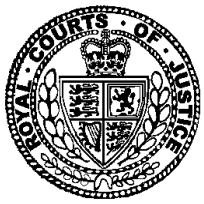

Neutral Citation Number: [2023] EWHC 2151 (Admin)

Case No: CO/151/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/08/2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

SOLICITORS REGULATION AUTHORITY	**Appellant**
- and -	
EDWARD JAMES WILLIAMS	**Respondent**

- -
- -

Rory Dunlop KC (instructed by **Capsticks LLP**) for the **Appellant**
The Respondent did not appear and was not represented

Hearing date: **13 July 2023**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. On 13 July 2023 I heard an appeal by the Appellant, the Solicitors Regulation Authority (SRA), against an order made by the Solicitors Disciplinary Tribunal (SDT) in disciplinary proceedings against Edward Williams (the Respondent). He took no part in the appeal, and nor did the SDT. At the conclusion of the hearing I allowed the appeal and said I would put my reasons in writing. This I now do.

Background

2. The decision under appeal is the SDT's decision refusing to make an anonymity order in respect of several former clients of the Respondent whose property affairs were involved in the disciplinary proceedings against him. The SDT's decision of November 2022 striking off the Respondent was announced orally with summary reasons at the conclusion of the disciplinary hearing against him. A written version of the SDT's decision was provided to the parties the following month. At the SRA's request, the SDT's decision has not yet been published, pending the outcome of this appeal.

3. In summary, the SRA submits that the SDT erred in law in not making the anonymity order which it sought. To publish an unanonymised version of the SDT's decision would lead to a breach of legal professional privilege (LPP) and would be inconsistent with binding authority. The SRA says that in the circumstances of this case, the principle of open justice does not justify or necessitate such an outcome.

4. For the purposes of this appeal I can take the underlying facts comparatively briefly.

5. The Respondent was a solicitor who was admitted to the Roll in 1988. At the time of his misconduct, he was working at a solicitors firm in Yorkshire in the property department (the Firm).

Clients A, B and D

6. Client D instructed the Firm to purchase a property in Property E. The Respondent was the fee-earner dealing with the matter. On 17 November 2014 the Respondent gave an undertaking to Bell & Buxton LLP (who acted for a company with an interest in the property) that its legal costs of £1,200 (inclusive of VAT) would be met by the Firm, whether or not the purchase completed.

7. The purchase did not complete. On 5 August 2015, Bell & Buxton LLP sent a request to the Respondent for £1,000 plus VAT. On 22 September 2016, the Respondent sent an electronic chit to the Firm's accounts department requesting a cheque payable to Bell & Buxton LLP for £1,200. The details provided for this request were, 'Sellers legal costs'. The client account number provided in that request related to Clients A and B, not Client D, however.

8. On 9 August 2016 Clients A and B instructed the Firm to act in the purchase of a property (Property F).

9. On 23 September 2016, an outgoing payment of £1,200 was recorded on the client ledger for Clients A and B. The description for this payment was, 'Sellers legal costs'.

On the same date, the Respondent forwarded to himself an email from Bell & Buxton LLP but changed the title and contents of the email so as to refer to Property F instead of the Property E property.

Clients J, K, L and M

10. Clients J and K owned a leasehold interest in Property I. On 20 October 2015, they instructed the Firm to purchase the freehold interest in Property I from the Person N, who was represented by Brabners LLP.

11. On 14 January 2016, the Respondent e-mailed Client J, attaching a 6 January 2016 letter from chartered surveyors, indicating that the Person N was willing to sell his interest in Property I for £4,500, plus costs and VAT.

12. On 16 January 2017, Client J paid £4,500 by BACS to an HSBC bank account, Sort Code: 40-19-20; and Account Number: 53986268. This HSBC bank account was not controlled by the Firm.

13. The freehold reversion in Property I completed on 31 January 2017 and £5,712 was owed to the vendor, namely, £4,500 plus costs and VAT. On that date, the Respondent arranged for £5,712 to be transferred to Brabners LLP and registered that transaction against the account of Clients L and M. The £5,712 transfer to Brabners LLP was recorded on the Firm's client ledger for Clients L and M. Clients L and M subsequently purchased Property I for £82,000 from Clients J and K.

14. On 18 June 2019, the Firm received a call from Client K. In the course of that conversation, Client K was told that Clients L and M had funded the purchase price for the freehold reversion. Client K disagreed with this, and stated that his business partner, Client J, had paid £4,500 for the purchase price. Client K stated that the money had been paid by faster payment to a HSBC account, as requested by the Respondent.

