Case studies

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Solicitors warned to attend hearings

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The High Court has thrown out a challenge from a solicitor who was struck off in his absence.

Nathaniel Akindele Faniyi appealed the decision of the Solicitors Disciplinary Tribunal (SDT) on 2 December 2010 when it found proved nine allegations against him. But in Faniyi v Solicitors Regulation Authority [2012] EWHC 2965 (Admin), Mr Justice Foskett dismissed the appeal and reiterated a warning that those who fail to attend SDT hearings do so at their own peril.

The hearing proceeded in his absence after the SDT determined notice had been properly served. It struck off Mr Faniyi and ordered him to pay £28,000 in costs.

Mr Faniyi issued an application for the tribunal to set aside the decision and grant a re-hearing on the basis that he believed the 2 December date had been vacated. A differently-constituted SDT rejected this on 16 December, concluding he had been aware of the date and deliberately not attended. It ordered him to pay a further £7,500 in costs.

Mr Justice Foskett found the conclusion of the 16 December tribunal "unassailable", and said: "The evidence the appellant had known about the first hearing and had been running shy of the whole process, hoping to delay it for as long as possible, was, to my mind, overwhelming."

He added: "Leveson J, as he then was, put the matter pithily in Elliott (R on the application of) v Solicitors Disciplinary Tribunal & another [2004] EWHC 1176 (Admin) when he said this: "Those who fail to attend lose the right to participate and explain, and they do so at their peril. As [was] conceded, if, without more, a solicitor deliberately absented himself it would not be feasible to argue that he was entitled to a re-hearing." I respectfully agree with that approach."

More on the case

The allegations were that Nathaniel Akindele Faniyi, of Nathaniel & Co in Dalston, east London, provided misleading statements to prospective professional indemnity insurers in circumstances where he knew that such statements were incorrect and inaccurate, failed adequately to supervise fee earners, failed to provide client care letters and cost information to clients, failed to deliver clients' papers promptly on termination of the retainer, misled certain clients, the Legal Complaints Service and the SRA and failed to comply with the Law Society's Guidance on Property Fraud.

The matter was originally considered by the SDT on Thursday, 2 December 2010. Mr Faniyi as the Appellant did not appear at the hearing and the SDT proceeded to hear the case against him in his absence. The evidence advanced was, unchallenged by Mr Faniyi or anyone on his behalf although the SDT had available written responses to the allegations.

The tribunal found the allegations proved (albeit only one of the allegations of dishonesty being established, others being established on the basis of recklessness), struck Mr Faniyi off the Roll and ordered him to pay costs. This was the second occasion on which the hearing had been listed. The case had been due to be heard for one day on Thursday, 10 June 2010, but on 7 June a letter from Mr Faniyi's firm indicated he was unwell and would not be able to attend. At that stage, there was no suggestion a hearing lasting longer than one day would be required. It was what happened in the period thereafter and prior to the hearing fixed for 2 December that lay at the heart of the first issue before the court.

On Monday, 6 December, Mr Faniyi issued an application pursuant to rule 19 of the Solicitors (Disciplinary Proceedings) Rules 2007 addressed to the tribunal, inviting it to set aside its earlier decision and to grant a re-hearing, as he believed the hearing set for 2 December had been vacated. The application was supported by a witness statement.

A differently-constituted SDT ("the second tribunal") considered that application on 16 December, rejected it and ordered him to pay £7,500 costs. The second tribunal concluded that, contrary to his case, Mr Faniyi was aware prior to the hearing on 2 December that his case had been fixed for that date, but that he had deliberately not attended. In those circumstances, the tribunal concluded he had not been denied a fair hearing and it would not be "just" to order a rehearing. Rule 19(3) provides as follows: "If satisfied that it is just so to do, the Tribunal may grant the application upon such terms, including as to costs, as it thinks fit…." Mr Faniyi challenged that decision.

High Court consideration

The court considered a number of issues such as whether Mr Faniyi had received correspondence regarding the hearing listed for 2 December 2010 and the time estimate for the hearing. Mr Faniyi received all correspondence from the SRA apart from one letter. His case was that he understood the hearing had been adjourned, based upon correspondence with the SRA's solicitor. In any event, Mr Faniyi had received a letter from the SDT regarding the hearing date. The SDT did not send any letters to the parties confirming that the matter had been adjourned.

Mr Faniyi did not attend the hearing and the SDT invited attempts to be made to establish the position. The SRA's counsel telephoned Mr Faniyi's office was told that Mr Faniyi was not in the office, could not be contacted and would not be in the office until the following Monday. This was relayed to the tribunal. Based on the information conveyed to the original tribunal, it decided to proceed in Mr Faniyi's absence concluding that he was aware of the hearing date. If that tribunal was wrong to do so, the remedy lay in seeking a re-hearing once Mr Faniyi became aware that a decision had been made in his absence and within the time limits prescribed by the rules.

The application for rehearing was made very quickly after 2 December and was heard by a different tribunal on 16 December. Mr Faniyi was represented by a solicitor.

