Who will regulate the regulators? Concerns after Hurst v SRA

Introduction

Solicitors are breathing a sigh of relief after the High Court overturned the decision of the Solicitors Disciplinary Tribunal that a solicitor had committed misconduct by sending an email marked "privileged" and "confidential" with the intent of improperly preventing its publication, allaying concerns that the wrath of the SDT may await any solicitor attempting, in without prejudice correspondence, to persuade an opponent to desist from whatever behaviour is objectionable to the client.

The decision is a further blow to the SRA's anti-SLAPP campaign after the failure of two similar prosecutions last year; but the judgment highlights broader concerns about charging practices, standards of reasoning, and fairness in disciplinary proceedings.

Background

The facts will by now be familiar to many: media lawyer Ashley Hurst was instructed in July 2022 by Nadim Zahawi, then Chancellor of the Exchequer, to challenge allegations made by investigative journalist, former lawyer and tax expert Dan Neidle (himself a former lawyer) that he had lied about his tax affairs. In an email marked "Confidential & Without Prejudice" and containing a warning that the email should not be published or otherwise referred to, Mr Hurst urged Mr Neidle to retract the allegation. In December 2024 the SDT found Mr Hurst guilty of professional misconduct in that he had improperly tried to restrict Mr Neidle's right to publish or discuss the contents of the email. He was fined £50,000 and ordered to pay costs of £260,000.[1] Those findings have been overturned in a 124-paragraph judgment that sharply criticises both the

[1] The same allegations were also made in respect of a second letter, described as "confidential and not for publication", but the charges were found not proved in relation to that letter, and that part of the decision was not appealed.

SRA's framing of the case and the SDT's analysis, before concluding: "*The decision challenged in this appeal was insufficiently analysed and reasoned, vitiated by misdirection and error of law, and unfair.*"

The SRA's case and the SDT decision

The SRA's formal Notice of Referral cited its November 2022 Warning Notice on SLAPPs.[2] It alleged that the use of what it called "the restrictive labels" was improper because "*the conditions for using the relevant terms were not fulfilled; the restrictive labels were intimidating and inaccurate and the true intention of the labels was to prevent the email/letter being disclosed to the public when this would otherwise be permissible. As such, the use of the labels was oppressive in nature and bore the hallmarks of a SLAPP*."

In May 2024 the SRA applied to the SDT for a decision, alleging breach of professional standards by sending the email, which improperly attempted to restrict Mr Neidle's right to publish it or discuss its contents. This was said to amount to misconduct in the form of (a) abuse of position; (b) misleading, or attempting to mislead; (c) making assertions or putting forward statements, representations or submissions which were not properly arguable; (d) acting in a way that did not uphold public trust and confidence; and (e) failing to act with integrity.

The SDT handed down its decision following a hearing in December 2024; written reasons followed 5 months later. It concluded that Mr Hurst had applied the WP label not because the email genuinely met the criteria for WP protection, but to try to prevent Mr Neidle from publishing its contents. It also concluded – having first decided that it was for Mr Hurst to show that the email included genuinely confidential material – that there was no proper basis for describing the email

[2] Strategic Lawsuits Against Public Participation, described in the Warning Notice as "misuse of the legal system and the bringing or threatening of proceedings to prevent publication on matters of public importance."

as confidential either. The SDT described the misconduct as "*very serious*" but, interestingly, specifically found that it did not amount to a SLAPP.

The High Court's decision

Mrs Justice Collins Rice allowed the appeal in full, criticising multiple fundamental errors of approach.

Wrong starting point

The judge held that the Tribunal had approached the analysis from the wrong starting point. As she pointed out (para 66), the charges had morphed from an initial focus (in the Referral) on the improper use of the "restrictive labels" to a broader one characterising the whole email as an improper attempt to restrict Mr Neidle's right to publish. The SDT adopted this reframed premise uncritically. Instead of asking whether the labels were improperly applied, it first concluded that Mr Neidle had a right to publish and treated any attempt to restrain publication as inherently improper.

