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## **A Solicitor's Duty of Disclosure: Conlon v Simms [2007] 3 All E.R. 802**

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### **Introduction**

At the end of his judgment in *Conlon v Simms* [2007] 3 All E.R. 802, Ward L.J. said at para.[179]: "Partnership disputes are invariably tinged with bitterness and recrimination. It is a class of litigation so frequently fought to the death. If these parties had any sense at all, they would take time to lick their wounds and then invite the help of a mediator to bring this sorry litigation to an end." Although wise words, the history of the litigation indicated that a mediated settlement was unlikely. The particular value of the decision is the focus it brings to the issues of a solicitor's duty of disclosure to other prospective partners and the admissibility in proceedings between those partners of findings of a separate professional disciplinary tribunal against one of the partners, in other words, what use can be made of those findings in any subsequent civil litigation.

### **Background**

S and C, both solicitors and former partners of a dissolved firm, had entered into partnership together on May 1, 2000, and on September 30, 2000 H, also a solicitor, had become the third partner. The partners in the dissolved firm had agreed to merge with another firm but S and C wished to remain in partnership together, a fateful decision for C. As a result of an investigation by the Office of Supervision of Solicitors (OSS) which had started in 1999, the Law Society in 2002 had intervened in the practice of S, C and H and suspended S's practising certificate on the basis of his dishonesty and had notified C and H of the evidence of that dishonesty. Notwithstanding that evidence, C and H made an agreement in May 2002 for payments to S of security he had provided to the firm in the event that he was unable to return as an equity partner. It was clear from the judgments that S was a powerful and persuasive personality who had been able to convince C and H, in the face of objective evidence to the contrary, that he was an honest and reliable business partner. In September 2002 the OSS started disciplinary proceedings against S before the Solicitors Disciplinary Tribunal (SDT), which were heard over 14 days in November 2003. They resulted in the SDT striking S off the Roll of Solicitors in February 2004 and publishing its full findings in April 2004; those findings included S being actively involved in bogus transactions which lacked an honest commercial purpose, making deceitful misrepresentations to third parties and acting for two or more clients in circumstances of conflict (a 'full house' of professional misconduct). S unsuccessfully appealed to the Divisional Court against the SDT's order (that appeal being by way of rehearing).

Running in tandem with the SDT proceedings, in the summer of 2003 S had started a High Court action against C and H for specific performance of the May 2002 agreement; it was not clear from the judgment why C and H refused to abide by that agreement, although it may have been that by then they had realised, albeit late in the

day, the true nature of S's business dealings. David Richards J. heard that trial in January 2004 (reported at [2004] EWHC 585 (Ch D)); during the trial counsel for C and H had sought to introduce a defence based on S's misrepresentations and lack of clean hands but the judge refused to allow that defence to be pled so late in the day when C and H had been aware since 2002 of the evidence of dishonesty. In February 2004, after the trial had finished but before the judge had delivered his reserved judgment, C and H sought to re-open the clean hands argument on the basis of the SDT decision (given in February 2004). The judge rejected this application, principally on the basis that there would need to be a further trial of the connection between the dishonesty found by the SDT and the May 2002 agreement and also on the basis that the SDT's findings were not admissible in the action as evidence of the facts found by the SDT (per *Secretary of State for Trade and Industry v Baird*, *Re Queens Moat Houses Plc* [2004] Ch. 1) and that it would not be an abuse of process for S to require re-litigation of issues of fact found by the SDT. The judge found for S and ordered specific performance of the May 2002 agreement. Although David Richards J. appeared to have excluded use of the SDT findings, counsel for C and H would attempt to use those same findings in the next action.

Also running in tandem was an action raised by C and H against S in February 2004 for a declaration that he had induced them to enter into partnership with him by fraudulent misrepresentations concerning two companies which were clients of S, and that in the negotiations leading up to the partnership agreement he had fraudulently refrained from disclosing matters which would affect his status and ability to practise as a solicitor, which would entitle them to damages for fraudulent misrepresentation. No damages were claimed. The trial of the misrepresentation and non-disclosure claims was held before Lawrence Collins J.

