29 October 2015

The DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the Matter of A Complaint against a Law Firm and two of its partners Under the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts

RULING ON REVIEW

This is an Application for a Review of the Decision of Registrar Mark Beer and Assessor D.J. Greenwald dated 30 April 2015 (collectively "the Tribunal"). The decision of the Tribunal ("the Decision") was made in response to a Complaint dated 19 June 2014 against a Law Firm and two of its partners (individually "the First, Second and Third Respondents" as the context requires and collectively "the Respondents") for various alleged breaches of the DIFC Courts' Code of Professional Conduct for Legal Practitioners [2009] ("the Code") in the Respondents' handling of a case that was filed and heard in the DIFC Courts. For reasons appearing below, I will not rehearse the full particulars of the Complaint or the Decision, but will only outline the main features of the case so as to place my Ruling on this review in its proper context.

The Complaint was made against the three Respondents, all of whom were registered to practise before the DIFC Courts, the First Respondent under Part I of the Register of Practitioners and the Second and Third Respondents under Part II. The Complaint set out a number of allegations, some of which were upheld by the Tribunal, and others of which were dismissed. The Law Firm will be referred to as the "First Respondent", and its two partners as the "Second Respondent" and the "Third Respondent" respectively.

In respect of those findings made by the Tribunal against the Respondents, the Tribunal imposed the following sanctions:-

(a) A fine of US$7,500 against the First Respondent

(b) A fine of US$1,000 against the Second Respondent

(c) A fine of US$2,500 against the Third Respondent

(d) A Private Admonition

(e) The publication of the Decision, but in redacted form

The Tribunal further indicated in the Decision that it intended to publish a redacted version of its Decision so that it might prove of value to other Practitioners when considering their own actions with respect to the Code as well as bringing or defending Code complaints.

The relevant provisions of the Code which are discussed below are in the following terms:

"B4. Practitioners shall never knowingly make any incorrect or misleading statement of fact or law to the Court and shall correct any material error or omission at the earliest opportunity.

C8. Practitioners shall only agree to act in proceedings before the Court if they can handle them promptly, with competence and without undue interference from the pressure of other work.

C10. Practitioners shall at the earliest opportunity advise their client of the Court's discretion as to costs and in particular the general rule at Part 38.7(1) of the Rules that the unsuccessful party will be ordered to pay the reasonable legal costs and expenses of the successful party.

C11. Practitioners shall at the earliest opportunity enter into a clear and transparent fee agreement with their client and thereafter ensure that sufficient records are kept of work done to enable the Court to properly assess any legal costs and expenses claimed during, or at the conclusion of, proceedings.

E19. Practitioners shall never agree to act in proceedings before the Court other than at the direct request of the party concerned unless they are satisfied that the person making the request is authorized by the concerned party."

It is sufficient for me to say that the violations of the Code which formed the basis for the sanctions in this particular case were as follows.

(a) The First Respondent had taken on too much litigation work which it did not have the staffing resources to handle, and did not have adequate resources to ensure a smooth transition when a staff member left, resulting in the Third Respondent (who had little litigation experience) having to handle a case before the DIFC Courts. This was a breach of Section C8 of the Code by the First Respondent (but not the Second). The Third Respondent also breached Section C8 of the Code because he agreed to act in proceedings before the DIFC Courts without sufficient competence and without having fully reviewed the file. These findings are challenged by the Application for Review. In the Application for Review there are several paragraphs commenting on these findings but it is unclear whether the Application is requesting for a review of these findings as such, or merely putting forward relevant facts in mitigation of the admitted offence. In these circumstances. I propose not to deal with this challenge in this Ruling, because to do so would require some discussion of the facts of the case which would have the possible result of enabling easier identification of the law

firm and lawyer(s) concerned, which is a result I intend to avoid, as will be seen from my later remarks. If the Respondents insist on pressing on with their application for review I will do so, but the possibility would then open up to my second Ruling being published (without redaction), which will contain more identifying facts than the Respondents would wish.

(b) The Second and Third Respondents breached Section C11 of the Code which requires all practitioners to (inter alia) enter into a fee agreement with the client at the earliest opportunity. They also breached Section C10 of the Code which requires every practitioner to explain to the client the possibility of the client having to pay damages if he loses. These findings are not challenged by the Application for Review.