Wrong test

The Tribunal purported to decide whether the email *was* confidential or WP, rather than whether it was *arguably* so — the correct test for assessing whether a solicitor's conduct was improper.

The SDT's analysis of whether the email was arguably WP ignored or dismissed relevant authorities, applied irrelevant ones, and failed to recognise that the email, on a fair and objective reading of the whole, contained clear elements of a genuine attempt to resolve a dispute: it identified a legal dispute, made concessions, and offered a retraction as an alternative to litigation. This was plainly at least arguably capable of attracting WP protection. Even Mr Neidle's request for an "open" letter implicitly acknowledged that the email was WP.

Similarly, in considering confidentiality the SDT misstated the law, applied a non-existent test ("information must genuinely deserve protection"), and failed to consider relevant factors, including the express confidentiality warning.

On the face of it, the email contained personal and financial information not in the public domain, provided for a limited purpose. There was at least an arguable basis for confidentiality.

Key findings were unsupported or irrational

The SDT concluded that Mr Hurst's primary motive was to stifle publication. Mr Hurst denied this, and the SDT gave no reason for rejecting his evidence. The judge found this approach unfair and irrational, especially given the seriousness of the allegations.

Inadequate reasoning

The judge described the SDT's reasoning as "condensed to the point of compromised intelligibility". It did not explain how the law was applied or how conclusions were reached. This alone would have justified overturning the decision.

Comment

No doubt the public policy debate over whether the SRA has a role to play in restraining the use of so-called SLAPPs and discouraging "lawfare" will continue to rage. The judgment clearly points up the problem with such prosecutions: whether a publication is unlawful is at the heart of the underlying dispute between the lawyer's client and the putative defendant, and it cannot be right to start from a virtual presumption that the lawyer and client are engaged in a conspiracy to stifle a plucky seeker after truth.

In the present case, the SDT accepted that if the email was properly labelled WP then the use of the label could not be misconduct, and that if there is a genuine attempt to resolve a dispute then

other motivations may be irrelevant. It is hard to see how the SDT could ever reach a contrary conclusion without first examining and positively concluding that the basis for objecting to publication was wrong, and then going on to find that the lawyer knew that it was. Such analysis was notably lacking in the SDT's reasoning.

But the case highlights more general concerns about the conduct of the SRA (and other regulators).

The judge accepted that a tribunal is not expected to explain its reasoning with the same level of analysis and exposition as a court of record, but "*The Tribunal is a quasi-judicial decision-making body with huge powers over the reputation and livelihoods of the professionals who appear before it, and important responsibilities to the public and the wider profession. It has corresponding duties to explain its decisions clearly, not least in high-profile cases and in any context of public policy controversy … an appellate court must at least be able to follow and understand at a basic level the route by which a tribunal has reached its conclusions*" (para 119, and see also para 53). In this case – and so potentially in others – part of the difficulty appears to have stemmed from lack of clarity in the charges, which by the time they reached the SDT formed a generalised attack on Mr Hurst's motives and intentions.

A related concern alluded to by the judge is the commonly-encountered practice of charging the same conduct under multiple regulatory headings, wrapped up for good measure with a catch-all allegation such as a lack of integrity. She stated at paragraph 61 (emphasis added):

> *"A failure to act with integrity is an imputation of unethical conduct. As such, it is more than a portmanteau reference to a corpus of professional standards. It connotes an element of personal substandard ethical behaviour or untrustworthiness – a degree of what lawyers sometimes refer to as moral turpitude."*

One is reminded of the must-disparaged practice in civil litigation of characterising every breach of duty by a fiduciary as a "breach of fiduciary duty", whether the act itself involves a conscious breach of the duty of good faith or not. In similar vein, this appears to be a strong signal to those formulating such charges to identify with precision which obligation the professional was aware of and on what basis it is said that there was a deliberate decision not to abide by it.

Alice Nash

January 2026