bizarre to impose such a restraint in circumstances where Private Eye is free to report the result of the Law Society investigation which forms the subject of the SLCC's opinion. In any event, I have already considered and rejected the argument based on the Ombudsman's limited publication powers under the CLSA 1990 s23. I would therefore reject both arguments advanced for saying that reporting of the SLCC's opinion should be restricted in the manner suggested.

Conclusion

69. Eady J gave his reasons for refusing the relief claimed with admirable succinctness. I agree with his decision and would dismiss the appeal.

Lord Justice Sullivan:

70. I agree.

Lord Justice Hughes:

71. I also agree.