A case to answer is not enough

The 'public interest' justification for the right of any individual to bring disciplinary proceedings against any solicitor disappeared a long time ago, says John Gould

IN BRIEF

- Solicitors have a right to expect that decisions to bring disciplinary proceedings and to prosecute are taken carefully and correctly.
- A recent case, *Greene v Davies*, illustrates the potential duration and complexity of disciplinary proceedings.
- Such cases should be screened objectively and independently for prospects, proportionality and the public interest. For this purpose, 'a case to answer' is an inadequate test.

For many people, enduring court proceedings is like serving a term in a kind of litigation prison. If what is at stake is a person's whole livelihood and reputation, the gaol is a tough one. If the wheels of justice turn slowly while they grind to fine dust, the sentence may be long. Every day the anxiety, and even the fear of ruin, may lurk, ready to push forward through the throng of more ordinary thoughts. If the accusations are in the public domain, then colleagues, and even friends, may become more reserved and hesitant, seeing the smoke and unable to be certain about the absence of fire. Meanwhile, the bills for legal costs continue to mount.

Most people have a choice whether or not to litigate because every civil dispute may be settled or resolved on some basis, even if that is unpalatable; but for a member of a profession, accused of misconduct, there is no such escape. If the allegation is serious but unjustified, they must stand and fight. They can do no other.

It may be little comfort to a person to believe that they should be vindicated; where there is litigation, there is always risk. A small chance of ruin is still a large risk to worry about.

Disciplinary proceedings are themselves a penalty for the respondent, whatever the outcome. Cases should never be brought lightly or disproportionately. It is inevitable—indeed essential—that some cases result in an acquittal, because a 100% conviction rate would suggest that the prosecutor's threshold was too high and some of those who were guilty were not being held to account. It might even give the appearance that the tribunal was not independent of the prosecution.

It is not, however, part of the general run of a solicitor's practice to defend disciplinary proceedings brought against them. The defence of such proceedings is not a fact of professional life, with a human and financial cost which a solicitor must bear as the price of regulated practice (see *Rowe v Lindsay* [2001] EWHC 783 (Admin)). Solicitors have a right to expect that decisions to prosecute are taken carefully and correctly.

Greene v Davies

A recent case involving a president of the Law Society which eventually led to his exoneration by the Solicitors Disciplinary Tribunal (SDT) (subject to any further appeal) certainly illustrates the duration and complexity of disciplinary proceedings (*Greene v Davies* [2022] EWCA Civ 414; and SDT Case No 12320-2022). Eventually the tribunal concluded that Mr Greene had not lied or been inaccurate in a way which had mattered or intended to mislead the court.

On 3 December 2010, Mr Greene's firm Edwin Coe invoiced a Mr Davies for £7,218.74. Mr Davies refused to pay on the basis that Edwin Coe's client was his company, Eco-Power.co.uk Ltd, which had little or no money. Edwin Coe sued Mr Davies on the fast-track in the Winchester County Court and at a trial before District Judge Stewart in December 2012, Mr Greene gave oral evidence following an earlier written statement. Mr Greene maintained that there had been a break in communication of about a year between acting for Eco-Power and opening a new file for Mr Davies. In fact, both Edwin Coe and Mr Davies were in possession of emails which showed that that was not correct, but neither disclosed them nor showed them to District Judge Stewart. Mr Davies lost and applied for permission to appeal on the basis of the communications, which was refused because they made no difference to the outcome.

Subsequently, on 29 June 2015 Mr Davies made a further application for permission, alleging that Mr Greene had deliberately misled the court that there had been a break in representation. That application was superseded by another on 24 September 2015 which District Judge Stewart rejected on the basis, among other things, that the emails would have not made any difference to his original decision. On 16 March 2019, Mr Davies filed a complaint with the SDT.

The great majority of cases before the SDT are brought by the Solicitors Regulation Authority (SRA), but the right for any person to do so remains. The first hurdle that anyone bringing a prosecution must cross is to have the tribunal certify that there is a 'case to answer'. This is usually done by a single member, but here, as it was a difficult decision, a panel was consulted. The panel determined that there was a case to answer, mainly because it considered the allegations serious and could not determine whether the client was or was not Mr Davies.

A 'case to answer' is a low threshold which is not met if there is no evidence to support the allegation, or where the evidence is sufficiently tenuous such that, taken at its highest, the tribunal applying the law correctly could not properly convict. On the other hand, if on one possible view there is evidence which could lead properly to a conviction, the case should proceed to a trial (see *Solicitors Regulation Authority v Sheikh* [2020] EWHC 3062 (Admin)).

It might be thought that, for disciplinary purposes, the key facts were not who the client was, but rather what had been said to the court about communications, whether it was true and if not whether there was some evidence of an intention to deceive. Mr Greene was entitled to assert that Mr Davies was the client.

The case having been certified by the SDT, Mr Greene applied on 17 July 2019 to the SDT for the case to be struck out as an abuse of process. Mr Greene relied on Mr Davies's failure to provide District Judge Stewart's 2016 judgment to the tribunal, arguing that the disciplinary proceedings were a 'collateral attack' upon the judgment and that the disciplinary proceedings were bound to fail on the basis of what the district judge had decided.

