Decision No.1 of 2017 - Issued on 9 March 2017

Summary of the Decision of DIFC Courts Assistant Registrar, Natasha Bakirci & Assessors Henry Quinlan (DLA Piper) and Simon Roderick (Allen & Overy) – collectively "the Investigatory Committee" - in relation to a Complaint lodged under the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts.

The DRA Academy of Law has issued this summary for the benefit of DIFC Courts Practitioners. This summary is an abridged and anonymised version of the decision of the Investigatory Committee.

On 20 September 2016, the DIFC Dispute Resolution Authority (DRA) Academy of Law received a complaint from a law firm ("the Complainant") alleging breaches of the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts (the "Code").

The Complainant's principal allegation was that the Respondents (a registered law firm, a Part I registered Practitioner and a Part II registered Counsel) had breached **Part B-4 of the Code**, which provides as follows:

"4. Practitioners shall never knowingly or recklessly make any incorrect or misleading statement of fact or law to the Court and shall correct any material incorrect or misleading statement of fact or law at the earliest opportunity".

The Complainant also alleged breaches of **Part E-19 of the Code** which states:

"19. Practitioners shall abstain from any behaviour which may tend to discredit the Court and the reputation of its Practitioners."

The Complainant further referred to the following provisions of **Supplementary Code of Conduct Practice Direction No. 1 of 2016** ("SPD"):

"SPD **E-17** (viii) A Practitioner shall not engage in conduct involving dishonesty, fraud, deceit, or deliberate misrepresentation" and;

"SPD **E-17** (xii) A Practitioner shall not contrive facts which will assist his client's case or draft any originating process, pleading, affidavit, witness statement or notice or grounds of appeal containing:

(a) any statement of fact or contention (as the case may be) which is not supported by his client's instructions or by other reasonably credible material…"

The allegations concerned the Respondents' alleged conduct in pursuing an ex parte order before the DIFC Courts, in particular their reliance on, and interpretation of, a certain passage of a Witness Statement (including in affidavit evidence), which the Complainant alleged to have been a gross misrepresentation made in order to convince the judge to grant the ex parte order.

The Respondents refuted all the allegations, contending that there had been no breaches of the Code, and that they had not knowingly or recklessly made any incorrect or misleading statement of fact or law to the Court. The application for a ex parte order had been justified and the injunction had been continued notwithstanding the additional scrutiny which the judge on the return date had applied to the paragraph of the affidavit about which the Complaint has been made.

Decision

The Investigatory Committee derives its jurisdiction from Part F of the Code. In particular:

Part F-24 provides that any complaint by a person or body that a Practitioner has acted in breach of the Code shall be made in writing to the Director of the DRA Academy of Law, who shall then forward the complaint to a Registrar of the DIFC Courts.

Part F-27 provides that no complaint received by a Registrar more than 12 months after the facts complained of shall be accepted, save in certain stated circumstances. Here, the Complaint was received within this time limit.

Part F-28 then requires the relevant Registrar to (i) decide on reasonable grounds whether the complaint is frivolous or vexatious (and Ms. Bakirci here decided that the Complaint was not) and (ii) proceed with a prescribed procedure culminating in a reasoned written decision.

Part F-29 permits a Practitioner against whom a complaint is made to require that it is investigated and decided upon jointly by a Registrar and two independent Assessors chosen by

the Registrar from the Register of Practitioners. This led to the appointment of the two independent Assessors (whose appointment was agreed upon by the parties).

Alleged breach of Part B-4 of the Code

There are two key elements to establishing that a breach of Part B-4 of the Code has occurred:

First, an incorrect or misleading statement must have been made to the Court by a Practitioner; and

Second, that statement must have been made knowingly or recklessly by the Practitioner.

Was an "incorrect or misleading statement" made to the Court by any of the Respondents?

The Investigatory Committee finds that there has been a misrepresentation to the Court, and concludes that incorrect or misleading statements were made to the Court.

Were the statements made by the Respondents (or any of them) knowingly or recklessly?

The Investigatory Committee concludes that there was no evidence before it that any of the Respondents knowingly made any incorrect or misleading statement to the Court; indeed, there was ample evidence to the contrary.

The Committee therefore determines that there was no knowing or intentional breach of the Code by the Respondents in this case.

Definition of “Recklessness” in the context of Practitioners’ duties

In considering the correct definition of, and test for, recklessness which should be applied, the Investigatory Committee has reviewed decisions made by courts and tribunals in similar disciplinary proceedings in fellow common law jurisdictions, including England & Wales and Australia, which themselves inspired much of the content of the DIFC’s own Code of Conduct.

The England & Wales Solicitors' Code of Conduct 2007, at Rule 11.01 entitled "deceiving or misleading the Court", provides as follows:

"(1) You must never deceive or knowingly or recklessly mislead the court."

The guidance concerning Rule 11 provides as follows:

"12. Rule 11.01 makes a distinction between deceiving the court when knowledge is assumed and misleading the court which could happen inadvertently. You would not normally be guilty of misconduct if you inadvertently mislead the court. However, if, during the course of proceedings, you become aware that you have inadvertently misled the court, you must, with your client's consent, immediately inform the court. If the client does not consent you must stop acting. Rule 11.01 includes attempting to deceive or mislead the court.

13. You might deceive or mislead the court by for example:

a. submitting inaccurate information or allowing another person to do so;

…

c. calling a witness whose evidence you know is untrue…."

There is no further guidance on the distinctions, within Rule 11.01, between deceiving the court and knowingly or recklessly misleading the court.

