Neutral Citation Number: [2013] EWHC 28 (Admin)

Case No: CO/12583/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2014

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE BEAN
MR JUSTICE CRANSTON

BETWEEN

THE QUEEN

on the application of

(1) KATHERINE JANE LUMSDON
(2) RUFUS TAYLOR
(3) DAVID HOWKER QC
(4) CHRISTOPHER HEWERTSON

Claimants

- and -

LEGAL SERVICES BOARD

Defendant

- and -

(1) GENERAL COUNCIL OF THE BAR
(acting by the BAR STANDARDS BOARD)
(2) SOLICITORS REGULATION AUTHORITY
(3) ILEX PROFESSIONAL STANDARDS
(4) LAW SOCIETY

Interested Parties

The independence of the advocate

54. It is common ground among all the parties to this litigation that an advocate owes a duty to his client and a duty to the court: the latter is now encapsulated in section 188(2) of the 2007 Act as a duty "to act with independence in the interests of justice". These twin duties apply to advocates for any party in any court or tribunal, but the Claimants are all members of the Criminal Bar; and the focus of the argument advanced by Ms Dinah Rose Q.C. on their behalf was naturally the duties of advocates acting for the defence in criminal cases.

55. The importance of the duty to the client and the need for the criminal defence advocate to act fearlessly in the discharge of that duty were expressed in famous terms by Thomas Erskine in 1792. Although traditionally cited as the basis of the Bar's "cab rank rule", what Erskine said is of wider application:-

> "I will forever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end."

56. Section 1 of the 2007 Act refers to independence in three places. By section 1(1)(f) the "regulatory objectives" include that of encouraging an independent, strong, diverse and effective legal profession. Section 1(1)(h) also lists among the regulatory objectives that of promoting and maintaining adherence to the "professional principles" listed in section 1(3): these include (a) that authorised persons should act with independence and integrity; and (d) that persons exercising a right of audience or right to conduct litigation in any court should comply with their duty to the court to act with independence in the interests of justice. Ms Rose expressly stated that the duty to the client to act with independence in his interests and the duty to the court to act independently in the interests of justice are not incompatible. We agree. However, the 2007 Act does not establish an order of priorities between the eight regulatory objectives listed in s 1(1), nor between the five professional principles listed in s 1(3). For the most part they will all be in harmony; but where they are not the regulators have to carry out a balancing exercise between them.

57. It is well established that on occasions the need to comply with the twin duties to the court and to the client may, in Mr Dutton's phrase, pull the advocate's loyalty in opposite directions. In *Hall v Simons* [2002] 1 AC 615 Lord Hoffmann said (at 686E):

> "Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to

> take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not waste time on irrelevancies even if the client thinks that they are important."

58. Ms Rose referred us to two cases which, although they are the leading authorities on wasted costs orders, contain useful analyses of these duties. In *Ridehalgh v Horsefield* [1994] Ch 205, Sir Thomas Bingham MR (as he then was) said (in the context of civil proceedings, but the words are applicable to criminal trials with only minor changes of terminology):-

> "Legal representatives will of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it. It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court… It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

59. In *Medcalf v Mardell* [2003] 1 AC 120, Lord Hobhouse put the matter as follows:-

> "51 … It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.

52. It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite in a manner too often taken for granted this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the Executive, the Judiciary or by anyone else. Similarly, situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest.

53. … At times, the proper discharge by the advocate of his duties to his client will be liable to bring him into conflict with the court. This does not alter the duty of the advocate. It may require more courage to represent a client in the face of a hostile court but the advocate must still be prepared to act fearlessly. It is part of the duty of an advocate, where necessary, appropriately to protect his client from the court as well as from the opposing party. Similarly, the advocate acting in good faith is entitled to protection from outside pressures for what he does as an advocate. Thus, what the advocate says in the course of the legal proceedings is privileged and he cannot be sued for defamation. For similar reasons the others involved in the proceedings (eg the judge, the witness) have a similar immunity.