15. The telephone note of this call with Client K records that Client K made the following comments:

> "He paid it by faster payment as requested by EJW to a HSBC account … He paid it to our HSBC account on 16 January 2017."

16. On 25 June 2019, the Firm conducted a meeting with Client L. In the course of that meeting, Client L confirmed the following: (a) that he was not aware that his money had been used to fund Clients J and K's purchase of the freehold reversion; (b) that he was not aware that the Firm held money on account for him to fund this purchase; (c) that he had not authorised the Respondent to use his funds for this purchase; and (d) that it was his understanding that Client(s) J and/or K had paid for the purchase of the freehold reversion.

The Rule 12 statement

17. The SRA filed a Rule 12 statement (in simple terms, the document setting out the SRA's allegations against the Respondent) on 4 August 2022. The Rule 12 statement used letters to anonymise many of the persons and addresses referred to. Appendix 2 was an anonymisation schedule with a table of the codes and the names they replaced.

18. The allegations against the Respondent in the Rule 12 statement were, in essence, that he: (a) caused the transfer, to Bell & Buxton LLP, of £1,200 belonging to Clients A and B, without their consent; (b) falsified an email to justify this transfer above; (c) misappropriated £4,500 from Client J and caused the transfer of £5,712 client money, belonging to Client L and Client M, to Brabners LLP, without the clients' consent; (d) created, or caused to be created, a false Attendance Note suggesting that he had met with Client L and informed him of plans to release funds to a plumber; (e) created, or caused to be created, a false client care letter suggesting that he had been instructed by Clients L and M to represent them in providing tenancy advice; (f) caused the transfer of £1,034 of client money, belonging to Client L and Client M, to another person, without the clients' consent; (g) created, or caused to be created, a false invoice for Clients L and M relating to work that had not been carried out.

The disciplinary hearing on 17-18 November 2022

19. On 17 November 2022 a hearing began before the SDT in relation to these allegations. The Respondent did not attend the hearing and the SDT decided to proceed in his absence.

20. Counsel for the SRA applied, under Rule 35(9) of the Solicitors (Disciplinary Proceedings) Rules 2019 (SI 2019/1185) (the 2019 Rules/SDPR), for an order anonymising the Respondent's clients and the properties they had purchased or attempted to purchase. The Tribunal was invited to continue the anonymisation used in the Rule 12 statement, with the exception of Companies G and H, Persons N and S and Property Q. In other words, the SRA applied for anonymity for clients A, B, D and J-M and properties E, F, P and I.

21. Rule 35(9) provides:

> "(9) The Tribunal may make a direction prohibiting the disclosure or publication of any matter likely to lead to the identification of any person whom the Tribunal considers should not be identified."

22. The SDT refused to make the anonymity order that the SRA applied for. The SDT provided the following oral reasons for their decision. In summary: (a) the SDT said that it had carefully considered the matter and had had regard to the judgment of Kerr J in *Lu v SRA* **[**2022] EWHC 1729 (Admin); (b) it found there was no compelling reason to depart from the principle of open justice dealt with by Kerr J in [138] of *Lu*:

> "138. In my judgment, the sweeping anonymity orders in respect of the third parties ought not to have been made. 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."

23. I should also cite [5]-[6] of *Lu*, the SDT having referred to [6] in its reasons:

> "5. I have found this appeal difficult. It shows the problems we are experiencing in our justice system with the notion of open

> justice. We repeatedly stress its importance, yet increasingly undermine it by the creeping march of anonymity and redaction. Parties, witnesses and ordinary workers - for example, a case worker at the SRA in this case - are routinely anonymised without asking the court or giving the matter much thought.
>
> 6. 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"[1]. Clarity and a sense of purpose are lost. Reading or writing reports about nameless people is tedious."

24. On 18 November 2022 the SDT made an order striking the Respondent off the Roll, with written reasons to follow, which were duly given the following month, as I have said.

25. On 12 December 2022 the SRA wrote to the SDT informing it that the SRA intended to appeal against the decision in relation to anonymity, and asking it whether it would agree not to publish names in any judgment pending the outcome of the appeal.

26. Later the same day, the SDT responded by email, saying that it would not publish its judgment 'pending a decision on the issue of anonymity'.