On 13 August 2019, the SDT struck the proceedings out as an abuse. Mr Davies appealed to the Divisional Court, and on 12 January 2021 his appeal succeeded on the basis that the SDT's decision was flawed both in its analysis of abuse of process and on the merits. Mr Greene appealed to the Court of Appeal.

The Court of Appeal found that it was not necessarily an abuse to seek to prove or to contest allegations in disciplinary proceedings which would be inconsistent with findings in other proceedings. The county court's decision was only evidence, not a binding determination for all purposes. Accordingly, the Court of Appeal decided on 29 March 2022 to send the case back to the SDT for trial.

Perhaps unsurprisingly, the SDT concluded that Mr Greene had not intended to mislead the court and that there was no

professional misconduct. The case against him was dismissed. Nearly four years had passed since the SDT case started and more than a decade since the trial in the county court about the £7,000 bill.

Public authority needed

Very rarely, a case brought by a private individual does result in a finding of misconduct. In *Logue v Shaw & Turnbull* (SDT case 10999-2012), which again concerned an allegation of untruthfulness misleading a court, two solicitors were eventually struck off following a finding of dishonesty.

A rather different approach was applied in a case in which a solicitor was criticised in relation to their evidence. In *Reeves v Drew and others* [2022] EWHC 159 (Ch), Mr Justice Green criticised a solicitor witness in the following terms:

> 'Mr Curnock had an annoying habit of buying time in the witness box by insisting on reading the whole of every document he was taken to. He also persistently tried to avoid answering the question by asking questions back either to counsel or the Court. He was a most unsatisfactory witness whose evidence cannot be tested by reference to his own attendance notes because those attendance notes are themselves under challenge. It is actually quite distressing to say that I cannot safely rely on the evidence from an officer of the court but I do not think he was giving truthful evidence about how he took instructions, prepared the 2014 will and the relationship between him and the Claimant' (at para [76]).

Applications were made by hostile parties in the litigation to commit Mr Curnock to prison which came before Mrs Justice Joanna Smith, who rejected them (*Frain v Reeves* [2023] EWHC 73 (Ch)). She did so on the basis that there was no strong prima facie case (to the criminal standard) because there was no evidence that Mr Curnock had intended to deceive, and that proceeding with the applications would not be proportionate or in the public interest. The judge noted that Mr Curnock's name had been dragged through the mud and that there was no real public interest in putting him through the further ordeal and disruption of a substantive hearing.

All of these cases were driven by non-lawyers rather than public authorities. The SRA had the opportunity to take over *Greene v Davies*, but declined to do so. Both disciplinary and contempt proceedings lie at the boundary of issues which should properly concern private individuals. The issues are not fundamentally about individual redress; they are about public interest regulation. In none of my three examples were the prosecutors clients of the solicitor in question—they were all opposing parties in litigation. It is unrealistic to expect that such individuals are in a position to dispassionately balance the public interest or the merits of disciplinary proceedings or the punishment of a lawyer in giving evidence.

A public authority is best placed to judge, as Joanna Smith J did, proportionality and the actual public interest in inflicting the inevitable damage to an individual in a prima facie case with poor prospects of success. For this purpose, a case to answer is an inadequate test, particularly for cases in which there is no public authority screening cases for proportionality and prospects.

Open to all?

The public interest does not require that the bringing of SDT proceedings be open to any individual. The individual right to bring disciplinary proceedings is anomalous and does not provide any material guarantee that serious cases will not be overlooked by the SRA. If there was a justification for such an individual right, when only the court dealt with disciplining solicitors before World War I or when representation and regulation were unified in the Law Society, that is no longer the case.

Although an individual bringing SDT or contempt proceedings may well be liable for adverse costs if unsuccessful, that may not restrain either those with a great deal of money or no money at all. For them, the ability to address a personal grievance may be highly affordable. Sometimes the harm caused to the defendant lawyer may be satisfaction enough. For a solicitor, it may amount to a collateral attack because of their very role as a lawyer in bitterly fought litigation.

In Mr Greene's case, neither the SDT nor the courts doubted that there was a case to answer. As things stand, once that is certified it is almost inevitable that a trial must follow. The tribunal has not, and should not have, a power to strike out cases because they view them as unfair. This is even more important when the person accused has a high profile or holds an office.

In a properly operating system, some defendants will be acquitted and must accept that the harm done to them cannot be undone. That is the lesser of two evils. The greater evil would be if solicitors escaped prosecution notwithstanding a prima facie case, serious allegations and reasonable prospects of conviction. Even if they lead to acquittal, such cases are likely to be proportionate and in the public interest.

The conclusion, which seems to me to be inescapable, is that any public interest justification for the right of any individual to bring SDT proceedings against any solicitor disappeared a very long time ago. All prosecutions should be screened objectively and independently for prospects, proportionality and the public interest. A case to answer is not enough. NLJ

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