

# Another 'Wake Up' Call for In-House Lawyers

HAUSFELD & CO LLP - BRIEFING

*Alastair Brett v Solicitors Regulation Authority; a recent reminder to in-house lawyers of their dual duties to client and Court – a cautionary tale all in-house lawyers should have across their radars.*

## KEY POINTS:

- THE DUTY TO THE COURT IS FIRST AND FOREMOST AND WILL 'TRUMP' THE DUTY TO THE CLIENT WHEN THE TWO CONFLICT.
- IN-HOUSE LAWYERS OWE DUTIES TO THEIR CLIENT – THE BUSINESS – AND AS FIDUCIARIES ARE NOT MERELY FUNCTIONARIES OF THE BUSINESS.
- IN-HOUSE LAWYERS SHOULD HAVE IN PLACE CLEAR POLICIES, PROCESSES AND PROTOCOLS AROUND IDENTIFYING THE 'CLIENT', PRIVILEGE AND WAIVER.
- IN-HOUSE LAWYERS SHOULD ALSO HAVE IN PLACE CLEAR POLICIES, PROCESSES AND PROTOCOLS AROUND ETHICS SUCH AS 'UP THE LINE REPORTING'.
- EDUCATION FOR BOTH IN-HOUSE LAWYERS AND THE BUSINESS ABOUT THESE ISSUES REMAINS FUNDAMENTAL TO GOOD IN-HOUSE LEGAL PRACTICE MANAGEMENT.

## Background

With the fall-out of various corporate scandals, the last few years has witnessed an increasing focus on in-house lawyers' ethical obligations. In much the same way as Enron, Arthur Andersen, Tyco and WorldCom canvassed these issues back in the late 1990's; and early 2000's, a decade or so on, the likes of General Motors, News International and GSK have re-ignited the discussion.

This month saw the UK's High Court consider the former

Times lawyer's appeal from the Solicitors Disciplinary Tribunal's finding that he was in breach of the Solicitors Code of Conduct.

## The Issues

The lawyer was originally suspended from practising for 6 months and fined £30,000 for failing to act with integrity and knowingly misleading the Court.

Those findings were made against the backdrop that the lawyer had failed to put 'known' facts before the Court in witness evidence concerning the way in which a Times reporter had originally identified an anonymous blogger - the key issue before the Court.

The Appeal then focussed on 3 main issues:

- The scope of privilege and options open to an in-house lawyer in safeguarding privilege;
- Misleading the Court; and
- The in-house lawyer's state of mind.

## Privilege & Its Safeguard

The Court's discussion on privilege and who was the lawyer's 'client' is opaque. The judgment suggests that privilege existed between the reporter (rather than the newspaper) and the in-house lawyer.

Putting that to one side, the Court held that the lawyer had options available to prevent him from misleading the Court.

He could have obtained agreement (from the reporter) to waive privilege; or corrected the misleading impression given in his witness statement by clearly indicating the scope of the statement; or openly refused to say that the 'newspaper' was not prepared to disclose how the identity came about; or abandoned defending the claim.

## Misleading the Court

The real issue for the Court was whether it had been misled. The answer was an unequivocal 'yes'. The witness evidence gave a distinct impression that the reporter originally identified the blogger's identity from public sources - when in fact the identity had been illegally obtained by the reporter.

## State of Mind

For the Court, the issue boiled down to whether the in-house lawyer "knowingly" or "recklessly" misled the Court. While the Court replaced the Tribunal's finding of "knowingly" to that of "recklessly", the practical effect remained the same. He was still held to be in breach of the Solicitors Code of Conduct and the original sanctions remained.

## Concluding Thoughts

Ethics in-house is back in the legal and business spotlight. Corporate wrongdoings in an

*"Misleading the court...is not simply a breach of a rule of a game, but a fundamental affront to a rule designed to safeguard the fairness and justice of proceedings"*

*- Lord Thomas of Cwmgiedd CJ*

increasingly globalised and regulated environment have directly impacted on the ethical responsibilities of all lawyers.

This judgment serves as another practical reminder for in-house lawyers of the need to preserve their ethical obligations and the ever high standards demanded by the profession.

## Contact



**Sascha Hindmarch**  
Of Counsel  
shindmarch@hausfeldllp.com



**Aimee Brookes**  
Foreign Qualified Lawyer  
abrookes@hausfeldllp.com