27. The SDT's key reasoning on the SRA's Rule 35(9) application was at [8.16] of its written reasons, as follows:

> "8.16 The Tribunal had regard to the submissions made by Mr Collis [counsel for the SRA] and to the comments made by Mr Justice Kerr in the case of *Lu* about the principles of open justice particularly in paragraphs 6 about the 'plague of initials' and in paragraph 138. The Tribunal understood Mr Collis to say that for the sake of convenience a considerable number of individuals, companies and properties had been anonymised when the Rule 12 Statement was drafted. They were then identified to the Tribunal by way of an anonymisation schedule attached to that Statement. None of these individuals or companies had contacted and/or given any commitment that they would be anonymised during the proceedings and in any judgment published following the proceedings. Mr Collis distinguished the need to do so as relating only to parties who had already been anonymised in a judgment handed down but faced the possibility of the anonymisation being lifted if an appeal against it succeeded in the High Court. Mr Collis applied for anonymisation to be maintained in respect of individuals and companies who were clients of Mr Williams based on an assertion of confidentiality for clients in respect of matters and dealings for which they had sought legal advice and assistance. As against this, the judgment of Mr Justice Kerr severely criticised the use of a multiplicity of initials in

> proceedings brought by regulators and in the judgments which resulted from them and also emphasised that courts and Tribunals should not be squeamish about naming innocent people (and by extension innocent companies) caught up in the alleged wrongdoing of others. He described it as being part of the price of open justice and made clear there is no presumption that their privacy is more important than open justice. While nowhere in the judgment did Mr Justice Kerr refer to the precise position of a solicitor's client whether an individual or entity, the Tribunal considered the judgement to be potentially broad in its application. It had been some months since the proceedings in this case had been issued and the SRA had not felt it necessary to approach any of the individuals or companies for comment. Furthermore paragraph 138 of the *Lu* judgment had been referred to during the 6 October 2022 CMH. Mr Collis had stated that the SRA was not aware of any particular sensitivities or vulnerabilities which needed to be protected by anonymisation. The Tribunal, while very conscious of the need for client confidentiality in the normal course of events could not detect any harm which might result to any of the individual or company clients referred to in the Rule 12 Statement and it therefore determined that this was not a case under Rule 35(9) of the SDPR of exceptional hardship or exceptional prejudice such that anonymisation should be applied. The Tribunal therefore saw no reason to depart from the principle set out by Mr Justice Kerr that 'Courts and Tribunals should not be squeamish about naming innocent people caught up in alleged wrongdoing of others …' and his observation set out in paragraph 6 of the judgment. It refused Mr Collis's application in respect of Mr Williams's clients. However the Tribunal did not think it was necessary to identify the property numbers involved in the transactions the subject of the allegations which could be residential addresses of clients."

Legal framework for appeals from the SDT

28. The SDT is an independent tribunal established under s 46 of the Solicitors Act 1974 (SA 1974), whose members are appointed by the Master of the Rolls. By s 47(1), any application to require a solicitor to answer allegations contained in an affidavit is to be made to the SDT.

29. By s 47(2) of the SA 1974, the SDT has the power, on the hearing of such an application, to make 'such order as it may think fit'. A non-exhaustive list of examples is set out in s.47(2), including striking off and costs.

30. Section 49(1) provides for a right of appeal against any such order to the High Court. In *Lu* at [66]-[69], Kerr J held that decisions on anonymity are 'not mere case management decisions' but 'matters of open justice and human rights' and that they are decisions against which an appeal lies under s 49.

31. The SA 1974 does not specify a time limit for appeals, and so the CPR applies. For the purposes of an appeal such as this, the 21-day time period for appealing is calculated from the date on which a statement of reasons is sent to the appellant (see [3.3A] of CPR 52PD and *Taylor v SRA* [2019] EWHC 201 (Admin), [7]).

32. The SDT's statement of reasons in this case was sent to the SRA on or around 21 December 2022. As a result, the deadline for bringing this appeal was on or around 11 January 2023.

33. The test on such an appeal is the usual appeal test under CPR r 52.21(3):

> "(3) The appeal court will allow an appeal where the decision of the lower court was -
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> …
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence."

34. Rule 35 of the 2019 Rules provides: that subject to Rules 35(2), (4), (5) and (6), every hearing of the SDT must be in public. As I have said, Rule 35(9) entitles the SDT to make orders prohibiting the disclosure or publication of any matter likely to lead to the identification of any person whom the Tribunal considers should not be identified. Rule 35(10) confers a like power in respect of the non-publication of documents.

