Challenge to SRA intervention rejected

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Suspicion of wrongdoing in law firms gives rise to difficult judgments. Managers of firms have to balance the firm's obligations to the lawyer under suspicion, the firm's regulatory obligations, and the firm's own interests. That exercise went wrong in a case determined by Newey J in July. The firm had failed to distance itself adequately from the lawyer under suspicion.

Summary

On 28 July 2017 Mr Justice Newey dismissed an application by a boutique city firm to withdraw the SRA intervention into its practice[1]. The court found that the risks of withdrawing the intervention outweighed the risks of it continuing and that the SRA's decision to intervene was rational and proportionate.

The facts

The firm is a two member LLP. One of the members was absent from the business between March 2007 and December 2015. The firm – through the remaining member – was instructed to act for a defendant in relation to criminal proceedings. Its charging rates were increased in early 2007 and at around the same time it entered into an oral agreement to cap its fees to the defendant at £275,000.

The defendant was convicted of two offences in November 2007 but the conviction was overturned on appeal and he obtained an award permitting him to recover his costs from Central Funds. In 2009 the firm and the defendant entered into a Deed of Variation in relation to the firm's fees. This purported to declare the oral agreement to cap the fees as not binding and to increase retrospectively the firm's charge out rates.

The defendant submitted a bill of costs to the Court of Appeal in June 2011 for £2.9 million and received an interim payment of £500,000. The Court of Appeal initiated a formal investigation into the bill and in May 2015 Master Eagan found that there was clear evidence of fraud. Following further factual investigation the defendant and the firm were held jointly and severally liable to repay the interim payment. The defendant repaid the interim payment.

In January 2017 Master Eagan's report was referred to the SRA and in March 2017 the absent member (now returned) was served with a notice under section 44B of the Solicitors Act 1974 requiring her to provide information and documentation to the SRA. That member responded to the notice and the firm then provided a self-report to the SRA amongst other things denying dishonesty and any agreement to obtain public money unlawfully.

In May 2017 the SRA prepared an Intervention Report which recommended intervention into the practices of the individual members and the LLP. The firm continued to discuss the position with the SRA and offered that the remaining member would step aside from his management role and as COLP and

Any comments or queries?

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1. *Neumans v The Law Society* [2017] EWHC 2004 (Ch)

COFA. The SRA continued to recommend intervention and the remaining member eventually ceased to be a member of the firm and resigned as COLP and COFA with effect from 21 June 2017.

Despite this, the Intervention Panel resolved to proceed with the intervention on the basis that there was "reason to suspect dishonesty on behalf of [the remaining member] and the Firm (on behalf of whom [he] acted) in connection with the Firm's business". The SRA made no positive finding of dishonesty against the returned member and did not intervene into her practice.

The SRA found that it was necessary to exercise the powers of intervention because there was strong evidence that suggested that the misconduct of the remaining member was serious, involved the public at large and involved large sums of public money. The misconduct was intentional, pre-meditated and appeared to be designed to enrich him and the firm. Despite him stepping down, the SRA contended that his relationship with the firm was so close and intertwined that there was "no meaningful and realistic distinction" between him and the firm.

The SRA effected the intervention against the firm on 3 July 2017. The firm then applied to the High Court for the intervention notice to be withdrawn pursuant to paragraph 6(4) of schedule 1 of the Solicitors Act 1974.

Legal framework

The SRA's power to effect an intervention in a "recognised body" derives from paragraph 32(1) of Schedule 2 to the Administration of Justice Act 1985. It enables the SRA to intervene in a practice where (amongst other things) "... the [SRA] has reason to suspect dishonesty on the part of any manager or employee of a recognised body in connection with ...that body's business...".

In considering the firm's application Newey J highlighted the principles that apply when considering interventions and applications for them to be withdrawn. In particular he noted that that the rules of natural justice do not apply to an SRA intervention (*Giles v Law Society* (1995) 8 Admin LR 105). He further noted that whilst the SRA's decision to intervene must be proportionate, it was entitled to decide to intervene on the basis of risks rather than certainties (*Buckley v Law Society (No.2)* [1984] 1 WLR 1101).

The decision

The firm argued that the intervention should be withdrawn on the basis that the original decision to intervene had been fundamentally flawed and also on the substantive grounds before the court at the hearing.

Both of these grounds were rejected by Newey J.

The decision to intervene had not been fundamentally flawed. At the time of the relevant conduct, the remaining member was a "manager" of the firm within the definition of paragraph 32(1) of schedule 2 of the Administration of Justice Act 1985. The fact that he subsequently left the firm and was not a manager at the time of the intervention was irrelevant. Further, there was no obligation on the SRA to accept an offer by the returning member to explain matters in person, and there was no failure by the Intervention Panel lawyers to take into account the firm's proposals for future management. The decision was within the SRA's margin of discretion.

On the substantive grounds the court held that the risks of withdrawing the intervention outweighed the detriment of continuing it. The firm had made common cause with the remaining member rather than distancing itself from him. It had rejected Master Egan's

findings and allowed the remaining member to continue as COLP and COFA despite the serious allegations against him. The firm's separation from the remaining member had been late in the day and there was a doubt as to whether it would be entirely independent from him in the future.

The remaining member's resignation had "the air of a last throw of the dice" and had only occurred after the SRA had maintained its position on intervention. His previous role as a rainmaker within the firm cast further doubt on whether there could be a complete divorce between him and the firm. Further, the firm's proposals for alternative candidates for the COLP and COFA role lacked clarity and there was no attempt to define the scope of their roles in the firm going forward.

Commentary

The fact that the rules of natural justice do not apply to decisions to intervene mean that law firms at risk of intervention have to be proactive in investigating problems and putting forward sensible solutions to mitigate the risks. It is not a process in which a firm can rely on being responsive to investigations from the SRA.

Here the firm had gone wrong in not distancing itself sufficiently and quickly from the lawyer under suspicion. Although the lawyer had resigned, the firm had previously made common cause with that lawyer and instructed the same firm of solicitors as the lawyer to act for them. There was also a lack of clarity as to how the firm would operate going forward.

There were particular reasons that these factors exacerbated the risk in this case. The firm was a two member LLP and the members were and are married. That is an unusual factor which won't be present in most cases. It should be easier in larger firms to demonstrate that adequate steps have been taken eliminate the risks.

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