### **First Instance Decision**

Lawrence Collins J. found (reported at [2006] EWHC 401 (Ch)) that the statements about the two companies were misrepresentations but that they had not induced C or H to enter into partnership with him. He found that in the context of negotiations for a partnership a party was under a duty to make disclosure of matters affecting or likely to affect his status as a partner and that non-disclosure gave rise in law to a claim for damages. He held that the SDT's findings were inadmissible as prima facie evidence of the facts found, but held that, in seeking to contest those findings in the action, S was abusing the process of the court so that he was stopped from denying those facts. In particular, that it would be unfair to require C and H to prove dishonesty in transactions to which they were not party and in relation to which the only contemporaneous evidence they had was in the SDT findings, that it would bring the administration of justice into disrepute if S could challenge the SDT and Divisional Court's rulings, and that it would not be unfair to S to prevent him from re-litigating those issues since he had not sought to introduce any additional evidence to disprove them. He ordered that there be a declaration that S had fraudulently failed to disclose his dishonesty to C and H and had falsely represented his honesty thereby inducing C and H to enter into the partnership agreement and the May 2002 agreement, and that C and H were entitled to damages to be assessed. S appealed against that decision.

### **The Court of Appeal**

In the appeal before Ward, Jonathan Parker and Moore-Bick L.J.J., C and H appeared by counsel and S represented himself. Jonathan Parker L.J. said at para.[127] on the

non-disclosure issue: "There can be no doubt that the principle of caveat emptor does not apply to the making of a partnership agreement and that in negotiating such an agreement a party owes a duty to the other negotiating parties to disclose all material facts of which he has knowledge and of which the other negotiating parties may not be aware." This was made clear by Lord Atkin in *Bell v Lever Bros Ltd* [1932] A.C. 161 at 227: "Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of caveat emptor applies outside contracts of sale. There are certain contracts expressed by law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made, so of an intending partner." Jonathan Parker L.J. added that a fraudulent breach of that duty gave rise to a claim for damages since non-disclosure where there was a duty to disclose was "tantamount to an implied representation that there is nothing relevant to disclose." para.[130].

It was on the issue of the admissibility of the SDT findings that the Court of Appeal reversed the first instance decision. While agreeing that the findings of the SDT and Divisional Court were inadmissible in the action, the Court of Appeal disagreed with the judge's view that S was in effect bound by those findings or estopped from denying those facts and held that it would not be an abuse of process for S to contest those findings. Having set out the general principle that abuse of process must be based on manifest unfairness to C and H or on S bringing the administration of justice into disrepute, Jonathan Parker L.J. held at para.[149] that C and H as claimants in the action had to establish that, had they known of S's dishonesty, they would not have made the agreements with him, and that as a result they had suffered loss. "I can see no good reason why, in attempting to do so, they could not have pleaded and proved specific examples of [S]'s dishonest conduct rather than seeking to import the entirety of the SDT's findings into their pleadings as, in effect, determinative of the issue of dishonesty." By contrast, S was denying the allegation of the claim and it could not bring the administration of justice into disrepute if S required C and H to prove its case.

Moore-Bick L.J. also allowed the appeal and added his own views on the question of abuse of process. He said that it had long been recognised that the court had an inherent jurisdiction to control its proceedings in order to prevent abuse but it was "necessary to be particularly cautious before holding that it would be an abuse of process for a party to challenge findings of fact made in previous proceedings between himself and a person who is not a party to the current litigation. Normally such findings are binding only between the immediate parties to the proceedings and their privies." (para.[168]). He added at para.[173] that the "Law Society is a professional body which exercises a disciplinary function in relation to its members. That function is undoubtedly important and many of its rules and procedures reflect those of the criminal courts, in particular in relation to the burden and standard of proof, but it does not form part of the public system for the administration of justice, despite the fact that an appeal lies to the Divisional Court. [C] and [H] were not parties to the disciplinary proceedings against [S], nor did they have any direct interest in them. It is difficult, therefore, to see why as against [C] and [H], [S] should be bound by the tribunal's findings and why it should be an abuse of process for him to re-litigate the issues in this action." As a defender to the proceedings he was simply putting in issue the claimants' allegations and required them to prove their case by any admissible evidence available to them rather than challenging the findings of the SDT.

**Conclusion**

The decision may appear to be a matter of commonsense: a partner does owe a duty of disclosure to prospective partners, and partners taking action for fraud against a former partner must prove those allegations of fraud. However, *Conlon v Simms* is helpful clarification of the principle that, whatever the professional disciplinary body, the body's findings cannot be used to prove the allegations of fraud and that the party bearing the onus of proof must plead and prove those allegations as in any other civil action.