The SRA's grounds of appeal

35. On behalf of the SRA, Mr Dunlop KC advanced the following grounds of appeal.

36. Ground 1: the SDT failed to have regard to the public interest in maintaining LPP and the fact that LPP is a fundamental right which cannot be overridden where it applies.

37. Mr Dunlop said that it is trite law, long established by authority at the highest level, that there is a strong public interest in protecting LPP, and thereby protecting the ability of members of the public to communicate in confidence with their lawyers.

38. He referred me to *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649, per Sir George Jessel MR:

> "The object and meaning of the rule [on LPPl] is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom

> he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."\

39. More recently, in *R v Derby Magistrates' Court ex parte B* [1996] AC 487, 507, Lord Taylor CJ said:

> "A man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests".

40. The principle that communications between a client and lawyer should not be disclosed without the client's consent is not limited to litigation, but also includes non-litigious business: see *Balabel and another v Air India* [1988] Ch 317, 330D. In particular, LPP covers communications between a solicitor and client in relation to the handling of a conveyancing transaction, even where legal advice is not being specifically given in the communication in question. In *Balabel*, p332E, Taylor LJ (as he then was) said:

> "As indicated, whether such documents are privileged or not must depend on whether they are part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate. Accordingly, I agree with the formulation made by Master Munrow in the present case, subject to the additional words which I have placed in brackets. He said:
>
> > "Once solicitors are embarked on a conveyancing transaction they are employed to ensure that the client steers clear of legal difficulties, and communications passing in the handling of that transaction are privileged (if their aim is the obtaining of appropriate legal advice) since the whole handling is experience and legal skill in action and a document uttered during the transaction does not have to incorporate a specific piece of legal advice to obtain that privilege."

41. LPP is a fundamental right which cannot be overridden by some competing public interest. Parliament can only override it by express words or necessary implication: *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and Another* [2003] 1 AC 563. [15]). Parliament has permitted the Law Society to require solicitors to disclose to the Law Society documents which are subject to LPP. Such limited disclosure either does not breach the clients' LPP or, to the extent that it technically does, is authorised by the Law Society's statutory powers; cf *B v Auckland District Law*

Society [2003] 2 AC 736, [69]. It is critical that this 'limited disclosure' does not involve the information which is subject to LPP being made public: *Morgan Grenfell*, [32].

42. In light of these principles (which, as I have said, are long established and not controversial) Mr Dunlop said that the SDT's reasons indicated that it did not have any, or any adequate, regard to the strength of the public interest in maintaining LPP or to the relevant principles.

43. Mr Dunlop said that the SDT did not identify any statutory provision which would enable it to breach the clients' LPP, eg, by publishing the substance of their communications with the Firm and naming them.

44. He said that the SDT had focussed only on harm to the particular clients in this case – it said it could not 'detect any harm which might result to any of the individual or company clients referred to in the Rule 12 statement'. He argued that the SDT had failed to consider or recognise the wider harm to the public interest which occurs when the general principle, that a client may expect their communications to their lawyers to be kept confidential, is eroded without proper or lawful reason.

45. The principles of open justice are not equivalent to a statutory provision justifying a departure from LPP. They are not absolute. A departure from open justice may be made where it is necessary in the interests of justice: *R (Good Law Project Limited and another v Secretary of State for Health* [2022] EWHC 46 (TCC), [248], where O'Farrell J summarised the relevant principles as follows:

> "(i) The principle of open justice demands that the public are entitled to attend court proceedings to see what is going on - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly: *AG v Leveller* per Lord Diplock at p.450; *Al Rawi* per Lord Dyson at [11]; *Guardian Newspapers and Media Ltd* per Toulson LJ at [1].
>
> (ii) The evidence and argument before the court should be made public so that the public can understand the issues for determination, the evidence and legal arguments on those issues, the procedural rules applied and the basis on which the court reaches its decision: *AG v Leveller* per Lord Diplock at p.450.
>
> (iii) The media should be permitted to report court proceedings to the public, in furtherance of the principle of open justice and to facilitate exercise of their right to freedom of expression: *AG v Leveller* per Lord Diplock at p.450; *R v Shayler* per Lord Bingham at [21]
>
> (iv) The fact that a hearing in open court may be uncomfortable or humiliating to a party or witness is not normally a proper basis for departing from the open justice principle.