In ***Brett v SRA***,[1] the charge against Mr Brett was one of knowingly (and/or recklessly) allowing the court to be misled in two ways: first, by causing or allowing a witness statement to be served and relied on which created a misleading impression as to the facts and matters deposed to in that statement and, secondly, by allowing the court to proceed on the basis of an incorrect assumption as to the facts and matters set out in that witness statement. Wilkie J, sitting in the High Court with the Lord Chief Justice, on appeal against a decision of the Solicitors' Disciplinary Tribunal (SDT), found as follows:

> "76. A breach of Rule 11.01 can arise on the basis of deceit, or knowingly or recklessly misleading the Court. In this case at least one of the particulars is couched in the alternative

[1] see http://www.bailii.org/ew/cases/EWHC/Admin/2014/2974.html

as knowingly and/or recklessly misleading a Court. In my judgment, it is open to this Court, if it were to conclude that the finding of the SDT was wrong on the basis of Mr Brett having: "knowingly allowed the Court to be misled" nonetheless, to conclude that he was guilty of a breach of Rule 11.01 on the basis that he "recklessly" allowed the Court to be misled if, on the facts properly found, that was the correct conclusion.

77. Accordingly, I will consider not only whether the SDT was wrong to conclude that Mr Brett was guilty of "knowingly" allowing the Court to be misled but also consider whether, if so, he was, nonetheless, guilty of "recklessly" allowing the Court to be misled, always remembering that Mr Brett does not accept that contention, but only accepts that he was negligent.

78. I remind myself that the word "recklessly", in criminal statutes, is now settled as being satisfied:

"with respect to (i) a circumstance when he is aware of a risk that it exists or will exist and (ii) a result when he is aware that a risk will occur and it is, in circumstances known to him, unreasonable for him to take the risk" (See R v G [2004] 1AC 1034 Archbold para 11-51.)

I adopt that as the working definition of recklessness for the purpose of this appeal."

Turning to Australia, in the case of ***Giudice v Legal Profession Complaints Committee [2014] WASCA 115*** ("Giudice"), the Western Australia Court of Appeal considered the meaning of the term 'reckless disregard' in the context of a legal practitioner's conduct. In that context, Martin CJ stated in his judgment (at 44ff):

"In other legal contexts, the word 'reckless' requires that a particular state of mind be subjectively established. In *Fidock v Legal Professional Complaints Committee* this court held that an allegation of reckless disregard of the truth by a legal practitioner could only be made out if it was established that the practitioner's actual state of mind was that of indifference to the truth of the relevant statement or, in the more colourful language of *Le Lievre v Gould*: … not caring in

the man's own heart and conscience whether it was true or false - and that would be wicked indifference and recklessness. The court cited the observation of Bowen LJ in Angus v Clifford that, in this context, not caring did not mean not taking care." Edelman J agreed with this, and added as follows (at 130ff): "I agree with the Chief Justice, for the reasons he gives, that the meaning of 'reckless' will be coloured by the context in which that term is used. I also agree with the Chief Justice's reasons at [44] that the context of the allegation of recklessness, involving a complaint against a legal practitioner, was an allegation of subjective recklessness in the sense of the practitioner being indifferent to the truth of the statement or 'not caring in the [practitioner's] own heart and conscience whether it was true or false'. As the High Court of Australia, quoting from various judgments in the House of Lords, recently expressed the common law concept of recklessness in criminal law, it involves 'at least indifference' or 'not caring'. This was also the sense in which the case was run. The case was opened on the basis that the practitioner knew that the statement was false or was 'reckless as to whether [the statement] was true'."

Having reviewed these authorities, the Investigatory Committee is of the view that, in order to determine whether a Practitioner has acted recklessly, we must conclude on the balance of probabilities, having carried out a subjective assessment of the relevant Practitioner's state of mind (based on the evidence available), that:

(a) the Practitioner was subjectively aware that there was a real risk that the statement made to the Court was incorrect or misleading; and

(b) they disregarded or closed their mind to that risk in the sense that they were indifferent as to, or did not care, whether the statement was correct or not.

At the outset, the Committee stresses the paramount importance of Practitioners giving full attention to their duty of full and frank disclosure in the context of all *ex parte* applications, but perhaps especially an application for a ex parte order.

It is clear from the two relevant cases cited above, namely *Brett v SRA* and *Giudice v Legal Profession Complaints Committee* that the standard for establishing "recklessness" in such instances is a high one.

After extensive deliberation and close scrutiny of the submissions made by the parties, the Committee does not believe that this threshold has been met. In particular, we do not consider that the Respondents were subjectively aware of the risk that they had made, or were continuing to make or rely upon, an incorrect or misleading statement. We also consider that the statement has been corrected at the "earliest opportunity" by the Respondents, for the purposes of Part B-4, when the Respondent Counsel apologised to the Court at the return date hearing.

There has therefore been no breach of Part B-4 of the Code.

Given the conclusions in respect of the alleged breaches of Part B-4, the Investigatory Committee also concludes that there has been no breach of SPD E-17 (viii).

Moreover, the Committee concludes as follows in relation to the other allegations of breaches of the Code:

In respect of the allegation of breaches of Part E-19, the Committee's view is that the Respondents' behaviour would not tend to discredit the Court or the reputation of its Practitioners. This situation has been unfortunate but, in the Committee's view, was addressed as soon as the Respondents became fully aware of the issue.

In respect of the allegation of breaches of SPD E-17 (xii), the Committee accepts that the Respondent believed that there was reasonably credible material (in the form of the relevant paragraph of the Witness Statement in issue) which could be deployed in forming the basis for their affidavit.