The basis for Mr Faniyi's application for a re-hearing was that he reasonably believed that the hearing of 2 December had been vacated, or would be vacated, because of the correspondence referred to above. He did not give evidence to that effect before the second tribunal and it seems that those proceedings continued Mr Faniyi's representative taking instructions if matters of contention or uncertainty arose. This had the result that he was not cross-examined about his account of relevant matters and no findings of fact were made on the basis of the second tribunal's assessment of Mr Faniyi as a witness.

Deliberate decision

The Court considered that a deliberate decision was made that Mr Faniyi would not give evidence and there was no basis for complaining now about the consequences of that decision. The Court further considered that Mr Faniyi was himself a solicitor of some years' experience and must have appreciated the significance of ensuring that the Second Tribunal accepted his account of the preceding events and the truth of his assertion that he believed that the earlier hearing date had been vacated. Indeed it would have been open to him at any time during the hearing before the Second Tribunal, when it became plain that his account was being challenged, to invite that tribunal to hear his evidence. The transcript demonstrates that he intervened personally on a number of occasions during the hearing to deal with issues that were raised.

The burden of establishing the justice of ordering a re-hearing does lie on the party seeking it, in particular where, as in this case, there was clearly credible evidence before the original Tribunal that Mr Faniyi had deliberately chosen not to attend. However, at the end of the day, a tribunal must look at the material presented to it in the round to see where it leads and it would be surprising if the burden or standard of proof played a particularly significant part in the ultimate conclusion. The evidence that Mr Faniyi had known about the first hearing and had been running shy of the whole process, hoping to delay it for as long as possible, was overwhelming and the conclusion of the Second Tribunal was unassailable. The Tribunal plainly had a very good "feel" for the truth in this case and there were no grounds for the court coming to a different conclusion.

There were technical arguments regarding whether a Civil Evidence Act Notice had been correctly served as Mr Faniyi received the notice before he received the proceedings. The Court noted that there was nothing within the Rules that would operate to invalidate a notice to admit documents under rule 13(6) simply because the rule 5 statement and other material had not been served. There was an argument that the six-day period would not begin to run until the rule 5 material had been served but there was in the Court's view no legitimate basis for suggesting that a "premature" notice to admit (whether of facts or documents) is invalid for all purposes.

Right to proceed

The tribunal went on to consider separately the issue of whether it was right to proceed in the Appellant's absence. The power to do so is conferred by rule 16(2) which is in the following terms:

"If the tribunal is satisfied that notice of the hearing was served on the respondent in accordance with these Rules, the Tribunal shall have power to hear and determine an application notwithstanding that the Respondent fails to attend in person or is not represented at the hearing."

In considering that issue, the tribunal was invited by the SRA to bear in mind that the first hearing had been adjourned on health grounds and, in effect, that Mr Faniyi may be trying to thwart the proceedings. It decided to proceed and there were no possible grounds for criticising that decision. Deciding to proceed in this way did not, of course, absolve the tribunal from its responsibility to consider the case advanced before it fairly. It is plain from the transcript that that is precisely what the tribunal did. It examined the evidence with care, asked questions about it and was only prepared to find established that which the evidence did establish. As evidence of this, the tribunal rejected some of the allegations of dishonesty.

The final argument advanced by the Appellant was that the tribunal acted unreasonably in not affording him an opportunity to make submissions by way of mitigation after it had made the adverse findings against him. He drew attention to rule 16(3) and (4) which are as follows:

"(3) At the conclusion of the hearing, the Tribunal shall make a finding as to whether any or all of the allegations in the application have been substantiated whereupon a clerk shall inform the Tribunal whether in any previous disciplinary proceedings before the Tribunal allegations were found to have been substantiated against the Respondent.

"(4) The Respondent shall be entitled to make submissions by way of mitigation in respect of any sanction (including any order for costs) which the Tribunal may impose."

The Court did not accept that the tribunal was either obliged to afford the Appellant such an opportunity in the circumstances with which it was confronted or acted unreasonably in not doing so. The Appellant chose to stay away. By doing so he must be taken to have appreciated that, if adverse findings were made against him, he would not be present to make submissions about his personal circumstances, the facts as found or other matters of mitigation.

"Those who fail to attend..."

It was wholly inappropriate in circumstances such as these to criticise a tribunal for proceeding to deal with the whole case. A tribunal can, of course, adjourn to give such an opportunity if it considers it appropriate to do so, but it is not obliged to do so. The submission of Mr Krolick (Mr Faniyi's representative), if it succeeded would mean that a solicitor who deliberately failed to attend a hearing before the SDT could readily obtain a re-hearing of that part of the proceedings relating to sanction. That, in the Court’s judgement, cannot possibly be right. Reference was made to Leveson J, as he then was, who put the matter pithily in Elliott (Ron the application of) v Solicitors Disciplinary Tribunal & another [2004] EWHC 1176 (Admin) when he said:

"… Those who fail to attend lose the right to participate and explain, and they do so at their peril. As [was] conceded, if, without more, a solicitor deliberately absented himself it would not be feasible to argue that he was entitled to a re-hearing."

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