> (v) Any departure from the principle of open justice must be justified and will be permitted only where it is necessary in the interests of justice and the administration of justice: *Guardian Newspapers and Media Ltd* per Toulson LJ at [4]; *McKillen* per Richards J [32]-[34]."

46. Mr Dunlop said that LPP requires such a departure. That is because it is necessary - indeed, mandatory - in the interests of justice for tribunals and courts to uphold LPP when conducting public hearings and giving public judgments. Otherwise, clients might lose the ability to 'make a clean breast of it' to their solicitors.

47. He said that was why, prior to *Lu* at least, the practice of the SDT and the appellate courts above them had been to anonymise clients' names in any public judgment where that was necessary to protect LPP, and cited *Simms v the Law Society* [2005] EWHC 408 (Admin), as an example. Thus, the principle of open justice was respected, so far as possible, while at the same time protecting clients' fundamental right to LPP.

48. Mr Dunlop said that for the reasons given in relation to Ground 2, *Lu* provided no justification (and certainly no adequate justification) for the SDT to breach the Firm's anonymised clients' LPP.

49. Ground 2: the SDT misdirected itself as to the effect of *Lu*.

50. Mr Dunlop said that *Lu* provided no reason to depart from the authorities and the practice set out above. *Lu* was a High Court judgment on appeal from the SDT, but it was not concerned with LPP, and none of the anonymity orders in issue in that case was made for the purpose of protecting LPP.

51. The case arose out of a grievance dispute between Ms Lu and her former employer, a leading US law firm. Kerr J said:

> "1. This appeal by the appellant (Ms Lu) is from a decision of the Solicitors Disciplinary Tribunal (the tribunal) published on 26 February 2021, in disciplinary proceedings brought by the respondent (the SRA) against Ms Lu. Ms Lu was *acquitted* of any misconduct. The appeal concerns the tribunal's approach to open justice and to the anonymity of persons mentioned in the tribunal's decision and relevant to the allegations it had to determine.
>
> 2. The tribunal agreed to sit in private and decided to anonymise two complainant firms of solicitors, relevant individuals employed by them and, for some reason, a barrister and an expert witness whose roles were not particularly controversial. The tribunal so decided of its own accord, without any application from those concerned. However, the tribunal refused to agree to Ms Lu's request that her identity be withheld from the public domain.
>
> 3. At the hearing before me, held in public, with some misgivings I gave a *temporary* direction preserving the status quo and

> prohibiting publication of Ms Lu's name and that of the two firms, their relevant employees and the barrister. Before the draft of this judgment was made final, the two firms and four individuals were able to (and most did) make representations as to whether their anonymity should be preserved in this judgment. Ms Lu's should not be.
>
> 4. I am prepared, not without hesitation, to continue the anonymity of three relevant individuals within the two complainant firms. This is because they are likely, as against their employer, to have a contractual right to anonymity in respect of allegations made by or against them internally within the context of their employment; albeit that contractual right is far from conclusive, does not bind the court and might well have to yield to open justice.
>
> …
>
> 37. Ms Lu's arguments centred on protecting her identity as a complainant alleging sexual harassment, included among her grievance allegations. She argued that the identity of those complaining of sexual harassment is always protected by the courts. She also relied on medical evidence to support her contention that her health and mental state would be endangered if her identity became known.
>
> 38. It appears from paragraph 56 (and following) of the 'anonymised and unredacted' version of the tribunal's subsequent judgment that the chairman picked up on Mr Johal's references to probable allegations of sexual harassment against individuals who would not be giving evidence. The chairman wished to protect 'persons who were not present to defend themselves'.
>
> 39. Rule 35(5) of the SDPR, read with rule 35(2), does indeed provide for a tribunal to sit in private for all or part of a hearing, even without an application from a person affected, provided such a person would suffer 'exceptional hardship' or 'exceptional prejudice'; and provided the tribunal 'considers that a hearing in public would prejudice the interests of justice' (rule 35(5)(b))."

52. Mr Dunlop said that given this was the context, Kerr J had no need to (and did not) consider the strong public interest in maintaining LPP, or the status of LPP as a fundamental right which cannot be overridden save in the circumstances I have set out.

53. Mr Dunlop therefore said the SDT's reliance on *Lu* had been inapposite. In particular, it had been wrong to conclude [138] of *Lu* was so 'potentially broad in its application' as to apply to confidential information or information subject to LPP. Kerr J did not say that SDTs could never anonymise individuals to protect confidential information. On the contrary, Kerr J decided to maintain the anonymity orders made below in relation to certain individuals who were likely to have a contractual expectation of privacy.