(c) There were two Defendants in the case under discussion. It is common ground that the First Respondent was at all material times acting for the First Defendant in the case. Owing to lack of, or miscommunications between the three Respondents, misstatements about their representation of the Second Defendant were made to the Registry and certain Judges of the DIFC Courts at different times. On 29 November 2012 an associate of the First Respondent submitted the Acknowledgment of Service ("AOS") on behalf of both Defendants under the Second Respondent's electronic signature. At that time. the Third Respondent was not aware that the First Respondent was supposed to be acting on behalf of both Defendants. When the Third Respondent reviewed the DIFC Courts' online database, he could not find the initial AOS and submitted a new AOS on 31 December 2012 only on behalf of the First Defendant. For the next few months the case documents only referred to the First Defendant. At the first Case Management Conference on 17 February 2013, the Third Respondent mentioned that his firm was representing only the First Defendant (as this was his

understanding), but the Court pointed him to the AOS filed by the Second Respondent stating that the First Respondent was representing both the First and Second Defendant. The Third Respondent was surprised by the fact that the Court had an AOS stating that the First Respondent was acting for both Defendants, but he assumed that such a document had been filed by the Second Respondent, and would therefore have been correct. Accordingly, he informed the Court that he was indeed also representing the Second Defendant in the case. After the hearing the Third Respondent checked with the First Defendant, and was informed that the two Defendants had an agreement that the First Respondent was to act on behalf of both Defendants. However, he took no steps to meet or speak with the Second Defendant to confirm that the latter was indeed instructing the First Respondent to act for both Defendants in this case; hence the breaches of Sections C10 and C12. Neither did he brief the Second Respondent (on the latter's return to the office) about the agreement between the Defendants as to a joint defence by the First Respondent of both Defendants. Nor did he prepare an amended Defence on behalf of both Defendants or file a separate Defence on behalf of the Second Defendant alone. Approximately two weeks before the trial, a new lawyer employed by the First Respondent checked with the Third Respondent whether the First Respondent was meant to be acting for both Defendants. The Third Respondent told the new lawyer that the First Respondent was acting for both Defendants, but was later told by the new lawyer (who had consulted the Second Respondent) that the First Respondent was only acting for the First Defendant. The Second Respondent (as the lead counsel) stated that they were only acting for the First Defendant and the Third Respondent believed that the Second Respondent must be correct, but did not discuss the issue with the Second Respondent himself. On 15 May 2013, the Second Respondent attended Court for the trial, and again the question of representation arose for clarification. As the Second Respondent was not aware

of the client's instructions to represent both Defendants, he reiterated his understanding that he and the First Respondent were only acting for the First Defendant. Later, the error was discovered, but no correction of the earlier misstatements to the Court was given by any of the three Respondents. Accordingly, there were breaches of Section B4 of the Code by all three Respondents arising from the initial misstatements and the failure to correct those misstatements to the Courts when the error was eventually discovered. This finding is not challenged by the Application for Review, which makes submissions in apology and mitigation for these admitted breaches as follows:

(i) None of these lapses arose as a result of any deliberate intention to violate the relevant provisions of the Mandatory Code.

(ii) Any misrepresentations made by the Second and Third Respondents to the Court were made in good faith, but in error.

There is no review against the sanctions ordered by the Tribunal as a result of the breaches of the Code except as follows. The main thrust of the Application for Review is against the ruling of the Tribunal that there should be publication of the Decision, albeit in a redacted form. It is submitted that such publication would cause disproportionate harm to the reputation of the three Respondents, considering that no tangible harm has resulted from the admitted breaches.

RULING

In the light of these circumstances, my Ruling is as follows.

(1) Having regard to the mitigating circumstances of this case, I am prepared to grant the request made by the Respondents for the DIFC Courts not to publish the Decision, either in full or in redacted form. However, there is a strong need for the DIFC Courts to give clear guidance to the profession on its basic duties to clients so that Practitioners in the DIFC Courts (and the DIFC generally) will know what to do when acting for potential clients if circumstances such as those in this case were to recur, whether as a litigation case or a non-contentious transaction.

