



Duties to the court - warning from Lord Chief Justice

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The Lord Chief Justice has warned litigators and advocates that they face “*exemplary and deterrent*” punishments if they mislead the court.

Whilst not delivering the leading judgment, Lord Thomas nonetheless seized the opportunity to remind lawyers of their onerous duties to the court. He set out in nine carefully crafted paragraphs a summary of the conflicting duties to the court and to the client together with the leading authorities.

The case that warranted the Lord Chief Justice’s intervention was an appeal to the Administrative Court by Alastair Brett against a decision of the Solicitors Disciplinary Tribunal (“SDT”) that he had “*knowingly*” allowed the court to be misled (*Alastair Brett v Solicitors Regulation Authority [2014] EWHC 2974 (Admin)*). Mr Brett, who had been admitted in 1975, had been in-house solicitor at the Times Newspapers for over 30 years.

The facts of Mr Brett’s case arose from the identification of the author of the “*Nightjack*” blog which was an anonymous account of life as a police officer. The author of the blog sought an injunction to prevent the newspaper revealing his identity.

A journalist for The Times had informed Mr Brett that he had unlawfully hacked the police officer’s email account to uncover his identity. Mr Brett told the journalist that his action was totally unacceptable and that the story was unpublishable from a legal perspective if it were based upon illegally obtained information. More particularly, the story was “*dead in the water*” unless the journalist could obtain information through the public domain.

However, Mr Brett made two mistakes during the subsequent injunction proceedings. First, he failed to inform counsel for Times Newspapers of the unauthorised access to the police officer’s email account and secondly, he allowed a witness statement by the journalist to be lodged with the court giving a false impression of the facts. The privacy injunction was in fact refused by the court.

In an unusual twist to the story, these matters came to light not during the injunction proceedings but when Mr Brett was vigorously cross examined during the Leveson enquiry into press standards, all the relevant documents having been disclosed to the enquiry.

At the SDT hearing, Mr Brett argued that he had a dilemma between his duty to the court and breaking confidence in respect of what he regarded as legally privileged information given to him by the journalist. He did not accept that he was under a duty to breach the journalist’s confidence and denied his actions amounted to a failure on his part. The SDT disagreed and suspended him from practice for six months and ordered him to pay £30,000 costs.

On appeal, Mr Justice Wilkie said that it was clear that Mr Brett had a “*deep conviction*” that he could not, consistent with his duty of confidentiality towards the journalist, be required to reveal the nature of the unauthorised email access. Interestingly, the court listed a number of ways in which Mr Brett could have ensured that the court was not misled that were not incompatible with the duty of confidentiality and emphasised that seeking independent legal advice was often a solution.

Chapter 5 of the SRA Code of Conduct 2011 specifies the duties to the court and to the client whilst conducting litigation or acting as an advocate. The principal duty is that “*you do not attempt to deceive or knowingly or recklessly mislead the court*” O(5.1). For example, you should not make submissions to the court which you know or are instructed are untrue or misleading. You must not submit witness evidence either oral or documentary to the court that you know to be untrue or misleading unless you inform the court of the correct position. If you inadvertently mislead the court you must rectify the mistake. The obligation not to mislead the court continues to apply for the duration of the case.

There is a specific requirement under O.(5.5) that clients should be informed of the circumstances where duties to the court outweigh the obligations to the client. The note to Chapter 5 reinforces the obligation that if your duty to act in the best interests of the client conflicts with your duty to the court you may need to consider whether the public interest is best served by the proper administration of justice and should take precedence over the interests of your client.

The importance of these duties were reinforced even further by Lord Thomas who added that misleading the court was “*regarded by the court and must be regarded by any disciplinary tribunal as one of the most serious offences that an advocate or litigator can commit*”.

Our system and reputation for the administration of justice relies heavily upon the integrity of the profession and the full discharge of the profession’s duties to the court. For this reason, the profession is subject to the very highest standards of professional conduct. These duties are now made more challenging because of the innumerable litigants in person and McKenzie friends now appearing before the courts. ■



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