54. The SDT had purported to apply *Lu* and found that there was 'no compelling reason to depart from the principle of open justice'. The SDT's reasons failed to recognise that, applying the ratio of *Lu*, the need to protect confidentiality may, in itself, be a 'compelling reason' to depart from the principle of open justice.

55. Ground 3: the misdirected itself as to Rule 35(9).

56. Mr Dunlop submitted that SDT had said, in its written decision, that 'this was not a case under Rule 35(9) of the SDPR of exceptional hardship or exceptional prejudice such that anonymisation should be applied.' It therefore appeared that the SDT directed itself that it should only exercise its power, under Rule 35(9), in a case of 'exceptional hardship or exceptional prejudice'. That was wrong. The thresholds of 'exceptional hardship' and 'exceptional prejudice' appear only in the wording of Rule 35(1)-(2), which is the rule governing whether a hearing should be in public or private:

> "35. (1) Subject to paragraphs (2), (4), (5) and (6), every hearing of the Tribunal must take place in public.
>
> (2) Any person who claims to be affected by an application may apply to the Tribunal for the hearing of the application to be conducted in private on the grounds of -
>
> (a) exceptional hardship; or
>
> (b) exceptional prejudice
>
> to a party, a witness or any person affected by the hearing."

57. Those thresholds do not appear in the wording of Rule 35(9) (set out above). The SDT therefore wrongly conflated those two rules and applied the threshold from Rule 35(2) to its determination under Rule 35(9).

58. Mr Dunlop submitted that the SDT should have directed itself that it had power, under Rule 35(9), to anonymise names and other information where LPP applied (as it did in this case).

59. Accordingly, the SRA asked me to vary the order of the SDT below and substitute an order prohibiting the disclosure or publication of any matter likely to lead to the identification of any LPP communications from former clients to the Firm. In practice, that required the anonymisation of clients A, B, D, J, K, L and M and properties F and I in all relevant communications mentioned in the SDT's reasons. Such an order was necessary to uphold LPP. The SDT's decision names these former clients of the Firm and describes their confidential communications with the Firm. To publish the SDT's reasons in their unredacted form would destroy the clients' LPP either by identifying them directly, or allowing for the jigsaw identification of one or more of them.

Discussion

60. Having read Mr Dunlop's written submissions and the bundle and the authorities in advance of the hearing, and having heard and considered his oral submissions, I was (and am) satisfied that they are soundly based, and it was for that reason I announced at

the conclusion of the hearing that the appeal would be allowed and that I would make the order sought by the SRA (which I duly did).

61. I consider that I have sufficiently set out the SRA's case - the substance of which I accept and adopt without repeating - to allow the reasons for my decision to be understood, and I therefore need only add the following brief observations of my own.

62. My first observation is that, obviously, *Lu* was not a decision about LPP. The claims for anonymity in that case were concerned with interests other than LPP, which it was argued required anonymisation. Kerr J did not mention LPP once. In my judgment, therefore, if it be the case (as I was told it was) that the SDT has been relying upon *Lu* in relation to claims for LPP, then generally it should no longer do so. That case will almost certainly be irrelevant to any question of LPP likely to arise before the SDT.

63. Second - and this was the SDT's main error - a claim for LPP does not involve the balancing of competing interests against a client's right to the confidentiality of communications with his solicitor, eg whether the broader interests of justice require disclosure. LPP either applies to a communication, or it does not. Where it applies, then it is absolute unless it is waived by the client. It follows that the SDT's consideration in [8.16] of its reasons whether the Firm's clients had been asked to comment, or whether they had particular sensitivities or vulnerabilities, was unnecessary and completely beside the point. The facts of the *Derby Justices* case are striking, and well illustrate the absolute nature of the LPP. They throw into sharp focus the SDT's principal error in this case.

64. In 1978 the applicant went for a walk with a 16-year-old girl, who was later found murdered. The applicant was arrested and made a statement to the police admitting being solely responsible for the murder. Shortly before his trial at the Crown Court for murder he retracted that statement and alleged that although he had been at the scene of the crime, his stepfather had killed the girl. The applicant was acquitted.