(2) The fact that the Respondents submitted that they were unaware that they had committed breaches of the Code is sufficient evidence that Practitioners are not yet widely familiar with the rules of ethical conduct that must be followed.

(3) I therefore propose to make certain remarks below concerning the significance and importance of these Rules so that, without identifying the parties or the case in question, there is sufficient context for those reading my judgment to educate themselves on certain important aspects of professional ethics.

(4) In my review of the facts of this case, the following matters strike me as being of significant importance.

(a) Practitioners should fully appreciate the principle that all lawyers must take personal responsibility for ensuring that they have been truly instructed by a potential client and not merely rely on the word of a third party purporting to

act on behalf of that client. I have had personal experience in other jurisdictions of cases where such assumptions or reliance on a third party have led to misunderstanding, excess of authority, and even fraud by the purported agent.

(b) The importance of E19 of the Mandatory Code cannot be over emphasized, particularly when read with Rule 7.4 of the Non-Mandatory Code of Best Professional Practices (admittedly not in existence at the time of the breaches) which is in the following terms:-

"A Lawyer shall ensure that an agent giving instructions on behalf of a client has the required authority to do so and, in the absence of evidence of such authority, the Lawyer shall, within a reasonable time thereof, confirm the instructions with the client."

This provision is applicable to both contentious as well as non-contentious cases as well as civil and commercial transactions.

(c) Misrepresentation to the Court, whether innocent or otherwise, must be corrected by the misrepresenting lawyer as soon as the error is discovered. In this particular case, the failure of the Respondent to make disclosure in good time led to confusion of different judges of the DIFC Courts in hearing this case, thereby seriously undermining the Overriding Objective.

(d) What is therefore of paramount importance when a lawyer is briefed by a purported agent of a potential client to act for that client is that the following steps are observed.

(i) The lawyer must take reasonable steps to ensure that the purported agent instructed him with the informed authority of the potential client to do so.

(ii) The lawyer should be particularly careful where the instructing agent may have a conflicting personal interest in the case or transaction on which the lawyer is being instructed and the agent may therefore either be acting without any authority or in excess of the authority given.

(iii) The only safe way that a lawyer can protect himself against untoward results is to make an appointment as soon as practicable (and certainly without taking any action on any instructions from the purported agent) to meet the potential client (ideally in person) to confirm that the client has indeed instructed the purported agent to act and, in particular, to confirm the exact scope of the agent's authority to give or receive instructions and the agreed lines of communication between the lawyer and the client.

(iv) The lawyer should also continue to keep the client personally informed of all actions taken on behalf of the client even if the agent has been instructed to convey all reports from the lawyer to his principal (the client). For example, copies of all correspondence written by the lawyer and submissions or witness statements submitted to the Court for or against the client should be furnished directly to the client in addition to the agent unless the lines of communication agreed with the client clearly indicate that the client is happy to have all relevant documents sent to its agent and to be briefed by the agent accordingly.

(5) In this particular case, I note that the Tribunal expressly found that it did not have sufficient evidence of breach of Rule E9. However, in my view, the Third Respondent was derelict in his professional duty in failing to meet or speak or otherwise directly communicate with the client to confirm the authority of the First Defendant to speak on its behalf and not even to seek instructions from the Second Defendant on how to pursue the latter's Defence. However, I accept that no untoward outcome (other than confusion caused to the DIFC Courts) resulted from the Third Respondent's lapses in this regard. For the reasons stated above, I do not think it is necessary for the details of the case to be published, as the matter of importance is for the legal profession to be made aware of its professional duties to clients (with regard to accepting instructions from third parties on behalf of purported clients) and to the court (in respect of duties not to knowingly make misstatements to the court and further to correct any such misstatements (whether made inadvertently or otherwise) immediately on discovery of that misstatement. I therefore order that only the Decision of this case shall be published, and done so without redaction. I also confirm all the financial sanctions ordered by the Tribunal and the Private Admonition, but revoke the order for publication of the Decision in a redacted form.

I have dealt above with the various challenges to the other findings of the Tribunal, and have nothing more to add.

29 October 2015

CHIEF JUSTICE MICHAEL HWANG