54. The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession…… The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time. The codes of conduct of the advocate's profession spell out the detailed provisions to be derived from the general principles……. All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice.

55. … The advocate's duty to his own client is subject to his duty to the court: the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court. (*Arthur Hall v Simons* [2000] 3 WLR

> 543) But the situation in which the advocate finds himself may not be so clear cut. Difficult tactical decisions may have to be made, maybe in difficult circumstances. Opinions can differ, particularly in the heated and stressed arena of litigation. ….[It] is the duty of the advocate to present his client's case even though he may think that it is hopeless and even though he may have advised his client that it is. (*Ridehalgh* pp.233-4) So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard; to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principles to which I have referred. The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process."

60. It should be noted that the Council of Bars and Law Societies of Europe (the CCBE), stated in 2006 in its Charter of Core Principles of the European Legal Profession that the core principles include "the independence of the lawyer and the freedom of the lawyer to pursue the client's case" as well as "the lawyer's professional competence". The Charter goes on to state:

> "The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties, or the court indeed. Without this independence from the client there can be no guarantee of the lawyer's work."

61. In *R v Farooqi* [2013] EWCA Crim 1649, Lord Judge CJ underlined the principle in this way:

> "Something of a myth about the meaning of the client's "instructions" has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor "instructs" him. In short, the advocate is bound to advance the defendant's case on the basis that what his client tells him is the truth, but save for well-established principles, like the personal responsibility of the defendant to enter his own plea, and to make his own decision whether to give evidence, and perhaps whether a witness who appears to be able to give relevant admissible evidence favourable to the defendant should or should not be called, the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with twin responsibilities, both to the client and to the court.

> In the trial process the advocate is subject to some elementary rules. They apply whether the advocate in question is a barrister or solicitor, and to the extent that the rules of professional conduct of either profession are not consistent, they should be made so. In the forensic process the decision and judgment of this court bind the professions, and if there is a difference, the rules must conform with the decisions of the court. By way of emphasis, in the course of any trial, like everyone else, the advocate is ultimately bound to abide by the rulings of the court. If a remedy is needed, the rulings are open to criticism in this court, and if they are wrong, their impact on the trial and the safety of any conviction can be fully examined. Although the judge is ultimately responsible for the conduct of the proceedings, the judge personally, and the administration of justice as a whole, are advantaged by the presence, assistance and professionalism of high quality advocates on both sides. *Neither the judge nor the administration of justice is advantaged if the advocates are pusillanimous. Professional integrity, if nothing else, sometimes requires submissions to be made to the judge that he is mistaken, or even, as sometimes occurs, that he is departing from contemporary standards of fairness. When difficult submissions of this kind have to be made, the advocate is simultaneously performing his responsibilities to his client and to the administration of justice.* The judge, too, must respect the reality that a very wide discretion is vested in the judgment of the advocate about how best to conduct the trial, recognising that different advocates will conduct their cases in different ways, and that the advocate will be party to confidential instructions from his client from which the judge must be excluded. In general terms, the administration of criminal justice is best served when the relationship between the judge and the advocates on all sides is marked by mutual respect, each of them fully attuned to their respective responsibilities. This indeed is at the heart of our forensic processes." [emphasis added]

Hopes and fears

62. An important strand of Ms Rose's argument was that even if it is unlikely that an advocate will in fact "pull his punches" for fear of offending the judge and irrespective of that possibility, nevertheless the introduction of QASA creates at least the *perception* of a relationship of dependence between the advocate and the judge who is to assess him for QASA purposes. To illustrate that perception and that the possibility of at least subconscious influence are significant, Ms Rose relied on two cases concerning the independence of the judiciary, in particular temporary sheriffs appointed by the Lord Advocate to sit in the criminal courts in Scotland for one year at a time. In *Starrs v Ruxton* [2000] JC 208, the High Court of Justiciary held that such temporary sheriffs were not an "independent and impartial tribunal" within the meaning of Article 6(1) of the ECHR. Lord Cullen, the Lord Justice-Clerk, said:-