65. In 1992 the stepfather was charged with the girl's murder and committal proceedings were commenced before the stipendiary magistrate. The applicant gave evidence for the prosecution and repeated his allegation that his stepfather had murdered the girl. Counsel for the stepfather, in cross-examining the applicant, asked about the instructions he had initially given to his solicitors when admitting to the murder. The applicant declined to answer on the grounds of LPP. An application was thereupon made on behalf of the stepfather, pursuant to s 97 of the Magistrates' Courts Act 1980, for a witness summons directed to the applicant's solicitor requiring production of the attendance notes and proofs of evidence disclosing the relevant instructions. The stipendiary magistrate held that the documents were 'likely to be material evidence' within s 97 and, having weighed the public interest in protecting solicitor and client communications against the public interest in securing that all relevant evidence was available to the defence, issued the summons. A second summons to like effect directed to the applicant himself was later issued. The applicant obtained leave to seek judicial review of the stipendiary magistrate's decisions, but the Divisional Court dismissed the applications.

66. The House of Lords allowed the appeal. In relation to LPP, quoting from the headnote, the House of Lords held that:

> "(2) … a witness summons could not be issued under section 97 of the Magistrates' Courts Act 1980 to compel the production of documents subject to legal professional privilege which had not been waived, since the principle that a client should be free to consult his legal advisers without fear of his communications being revealed was a fundamental condition on which the administration of justice as a whole rested; that notwithstanding the public interest in securing that all relevant evidence was made available to the defence, legal professional privilege was to be upheld in all cases as the predominant public interest, even (Lord Nicholls of Birkenhead *dubitante*) where the witness no longer had any recognisable interest in preserving the confidentiality; and that, accordingly, the applicant had been entitled to claim legal professional privilege."

67. In his speech Lord Taylor CJ surveyed case law on LPP going back to the 16th century. Earlier, I quoted part of his speech (at p507 of the law report). The following is also worth citing on the question whether a claim to LPP requires a balancing exercise, as is required in relation to other bases for resisting disclosure, such as public interest immunity. He said at p508:

> "Mr Richards, as *amicus curiae*, acknowledged the importance of maintaining legal professional privilege as the general rule. But he submitted that the rule should not be absolute. There might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance. He referred by analogy to the balancing exercise which is called for where documents are withheld on the ground of public interest immunity, and cited the speech of Lord Simon of Glaisdale in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 233, and in *Waugh v. British Railways Board* [1980] A.C. 521, 535. But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had 'any recognisable interest' in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined.
>
> As for the analogy with public interest immunity, I accept that the various classes of case in which relevant evidence is excluded may, as Lord Simon of Glaisdale suggested, be regarded as forming part of a continuous spectrum. But it by no means follows that because a balancing exercise is called for in one class of case, it may also be allowed in another. Legal professional privilege and public interest immunity are as different in their

origin as they are in their scope. Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits.

In the course of his judgment in the Divisional Court, McCowan LJ indicated that he not only felt bound by *Reg v Ataou* [1988] QB 798, but he also agreed with it. He continued:

> "These further points were made by Mr. Francis. He says that if a man charged with a criminal offence cannot go to a solicitor in the certainty that such matters as he places before him will be kept private for all time, he may be reluctant to be candid with his solicitors. Surely, however, it ought to be an incentive to him to tell the truth to his solicitors, which surely cannot be a bad thing. Mr. Francis went on to suggest that his client's reputation would be damaged if the disclosures were to go to suggest that he was the murderer. For my part, I would be able to bear with equanimity that damage to his reputation. In the interests of justice and of the respondent, it would be a good thing that that reputation should be so damaged."

One can have much sympathy with McCowan LJ's approach, especially in relation to the unusual facts of this case. But it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established. It follows that *Reg. v Barton* [1973] 1 WLR 115 and *Reg v Ataou* [1988] QB 798 were wrongly decided, and ought to be overruled. I therefore considered these appeals should be allowed on both grounds and the case remitted to the High Court, with a direction that the decisions of the stipendiary magistrate and the justice of the peace dated 21 June and 8 August 1994 be quashed."

68. The communications at issue in the present case are and were obviously protected by LPP which had not been waived, and that should have been the end of the matter. No further analysis was necessary, and the SDT should have reflected the communications' privileged status by anonymising its reasons, as it was asked to do by the SRA. Its decision refusing to do so was obviously wrong as a matter of law.

69. Third, and finally, by the same token, the SDT was also plainly in error when it entered into the territory of considering the questions of exceptional hardship; or exceptional prejudice. On any view, these questions simply did not arise.