FORM 8A

The Simple Procedure Order of the Sheriff

This is an order of the sheriff in a case which you are a party in. You should **read it** and **follow it**.

You should also read Part 8 of the Simple Procedure Rules, which is about orders of the sheriff.

Sheriff Court: Edinburgh
Date of order: 6 November 2019
Claimant: Andrew John Ashworth, Bonhard House, Bo'ness, eh51 9RR
Respondent: Davidson Chalmers Stewart LLP, 12 Hope Street, Edinburgh, EH2 4DB
Case reference number: EDI-SM46-19

The sheriff, discharges the continued hearing fixed for 07 November 2019 and, having considered the submissions dismisses the claim for the reasons set out in the following note. Parties are asked to submit written submissions, and the appropriate incidental application if necessary to fix a hearing, regarding expenses, recognising the usual deductions etc which would have to be made as the claimant is a party litigant.

Background

This is a claim, in effect, for a compliance order in terms of the Data Protection Act 1998. However it is not clear if such an order is competent in simple procedure as the Act is silent to that extent. The court therefore considered the claim as an action for delivery (with associated claim for payment) of documents which contained personal data of the claimant held by the respondents.

Parties agreed after discussion that whilst the 1998 Act, and moreover the GDPR, provide a wide range of provisions for disclosure of information (of which written communication about a person is of course a sub-set) there are prescribed restrictions and limitations. A clear limitation is legal professional privilege, defined in the GDPR as "(a) information in respect of which a claim of legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings, or (b) information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser". After submissions and discussions the court determined the questions were:

1. Who were the respondent's clients when the two partners (not Dr Ashworth) sought advice from the respondent?
2. Were discussions and advice about Dr Ashworth's conduct and position in the firm given to the partnership, or individually to the two partners?
3. Was advice and information passed between the two other partners and the respondent covered by a duty of confidentiality.

The arguments

Dr Ashworth provided very helpful written submissions and amplified them during the case management discussion. Relying on common law and the very nature of partnerships, and further on the English authority of *BBGP Managing Partner Ltd and others v Babcock & Brown Global Partners [2011] 2 All E.R.297*, he argued that from the date of instruction in April 2011, until at the very least (if not forever) 16th October 2013 the respondents acted for the partnership as an entity and therefore advice given during that time was confidential only in respect of the partnership and not separately to only two of the partners. He further argued that the respondent's own terms and conditions allowed instruction by any of the partners on behalf of the partnership. The dicta in BBGP was that a number of partners cannot rely on confidentiality and restrict information going to other partners when dealing with a solicitors' firm who are acting for the partnership. The whole partnership, he argued, was the client throughout the time complained of. It was not sufficient to "backdate" instructions and the fact he was told in a letter in September 2013 that the advice was only for his colleagues makes no difference at all.

The respondent argued that there was no existing relationship between the partnership as an entity and his firm during the period Dr Ashworth wished to have information disclosed. The dialogue (admittedly about Dr Ashworth's place in the practice and about complaints to the GMC) were part of a separate legal relationship for a separate purpose. The firm were employed by the partnership as an entity for a single purpose in 2011 to draw up a new partnership agreement. It was not an ongoing contract or agreement for advice or assistance. It was accepted that in July 2012 the partnership agreement was not completed. However the last meaningful work was in April 2011 and any further work consisted of a "few chasing emails" for the year up to May 2012. The approach on 26th July 2012 by the two other partners was separate from any work done or being done. Seeking to distinguish the *BBGP* case, the respondents pointed out that that case turned on the existence of a "joint retainer". Whilst there was no equivalent concept in Scotland, it was clear in BBGP that it related to an ongoing paid relationship for ongoing legal advice over a variety of matters. Applying that logic to the present case, there was no "joint retainer" and no agreement for ongoing legal advice over a variety of matters. The original (and only, it was submitted) relationship with the entire partnership was for a single purpose and clearly set out in the letter of engagement between the respondent (then just Davidson Chalmers) and the full Davidson Mains medical partnership dated 13th April 2011. Whilst it was accepted there was no fresh letter of engagement for the two partners in July 2012, and accepted that this was not in fact in place until 19 September 2013, it was a separate instruction.

Decision

After consideration I am of the view that the respondent's arguments are to be preferred. Any contract or legal relationship or "retainer" between the partnership as a full entity (and during which privilege or confidentiality could not be preyed to prevent disclosure of advice given to some partners over others) is restricted to the letter of engagement of 13 April 2011. This defines the original relationship and the instruction the solicitors had accepted from the medical practice. On this basis the dicta of *BBGP* can be distinguished. There is nothing akin to a joint retainer. The fact that the letter of engagement set a fixed price for the work, and not an hourly rate, fortifies my decision in this regard and shows to me there was not the equivalent overall ongoing legal relationship.

I find that there is a clear and distinct difference in the relationship between the solicitors and the medical practice as an entity re the partnership agreement, and the second relationship between the solicitors and Drs' McGuigan and Ewen only. This second relationship was for a second specific purpose and it must be possible in any situation for partners to take legal advice on the removal of a third partner and for that advice to be treated with the same protection of confidentiality as anyone else taking advice. Whilst it would have been neater to have a fresh letter of engagement in July 2012, and perhaps in my view (although I note the SLCC have ruled differently) more appropriate for a separate firm to be instructed that does not dilute the duty and protection of confidentiality in the second relationship.

Communications between Drs McGuigan and Ewen and the respondents are in my view protected by the doctrine of legal confidentiality. Therefore they form an exception to the general rules of disclosure under GDPR.

For completeness I answer the questions posed as follows:

1. **Who were the respondent's clients when the two partners (not Dr Ashworth) sought advice from the respondent? The partnership was a client only in relation to the drawing up of the partnership agreement.**
2. **Were discussions and advice about Dr Ashworth's conduct and position in the firm given to the partnership, or individually to the two partners? The two partners.**
3. Was advice and information passed between the two other partners and the respondent covered by a duty of confidentiality. **Yes**

The claim is therefore refused.

Signed by: **SheriffS Cottam**

Sheriff of The Sheriffdom of Lothian and Borders at Edinburgh

This document has been electronically authenticated and requires no wet signature.